Nova Law Review

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Nova Law Center Deans, 1974-93: A Tribute ..... *Faculty*

REMARKS

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Securities Arbitration: A Need for Continued Reform ..... *William A. Gregory*
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Florida Criminal Procedure—Eighteen Months of Appellate Decisions: Defining Directions for the Nineties ..... *Bruce A. Zimet*
Erica J. Massaro

NOTES AND COMMENTS

Abolishing the Peremptory Challenge: The Verdict of Emerging Caselaw ..... *Rodger L. Hochman*

RED ALERT: The *D'Oench* Doctrine's Expansion Can Cause Financial Ruin for Borrowers When Insured Lenders Become Insolvent ..... *Jack S. Sacks*

Judicial Use Immunity and the Privilege Against Self-Incrimination in Court Mandated Therapy Programs ..... *Scott Michael Solkoff*

VOLUME 17 SPRING 1993 NUMBER 4

Recent Articles of the Nova Law Review:

Emergency Decisionmaking During The State of Florida's Response To Hurricane Andrew
Stephen T. Maher

Section 553.84: Remedy Without A Cause?
Byron G. Petersen and Steven S. Goodman; Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A.

That Sinking Feeling—A Boat Owner's Liability in the Aftermath of a Hurricane
James E. Mercante; Hill, Rivkins, Loesberg, O'Brien, Mulroy & Hayden

Recovering From Hurricane Andrew: Your Legal Rights
Legal Services of Greater Miami, Inc.

Business Interruption Insurance — A Business Perspective
David A. Borghesi; Arthur Andersen, Chicago, Ill.

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Julie Koenig

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VOLUME 17 SPRING 1993 NUMBER 4

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NOVA LAW REVIEW

Volume 17 Spring 1993 Number 4

TABLE OF CONTENTS

Nova Law Center Deans, 1974-93: A Tribute ..... *Faculty* i-xvii

REMARKS

Towards a Bill of Rights For Russia: Progress and Roadblocks ..... *Vasily A. Vlasihin* 1201

Remarks Concerning Prosecution of Bias-Related Crimes ..... *Charles J. Hynes* 1213

ARTICLES

Securities Arbitration: A Need for Continued Reform ..... *William A. Gregory* *William J. Schneider* 1223

Truth in Lending—Rescission and Disclosure Issues in Closed-End Credit ..... *Elwin Griffith* 1253

Florida Criminal Procedure: Eighteen Months of Appellate Decisions . . . Defining Directions for the Nineties ..... *Bruce A. Zimet* *Erica J. Massaro* 1331

NOTES AND COMMENTS

Abolishing the Peremptory Challenge: The Verdict of Emerging Caselaw ..... *Rodger L. Hochman* 1367

RED ALERT: The *D'Oench* Doctrine's Expansion Can Cause Financial Ruin for Borrowers When Insured Lenders Become Insolvent ..... *Jack S. Sacks* 1405

Judicial Use Immunity and the Privilege Against Self-Incrimination in Court Mandated Therapy Programs ..... *Scott Michael Solkoff* 1441

Nova Law Center Deans, 1974-93: A Tribute

INTRODUCTION[1]

Shepard Broad Law Center has been fortunate in its deans, both acting and permanent. In our nineteen year history, four present or former colleagues have served as dean, four others as acting dean or in a similar capacity. Some of their tenures were quite short, in one case less than a full academic year. Two—those of Ovid Lewis and Roger Abrams—were long enough to grant us much-needed stability.

It is unfortunate that these gentlemen have not previously been recognized for their efforts. Even the most casual of readers would be struck by the environment of adversity in which so many of them operated. Because of their efforts, the Law Center of 1993 is, in many ways, quite different from the Law Center of 1974. At the same time, each acknowledged the special qualities of our early students, faculty, and staff. Recognizing that newer is not always better, each dean played an important role in making the Shepard Broad Law Center into the extraordinary institution it is today.

The brief segments that follow offer only a glimpse of the challenges and contributions made during their tenures. There is limited repetition of some events and an occasional difference in perspective. The order is largely that of the various deanships, an exception being Steve Wisotsky's discussion of our acting deanships. We hope each dean senses our respect and affection. We hope we have earned theirs as well.

On behalf of our entire faculty, we are grateful for the opportunity to publicly say "Thank you, Peter, Larry, Bruce, Don, Ovid, Bruce (again), Joe, Steve, and Roger."

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1. Because every section was written by a current Law Center faculty member, we have omitted the traditional institutional affiliation footnotes. The authors joined the Law Center faculty between 1974 (Bruce Rogow) and 1984 (Paul Joseph). While Bruce is the only member of the "charter" faculty still teaching full time at Nova, each author has observed at least three of our deanships.

Peter Thornton, 1974-75

Bruce Rogow

It must have been March 1974 when I came up to Fort Lauderdale to meet Peter Thornton, the dean of the non-existent Nova Law School.

I had read a small story in the *Miami Review* about the plan to start a new law school at Nova. I was teaching at the University of Miami Law School, and the thought of starting a law school intrigued me. I was familiar with Nova's external degree emphasis and was sympathetic to the alternative graduate educational opportunities that it and other *avant garde* schools were offering. The only other new law school on the boards was Antioch, which had started a clinical style program in Washington. I thought that Nova might have similar potential to expand the traditional curriculum to something more practical.

Peter Thornton quickly set me straight. We met at his office in the Parker Building, which was (and is) just west of our presently-sited new building. That is all there was to the law school—his office. We went to lunch at Rolling Hills Country Club. Recognizing my civil rights, legal aid, clinical legal education background, and anticipating my interests, he quickly set me straight: "We are not going to be the Antioch of the South." I quickly shifted gears and spoke glowingly of the virtues of the traditional law school curriculum, like it was taught at Notre Dame.

Peter had taught at Notre Dame for years. He was about 50 I guess, with beautifully white hair, blue eyes, and a reddish glow on his light complexion. He twinkled, and I sensed some clouds too. Little did I know that he had been promised a seven-figure starting fund at Nova, but had only received six zeros. In any event, I liked him, he liked me, and I was hired by a telephone call a week or so later. I was to teach civil procedure.

Over that summer of '74 I stopped by the Parker Building to see how construction was going. We had part of the first floor. On the west side were faculty offices; on the east, the dean's and law librarian's offices (a wonderful woman named Lucretia Granda); and in between, the library and two classrooms. I brought a few things into my office, looked at the admissions files, and began to look forward to the August beginning of classes.

et al.: Nova Law Review Full Issue

The meeting was better than the waiting. The initial class was a wonderful mix of people who were willing to take the risk of a new, untested law school. Many of those students came to Nova because they had families in the South Florida area and could not go away to law school. Others had no choice—the new Nova was their only *entre* to becoming a lawyer. At that meeting Peter provided wisdom, humor, stability and, when introducing the faculty, made it seem like the students were lucky to be in on the ground floor of this new law school.

Peter Thornton was right. That first class had a special nature, and formed a special bond with themselves and the faculty, and, later, with the communities in which they went to practice. Their successes are a tribute to Peter Thornton's willingness to leave the safety of South Bend and create a new institution in a less than optimum physical, economic and educational environment. He put together the few resources he could find and actually made a law school. Today, almost 20 years later, we are ready to embark on the rest of our life. We are well housed, in a new building. We are well educated, with ABA and AALS accreditation. We are respected for what we have accomplished in our first two decades. We were lucky to have Peter Thornton as our Founding Father—the man who set us on the way.

Last year Peter Thornton came back for a class reunion at my house. His white hair was as thick and beautiful as always; his blue eyes as clear as that luncheon day in 1974; and the twinkle even stronger, for he was surrounded by many of those in the charter class: men and women whose lives were changed because Peter Thornton made a law school.

Laurance Hyde, 1975-78

Ronald Benton Brown

I came to Fort Lauderdale in February 1976 to interview for a faculty position at the new Nova University "Center for the Study of Law." It was housed in the bottom floor of the Parker Building. Germ-free rats lived on the top floor. The new law school's dean was Laurance M. Hyde, Jr. Larry had been hired to be a professor, but was thrust into the deanship shortly after the law school opened. Nothing in the minutes of the faculty meetings (or anywhere else for that matter) explains how or why or when the mantle of leadership abruptly shifted to him from Dean Thornton, and no one was interested in revealing the details to the newcomers.

Larry had been a judge in Missouri—and he had both run and taught at the National Judicial College at the University of Nevada—but running a law school was an entirely different matter. For one thing, there was the American Bar Association to deal with. For another, the university was far from stable. In fact, one inspector had charitably described it as "a speculative venture." Thus Larry had to learn the law school business on the job, under fire, and in the midst of an academic earthquake.

Joining the faculty in the law school's third year was an adventure. There were third year students for the first time and we had to prepare for the first graduation. There were only seventeen professors, but that was almost double the size of the previous year and created a lot of disruption in faculty dynamics.

In those early years, the dean was practically the whole administration. He operated with only his secretary, one administrative assistant, a director of admissions, and an admissions secretary. How they managed to get everything done in those pre-computer years is a wonder. In his spare time, Larry also taught Professional Responsibility and Criminal Law to the freshmen. He rode his bicycle to and from school every day, setting the relaxed social atmosphere.

Larry is a sailor at heart. After returning to the faculty in his post-dean years, he had a poster on his door which read, "I'd rather be sailing," and I am sure that was true. He was a first-rate navigator, capable of piloting a sailboat across the Atlantic, but he was never the tyrannical sea captain so popular in literature. He would try to get the faculty talking together so we

could work out a consensus. This was no easy feat. Larry chose to downplay or even disregard most interpersonal conflicts, and frequently the conflict just went away. Larry instituted an "attitude adjustment seminar," which turned out to be a cocktail hour or, on one occasion, a wine tasting. It set the tone that cooperation and respect were to be accorded colleagues, even colleagues with whom one disagreed strongly. The Nova faculty did not then, or ever, degenerate into the armed camps which are so common on law school faculties.

Larry was always a good sport. He never took any of the faculty politics personally. At least he never let on if he did. He was always kind, decent, and patient as dean and as colleague. Despite his inexperience with law schools, Larry somehow kept the ship afloat. He navigated us through the shoals of the early years and past the reefs of ABA inspections. With Larry at the helm, we survived.

Just in case we never mentioned it, thanks Larry.

Don Llewellyn and Bruce Rogow, 1978-79

Marc Rohr

> It was the best of times, it was the worst of times, it was the age of wisdom, it was the age of foolishness, it was the epoch of belief, it was the epoch of incredulity, it was the season of Light, it was the season of Darkness, it was the spring of hope, it was the winter of despair, we had everything before us, we had nothing before us, we were all going direct to Heaven, we were all going direct the other way.
>
> *Charles Dickens, A Tale of Two Cities*

The 1978-79 academic year was all of those things at Nova Law Center. The University's financial position was dire, and a substantial bequest upon which the Law Center was depending had become the subject of litigation. The faculty became convinced that too high a percentage of Law Center revenues was being siphoned off by the University, and relations with the central administration were strained nearly to the breaking point. Student morale plummeted, and wishful thinking of secession abounded. We were, in the meantime, still housed, as joint tenants with an odoriferous science lab, in a temporary structure that we knew would never be acceptable to the American Bar Association; our building plans, so long in the making, were scuttled by our fiscal morass.

It was a marvelous time to be alive.

It was against (and largely because of) this background that Professors Don Llewellyn and Bruce Rogow rose to the positions of "Acting Co-Deans" in the fall of 1978, and our spirits ascended with them. A wonderful sense of unity of purpose pervaded that academic year, joined by an exhilarating feeling of democracy; our leaders, dedicated but untainted by personal ambition, were also our peers. Don was the administrator of in-house details; Bruce was our minister of external affairs. A more capable team would be hard to imagine.

It's amazing how much was accomplished during that academic year. A "new" building was located, leased, and renovated; the Law Center's relationship with the University was greatly improved; a new dean was hired for the ensuing academic year; and, last but by no means least, faith was

restored. In the sunny spring of 1979, we were able to hire five new faculty members, including some who remain among our brightest stars.

Is it perverse to remember a time of struggle and adversity with such fondness? Perhaps so. But what is certain is that it was a critical period in the life of our law school, and that we will be forever indebted to Bruce and Don for their leadership during those challenging times.

Acting Deans I Have Known, 1978-79, 1984-85 & 1985-86

Steven Wisotsky

Writing a tribute to former acting deans is a challenge: usually, it is troubled times that push them to the fore, and one measure of success is how quickly they can bow out and turn over the reins to a permanent successor.

The first Nova dean was Peter Thornton, and when I interviewed for a faculty job he was in office. By the time I came on board a few months later, he had been replaced by Larry Hyde, a former judge. Barely three years into Larry's tenure, the university experienced a major financial crisis. Counting its chickens before they hatched, the university was devastated when a $14 million bequest from the late Leo S. Goodwin, Sr., progenitor of the GEICO fortune, was withheld by the estate's manipulative trustee. Part of that $14 million was dedicated to the Law Center, and it was seen as the key to our final ABA accreditation.

Although the situation was no fault of Larry's, the faculty felt the need to have strong crisis managers protecting the Law Center's interests during the deadly duel between the estate's trustee and Nova University. Don Llewellyn and Bruce Rogow, the two most senior, experienced faculty members, emerged as the leaders. The plan was for them to serve as co-deans, although, as Bruce later quipped, Don was the codeine and he was the cocaine (or was it the other way around?). The plan was to divide the deanship into domestic affairs under Don's aegis, and foreign policy, meaning relations with the university, in Bruce's bailiwick.

It was a very acrimonious time in the history of relations between the Law Center and the university, as we came to realize the degree of mismanagement that had prevailed for so many years and the failure of the board of trustees to take appropriate corrective action. Fortunately, the immediate pressures of the crisis did not last too long, and by the end of that academic year we had a new permanent dean, Ovid Lewis, to assume office in a building off campus, formerly the home of the Operating Engineers Union, at 3100 S.W. 9th Avenue.

We moved into the new facility, and things went pretty well for the next five years or so. The student body grew, the faculty grew, the Goodwin estate came through, and our final ABA accreditation was

awarded. Of course, there were problems, but on the whole it was a period of success.

But then the second financial crisis came in 1984. In many ways, it was worse than the first, because there was no hope of a major bequest in the pipeline to bail us out. The financial problem then prevailing has a very contemporary, Washingtonian, ring: a chronic budgetary deficit. For example, in the four year period preceding that crisis, the university had accumulated additional debt of $13 million, against a total annual budget of less than $30 million.

The immediate precipitating need for an acting dean was Ovid's decision to accept a position as Vice President for Academic Affairs at the university. Although the university administration wanted Ovid to continue as Law Center dean, Bruce argued that this would be a conflict of interest, and Ovid shortly thereafter resigned the deanship and accepted the other position. Once again, the vacuum of authority had to be filled. Bruce, who was most senior (and this time had actual on-the-job experience), was the logical choice. He wisely shared the responsibility and increased political consensus by forming a managerial triumvirate consisting of himself, Joe Smith and me. Although his actions had virtually insured that he would have to take on the decanal responsibility, Bruce was deeply ambivalent. His family responsibilities were growing, with two small children and a third soon to come. His activities as a litigator had taken off. He did not want the day to day hassles of running the law school. As it was, he caught pneumonia before his term ended. No doubt it was stress-induced.

The dean search produced no acceptable candidate by the spring of 1985, and Bruce made his intention to vacate the acting deanship clear in many ways. For example, he left for Europe after spring classes ended; Joe and I shared the thankless task of setting faculty salaries for the following year. Before his departure, he had talked to me about coming forward as acting dean, but, with my father dying of lung cancer and a second child on the way, the last thing I needed was a new set of responsibilities. To his credit, Joe Smith stepped up to the plate and held things together during the following academic year while the dean search produced Roger Abrams.

How then should we assess the tenure of acting deans serving during times of trouble? I think it can be said of them all that they did what was necessary to keep the place going and to give us hope for a better future.

Ovid C. Lewis, 1979-84

Johnny C. Burris

Ovid Lewis is a very special and unique person. He has played many roles in my life - teacher, mentor, colleague, and—most importantly—friend. I am one among many of his students and colleagues who benefitted from his counsel, guidance, and example during his years at Nova and earlier at Northern Kentucky University Salmon P. Chase College of Law and Case Western Reserve University Law School. He has always cared deeply about the individuals at each institution whether they were students, faculty, or staff. This commitment did not end at the office, as he often welcomed them to his home. Over the years, he and his spouse, Clare, have adopted many members of the Nova community as part of their extended family.

The success of a deanship can be measured in many ways. Certainly Ovid's tenure as Dean was a success using any of the traditional tangible criteria. The student body expanded and their credentials improved. The assortment of courses offered was augmented as the curriculum developed and new faculty from diverse backgrounds were added. Nationally known scholars, including Professors Arthur S. Miller and Alexander Brooks as well as Arthur Goldberg, former Justice of the United States Supreme Court, were distinguished visiting faculty members. Other scholars, jurists and distinguished members of the bar, such as Professor Jesse H. Choper, Justice Arthur England, Judge A. Leon Higginbotham, Jr., and F. Lee Bailey, made presentations to our faculty, students, and alumni. The Law Center hosted several interesting and important conferences, including the National Conference of Law Reviews' annual meeting.

The Law Center grew in other important ways, too. Ovid supervised the completion of the building renovations and the move to the Southwest Ninth Avenue facility in 1979 and 1980. This was a major improvement in the physical plant for the Law Center. Over the years he built that Law Center facility into a campus, adding not only needed classrooms, our first courtroom, facilities for our clinic, but also space for student housing, a cafeteria, and student organizations, including a student run bookstore. These additions transformed the Law Center from an exclusively commuter school into one with a substantial resident student population.

et al.: Nova Law Review Full Issue

While carrying out his decanal functions, Ovid also maintained his roles as teacher and scholar. He taught courses at the Law Center and for the undergraduate program at Nova College. He wrote articles for our fledgling law review and assisted the editors of what was then the *Nova Law Journal* in securing major articles.

Ovid was and remains a critic of the quality of legal education being offered in the United States and urged the faculty to pursue innovations. For several years he compiled lengthy annual reports on the state of law school curricula and other emerging issues in legal education and distributed them to the other law schools' deans. He foresaw how technology was going to change the practice of law and eventually legal education. He took the initial steps to assure our students were trained in the new technologies, particularly in the area of computer assisted legal research.

These were all great accomplishments, but do not reflect Ovid's most important contributions—the spirit he brought to the Law Center and his commitment to giving every individual an opportunity to succeed. Ovid believed in doing whatever was needed in order to make the Law Center a better place—whether it was negotiating for additional faculty positions, restructuring the budget to avoid a tuition increase, moving furniture to the new faculty offices, or setting up the chairs at two o'clock in the morning in a just-completed classroom so it would be ready for the first class the next morning. It was his "can do" spirit that often inspired others to seek and achieve goals that initially seemed out of reach. Ovid thought each member of the Law Center community was an important part of its success. Little could be accomplished without the assistance of others. He was always interested in their work. He believed that combining all our work had a synergistic effect on the Law Center, university, and surrounding community.

Ovid never turned away students or a colleague who needed help with a problem or had a question. The caring attitude of his administration and the faculty is part of the history of what has made the Shepard Broad Law Center a special place. This spirit lives on at the Shepard Broad Law Center and is part of what make it and Nova University a very special place for the faculty, staff and students. Thank you for those remarkable years.

The Executive Committee, 1984-85

Gail Levin Richmond

Initials take their meaning from their context. Diplomats and economists hear "E.C." and think "European Community." Lawyers trained in the seventies remember, fondly or otherwise, "Ethical Considerations." But I am a Nova law professor. As such, I know the true meaning of "E.C." Those initials stand for "Executive Committee"—our 1984-85 decanal triumvirate.

In spring 1984 we looked forward to celebrating two anniversaries: Ovid Lewis's fifth year as dean, and the Law Center's tenth year of operation. Suddenly (or so it seemed at the time), Ovid deserted us to become the university's Vice President for Academic Affairs. With virtually no notice, we were deanless. Yes, the university really needed his guidance, for it faced such serious financial challenges that many of us felt that no affiliation was better than this one. But we had finally secured some stability at the Law Center and clearly weren't prepared for Ovid's departure.

Luckily for the Law Center, three senior colleagues—Bruce Rogow, Joe Smith, and Steve Wisotsky—agreed to tackle the many challenges of 1984-85. Rebuilding our relationship with the university, commencing a dean search, and reassuring students were but a small part of their task. When Ovid left, we were less than a year away from American Bar Association and Southern Association reaccreditation inspections. The fact that such inspections occurred on a regular cycle in no way reduced our anxiety level. Seven years of ABA provisional approval, and an endless stream of site teams, had ended in 1982. We were fully approved and wanted to stay that way.

Bruce, Joe, and Steve denominated themselves the Executive Committee, which quickly became the "E.C." Bruce took the title Acting Dean and ultimately moved into the dean's office. (Was there a hidden meaning behind his hesitance to move?) Joe was the internal administrator, responsible for faculty committees, faculty promotion and tenure, and related items. Steve became Minister of Finance—or "Min. Fin."—and mastered the budget.

E.C. meetings, which occurred as often as weekly, were an off-beat mixture of intensity and frivolity. I vividly recall one meeting that began with a playing of "My Attorney Bernie," a sharp contrast to the rest of that session.

Too many cooks may spoil the stew, but that was not the case with the E.C. and the law school. We got through the year, retained our accreditation, and remained collegial. The E.C. provided an outstanding example of teamwork in action, and we are fortunate that all three remain on our faculty.

Thank you Bruce, Joe, and Steve.

Joseph F. Smith, Jr., 1985-86

Phyllis G. Coleman

In admiralty, Professor Joe Smith teaches about navigating through dangerous waters and the importance of salvage. As Acting Dean, Joe Smith lived it.

Eight years ago, the good ship Nova was adrift, with three acting captains. Recognizing a need for one leader at the helm, Joe volunteered to steer us through the troubled waters. And the waters were turbulent, indeed. Due to university financial problems, the American Bar Association issued what amounted to a show cause order. One of Joe's first tasks was responding to this order—a prospect which would cause less brave souls to contemplate walking the plank.

In fact, Joe might have thought he had chosen a similar option himself.

Because he has always valued candor, Joe wrote a response which placed the law school in a seemingly adversarial position against the university's president. Nevertheless, with faculty and student support, Joe was somehow able to honestly present the facts, soothe the university, and maintain ABA accreditation.

Initially beset by crisis, Joe put out the fires and made the ships run on time. I vividly recall the day the catalogue was to be sent to the printer. Unfortunately, when Joe went to get the materials, nothing had been done beyond collecting a few uncropped, and uninteresting, pictures. Joe worked through the night and, miraculously, produced a professional, impressive publication. But he did not do it alone. Credit must also be given to his lovely wife Alice and Amy, the first dog. Amy, clueless but loveable, added many valuable comments, probably on the catalogue, and certainly at faculty meetings and other official gatherings.

Joe faced confusion, the uncertainty of the position of acting dean, and transition in support personnel. And—though we all know how much he would have preferred to be on the slopes—when the university required the staff to work on Christmas and New Year's eves, Joe was at school, too. In fact, as dean, Joe always had time to speak with students, faculty, or staff.

One personal story: Because Joe is a jogger, I bought him a pedometer for some occasion or another. It was not until the pedometer emerged from the Snoopy wrapping paper that I realized how worthless it was for Joe. Nevertheless, he said he loved it because this gift showed I never even think of him as blind. In fact, Joe's lack of sight has never affected his vision. When Nova was in trouble, Joe saw what needed to be done and steered us on a steady course to safe harbor. Thank you, Joe.

Roger Abrams, 1986-93

Paul R Joseph

When word went around that Roger was leaving to accept the deanship at Rutgers, Newark, I E-mailed my congratulations to him on the computer network that did not exist before he came to Nova. Something in this act caused me to think about how much had changed since Roger became a part of us and how much we have to thank him for.

I came to Nova in 1984, a time that may one day be remembered as "the good old days." But to me, as a new member of the faculty, some things didn't seem very good at all. My faculty colleagues were very good, as they still are today. In fact, the faculty was the biggest plus for me about Nova. Many of the raw materials for positive growth existed, but forward motion seemed stymied. Morale was buffeted by financial uncertainties and a lack of an adequate physical plant, which drew intense and uncomfortable scrutiny from the American Bar Association. Relations with the university were deteriorating.

Roger Abrams acted as the catalyst for Nova's growth and for the creation of its stability. He sought out the best in each of us and encouraged its development. While he got down to the business of overhauling the Law Center, he created the space in which we could excel. And he did it all with a smile that became famous.

Roger realized that to serve students well we needed an adequately staffed administrative structure. He built that structure, and from Career and Student Services to Development and Admissions, we can see the positive results. Roger also supported the acquisition of better technology. When I sit in my office conducting a Westlaw search on my computer, I don't generally stop to thank Roger, so let me do so here.

Oh yes, my office: a clean, bright, sparkling workplace where my books do *not* mildew and my nose does *not* wrinkle at the smell. Lecture halls are tiered without sightline obstructions. The library is a three-floor invitation to productive work. The atrium, a sun-lit tree-filled area, has truly become the hub of the Law Center—a place where guest speakers and programs bring us together, just as Roger knew that it would.

Buildings do not spring into existence because we wish to have them. Millions of dollars must be raised. This required an excellent development

staff and, in a law school context, it required a dean who was committed to fund-raising and who was willing to give it the attention that it deserved. Roger was such a dean. The building is a lasting monument to his success. Thank you, Roger.

During Roger's tenure, the Shepard Broad Law Center reached out to involve itself with the wider world. The Youth Policy Center and Aids Law Clinics are two examples. The presence of John Anderson is another. A relationship was forged with the Russian Justice Ministry, and the Law Center hosted conferences and distinguished visitors.

The Law Center is larger than it was when Roger came, whether that is measured by square footage or size of the student body, staff, and faculty. We are a more diverse group than we were and we are forging, with Roger's strong encouragement, an increasing commitment to diversity, inclusion, and academic support. Many of the things we *will* become in the future began here during the deanship of Roger Abrams.

A dean is a leader of a group of active, intelligent individuals. What Nova is now represents our group effort over the last seven years. Nothing I say here is intended to take anything away from the important part played by my colleagues in Nova's success. Yet, it is the dean who sets the tone for an institution, is its most visible representative, and acts to nurture, encourage, and shape the overall direction. Roger Abrams has been a proactive, energetic visionary, who worked tirelessly to move us towards financial security, internal stability, and external visibility.

Roger, you may be going, but you will not be forgotten. You leave behind what you have been so central in building. You will be missed.

Towards a Bill of Rights For Russia: Progress and Roadblocks

Vasily A. Vlasihin*

Almost three years before the Soviet Union collapsed after the failed coup d'etat, I arrived at JFK International Airport as a member of a Soviet lawyers' delegation. At the airport, I was involved in a short but impressive dialogue with a United States customs officer. The officer, a young man, checked my passport and after seeing what was inscribed in my United States visa stamp asked me, "are you a Soviet lawyer?" I was too tired to explain that although I was trained as a lawyer, I never practiced, and that my work focused primarily on research. So, I just nodded affirmatively.

"Oh, how wonderful! Welcome to the United States," replied the officer, "but is there any law in the Soviet Union?!"

Customs check-points are not the best fitting place for academic lectures, so I just murmured confidentially in response, "there is, and quite a lot of it."

If I had been willing to give a lecture at the customs check-point, and if the officer had been willing to listen, I could have told him that during the previous seventy years of the Soviet regime, the country developed a certain legal system. This system of laws, as in any other country, is comprised of a Constitution, statutes, executive acts and administrative regulations, and other enactments. There are also legal institutions that are designed to be guardians of the legal system. These institutions include a judiciary, a bar, and prosecutorial and law enforcement agencies.

However, when I advised the customs officer that there is "quite a lot of" law in the Soviet Union, I was not attempting to commit perjury in front of a representative of the United States Government. Quantitatively, Soviet law has been developing rather rapidly. In the second half of the 1980's, there were more than thirty thousand legal enactments adopted only by the national legislature and the government.

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This essay is based upon author's remarks before the 1991 Annual Meeting of the Kansas Bar Association. It was revised and updated in respect of the latest constitutional developments in Russia. This essay was solicited for the Law Review by Professor Paul R Joseph.

However, while asking his question, that young customs officer, I am sure, had in his mind not just a mechanically assembled body of laws and regulations or a combination of legal institutions and agencies, but something which he and most of his fellow citizens understand as the idea of the Rule of Law.

A black letter description of the notion of the Rule of Law is not easily given. This notion implies quite a few things, such as constitutionalism, separation of powers, a bill of rights under which rights and liberties of an individual are safeguarded, a limited government, an independent judiciary, judicial review, fair legal order, due process guarantees, and justice administered under the fair law. Of course, this list is not exhaustive.

I did not blame that officer for his seemingly "ignorant" question. Since his boyhood, he heard of the Soviet Union as a "rule-of-the-state-law"—a totalitarian police state country—not as a rule-of-law state. That was true.

In the years preceding Gorbachev's *perestroika* policies, law and the legal profession at large in the Soviet Union did not serve the interests of the people, nor did they protect the rights and freedoms of an individual. Although the country had many laws, most of them suppressed democracy, oppressed citizens and pressed economy into what is now called a bureaucratically centralized administrative-command system. The system of legal agencies was effectively dominated and controlled by the Communist Party, the security apparatus, and prosecutorial agencies. We had law of tyranny; law of fear which equals the absence of law.

With the emergence of *perestroika*, the idea of the Rule of Law has made its way into the political vocabulary of our society. Once looked upon as an empty Western "bourgeois" slogan, the Rule of Law has rapidly become a goal as well as a great moral value of *perestroika*.

As this goal was set, the society battered by the lawlessness of the past and exhausted by "the rule-of-the-state-law" started the reform of the legal system in the move to achieve the goal.

Naturally, the country striving for freedom has made its first steps to ensure rights and liberties that come first: freedom of religion, expression, press, assembly and association, and also certain procedural guarantees in the system of criminal justice to prevent law enforcement abuses.

Constitutional niceties regarding rights and liberties were not unknown to the Soviet citizenry—they were written into both the Stalin Constitution of 1936 and the Brezhnev Constitution of 1977. However, these two documents were merely pieces of paper.

Besides, ours is not a common law society, but a country of statutory law. It means that the actual contents of the rights and freedoms of an

individual are not defined by the Constitution and its authoritative interpretation by the judiciary, but by statutes and governmental regulations construing constitutional commands. Until *perestroika* statutes regarding basic constitutional rights were virtually non-existent. However, there was a huge volume of sub-statutory governmental regulations (most of which were issued in secrecy and thus were unknown to the public) that "construed" these rights in a very destructive way.

Consequently, the new and freely elected legislatures moved to adopt statutes which would, in detail, spell out our particular constitutional rights and liberties, thus making the first moves toward a bill of rights for the people.

Much has been done to provide a statutory framework for the constitutional rights in the years of *perestroika*. Even after the disintegration of the Soviet Union and the emergence of Russia as an independent state, many Soviet laws which affected the rights and liberties of the people and which did not contradict the Russian legislation were left intact and operative on the territory of Russia.

Law on the freedom of religion has started the revival of religion in the country. Religious faith is no longer a suspicious trait of a person in society which was in the past, forcefully atheistic. New churches and religious groups are being formed on a wide scale. Sunday schools are there. The outburst of the religious freedom has led to situations which by the United States standards of the constitutional "establishment clause" would be judged unacceptable. The state owned television and radio gives airtime to sermons and other church authored programs. In my view the Russian Orthodox Church is being provided with more time on the air as compared with other churches. Furthermore, some public schools are experimenting with the Bible reading and sermons.

Inspired by the policy of *glasnost*, freedom of expression is blooming. Criticism of the government is so widespread that sometimes one may wonder if there is anybody who has anything good to say about any government action.

Provisions of the criminal code which used to give free hand to the state security organs to prosecute political speech and political dissidents were revised. Recently President Boris Yeltsin pardoned several convicts who were claimed by the West to be the last political prisoners.

Liberty of the press is guaranteed by the law on the press and other mass media. Under that law, government censorship is prohibited in absolute terms. There are now so many publications, with such a variety of opinions, that an average Russian brought up in the spirit of having just one

truth published by the Communist Party paper "*Pravda*" (Truth) now can be easily lost—in which of the opinions is there the truth?

Subject to certain regulations, the freedom to assemble is widely used by the citizens of various political leanings. Rallies of half a million people have become common.

Freedom of association verbalized in a corresponding statute gave birth to an assortment of various associations, unions, organizations and parties. Once a one party society, we have rapidly become a multi-party system. It is really amazing to hear of monarchists, anarchists, liberals, social-democrats, libertarians and even republicans and democrats. The Communist Party, outlawed after the August 1991 *putsch* by the decrees of President Yeltsin, is being galvanized by small groups but they do not succeed.

We have moved to introduce what is known in the United States as "due process" protections of an individual against abuses by law enforcement and criminal justice authorities.

Now, legal assistance of a counsel is provided to a suspect or a defendant at the earliest stages of criminal proceedings. The Miranda Rule seems to have sprouted out of the hard soil of Soviet/Russian justice. Elements of a jury trial are being introduced. It was proposed that serious cases shall be tried by a panel of two judges and three assessors or jurors. (The present scheme is a panel of a presiding professional judge and two lay judges called "People's Assessors"). Currently, in Russia, there is a movement to have jury trials as they are known in the United States. The leading proponent of the jury system is the energetic and wise Chief Justice of Russia, Vjacheslav Lebedev.

Prosecutorial over-zeal of the law enforcement establishment in most cases does not go unattended. There are more acquittals by courts, and closer judicial scrutiny of the police and prosecution evidence. The "Exclusionary Rule" is becoming more and more of an integral part of criminal procedure. Judges are no longer "rubber-stamps" for a government prosecutors' decisions.

Once a neglected segment of the legal system, the judiciary is gradually gaining prestige and status. Due to public support and new laws, judges are gaining independence. Practically speaking, we no longer hear of the instances of "the telephone justice," that is, of judges taking instructions on the phone from the powers-that-be on how to dispose of a sensitive case.

Good statutes were passed in order to insulate the judiciary from infringements upon judges' independence. For example, a statute was passed which has raised the status of judges and a contempt of court statute. This law provided for civil and criminal penalties for any pressures,

motivated by politics or money, placed upon courts. The tenure of judges was extended to ten years instead of five, and it is planned to be extended to life tenure. Judges' salaries were increased immensely, and the process of their election was given into the hands of higher level legislators. The reasoning behind the latter is that the process of electing judges by a peer level legislature would flounder on the shoals of localized interests and pressures.

The courts have also been given extensive powers to provide judicial protection to citizens' rights against governmental abuses of power. The courts, not the bureaucracies themselves as it was in the past, are now fully empowered to handle the complaints of citizens against governmental bodies or officers of any level. The elements of "habeas corpus" have also been introduced into Russian criminal justice; an arrested person now has the right to challenge, in court, the prosecutorial decision to detain.

Thus, judicial review is making its way into our legal system. The Constitutional Court of Russia has been established as a separate single body to exercise constitutional review of legislation, executive, and administrative acts.

Our privately practicing lawyers work within colleges of advocates. Until the end of the 1980's these colleges were tightly controlled by the government and the Communist Party. The independence of the Bar was virtually non-existent. Indeed, the Bar was a step-daughter of the Soviet legal system dominated by the law enforcement and prosecutorial agencies. With the formation of the national bar association, in 1989, the legal profession started to acquire the attributes of a civilized bar. Restrictions on the attorneys' fees were lifted, the attorney-client privilege became inviolable, and colleges of advocates became independent in running their business. Advocates drastically expanded their roles and status in criminal and civil litigation, and in business. Apart from colleges, separate private law firms are popping up.

The picture painted above shows a rosy garden of the legal paradise in our society. In fact, we are very far from entering the realm of the Rule of Law. Much has been done, but much more has to be done. On the way to that realm we too often run into road-blocks. The largest road-block is the lack of the traditions of democracy and constitutionalism, the lack of a genuine legal culture.

I would like to quote from an American authority, with whom I whole-heartedly concur. After his visit to the Union of Soviet Socialist Republic in 1990, the United States Attorney General Dick Thornburgh, delivering remarks in Philadelphia, said:

> What is really missing [in the Soviet Union] is what might be called a "legal culture." Time and again, we found a naive belief that all that was needed was to pass the correct statutes, to get the right laws on the books to create a "rule of law."
>
> It is going to take a commitment to the lawful, democratic process, and we tried to emphasize legal process—due process of law—even over substantive rights, as the true safeguard of the people's liberties. Again, they asked us often, and in much confusion, about separation of powers. The idea of deliberately building in a tension between separate branches of government—our concept of checks and balances—was extremely puzzling to them and, to some, incomprehensible.[1]

All too many people in Russia think that once you get the right statutes on the books, you automatically qualify to enter the realm of the Rule of Law. But, Russians still do not trust the law itself. It is a great pity that the old Russian saying, "the law is like the shaft of a wagon, it goes wherever you turn it," maintains a firm grasp on public consciousness, reflecting the failure of the legal system to provide ultimate protections to the people against abuses of government.

The law itself does not yet contain the maximum possible remedies for citizenry to protect individual rights and freedoms with the help of the courts. Most vital disputes, even those of a legal nature, are still channeled through bureaucracies. People do not yet view courts as their protectors. The Bar, by and large, has not become—in the eyes of citizens—a champion of rights and liberties.

Many things related to the Rule of Law that are widely accepted and known in the West from time immemorial are just incomprehensible for Russians. The minds of the people brought up in the spirit of "the-rule-of-the-state-law" are not capable of absorbing to the fullest extent the ideas of limited government, decentralized government, checks and balances within the mechanism of the separation of powers, the judicial supremacy, and the priority of individual rights and liberties over interests of the state. It is quite a task to implant ideas of judicial review when a criminal justice official seriously stated in a newspaper that when the judiciary assumes the duty of interpreting statutes and the Constitution, this is the first obvious sign of a totalitarian regime.[2]

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1. The Rule of Law in the Soviet Union: How Democracy Might Work. (U.S. Dept. of Justice, Apr. 4, 1990) (a press release containing remarks by Dick Thornburgh, Attorney General of the U.S., Before a Luncheon Meeting of the World Affairs Council of Philadelphia).

2. MOSKOVSKY KOMSOMOLETS, Feb. 23, 1990.

We differ much in terms of the legal culture. Even our kids differ. In 1977 when I was a post-graduate student at Harvard Law School I happened to see an article in, *The New Lawyer*, a New England newspaper.[3] The article titled *What do Judges and Lawyers really do?* contained answers to this question by fourth grade students—ten year olds. Here are some quotations they made about lawyers.

> A Lawyer is special she or he helps you win a case to court. They are important to you, they want to help you they are always ready (Karen).
>
> A Lawyer helps people sell or rent lands. A Lawyer is a friend that helps people (Debbie).
>
> A Lawyer is a person who fights for other people if the company is doing something wrong to the person. A Lawyer always tries to tell the truth because if they don't tell the truth then they are committing a terrible sin (Paul).
>
> A Lawyer is a man who helps your family when you get in trouble. He helps you out of trouble (Beth).

At the end of the 1980's, I decided to put the same question to fourth graders in a neighborhood school where our family lives. Here is the vision of a lawyer by Russian kids.[4]

> An advocate must defend a guilty man, justify him and accuse him if he thinks so (Sveta).
>
> An advocate investigates crimes. He looks for a person, who committed it, and when that person turns out to be a murderer, this case is submitted to court (Oksana).
>
> An advocate conducts questioning. An advocates works in the police, gives assignments to find criminals, for instance, robbers (Ira).
>
> An advocate is a person, who works at work. He finds out everything (Anya).
>
> An advocate is a person, who seems to do things that are not supposed to be done (Kolya).
>
> An advocate is a person, who is involved in things which are wrong, that is against the law. And he looks very much like a spy, has many high hopes for something dubious (Veronika).
>
> An advocate just sits at his desk (Sasha).

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3. I have a clipping of the quoted material, but there is no date on it. The grammar of kids preserved. (On file with the author.).

4. Out of the thirty students polled, eleven replied that they did not know what a lawyer does.

Russian adults, because of the lack of mature legal culture, still do not view their rights and liberties as inalienable, natural, and retained. Most of them still think that it is the state, the government, that grants their rights and liberties. The philosophy of the natural origin of rights (the basis of the Rule of Law notion) is trying to root itself in Russian constitutional thinking. the great self-evident truth "that all Men . . . are endowed by their Creator with certain inalienable Rights" is, as yet, alien to Russians.

Closely connected with the lack of proper legal culture is another road-block which is often intentionally erected by those who fear progress, those who feel comfortable under the "rule-of-the-state-law," and those who yearn for an iron fist to run the country the way it had been run for decades.

Such people in different echelons of power, paying lip-service to reforms and democratization, try to establish order under which freedoms have to be licensed. Actually, what we have now in Russia is the regime of licensed rights and freedoms.

Statutes on religion, the press, associations, and assembly were a great breakthrough, but whenever there is thinking that rights and liberties are granted by the state, there is the state licensing them. One example of this result is that in order to start a church, or any other type of religious organization, it must be registered with the state in order to get a license to practice religion in a group. Also, in order to start a newspaper or a magazine a Russian has to register with the state to get a license. Moreover, to have a rally or a parade, a permit from the city authorities must be obtained. This is not unknown in the United States. What is unknown is the legal power to discriminate ideologically or politically in the issuance of a permit. Moscow City's ordinance on assembly, for example, gives this power to a city government as well as a discretionary right to deny a permit on speculative grounds regarding "possible" violations of public order. Finally, to start an association or a party, people must register with the government which is empowered to scrutinize the program, the charter, and the by-laws, and has discretion to deny registration. Freedom of association is thus licensed.

The policy of *glasnost* has released the freedom of expression, but totalitarian traditions and those who would rather preserve them, try to limit it. *Glasnost* is not only freedom of speech, it is also freedom of information, openness. However, the cloak of secrecy still covers many parts of the government machinery. "The right to know" is not yet enjoyed by Russian citizens. We are far from having such laws as the Freedom of Information Act or the Privacy Act.

Despite the revision of the criminal law provisions that previously allowed the prosecution of political dissent, the potential for abuse is still

present. Generally worded, Article 70 (anti-Soviet propaganda) of the Russian Criminal Code was the main tool of repression. It was revised, and now the government can prosecute, we are told, only for "public calls for violent overthrow or change of the government and social system secured by the Constitution." This revision was considered to be progressive even by academician Andrey Sakharov.

But in fact, it is worded almost exactly as that part of the Smith Act of 1940 which made punishable advocacy for violent overthrow of the government. In 1975, the Smith Act, which punished pure speech, was frozen by the Supreme Court in *Yates v. United States*.[5] Further, in *Brandenburg v. Ohio*,[6] the Court set forth a test based on "imminent lawless action" to punish speech. I wonder how many years of development will be required for Russian constitutional jurisprudence to reach that test, if it is now employing what the United States had written into law in 1940 and effectively rejected in 1957?

In 1990, the Supreme Soviet of the Union of Soviet Socialist Republics passed a statute, which would not withstand the American constitutional scrutiny. This statute made it a crime, punishable up to three years of imprisonment, to publicly insult the President using "indecent" expressions. I recall that in *Cohen v. California*[7] the United States Supreme Court held that an American who is willing to express him or herself regarding the policy of the government or any of its officers, can freely use any expressions, including obscenities. With the fall of the Soviet Union and of its first and last President, the Union of Soviet Socialist Republics' law of 1990 has naturally become inoperative. But the "punishing political speech" instincts of certain political quarters are still there. In the summer of 1992, in the course of revising the Criminal Code, the Russian parliament suggested passing a provision which made it a crime to publicly insult any highly positioned officer of the state. In the United States, a special zone has been created around governmental officials within which an individual, critical of their policies, may use any expressions. While in Russia, however, certain forces are trying to create such a zone with a quite opposite goal, to silence those who in their criticism of the government, may prefer to use free expressions.

The laws that I have mentioned, along with the flag desecration statute in force, limit political speech and expression, and preserve the potential for politically motivated repressions.

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5. 354 U.S. 298, 314 (1957).
6. 395 U.S. 444, 447 (1969).
7. 403 U.S. 15, 16 (1971) (for example, "fuck the draft").

et al.: Nova Law Review Full Issue

Built-in statutory devices, which may tend to chip away newly gained rights and liberties, are complemented by vagueness in statutes. Such principles as "facial overbreadth" or "least restrictive means" which have been established by the United States Supreme Court would puzzle our legislators.

Certain forms of political speech connected with conduct may require regulation. However, our law-makers under the pressure from the right, try to regulate all. In doing so, they forget that any regulation means control which may lead to arbitrary restrictions. Indeed, why should there be a law on religion, or on the press? For instance, I state in my public lectures: America is a "lawless" society, two hundred years passed since the adoption of the Bill of Rights, yet they still do not have a law on the freedom of religion, or a statute regarding freedom of the press. After a pause, I add that these freedoms are sacred there.

It is true that "laws on the books" are not enough; there must be more. The following thought, expressed by Judge Learned Hand, fits perfectly into my country's situation:

> I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it. While it lies there it needs no constitution, no law, no court to save it.[8]

This admonition must be taken to the hearts of Russians. Even a perfect legal system could not by itself assure democratic liberties. Still, one element of such a system is critical. Inadequate place of this element in our system is another huge roadblock. The element to which I refer is the judiciary.

A bill of rights can become a practical reality only in a democracy where the supremacy of the independent judiciary is firmly established, and where the judiciary vested with the power of judicial constitutional review is the ultimate guarantor of rights and liberties. Our society, however, does not yet have such a judiciary.

Russian courts are not empowered to exercise judicial review of legislative or executive enactments. Although it was argued that at least the

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8. Learned Hand, Address at the "I am American Day" ceremony in Central Park, New York, New York (May 21, 1944), *in* THE SPIRIT OF LIBERTY, 189-90 (Irving Dilliard ed. 1960).

Supreme Court of Russia should be vested with the power of constitutional review, the legislature has made another choice—the Constitutional Court. As a separate body, this Court was established to judge the constitutionality of statutes, and executive and administrative enactments. The problem with this Court, is that it passes constitutional judgments in disputes which are not based upon actual cases and controversies. In reality, it means that if some statute or executive act is not favored by a certain political group, the group may petition the Constitutional Court, even if such a statute or act does not inflict actual injury. Thus, the typical constitutional standards and requisites of standing such as: "injury in fact," "real interest," "mootness," "abstract issues," and "political question," are truly foreign to the operational framework of the Constitutional Court of Russia. Furthermore, the establishment of such a Court as a tribunal, separate from the regular court system, has deprived the judiciary of its most important power—the administration of justice through the fundamental law of our country, its Constitution. Under the law of the Constitutional Court, whenever a dispute arises in a regular court regarding the constitutionality of a statute or administrative regulation, it is automatically transferred to the Constitutional Court. It is my belief, that by not allowing regular courts to apply and interpret the Constitution, the legislature has drastically diminished the roles of the judiciary in our society.

The judicial branch is far from being on an equal footing with the two other branches of the government; the judiciary in a renewed Russian statehood is truly "the least dangerous branch."

Another feature of the judiciary in Russia which undermines its proclaimed independence is that the courts operate under the supervision of the Ministry of Justice. Although this governmental agency does not have law enforcement powers and is charged with all kinds of legal work for the government, it is still part of the Executive. Organizationally and logistically, courts are dependent on the Ministry of Justice despite all the talk about separation of powers and judicial independence. This is the contradiction which has to be dealt with zealously in order to achieve a truly independent judiciary.

I have indicated only the largest roadblocks on the way to a bill of rights. There are some others. We have instances of abuses of executive powers. For example, in the fall of 1992 ex-President Gorbachev and his staff were unexpectedly and without any due process, ejected from the premises of "the Gorbachev Foundation" which they legally rented. Additionally, in the sphere of freedom of speech, the "heckler's veto" is wide spread. Activities of the legislature sometimes remind us of those days of American development, which were referred to as "legislative tyranny."

For example, in the summer of 1992, the Russian parliament attempted to control the critical press by trying to establish an oversight committee. However, once the fear is eliminated, the hope is still there.

Russia is now in the process of drafting a new Constitution. One part of the draft, which deals with rights and liberties of citizens, is worded in such a way that it takes the shape of a bill of rights in a civilized democracy. It places the highest value on liberties and natural and inalienable rights of human beings. It commands that "the enumeration in the Constitution and the laws of certain rights and freedoms shall not be used to disparage other rights and freedoms retained by an individual." It proclaims popular sovereignty, and its Preamble starts with the words "We, the People . . . ."

When I see these moves to ensure constitutionalism, I become optimistic. There is a Latin maxim *Per Aspera ad Astra*—Through Difficulties, Through Thorns to the Stars. In Russia we are now moving painfully through a political thorn-bush. However, we are not just scratching ourselves; we finally see the stars. I firmly believe that Russia shall reach the once unreachable, her stars of Liberty and Justice for All.

Remarks Concerning Prosecution of Bias-Related Crimes

Charles J. Hynes*

TABLE OF CONTENTS

I. INTRODUCTION 1213
II. PROSECUTION OF BIAS RELATED CRIMES IN NEW YORK 1214
A. *Howard Beach Case* 1214
B. *Bensonhurst Case* 1215
C. *Crown Heights Case* 1215
III. ANTI-BIAS STATUTES 1216
A. *R.A.V. v. St. Paul* 1217
B. *State v. Mitchell* 1219
C. *People v. Miccio* 1220
IV. CLOSING REMARKS 1220

I. INTRODUCTION

Prosecuting bias-related crimes is a very difficult task. Racial attitudes ingrained in our Nation's children and adolescents are not easily purged. There is a public mood that we have gone far enough in enforcing equal justice. But racial attitudes and the public mood, no matter how strident, are not excuses for a prosecutor's failure to vigorously promote and protect the rights of all citizens. When a person lies on the ground, beaten or murdered or is placed in fear or jeopardy simply because of the color of his or her skin, religion, ethnic heritage, or sexual orientation, everyone has suffered critical injury.

During the past six years, I have served as the chief prosecutor in three of the most notorious bias-related cases in this Country's recent history. In each of these cases, "Howard Beach," "Bensonhurst," and "Crown Heights," the irrational hatred we call "bias" caused a young man to lose his life and

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brought consequently critical damage to our society.

II. Prosecution of Bias Related Crimes in New York

A. *Howard Beach Case*

The "Howard Beach Case" began during the early morning hours of December 20, 1986, when three young African-American men whose car had broken down near the Howard Beach section of Queens County, New York City, were chased by a gang of young white men wielding sticks and bats and screaming racial epithets. One of the African-Americans was pursued until he was forced onto a six-lane highway where he was struck by a car and killed. A second was severely beaten. A third was able to escape without injury.

Public apprehension in the black community about the fairness of the investigation and prosecution led to my appointment by the Governor of New York as a Special Prosecutor to replace the then District Attorney of Queens County. As Special Prosecutor, I immediately formed a team of experienced investigative, trial, and appellate attorneys and veteran detectives. This team, was able to learn what had occurred on December 20, 1986 and, eventually, I was able to gain the confidence of the victims of the case. We quickly established a legal theory for the prosecution and proceeded to present the case to the Grand Jury. I was able to persuade one of the gang members to cooperate in exchange for the opportunity to plead to a lesser charge. These were essential components in developing homicide cases against those responsible for the acts of mayhem committed during the Christmas-Chanukah season of 1986 in that theretofore anonymous, quiet village called Howard Beach.[1] When the "Howard Beach Case" concluded, nine of the twelve defendants had been convicted by juries or had pled guilty.[2] Three of those defendants, convicted of manslaughter and assault, remain incarcerated.[3]

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1. *See* Charles J. Hynes & Bob Drury, Incident at Howard Beach: A Case For Murder (G.P. Putnam's Sons).

2. The jury convictions of three of the defendants in one of the trials were reversed on the law and the indictments against them were dismissed, without prejudice to the People to represent appropriate charges to another grand jury. People v. Bollander, 549 N.Y.S.2d 27 (N.Y. App. Div. 1989). The cases against those three defendants were represented to another grand jury. The defendants were indicted and subsequently convicted. The defendants did not appeal these convictions.

3. The jury convictions of those three defendants were affirmed. People v. Kern, 545

B. *Bensonhurst Case*

On August 23, 1989, Yusef Hawkins and three friends, all African-Americans, came to the mostly white Bensonhurst section of Brooklyn to look at an automobile which had been advertised for sale. A group of white youths apparently believed that the African-Americans were present to attend a birthday party of a young white woman who lived in the neighborhood. They angrily surrounded Hawkins and shouted racial epithets. One of the white youths pulled out a pistol, fired at Hawkins, and killed him.

One of those in the gang, John Vento, in exchange for full immunity, agreed to cooperate in the prosecution of the case. His testimony in the grand jury was instrumental to the indictment of six defendants for murder, manslaughter, riot, assault, unlawful imprisonment, menacing, and criminal possession of a weapon. A seventh defendant was indicted for riot and criminal possession of a weapon.

But sometime in December, 1989, Vento disappeared. On January 2, 1990, my second day as the Kings County (Brooklyn) District Attorney and the prosecutor responsible for the case, I learned of his disappearance. Vento was captured in March, 1990, but he refused to cooperate. Having breached his agreement, he was indicted by a Brooklyn Grand Jury. Ultimately, he was convicted of riot, unlawful imprisonment and menacing, but acquitted of murder, manslaughter, and discrimination. More importantly, however, without Vento's testimony at the trial of the other defendants, the prosecution was legally unable to prove the acting-in-concert charge required to convict of murder anyone but the actual shooter.

C. *Crown Heights Case*

On August 19, 1991, another well-publicized case in Brooklyn shook the belief of some in the ability of criminal justice system to prosecute a crime ignited by bias. In the racially mixed Crown Heights neighborhood of Brooklyn, Yankel Rosenbaum, a twenty-nine year-old Jewish scholar visiting from Australia, was surrounded by a mob and stabbed to death during the rioting that followed the death of seven year old Gavin Cato, an African-American child struck by a car driven by a Hasidic male. Rosenbaum was in no way responsible for young Cato's death. He was killed only because he was a Hasidic Jew. Grand juries immediately investigated both deaths.

After hearing testimony from more than thirty witnesses, including

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N.Y.S.2d 4 (N.Y. App. Div. 1989), *aff'd*, 554 N.E.2d 1235 (N.Y.), *cert. denied*, 111 S. Ct. 77 (1990).

et al.: Nova Law Review Full Issue

eyewitnesses, police officers, accident reconstruction experts and the driver of the car, a multi-racial grand jury investigating Gavin Cato's death decided that there was no evidence to indict anyone in this case. To further the interests of justice and because of intense public scrutiny, I took the unusual step of requesting that the proceedings of the grand jury, secret by law in New York,[4] be made public. My application was denied.[5]

Although a mob had surrounded Yankel Rosenbaum prior to his stabbing only one person was apprehended. The grand jury investigating Rosenbaum's death could obtain sufficient evidence to indict only one man for murder. That man, Lemrick Nelson, was subsequently tried and acquitted.

III. ANTI-BIAS STATUTES

Even before I became District Attorney, my experience as the Special Prosecutor in the "Howard Beach Case" demonstrated to me that all too frequently people are assaulted merely because of their race, ethnicity, religion or sexual orientation. As a result, when I became the chief law enforcement officer in Brooklyn in 1990, I immediately created a Civil Rights Bureau to handle these "hate crime" cases. This Bureau is also responsible for prosecuting those who prey on a very vulnerable group of recently-arrived immigrants from many different Countries. Regretfully, the highly publicized "Howard Beach," "Bensonhurst," and "Crown Heights" cases were not the only bias-related cases to occur recently in New York City. In the first ten months of 1992, my Civil Rights Bureau began the investigation and prosecution of sixty-one cases. Among the Bureau's investigations were cases in which a group of African-American children had their faces painted white, rocks were thrown at a bus of Jewish children riding home from their yeshiva, and a young white honor student was raped by two young black men who allegedly told her she was the right color to be raped.

Because of these and other terrible bias-related crimes, I endorse and urge the passage of New York State Governor Mario Cuomo's anti-bias bill.[6] Currently, under New York law, a civil rights violation is only a

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4. N.Y. CIV. PRAC. L. & R. 190.25(4)(a) (McKinney 1991); N.Y. PENAL LAW § 215.70 (McKinney 1988).

5. *In re* Hynes v. Patrolmen's Benevolent Ass'n, 579 N.Y.S.2d 117 (N.Y. App. Div. 1992).

6. That legislation is also supported by New York City Mayor David Dinkins, the Police Commissioner of New York City, the other district attorneys in New York City, the President

misdemeanor.[7] A person who strikes, shoves, kicks, or otherwise subjects another person to physical contact, or attempts or threatens to do the same because of the race, color, religion, or national origin of that person commits only a misdemeanor.[8] Currently, there is no penal statute in New York State which would make bias-related violence or intimidation against a person a felony.[9]

A. *R.A.V. v. St. Paul*

However, whether the current or proposed New York State bias-related violence statutes, or those of many other states,[10] would pass Constitutional

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of the New York State District Attorneys Association, the Superintendent of the New York State Police, and a large number of police chiefs from local police departments from across New York State.

7. Section 40-c(2) of the Civil Rights Law provides:

> No person shall, because of race, creed, color, national origin, sex, marital status or disability, as such term is defined in section two hundred ninety-two of the executive law, be subjected to any discrimination in his civil rights, or to any harassment, as defined in section 240.25 of the penal law, in the exercise thereof, by any other person or by any firm, corporation or institution, or by the state or any agency or subdivision of the state.

N.Y. CIVIL RIGHTS LAW § 40-c(2) (McKinney 1992).

8. N.Y. PENAL LAW § 240.30 (McKinney 1989). This section is titled *Aggravated harassment in the second degree.*

9. Governor Cuomo's 1992 anti-bias bill stated in pertinent part:

§ 490.05 Bias related violence or intimation in the second degree.

> A person is guilty of bias related violence or intimation in the second degree when, with the intent to deprive an individual or group of individuals of the exercise of civil rights because of the individual's or individuals' race, creed, color, national origin, sex, disability, age, or sexual orientation, such person intentionally, knowingly, or recklessly causes damage to the property of another, engages in sexual intercourse by forcible compulsion or deviate sexual intercourse by forcible compulsion as defined in article one hundred thirty of this chapter, or causes physical injury to another individual.
>
> Bias related violence or intimidation in the second degree is a class D felony.

§ 490.10 Bias related violence or intimidation in the first degree.

> A person is guilty of bias related violence or intimidation in the first degree when, with the intent to deprive an individual or group of individuals of the exercise of civil rights because of the individual's or individuals' race, creed, color, national origin, sex, disability, age, or sexual orientation, such person intentionally, knowingly, or recklessly causes the death of another individual.
>
> Bias related violence or intimidation in the first degree is a class C felony.

10. At the state level, the response to reports of bias-related violence has been significant. Nearly every state has enacted some bias legislation. *See* ADL LAW REPORT: HATE CRIME STATUTES: A 1991 STATUS REPORT 24-26 app. a (1991). In addition, during

muster remains an issue. In *R.A.V. v. St. Paul*,[11] the Supreme Court ruled that a city ordinance defining a bias motivated crime was unconstitutional because it violated free speech provision of the First Amendment to the United States Constitution.[12] The Court found that the ordinance was "facially unconstitutional in that it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses."[13] The Court focused on the danger of government censorship and regulation of speech. While the goal of the St. Paul ordinance was to regulate "fighting words,"[14] the Court found that it failed to do so.[15] Instead, the Court ruled, the ordinance banned only bias-related words which amounted to content discrimination,[16] and in its practical operation to "actual viewpoint discrimination," rendering the ordinance invalid.[17] The Court stated:

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the last session of the United States Congress, Congressman Charles Schumer (D-NY) introduced a bill (HR 4797) to "make sentencing guidelines for federal criminal cases that provide sentencing enhancements for hate crimes." Congressman Schumer will re-introduce that bill during the current session of the United States Congress.

11. 112 S. Ct. 2538 (1992).

12. The ordinance stated:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in other on the basis of race, color, creed, religion, or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Id. at 2541 (citing ST. PAUL, MINN. LEGIS. CODE § 292.02 (1990)).

13. *Id.* at 2542.

14. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

15. The Court has not said that "fighting words" constitute no part of the expression of ideas, but only that they constitute "no *essential* part of any exposition of ideas." *Id.* at 572 (emphasis added).

16. In its opinion, the Court offers examples of content based speech which would be unconstitutional. First, "the government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government." *R.A.V.*, 112 S. Ct. at 2543. Second, "[a] State might choose to prohibit only that obscenity which is the most patently offensive *in its prurience*—i.e., that which involves the most lascivious displays of sexual activity. But it may not prohibit, for example only that obscenity which includes offensive *political* messages." *Id.* at 2546. Third, "the Federal Government can criminalize only those threats of violence that are directed against the President . . . . [B]ut the Federal Government may not criminalize only those threats against the President that mention his policy on aid to inner cities." *Id.* Finally, "a State may choose to regulate price advertising in one industry but not in others because the risk of fraud . . . is in greater view there . . . . But a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion . . . ." *Id.*

17. *Id.* at 2545, 2547.

> The dispositive question in this case, therefore, is whether content discrimination is reasonably necessary to achieve St. Paul's compelling interests; it plainly is not. An ordinance not limited to the favored topics, for example, would have precisely the same beneficial effect. In fact the only interest distinctively served by the content limitation is that of displaying the city council's special hostility towards the particular biases singled out. That is precisely what the First Amendment forbids.[18]

B. *State v. Mitchell*

One day after the Supreme Court's decision in *R.A.V. v. St. Paul*, the Supreme Court of Wisconsin rendered its opinion in *Wisconsin v. Mitchell*.[19] The court, citing *R.A.V.* in its opinion, struck down the Wisconsin "hate crime" statute,[20] ruling that it violated the First Amendment right to free speech. The Wisconsin Attorney General argued that the statute punished only the "conduct" of intentional selection of a victim. The Supreme Court of Wisconsin, drawing heavily from an article published in the U.C.L.A. Law Review,[21] disagreed finding that:

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18. *R.A.V.*, 112 S. Ct. at 2550.

19. 485 N.W.2d 807 (1992), *cert. granted sub nom.* Wisconsin v. Mitchell, 113 S. Ct. 810 (1992).

20. Wisconsin's 1989-90 "hate crime" statute states in pertinent part:

> (1) If a person does all of the following, the penalties for the underlying crime are increased as provided in sub. (2):
>
> (a) Commits a crime under chs. 939 to 948.
>
> (b) Intentionally selects the person against whom the crime under par. (a) is committed or selects the property which is damaged or otherwise affected by the crime under par. (a) because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person or the owner or occupant of that property.
>
> (2)(a) If the crime committed under sub. (1) is ordinarily a misdemeanor other than a Class A misdemeanor, the revised maximum fine is $10,000 and the revised maximum period of imprisonment is one year in the county jail.
>
> (b) If the crime committed under sub. (1) is ordinarily a Class A misdemeanor, the penalty increase under this section changes the status of the crime to a felony and the revised maximum fine is $10,000 and the revised maximum period of imprisonment is 2 years.
>
> (c) If the crime committed under sub. 1 is a felony, the maximum fine prescribed by law for the crime may be increased by not more than $5,000 and the maximum period of imprisonment prescribed by law for the crime may be increased by not more than 5 years.

WIS. STAT. § 939.645 (1991).

21. Susan Gellman, *Sticks and Stones Can Put You in Jail, But Can Words Increase*

> [a] statute specifically designed to punish personal prejudice impermissibly infringes upon an individual's First Amendment rights, no matter how carefully or cleverly one words the statute . . . . The statute is directed solely at the subjective motivation of the actor—his or her prejudice. Punishment of one's thought, however repugnant the thought, is unconstitutional.[22]

In *Mitchell*, the defendant's speech was determined to be evidence of his intentional selection of his victim. The use of the defendant's speech, as circumstantial evidence to prove the defendant's selection, "makes it apparent that the statute sweeps protected speech within its ambit and will chill free speech."[23]

C. *People v. Miccio*

In the first case in New York following the *R.A.V.* decision, a case prosecuted and argued by the Civil Rights Bureau of my Office, charges related to bias crime were upheld as constitutional.[24] In *People v. Miccio*, three defendants, allegedly acting in concert, assaulted two people. Just prior to the beatings, one of the defendants stated '[w]e don't want any Spics or Niggers in the neighborhood.'[25] The court found that the behavior proscribed in the aggravated harassment[26] and civil rights laws[27] was not bias-related fighting words, as in the St. Paul ordinance.[28] Instead, the New York statutes targeted the defendant's physical actions. The defendant's actions were not a result of his biased thought or expression, but were a result of his violent behavior and physical intimidation based upon bigotry.

IV. Closing Remarks

Certiorari was recently granted in the *Mitchell* case.[29] We must wait

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Your Sentence? Constitutional and Policy Dilemmas of Ethnic Intimidation Laws, 39 U.C.L.A. L. Rev. 333 (1991).

22. 485 N.W.2d at 814.
23. *Id.*
24. People v. Miccio, 589 N.Y.S.2d 762 (N.Y. Crim. Ct. 1992).
25. *Id.* at 763.
26. N.Y. Penal Law § 240.30(3) (McKinney 1989).
27. N.Y. Civil Rights Law § 40-c(2) (McKinney 1992).
28. *Miccio*, 589 N.Y.S.2d at 764.
29. 113 S. Ct. at 812.

to learn if the Supreme Court chooses to extend *R.A.V.* and, ultimately, if bias-related crime legislation in any form is permissible.

Nevertheless, even if we were to have the necessary penal statutes and convictions in every case, we cannot expect law enforcement alone to end racial strife. We must understand that increasing prison populations has little relation to public safety. In addition, it threatens our fiscal survival. Prosecuting the guilty is not enough. Law enforcement, alone, cannot pacify the hate or cure the prejudice which cause bias-related crimes.

Prosecutors also have an obligation to ensure that crimes of racial or ethnic bigotry do not occur because it is far better to prevent a crime than to prosecute a case. When I became District Attorney in 1990, I launched two significant initiatives which I believe will provide long-term solutions to bias-related crime.

First, we must look to education to prevent prejudice. Accordingly, I created an adopt-a-school program called Project Legal Lives in which members of my staff reach out to the young people in Brooklyn schools. Prosecutors must forge a positive link between the schools and the criminal justice system. The program teaches a basic lesson—that the key to community harmony is mutual respect. In its pilot phase, in 1990, the program operated in fifty-eight schools. During the 1991-1992 school year, I was able to expand the program to 126 schools. This year, my program is in 201 schools working with 12,000 children in 241 classrooms. By the end of my first term I expect to have members of my staff in all 350 public, private, and parochial elementary schools in Brooklyn.

In Project Legal Lives, an Assistant District Attorney or other staff member from my office is paired with a fifth grade teacher to form a team. Together, they teach the importance of rules and laws to fifth graders. They use a law-related curriculum designed to raise the children's consciousness about bias and drug abuse. The young men and women from my Office visit the classrooms, sit down with the fifth graders, talk with them, and tell them what is important—openly and honestly. I am confident that these exchanges will lead to self-esteem and respect for others, as well as an increase in the students' knowledge about the criminal justice system and its relationship to the community. This program is a sound investment. I know it will be the legacy of my office.

Second, during the past two years I have established numerous advisory councils comprised of the major ethnic groups, senior citizens, a women's group, members of the gay and lesbian community and union health and safety experts. The purpose of these councils is to advise me about law enforcement issues facing their constituents. But these councils also have proved invaluable when a particular group believes that it is the victim of

bias crimes. For example, when violence erupted in Crown Heights in 1991, my African-American and Jewish Advisory Councils met in emergency joint sessions to discuss methods to ease tensions and to contribute to reestablishing the calm.

Third, I believe that bias crimes require the highest priority from the District Attorney and his or her senior staff. Using the most experienced attorneys and investigators should be the rule in these cases, not the exception. Each team which investigates bias cases is diverse in terms of race, sex, and ethnicity.

When a person is victimized because of his or her race, ethnicity, religion, or sexual orientation, the resulting harm is greater than the harm caused by the injury alone. In addition, all members of that victim's group frequently suffer feelings of isolation, guilt, fear, and frustration.

The government has an obligation to protect all people equally. Protecting the weak ultimately makes us all stronger. Bias crimes injure some, but demean everyone. They reflect the worst of our society. Therefore, all required steps, legislative, judicial and administrative, should be taken to combat bias-related crimes.

Securities Arbitration: A Need for Continued Reform

William A. Gregory*
William J. Schneider**

TABLE OF CONTENTS

I. INTRODUCTION 1224
II. THE MERITS OF ALTERNATIVE DISPUTE RESOLUTION 1226
III. ENFORCEABILITY OF PRE-DISPUTE ARBITRATION AGREEMENTS 1227
A. *Arbitrability of Claims Under the Securities and Exchange Acts* 1228
1. *Wilko v. Swan* 1228
2. *Dean Witter Reynolds, Inc. v. Byrd* 1230
3. *Shearson/American Express, Inc. v. McMahon* 1231
4. *Rodriguez De Quijas v. Shearson/American Express, Inc.* 1233
B. *Avoidance Based on Fraudulent Inducement or Overreaching* 1235
1. Claiming Fraudulent Inducement as a Means of Avoiding Arbitration 1235
2. PDAAs as Unconscionable Contracts of Adhesion 1236
a. Procedural Unconscionability 1238
b. Substantive Unconscionability 1239
IV. HOW FAIR HAS SECURITIES INDUSTRY ARBITRATION BEEN? 1240
V. IMPROVING PUBLIC PERCEPTION 1244
A. *State Legislative Action* 1244
B. *Congressional Action* 1246
C. *SEC Action* 1247
D. *A Suggested Reform* 1248
VI. CONCLUSION 1250

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I. INTRODUCTION

Arbitration as an alternative to the vagaries of litigating through the judicial system has worked well in practice, as well as in theory, for many kinds of disputes—in labor-management, commercial, and maritime. The process is generally less frustrating, less expensive, and less time-consuming than conventional litigation. However, securities broker/customer arbitrations have not enjoyed the same high degree of success as other types of commercial arbitration, which generally are between two industry participants that are on relatively equal footing.

Generally, investors are at a disadvantage with large brokerage firms that often are members of the self-regulating organizations (SROs) which typically conduct the arbitration proceedings. Brokerage firms also are intimately familiar with the arbitration process, whereas investors rarely understand this process prior to arbitrating an actual dispute. As such, the investing public perceives forced arbitration of their disputes with brokers as inherently unfair, which undermines the integrity of the financial markets and serves to impede the flow of capital upon which our economic system depends. Even if it could be successfully argued that securities arbitration in its current form is fair in the majority of cases, the fact that it is perceived as being unfair by the investing public should be reason enough to consider continued reform in order to instill investor confidence, a prime concern since the stockmarket crash of 1929. The public's apprehension is further justified by the fact that securities industry arbitrators are not required to follow laws and write no opinions for the scrutiny of any court or the appointed watchdog of the federal securities laws, the Securities and Exchange Commission (the SEC or the Commission).[1] Consequently, the

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1. Margo E. Reder, *Securities Law and Arbitration: The Enforceability of Predispute Arbitration Clauses in Broker-Customer Agreements*, 1990 COLUM. BUS. L. REV. 91, 96 (1990). Vacating decisions only upon a showing of "manifest disregard" for the law means the arbitrators do not have to strictly comply with the securities laws. *Id.*; *see also* 9 U.S.C.A. §§ 10, 11 (West 1981 & Supp. 1988) (judicial interpretations resulted in the development of the "manifest disregard" standard); Wilko v. Swan, 346 U.S. 427, 436 (1953) *overruled by* Rodriguez De Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989) (5-4 decision); David A. Lipton, *The Standard on Which Arbitrators Base Their Decisions: The SROs Must Decide*, 16 SEC. REG. L.J. 3, 8, 13-14 (1988) (securities arbitration awards typically made without any explanation and manifest disregard standard allows arbitrators great latitude in decision making); *cf.* Diana B. Henriques, *When Naivete Meets Wall Street*, N.Y. TIMES, Dec. 3, 1989, at § 6 (quoting Craig Goettsch, Superintendant of Securities of Iowa and Chairman of the Arbitration Review Panel of the North American Securities Administrators Association, as stating that the industry opposes written opinions because it opens door to appeals); Nathaniel C. Nash, *New SEC Chief Defines Goals*, N.Y. TIMES, Oct.

public cannot receive assurance that securities arbitrationis adequate. Under such circumstances the public's negative view is unlikely to wane.

This is not to say that securities arbitration could not be made to work to the satisfaction of both parties, not just to the satisfaction of the securities industry, as it now stands. For instance, a meaningful choice could be required in all pre-dispute arbitration agreements (PDAAs) to allow investors the option of selecting an alternative arbitration forum other than a SRO of which the opposing securities firm is likely to be a member or have significant ties, e.g., the American Arbitration Association (AAA). Arbitrators also should be required to write at least cursory opinions consisting of their basic findings of fact and the rules of law they apply in making their decisions and awards, so that the public can understand the reasoning behind their decisions. Losing customers could also be allowed to seek a judicial or Commission review based on these written opinions, if reasonable grounds could be shown that the securities laws were applied incorrectly by the arbitrators, or the arbitrators lacked sufficient evidence to support the findings of fact. Arbitrators should also be required to consider punitive and RICO (Racketeer Influenced and Corrupt Organization Act)[2] damages if a judicial remedy would permit such damages, whether or not such damages are provided for in the arbitration agreement.

Securities arbitration may well work better than expensive, time-consuming litigation through the court system, but it is far from ideal in its current form, and should be improved. Many of the claims investors bring against their brokers involve relatively small amounts of only a few thousand dollars.[3] These claimants obviously are better off arbitrating their disputes where time and expense are less of an obstacle to recovery. The securities industry also benefits, as its cost of litigation is substantially reduced.[4] Therefore, arbitration should be promoted, but changes are

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25, 1989, at D1, D10 (key to maintaining investor confidence is for SEC to enforce securities laws) [hereinafter N.Y. TIMES]; Letter from Securities Industry Conference on Arbitration to Richard G. Ketchum, Director of SEC Market Regulation Division 6-7 (Dec. 14, 1987) (on file with the SEC) (SICA agrees with SEC recommendation for maintenance of case results, but then criticizes plan as lacking in utility and misleading in nature).

2. 18 U.S.C.A. §§ 1961-1968 (West 1981 & Supp. 1988) (provides for treble damages for prohibited racketeering activities which typically involve charges of mail and wire fraud in securities cases).

3. *Surveying Public Award Results*, 3 SEC. ARB. COMMENTATOR (Nos. 3 & 4) 1, 2 (Mar. & Apr. 1990) [hereinafter *Survey*].

4. *See* John L. Di Fiore, *Problems in Alternative Dispute Resolution: Arbitration Agreements as Contracts of Adhesion in Consumer Securities Disputes*, 93 COM. L.J. 259 (1988).

necessary to ensure substantial fairness and justice, and to instill greater investor confidence in the securities industry, which would benefit securities firms more in the long run than any changes might cost them in the short run through more frequent or higher customer awards.

II. The Merits of Alternative Dispute Resolution

> Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man . . . . Never stir up litigation. A worse man can scarcely be found than one who does this.[5]

No one involved in the judicial process can deny that litigation can be frustrating, expensive, and time consuming. Frequently, it is unrewarding for litigants, as fees, expenses, and consumption of time often outweigh any award. Judge Learned Hand once said, "I must say that, as a litigant, I should dread a lawsuit beyond almost anything else short of sickness and death."[6] In complex commercial litigation, such as in the IBM and AT&T antitrust cases,[7] discovery and litigation can take many years and consume tens of millions of dollars. An avid enthusiast for alternative dispute resolution, former Chief Justice Warren E. Burger commented, "I cannot emphasize too strongly to those in business and industry—and especially to lawyers—that every private contract of real consequence to the parties ought to be treated as a 'candidate' for binding private arbitration."[8]

"Society cannot and should not rely exclusively on the courts for the resolution of disputes."[9] Alternative dispute resolution mechanisms can be

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5. Abraham Lincoln *quoted in* Warren E. Burger, *Using Arbitration to Achieve Justice*, 40 Arb. J., Dec. 1985, at 3, 4.

6. Learned Hand, *Deficiencies of Trials to Reach the Heart of the Matter*, *in* 3 Lectures on Legal Topics, Ass'n Bar City of N.Y. 89, 105 (1926).

7. The U.S. government instituted antitrust actions against AT&T and IBM in the mid-1970s. Both actions were tied up at the trial level until the early 1980's when the government dropped its action against IBM, and AT&T agreed to break up its local operating companies into separate independent concerns.

8. Burger, *supra* note 5, at 6.

9. National Institute for Dispute Resolution, Report of the Ad Hoc Panel on Dispute Resolution & Public Policy (1983), *reprinted in* L. Kanowitz, Alternative Dispute Resolution 3 (1986). Support for this project was provided by the Federal Justice Research Program, Grant No. 83-NI-AX-0002 to the National Institute for Dispute

less expensive, faster, less intimidating to the parties, more sensitive to their concerns, and more responsive to the underlying problem.[10] The parties also have a better chance of preserving the relationship and fulfilling their need to retain control over the dispute by not handing it over to the intricacies of the legal system.[11]

Americans are litigious by nature.[12] This results from an open and free society that allows wrongs to be remedied. As technological advances continue to complicate our lives, new causes of action arise. As a result, our court system is overloaded, not only because of an ever-increasing case load, but because cases are becoming evermore complex, resulting in trials that last months or even years. Alternative dispute resolution can serve to reduce this burden.

III. Enforceability of Pre-dispute Arbitration Agreements

In 1925, Congress enacted the Federal Arbitration Act[13] (FAA) to place arbitration agreements on the same footing as other private contracts and reduce costly litigation.[14] Section two of the FAA declares that such agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract," while sections three and four provide for a stay of judicial proceedings and a court order to compel arbitration where an agreement in writing for such arbitration exists between the parties. The FAA was necessary to overturn earlier case law which was hostile to the concept of arbitration. A party can only avoid arbitration on the limited grounds of fraud or overreaching by the party extracting the agreement, or by contrary congressional command.[15]

Pre-dispute arbitration agreements between securities brokers and investors usually permit customers to bring claims only before a SRO. Usually this means a choice between the New York Stock Exchange (NYSE), the National Association of Securities Dealers (NASD), or the

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Resolution. *Id.*

10. *Id.*

11. *Id.*

12. *See* 1 Alexis de Tocqueville, Democracy in America (H. Reeve trans. 1961). "Scarcely any question arises in the United States which does not become, sooner or later, a subject of judicial debate." *Id.* at 330.

13. 9 U.S.C.A. §§ 1-14 (West 1981 & Supp. 1992).

14. *See* H.R. No. 96, 68th Cong., 1st Sess. 1, 2 (1924).

15. *See* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987) (5-4 decision).

American Stock Exchange(AMEX). Only a few of the PDAAs allow for the option of bringing claims before the independent American Arbitration Association.[16] Securities disputes usually involve claims of broker fraud and misrepresentation, unauthorized trading, and racketeering activity, as well as other deceptive and unfair trade practices, which result in losses in the customer's account.[17] The Securities Act of 1933[18] and the Securities Exchange Act of 1934[19] were enacted by Congress to provide remedies for wrongs committed by brokers against customers in an attempt to instill confidence in the securities markets and to prevent any repeat of the 1929 stockmarket crash.[20] For instance, section 12(2) of the 1933 Act[21] provides for civil liability against sellers of securities who knowingly make misstatements of, or omit, material facts in order to induce investor purchases of securities. Section 10(b) of the 1934 Act[22] makes it unlawful for any person to employ any manipulative or deceptive device in connection with the purchase or sale of securities. How these statutory rights are to be enforced has been debated in the courts for over half a century.

As a precondition to trading in securities, the customer must sign the brokerage firm's standardized agreement, which invariably includes a predispute arbitration clause. This clause provides that any controversy between the parties relating to the account shall be settled by binding arbitration, usually before one of the SROs. Traditionally, the courts have not interpreted such agreements to preclude the customer's right to pursue congressionally created causes of action in court, despite the all-inclusive language of the PDAA.

A. *Arbitrability of Claims Under the Securities and Exchange Acts*

1. *Wilko v. Swan*

The Supreme Court first addressed the issue of arbitrability of claims under the Securities and Exchange Acts in 1953, in *Wilko v. Swan*.[23]

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16. Reder, *supra* note 1, at 95-96.

17. *See* David E. Robbins, *Securities Arbitration: Preparation and Presentation*, 42 ARB. J., June 1987, at 2, 6.

18. 15 U.S.C. §§ 77a-77z (1981).

19. 15 U.S.C. §§ 78a-78ll (1981).

20. *See generally* 1 LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1993 & SECURITIES EXCHANGE ACT OF 1934 (1973).

21. 15 U.S.C. § 77l (1981).

22. 15 U.S.C. § 78j (1981).

23. 346 U.S. 427 (1953), *overruled by* Rodriguez De Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989) (5-4 decision).

Wilko brought an action against a securities brokerage firm in district court to recover damages under section 12(2) of the 1933 Act.[24] The broker moved to stay the judicial proceedings and compel arbitration in accordance with the terms of an arbitration agreement signed by Wilko.[25] The district court denied the stay based on the advantageous court remedy afforded investors under the Securities Act.[26] A divided court of appeals reversed, stating that the Act did not prohibit arbitration of such controversies.[27] The issue before the Supreme Court was whether the agreement to arbitrate future controversies of all claims was void as to statutory claims under the Securities Act.[28]

The Supreme Court found that Congress passed the Securities Act of 1933 to protect investors from fraudulent sales of securities, and specifically created section 12(2) to allow recovery for misrepresentation.[29] The Court also found that section 14 of the Act[30] prevented the enforcement of the arbitration agreement, as it was the intent of Congress that the right to a judicial forum provided for under the Act could not be waived.[31] The Court stated that arbitral forums lacked suitable oversight and safeguards to ensure a fair and just resolution of the dispute.[32]

Construed to the narrow facts of the case, this holding applied only to alleged violations of the 1933 Act. While not addressed by the Court, a strong argument could have been made that *Wilko* extended to the 1934 Act, as the 1934 Act was *in pari materia* of the 1933 Act, which was enacted to provide some stability to the stockmarket during the depression years following the crash of 1929. As such, the 1934 Act was intended to finish the job started in 1933, and the two Acts should be read *in pari materia*, with section 14 of the 1933 Act extended to the latter. The Court's decision in *Wilko* may well have been the correct one. Importantly, the Securities Act was passed eight years following the FAA. Congress was well aware of its presence and specifically put language in the 1933 Act that gave the

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24. *Id.* at 428.
25. *Id.* at 429.
26. *Id.* at 430.
27. *Id.*
28. *Wilko*, 346 U.S. at 430.
29. *Id.* at 431.
30. Section 14 of the 1933 Act states, "[a]ny condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the Commission shall be void." 15 U.S.C. § 77n (1981).
31. *Wilko*, 346 U.S. at 436-37 (arbitrator's power almost unlimited while judicial review extremely limited).
32. *Id.* at 433-34.

district courts of the United States concurrent jurisdiction with state and territorial courts regarding offenses and violations under the Act.[33] Section 14 would seem to make this provision non-waivable.

United States courts of appeals interpreted *Wilko* to apply to the 1934 Act, as well. In *Dickinson v. Heinold Securities, Inc.*,[34] the Seventh Circuit held that a cause of action under section 10(b) of the Securities Exchange Act of 1934 was non-arbitrable regardless of the agreement between the parties, based on the Seventh Circuit's previous holding in *Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,[35] which relied upon the Supreme Court's holding in *Wilko*. The circuit courts generally held *Wilko* to mean that *all* alleged violations of *any* federal securities laws were non-arbitrable.[36]

2. *Dean Witter Reynolds, Inc. v. Byrd*

The Supreme Court remained silent, however, on the issue of arbitrability of alleged violations of the 1934 Act until its 1985 decision in *Dean Witter Reynolds, Inc. v. Byrd*.[37] The issue was not directly brought before the Court because Dean Witter never raised the issue of arbitrability of alleged violations of the 1934 Act.[38] Byrd, an investor, had brought a complaint against Dean Witter raising both federal securities claims based on sections 10(b), 15C, and 20 of the 1934 Act, and pendent state claims.[39] The state claims were admittedly arbitrable, but Byrd sought to have them

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33. Section 22(a) of the 1933 Act states, "[t]he district courts of the United States . . . shall have jurisdiction of offenses and violations under this subchapter . . . concurrent with State and Territorial courts . . . . " 15 U.S.C. § 77v (1981).

34. 661 F.2d 638 (7th Cir. 1981).

35. 558 F.2d 831 (7th Cir. 1977).

36. Kehr v. Smith Barney, Harris Upham & Co., 736 F.2d 1283 (9th Cir. 1984); Kershaw v. Dean Witter Reynolds, Inc., 734 F.2d 1327 (9th Cir. 1984); Liskey v. Oppenheimer & Co., 717 F.2d 314 (6th Cir. 1983); Sawyer v. Raymond, James & Assoc., Inc., 642 F.2d 791 (5th Cir. 1981); DeLancie v. Birr, Wilson & Co., 648 F.2d 1255 (9th Cir. 1981); Mansback v. Prescott, Ball & Turben, 598 F.2d 1017 (6th Cir. 1979); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Moore, 590 F.2d 823 (10th Cir. 1978); Sibley v. Tandy Corp., 543 F.2d 540 (5th Cir. 1976), *cert. denied*, 434 U.S. 824 (1977); Alleggert v. Perot, 548 F.2d 432 (2d Cir. 1977), *cert. denied*, 432 U.S. 910 (1977); Greater Continental Corp. v. Schechter, 422 F.2d 1100 (2d Cir. 1970); *see also* Surman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 733 F.2d 59 (8th Cir. 1984); Belke v. Merrill Lynch, Pierce, Fenner & Smith, 693 F.2d 1023 (11th Cir. 1982); Ayres v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 538 F.2d 532 (3d Cir. 1976), *cert. denied*, 429 U.S. 1010 (1976).

37. 470 U.S. 213 (1985).

38. *Id.* at 215.

39. *Id.* at 214.

tried along with the federal securities claims based on the principle of pendent jurisdiction.[40] The district court refused to grant Dean Witter's motion to compel arbitration of the state law claims independent of the federal securities claims.[41] The Supreme Court found unpersuasive the arguments advanced in support of the district court's ruling, however, and reversed the decision of the court of appeals insofar as it upheld the district court's denial of Dean Witter's motion to compel arbitration of the state law claims.[42]

The important language in *Byrd* can be found in footnote one.[43] In that footnote, the Court hinted at the inapplicability of *Wilko* to a claim arising under section 10(b) of the Securities Exchange Act of 1934. The court noted that the provisions of the 1933 and 1934 Acts differ, and that, unlike section 12(2) of the 1933 Act, section 10(b) of the 1934 Act does not expressly give rise to a private cause of action. Dean Witter and *amici* representing the securities industry urged the Court to resolve the applicability of *Wilko* to claims under the 1934 Act, but the Court declined to do so because the issue was not properly before the Court.

However, the Court did not have long to wait before the issue was properly presented. Shortly after *Byrd*, the Second Circuit reaffirmed its pre-*Byrd* holding of non-arbitrability in *McMahon v. Shearson/American Express, Inc.*[44] Shearson appealed and the Supreme Court granted certiorari.

3. *Shearson/American Express, Inc. v. McMahon*[45]

McMahon was the first case in which the Supreme Court directly considered the arbitrability of alleged violations under the 1934 Act. The Second Circuit reasoned that clear circuit precedent, the similarity of the

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40. *Id.*

41. *Id.* at 215-16.

42. *Dean Witter Reynolds, Inc.*, 470 U.S. at 223-24.

43. *Id.* at 215 n.1.

44. 788 F.2d 94 (2d Cir. 1986), *cert. granted*, 479 U.S. 812 (1986). Following *Byrd*, but before the Supreme Court's decision in *McMahon*, the Eighth Circuit refused to follow the precedent set by other circuit courts that alleged violations under the 1934 Act were non-arbitrable. *See* Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 795 F.2d 1393 (8th Cir. 1986). *But see* Conover v. Dean Witter Reynolds, Inc., 794 F.2d 520 (9th Cir. 1986) (continuing to hold that claims arising under § 10(b) of the 1934 Act were non-arbitrable); Preston v. Kruezer, 641 F. Supp. 1163 (N.D. Ill. 1986) (rule 10b-5 claims as well as RICO claims non-arbitrable). See sources cited *supra* note 36 for previous circuit court decisions holding that all alleged violations of any federal securities laws were non-arbitrable.

45. 482 U.S. 220 (1987) (5-4 decision).

1933 and 1934 Acts, and "strong public policy concerns" precluded arbitration of such claims.[46] Relying on the customer agreements that contained a PDAA, Shearson moved to compel arbitration of the claims under section three of the FAA.[47] The District Court held that under the Court's decision in *Byrd*, and the "strong national policy favoring the enforcement of arbitration agreements," the Securities Exchange Act claims were arbitrable under the terms of the agreements.[48] The Court of Appeals reversed, but acknowledged that *Byrd* had "cast some doubt on the applicability of *Wilko* to claims under [section] 10(b)" of the 1934 Act.[49]

In a 5-4 decision, the Supreme Court stated that the FAA was "intended to revers[e] centuries of judicial hostility to arbitration agreements by, plac[ing] [them] 'upon the same footing as other contracts.'"[50] The Court continued, saying that the FAA established a federal policy favoring arbitration which required rigorous enforcement of such agreements.[51] The Court had no qualms in applying this reasoning to claims founded on statutory rights.[52] "Absent a well-founded claim that an arbitration agreement resulted from the sort of fraud or excessive economic power that 'would provide grounds for the revocation of any contract,' the Arbitration Act 'provides no basis for disfavoring agreements to arbitrate statutory claims.'"[53] "The Arbitration Act, standing alone, therefore mandates enforcement of agreements to arbitrate statutory claims . . . by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute . . . ."[54] As such, absent any explicit congressional language in the 1934 Act, the Court held that agreements to arbitrate Exchange Act claims were enforceable in accord with the explicit provisions of the FAA.[55] The Court applied this same reasoning to the McMahons' RICO claims, finding them arbitrable as well.[56]

The dissent, led by Justice Blackmun, remained suspicious of securities arbitration, stating that "[b]oth the Securities Act of 1933 and the Securities

46. *Id.* at 225.
47. *Id.* at 223.
48. *Id.* at 224.
49. *Id.* at 225.
50. *McMahon*, 482 U.S. at 225-26 (citations omitted).
51. *Id.* at 226.
52. *Id.*
53. *Id.* (citation omitted).
54. *Id.* at 229.
55. *McMahon*, 482 U.S. at 226-27, 238.
56. *Id.* at 242.

Exchange Act of 1934 were enacted to protect investors.[57] However, "[t]he Court . . . leaves such claims to the arbitral forum of the securities industry at a time when the industry's abuses towards investors are more apparent than ever."[58] The dissent seemed to be saying that the majority was putting the "pirates in pinstripe" on Wall Street back at the helm of the ship, something that Congress had set out to undo in the 1933 and 1934 Acts. The dissent's apprehension of securities arbitration may have been overdone, but the perception of public hostility was well grounded. "[T]he investor has the impression, frequently justified, that his claims are being judged by a forum comprised of individuals sympathetic to the securities industry . . . ."[59] "The uniform opposition of investors to compelled arbitration and the overwhelming support of the securities industry for the process suggest that there must be *some* truth to the investors' belief that the securities industry has an advantage . . . ."[60] However, in *Rodriguez De Quijas v. Shearson/American Express, Inc.*,[61] the majority of the Court solidified its backing of securities arbitration.

4. *Rodriguez De Quijas v. Shearson/American Express, Inc.*

The *McMahon* Court went to considerable lengths to differentiate its decision from *Wilko*. The dissent was correct in its assessment, however, that the majority had effectively overruled *Wilko*. In *Rodriguez De Quijas*, not long after the *McMahon* decision, a divided Court officially overruled *Wilko*. Perhaps justifiably fearful of a flood of securities litigation following the stockmarket crash of October, 1987,[62] the Court held that all securities claims, including those under the 1933 Act, are arbitrable under PDAAs.[63]

In *Rodriguez De Quijas*, the petitioner alleged violations of both the

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57. *Id.*
58. *Id.* at 243 (Blackmun, J., dissenting).
59. *Id.* at 260.
60. *McMahon*, 482 U.S. at 261.
61. 490 U.S. 477 (1989) (5-4 decision).
62. In an effort to bring claims for judicial resolution, investors alleged violations of the Securities Act which were out of reach of the Court's holding in *McMahon*. *See, e.g.*, Osterneck v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 841 F.2d 508 (3d Cir. 1988); Chang v. Lin, 824 F.2d 219 (2d Cir. 1987); Ketchum v. Bloodstock, 685 F. Supp. 768 (D. Kan. 1988). These cases have been overruled by *Rodriguez De Quijas*. *But see* Noble v. Drexel, Burnham Lambert, Inc., 823 F.2d 849, 850 (5th Cir. 1987) (formal overruling of *Wilko* imminent); Ryan v. Liss, Tenner & Goldberg Sec. Corp., 683 F. Supp. 480, 494 (D.N.J. 1988) (claims under Securities Act arbitrable).
63. *Rodriguez De Quijas*, 490 U.S. at 479-82.

1933 and 1934 Acts, as well as of state law.[64] Relying on *Wilko*, the District Court had ordered all claims, save those raised under the 1933 Act, to be submitted to arbitration.[65] Thc court of appeals, however, reversed on the issue of arbitrability of alleged violations under the 1933 Act, because the Supreme Court had essentially reduced *Wilko* to "obsolescence" in *McMahon*.[66] After following *Wilko* for nearly four decades, the Supreme Court declared that "[i]t has been recognized that *Wilko* was not obviously correct . . . ."[67] The Court found that the language prohibiting waiver in the 1933 Act could easily have been read to relate to substantive provisions of the Act without including the remedy provisions, and that the *Wilko* Court had essentially decided the way it had because of "the old judicial hostility to arbitration."[68] "To the extent that *Wilko* rested on suspicion of arbitration . . . it has fallen far out of step with our (the Court's) current strong endorsement of the federal statutes favoring this method of resolving disputes . . . ."[69]

The majority also placed great weight on the SEC's ability to ensure fairness in the arbitral process.[70] However, as Justice Blackmun pointed out in his dissenting opinion in *McMahon*, the Commission's oversight consists of nothing more than a general review of SRO arbitration rules and does not include any review of specific arbitration proceedings for misapplication of securities laws or for any indication of fairness to investors.[71] It is unlikely any such review is a meaningful possibility, so long as arbitrators are not required to give reasons for their decisions.

If there were any doubts as to the direction of the Supreme Court after *McMahon*, they were laid to rest after *Rodriguez De Quijas*. Although both cases were decided by a 5-4 vote, none of the Justices in the majority in *McMahon* changed positions in *Rodriguez De Quijas*.[72] In the interim period between the two cases, Justice Kennedy, who voted with the majority in *Rodriguez De Quijas*, replaced Justice Powell, who voted with the majority in *McMahon*. Both Justice Brennan and Justice Marshall were

64. *Id.* at 478-79.
65. *Id.* at 479.
66. *Id.*
67. *Id.* at 480.
68. *Rodriguez De Quijas*, 490 U.S. at 480.
69. *Id.* at 481.
70. *Id.* at 482-83.
71. 482 U.S. at 265.
72. The *McMahon* majority included Chief Justice Rehnquist and Justices O'Connor, Powell, Scalia, and White, while the majority in *Rodrigues De Quijas* consisted of Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and White.

among the dissenters. Consequently, it appears that the Supreme Court is unlikely to change its position with respect to arbitration of securities disputes in the near future.

B. *Avoidance Based on Fraudulent Inducement or Overreaching*

For the courts and Congress to allow private remedies under the Securities and Exchange Acts, and then permit the securities industry unilaterally to force PDAAs on customers as a precondition to investing may seem to undermine the system's fairness and curtail congressionally-created and judicially-recognized rights.[73] Under section two of the FAA, however, arbitration agreements are valid, irrevocable, and enforceable except upon such grounds as exist at law or in equity for the revocation of any contract. Recognizing a strong federal policy favoring arbitration, the Supreme Court in *McMahon* interpreted this to mean that a contract to arbitrate must be rigorously enforced and that a party could only avoid arbitration on the limited grounds of fraud or overreaching by the party extracting the agreement, or by contrary congressional command.[74]

In *McMahon* and *Rodriguez De Quijas*, the Court determined that there was no such congressional command in either the Exchange Act or the Securities Act (despite its explicit language to the contrary).[75] This seems to limit challenges to enforcement of PDAAs to claims of fraud or of broker overreaching in forcing unconscionable contracts of adhesion on customers.

1. Claiming Fraudulent Inducement as a Means of Avoiding Arbitration

The Supreme Court has emphasized that "[i]n the absence of any express provision excluding a particular grievance from arbitration . . . only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail."[76] In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,[77] the Court refused to rescind an arbitration clause, despite a claim of fraud in the inducement of the contract.[78] The Court approved circuit court decisions holding that arbitration clauses are

73. Reder, *supra* note 1, at 117.
74. 482 U.S. at 226.
75. *See* sources cited *supra* notes 30 & 33.
76. United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 584-85 (1960).
77. 388 U.S. 395 (1967).
78. *Id.* at 406.

"separable" from the contracts in which they are embedded and, where no claim of fraud is directed at the arbitration clause itself, that claims of fraudulent inducement are arbitrable.[79] Reconfirming *Prima Paint*, the Court stated in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*[80] that "[t]he Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ."[81] To hold differently would permit a party, "upon the mere cry of fraud in the inducement . . . [to frustrate] the very purpose sought to be achieved by the agreement to arbitrate . . . ."[82] In a broadly-worded arbitration clause, all grievances even remotely related to the contract are arbitrable.[83]

2. PDAAs as Unconscionable Contracts of Adhesion

The Supreme Court has not precluded claims that securities arbitration agreements are unconscionable contracts of adhesion, but the lower federal and state courts have tended to reject such claims. "The purpose of the unconscionability doctrine is to prevent unfair surprise and oppression."[84] When a party of little bargaining power, and hence very little choice in the terms of the contract, signs a commercially unreasonable contract with little or no understanding of its terms, courts may withhold enforcement based on unconscionability.[85] Unconscionability will be found where: 1) there is

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79. *Id.* at 402. For a thorough discussion of this issue see Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak St., 673 P.2d 251 (Cal. 1983).

80. 460 U.S. 1 (1983).

81. *Id.* at 24-25.

82. Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 410 (2d Cir. 1959).

83. *See* Bird v. Shearson Lehman/Am. Express, Inc., No. 90-7688 (2d Cir. 1991) (LEXIS, Genfed library, US App file); *see also* Raytheon Co. v. Automated Business Sys., Inc., 882 F.2d 6 (1st Cir. 1989) (claims for punitive damages are arbitrable even if not provided for in PDAA); Pierson v. Dean, Witter, Reynolds, Inc., 742 F.2d 334 (7th Cir. 1984) (fraud, breach of fiduciary duty, gross negligence, negligence, all are arbitrable); Smoky Greenhaw Cotton Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 720 F.2d 1446 (5th Cir. 1983) (claims under the Commodity Exchange Act arbitrable); Sauer-Getriebe KG v. White Hydralics, Inc., 715 F.2d 348 (7th Cir. 1983) (under broadly-worded arbitration clause, even validity of contract itself is subject to arbitration); Fuller v. Guthrie, 565 F.2d 259 (2d Cir. 1977) (arbitrable unless wholly unexpected tortious behavior is far beyond the intended scope of the performance contract's arbitration clause).

84. Pierson v. Dean, Witter, Reynolds, Inc., 742 F.2d 334, 339 (7th Cir. 1984) (citing FMC Fin. Corp. v. Murphree, 632 F.2d 413, 420 (5th Cir. 1980); Leasing Serv. Corp. v. Broetje, 545 F. Supp. 362, 366 (S.D.N.Y. 1982)).

85. *Id.*; Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449-50 (D.C. Cir. 1965); Preston v. Kruezer, 641 F. Supp. 1163, 1172 (N.D. Ill. 1986); *Leasing Serv. Corp.*,

an "absence of meaningful choice on the part of one of the parties" and 2) the challenged "contract terms are unreasonably favorable to the other party."[86]

To satisfy the first part of this two-part test, the arbitration agreement must be a contract of adhesion. The common threads of adhesive contracts are that they are: 1) standardized contracts, 2) imposed and drafted by the party of superior bargaining strength, and 3) who offers the adhering party the limited choice of accepting or rejecting the contract as written.[87] Since virtually all brokerage firms now require customers to sign a standardized customer agreement that includes a pre-dispute arbitration clause as a precondition to investing,[88] and investors are generally in a weaker bargaining position,[89] such agreements are fairly classified as contracts of adhesion.[90]

Simply because a contract is one of adhesion, however, does not make it unenforceable.[91] The fact that one party had little bargaining power is

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545 F. Supp. at 366; Contract Buyers League v. F & F Inv., 300 F. Supp. 210, 227 (N.D. Ill. 1969), *aff'd*, 420 F.2d 1191 (7th Cir. 1969), *cert. denied*, 400 U.S. 821 (1970).

86. *Williams*, 350 F.2d at 449 (two-part test set forth by Judge Wright); *see also* Hume v. United States, 132 U.S. 406, 411 (1889) (unconscionable if "no man in his senses, not under delusion, would make on the one hand, and as no honest and fair man would accept on the other").

87. Graham v. Scissor-Tail, Inc., 623 P.2d 165, 171 (Cal. 1981); Neal v. State Farm Ins. Co., 188 Cal. App. 2d 690, 694 (Cal. Ct. App. 1961).

88. The SEC considers it typical for brokerage firms to include PDAAs in customer agreements and require customers to sign these agreements at the time of opening a securities trading account. *See* SEC. EXCH. ACT RELEASE NO. 15984 n.4 (July 2, 1979), *reprinted in* 17 SEC DOCKET 1167, 1169 n.4.

89. *See* Stanbury & Klein, *The Arbitration of Investor-Broker Disputes*, 35 ARB. J. (No. 3) 30, 37 (1980).

90. *See* Finkle & Ross v. A.G. Beker Paribus Inc., 622 F. Supp. 1505, 1511 (S.D.N.Y. 1985) (investors faced with accepting standardized brokerage contracts with arbitration clauses or being excluded from the securities market, such clauses come within the adhesion doctrine); *see also* Di Fiore, *supra* note 4, at 270-71.

91. One theory for not making such contracts unenforceable is as follows:

> Through advance knowledge on the part of the enterprise offering the contract that its relationship with each individual consumer or offeree will be uniform, standard and fixed, the device of form contracts introduces a degree of efficiency, simplicity, and stability. When such contracts are used widely, the savings in cost and energy can be substantial. An additional benefit is that goods and services which are covered by these contracts are put within the reach of the general public, whose sheer size might prohibit widespread distribution if the necessary contractual relationships had to be individualized. Transactional costs, and therefore the possible prices of these goods and services, are reduced. In short, form contracts appear to be necessary concomitant of a sophisticated,

not in itself sufficient to declare the PDAA provision unconscionable.[92] The second part of the two-part test must be met—the terms must be "unreasonably favorable" to the other party. In this regard, courts have considered whether: 1) the arbitration provision could reasonably be thought to fall within the normal expectations of the adhering party, *or* 2) whether the terms of the provision were so one-sided that enforcement against the adhering party would be unduly oppressive.[93] These two distinctions have been respectively termed "procedural unconscionability" and "substantive unconscionability."[94]

a. Procedural Unconscionability

Procedural unconscionability concerns the process and circumstances under which the parties entered into the PDAA.[95] The broker may use high-pressure tactics, downplay the importance of the provision, fail to explain its significance, or use other deceptive practices, especially where the customer is obviously unable to reasonably comprehend the import of such a clause.[96] This broker overreaching is better described as the fraudulent inducement of the arbitration clause.

In the past, some courts have refused to enforce PDAAs based on procedural unconscionability.[97] This was before the Supreme Court's strong pro-arbitration decision in *Rodriguez De Quijas,* however, and while other courts enforced PDAAs virtually no matter how they were procured.[98] Given the Supreme Court's strong backing for arbitration of

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mass-consumption economy.
Graham, 623 P.2d at 171 n.15.

92. T.A. Moynahan Properties Inc. v. Lancaster Village Coop., Inc., 496 F.2d 1114, 1119 (7th Cir. 1974).

93. *Graham*, 623 P.2d at 172-73.

94. *See* Di Fiore, *supra* note 4, at 269; Arthur A. Leff, *Unconscionability and the Code—The Emperor's New Clause,* 115 U. PA. L. REV. 485, 487 (1967).

95. Di Fiore, *supra* note 4, at 269-70.

96. *See* State v. Wolowitz, 468 N.Y.S.2d 131, 145 (N.Y. App. Div. 1983).

97. *E.g.,* Woodyard v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 640 F. Supp. 760 (S.D. Tex. 1986) (neophyte investor who admittedly did not understand arbitration was required by broker to sign arbitration agreement sometime after trading began in order to continue receiving investment income).

98. Surman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,733 F.2d 58, 59 (8th Cir. 1984) (nothing unfair about arbitration clause); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Benton, 467 So. 2d 311 (Fla. 5th Dist. Ct. App. 1985) (faith in fairness of arbitration compels enforcement even though investor did not read or speak English and could not have comprehended terms of agreement); *see also* Coleman v. Prudential Bache Sec. Inc., 802

securities disputes, the latter view will likely prevail. With PDAAs so widely used by the securities industry, and with this so widely known by investors, no one can argue any longer that such clauses in customer agreements are beyond the reasonable expectations of any investor.[99]

b. *Substantive Unconscionability*

Substantive unconscionability, the last remaining hope for investors to avoid forced arbitration, involves adhesive contracts that contain overly oppressive terms favoring the broker. The terms of the vast majority of securities arbitration agreements, however, do little more than bind both parties to arbitrate future disputes relating to the account before one of the named arbitration forums in the agreement.[100] Courts generally do not find such clauses that merely change the forum, while preserving the customer's substantive rights, to be unconscionable.[101] The Supreme Court made it clear in *McMahon* that by agreeing to arbitrate a statutory claim a party does not forgo any substantive rights.[102]

This view by the courts does not take into account the concerns raised in Justice Blackmun's dissenting opinion in *McMahon*.[103] The real substantive unconscionability cannot be found between the four corners of the arbitration agreement. Aggrieved investors forced into this situation can do little more than voice their fears to the courts that the broker will be favored if the case is arbitrated before a panel of the broker's fellows. Courts have summarily dismissed such claims, however, as "unfounded speculation."[104]

F.2d 1350 (11th Cir. 1986) (following *Surman*); Hall v. Prudential Bache Sec., Inc., 662 F. Supp. 468 (C.D. Ca. 1987) (following *Surman*).

99. *See* Marx v. Dean Witter Reynolds, Inc., No. 85-669-RG, Fed. Sec. L. Rep. (CCH) ¶ 92,311 (C.D. Cal. 1985) (arbitration provisions quite common and reasonably to be anticipated); Anderson v. Paine Webber Jackson & Curtis, Fed. Sec. L. Rep. (CCH) ¶ 92,446 (C.D. Cal. 1985) (arbitration provision reasonably within the expectation of both parties).

100. *See* Pierson v. Dean, Witter, Reynolds, Inc., 742 F.2d 334, 336 n.2 (7th Cir. 1984) (giving an example of a typical arbitration clause).

101. *See* Driscoll v. Smith Barney, Harris Upham & Co., 815 F.2d 655, 658 (11th Cir. 1987) (arbitration clause only changes forum where investor must go to assert rights); Preston v. Kruezer, 641 F. Supp. 1163, 1172-73 (N.D. Ill. 1986) (because of strong federal policy favoring arbitration, arbitration cannot be against public policy; arbitration clause only changes forum in which investors air complaints, so provision to arbitrate does not "unreasonably favor" the broker).

102. *McMahon*, 482 U.S. at 229.

103. *See supra* text accompanying notes 57-59.

104. *Preston*, 641 F. Supp. at 1173; *cf.* Parr v. Superior Court, 139 Cal. App. 3d 440,

et al.: Nova Law Review Full Issue

Essentially, once an investor signs a customer agreement that contains a PDAA, all future disputes relating to the account will have to be arbitrated predominately on the broker's terms. It does not matter under what circumstances the agreement was extracted, short of the broker holding a gun to the investor's head (but even this may be an arbitrable issue). With the perceived unfairness of forced securities industry arbitration, the rift between customers and brokers will not abate unless the perceived inequities are rectified.

IV. How Fair Has Securities Industry Arbitration Been?

The securities industry would have customers believe that "industry-run" arbitrations are fair. The industry has repeatedly pointed out that investors win more than half of the arbitration cases,[105] and that customers have received a greater percentage of their original claims and higher awards in arbitration, compared with litigation.[106] Since May, 1989, the SROs have been required to make customer awards public, which has shown that customers receive awards in about half the cases.[107] Generally, a fifty-fifty split in arbitration has been considered an indication of arbitrator impartiality, but "(t)o 'keep score' of arbitrators with such a simplistic classification represents an extremely naive view of neutrality."[108]

What is a win? Considering that the dollar amounts of awards in securities arbitrations have averaged less than thirty cents per dollar of the customer's initial claim (based only on compensatory damages),[109] a

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447 (Cal. Ct. App. 1983) (presumption of unconscionability in NYSE arbitration rebutted if a majority of arbitrators are from outside the securities industry); Hope v. Superior Court, 122 Cal. App. 3d 147, 154-55 (Cal. Ct. App. 1981), *cert. denied sub nom.* Shearson, Hayden, Stone, Inc. v. Hope, 456 U.S. 910 (1982) (presumptive institutional bias in favor of NYSE members in NYSE arbitration could be remedied by allowing neutral person to select panel). *But cf.* Lewis v. Prudential Bache Sec., Inc., 179 Cal. App. 3d 935 (Cal. Ct. App. 1986) (forcing investor to arbitrate solely before the NYSE of which defendant is a member unduly favors broker; arbitration appropriate if proper forum found).

105. *See, e.g.*, Edward Giltenan, *Wall Street's Other Arb's*, FORBES, Mar. 20, 1989, at 196-97.

106. Reder, *supra* note 1, at 114.

107. N.Y. TIMES, *supra* note 1, at D1, D10.

108. David A. Ditts & Clarence R. Deitsch, *Arbitration Win/Loss Rates as a Measure of Arbitration Neutrality*, 44 ARB. J., Sept. 1989, at 42, 43.

109. *See Survey*, *supra* note 3, at 2; *see also* Stephen P. Bedell et al., *The McMahon Mandate: Compulsory Arbitration of Securities and RICO Claims*, 19 LOY. U. CHI. L.J. 1, 9 (1987) (citing a 1985 AAA survey of 40 cases involving securities arbitration of which 27

customer win does not seem to amount to much.

Reported 1989 Customer/Claimant Arbitrations[110]

	No. of Awards	Percent Customer Wins	Percent Recovered by Winning Customer	Percent Compensatory Claim Recovered on All Initial Claims[111]
NYSE	206	52%	40%	21%
NASD	297	58%	60%	35%
All SROs	519	56%	50%	28%
AAA	146	59%	N/A	N/A

Reported 1990 Customer/Claimant Arbitrations[112]

	No. of Awards	Percent Customer Wins	Percent Recovered by Winning Customer	Percent Compensatory Claim Recovered on All Initial Claims
NYSE	263	55%	35%	19%
NASD	956	59%	41%	24%
All SROs	1263	59%	40%	24%
AAA	172	58%	57%	33%

The above figures indicate that while customer win ratios remained

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resulted in customer awards). When punitive claims are included the percentage of recovery declines dramatically, as punitive damages usually are not awarded.

110. *See Survey*, *supra* note 3, at 3-4; *AAA vs. SROs: The "Fairness Factor" – Is There a Difference*, 3 SEC. ARB. COMMENTATOR (Nos. 6 & 7) 1, 3 (June & July 1990).

111. To calculate the "Percent Compensatory Claim Recovered on All Initial Claims," multiply "Percent Customer Wins" by the "Percent Recovered by Winning Customer."

112. *Survey of Public Awards Results*, 4 SEC. ARB. COMMENTATOR (No. 5) 1, 2, 6-7 (Sept. 1991) (1990 figures are the most recent available, SAC expects to publish arbitration results for 1991 around mid-1993).

fairly constant in 1990 with 1989, customer recovery ratios at SRO arbitrations dropped markedly. this was despite an expected improvement by industry-watchers that was supposed to occur due to the new requirements for public disclosure awards. The figures also show that investors fared much better arbitrating claims before the AAA, compared with SROs, receiving substantially higher percentage awards in 1990, particularly compared with the NYSE. In fact, customer claimants recovered seventy-four percent more arbitrating before AAA, compared to NYSE arbitrations and were thirty-eight percent better off than arbitrating before NASD. This may be the result of differences in the arbitrator selection processes, reflecting the stronger ties of brokerage firms to the SROs, particularly with the NYSE.

Under the AAA securities arbitration rules, when the claim is for less than $20,000 only one arbitrator is chosen by the parties to decide the dispute, but the arbitrator may not be affiliated with the securities industry.[113] For larger claims, three arbitrators are chosen by the parties with no more than one having affiliation with the securities industry.[114] For a comparison with SROs, in an arbitration before the NYSE the arbitration panel is selected by the NYSE Director of Arbitration, who also appoints the chairman of the panel.[115] A panel consists of either three or five arbitrators, depending on the size of the claim, a majority of whom "shall not be from the securities industry."[116] This does not mean that the appointed arbitrators that are not from the securities industry cannot be affiliated with the securities industry in some way. Moreover, the securities industry partially funds the SROs,[117] although less of the SRO's revenues are being derived directly from member firms.[118]

What this proves is very little. It may be that a fifty percent win ratio paying out 30 cents on the dollar is quite generous to customers based on the facts of the individual cases. Unfortunately, there is no way of telling

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113. George H. Friedman, *Arbitrating Your Case Under the Securities Rules of the AAA*, 43 ARB. J., June 1988, at 23, 28-29 (affiliation is defined as persons who have been directly or indirectly employed by or acted as counselors, consultants, or advisors to any securities organization or affiliate within the past five years).

114. *Id.*

115. NYSE ARBITRATION RULES, Art. XI § 2, Rule 607 (identical to the NASD CODE OF ARBITRATION PROCEDURE, §§ 4, 19).

116. *Id.* (emphasis added).

117. Diana B. Henriques, *Market Place; Single Arbitration Agency Sought*, N.Y. TIMES, Dec. 21, 1989, at D8.

118. Interview with Richard Rider, Publisher of SEC. ARB. COMMENTATOR (Aug. 12, 1991).

without the written opinions of arbitrators. Under the present state of securities arbitration, our intuition may be the only guiding light. The industry's actions do not seem to support its contention that investors fare better in industry arbitration. With the securities industry feverishly fighting to uphold PDAAs at every turn, and disputing customers desperately trying in vain to avoid the consequence, it would seem that investors are the ones getting the short end of the stick, as Justice Blackmun pointed out in his dissenting opinion in *McMahon*.

If the true intent of the securities industry has been to provide a cost-effective, yet fair means of customer dispute resolution, that notion was brought into question by *Cowen & Co. v. Anderson*.[119] In this Court of Appeals of New York case, Cowen & Co. sought to stay arbitration of a customer dispute before the AAA and force arbitration before a SRO.[120] The securities firm lost at the trial level and through both appeals levels, despite support from the Securities Industry Association (SIA) as *amicus curiae*.[121] Essentially, because of a hidden flaw in the drafting of the PDAA, the customer could elect to arbitrate before the AAA, even though on its surface the PDAA seemed to limit the customer's choices to the NYSE, the NASD, or the AMEX.

The agreement stated that any controversy arising out of, or relating to, the customer's account shall be settled by arbitration in accordance with the rules of the NYSE, the NASD, or the AMEX, as the customer may elect.[122] Fortunately for the customer, the rules of the AMEX included the "AMEX Window"[123] which authorized the election of the AAA.[124] Cowen never intended the AAA to be an option, and had it drafted the PDAA to limit arbitration only before the three SROs, rather than in accordance with their rules, the customer would not have had the AAA as an option.[125] But even before this case was decided by the Court of Appeals of New York, the AMEX promptly removed the clause from its constitution so that investors could no longer take their disputes to the

119. 558 N.E.2d 27 (N.Y. 1990).
120. *Id.* at 27-28.
121. *Id.* at 28.
122. *Id.* at 28 n.2.
123. AMEX CONST. art. VIII, § 2(c).
124. *Cowen & Co.*, 558 N.E.2d at 28. Federal district courts have refused to interpret "rules of the AMEX" to encompass the "AMEX Window." *See* Bear Stearns & Co. v. N.H. Karol & Assocs., 728 F. Supp. 499, 500, 503-04 (N.D. Ill. 1989); Paine Webber, Inc. v. Astrella, No. 89-2268 (D.N.J. Sept. 6, 1989).
125. *Cowen & Co.*, 558 N.E.2d at 29.

independent AAA.[126] The securities industry prefer industry arbitration to the independent AAA. The above data seems to bear this out. Importantly, most PDAAs restrict arbitration forums to SROs.

V. Improving Public Perception

A. *State Legislative Action*

In *Securities Industry Ass'n v. Connolly*,[127] the SIA along with ten brokerage firms sought a declaration that new Massachusetts legislation was unconstitutional because it conflicted with the provisions and policies of the FAA.[128] The new regulations: 1) barred brokerage firms from requiring individuals to enter PDAAs as a non-negotiable condition to opening an account, 2) required brokers to inform prospective customers of this prohibition, and 3) demanded full written disclosure of the legal effect of pre-dispute arbitration contracts.[129] (The Commonwealth of Massachusetts enacted this legislation after the Supreme Court's decision in *McMahon*.) The district court granted declaratory and injunctive relief and the First Circuit affirmed, based on preemption under the supremacy clause of article VI of the United States Constitution."[130] The Supreme Court denied certiorari.

Somehow the First Circuit found on-point, prohibitive language in the "ordinary meaning" of section two of the FAA,[131] where no such explicit language exists. Section two of the FAA only serves to place written arbitration agreements on the same footing as other enforceable contracts.[132] It says nothing about how those contracts are to come into

126. N.Y. Times, *supra* note 1, at D1, D10.
127. 883 F.2d 1114 (1st Cir. 1989), *cert. denied*, 495 U.S. 956 (1990).
128. *Id.* at 1116-17.
129. *Id.* at 1117.
130. *Id.*
131. *Id.* at 1118.
132. Section 2 of the FAA states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (1989).

existence. The court read section two beyond its "ordinary meaning." This reflects the current obsession of the judiciary that all securities disputes be settled by arbitration rather than in the courts.

On the surface, the Massachusetts regulations were not in direct conflict with the FAA. Massachusetts apparently was only trying to provide its citizens with a true choice of voluntarily entering into a PDAA contract fully understanding the consequences. Maybe the court actually thought that the regulations would raise false apprehensions among investors with regard to entering into PDAAs and that other states would follow the Massachusetts lead. "[T]he Regulations, by requiring what is not generally required to enter contracts in the Commonwealth, e.g., certain negotiations, explanations, and disclosures, inhibit a party's willingness to create an arbitration contract . . . ."[133] Investors already had apprehensions regarding securities industry arbitration, however, so that could not have been the reason. More likely, the court feared that when confronted with a true choice investors would opt out en masse from PDAAs. (It would be a simple task to open a new account with another brokerage firm, excluding the PDAA clause, and transfer all the funds and securities from the old account.) This obviously would not comport with the Supreme Court's determination that arbitration is to be preferred in securities disputes.[134] The court in *Connolly* stated that any "limitary approach would seemingly defeat the very aim of the Act, allowing states to revivify the ancient jurisdictional antagonism toward arbitration by cloaking it in regulatory garb. At the very least, such enmity, howsoever manifested in state law, is preempted."[135]

A frontal assault by state legislatures obviously will not work and is likely to be counterproductive. "The legal standard is whether the Regulations take their meaning from the fact that a contract to arbitrate is at issue, or frustrate arbitration, or provide a defense to it. If so, the federal policy requires . . . finding the Regulation preempted."[136] State legislatures should keep in mind that securities arbitration can be made fair and can offer significant benefits to the investing public. Instead of passing legislation that is dead upon enactment, states should consider regulations

133. 883 F.2d at 1123.

134. *See* Webb v. R. Rowland & Co., 800 F.2d 803, 906 (8th Cir. 1986) (court struck down Missouri's effort to require highlighting of arbitration clauses in contracts); Collins Radio Co. v. Ex-Cell-O Corp., 467 F.2d 995, 997 (8th Cir. 1972) (court refused to honor state requirement that arbitration agreements bear an attorney's acknowledgement attesting that all parties had been informed of the agreement's effects).

135. 883 F.2d at 1120.

136. *Id.* at 1123.

et al.: Nova Law Review Full Issue

that would promote arbitration by requiring openness and fairness in the arbitration process, which might not be objected to by the federal courts.

B. *Congressional Action*

Although some members strongly oppose the Court's rulings in *McMahon* and *Rodriguez De Quijas*, Congress has not exercised its power to override these decisions. Following the Court's ruling in *McMahon*, Representative Frederick C. Boucher (D. VA.) introduced a bill, entitled the Securities Arbitration Reform Act of 1988.[137] The bill would have invalidated all existing, as well as future PDAAs that were not entered into on a "truly" voluntary basis.[138] Brokerage firms would not have been allowed to require customers to sign a PDAA as a precondition to opening an account, thereby preserving rights to a judicial forum.[139] This bill, however, has not become law. Representative Edward J. Markey, (D. Mass.), a co-sponsor of the bill and Chairman of the Subcommittee on Telecommunications and Finance of the Energy and Commerce Committee, called the Court's ruling in *Rodriguez De Quijas* a blow to the rights of investors who are forced into a "Faustian bargain" of giving up the right to litigate in order to gain the right to invest,[140] and while Congress continued to hold hearings on this matter,[141] no action was taken. The fact remains that passing a bill which would allow customers to litigate disputes against brokers is difficult, due to the securities industry's well-financed and powerful lobby in Washington. Moreover, passing such legislation may be counterproductive. Representative Boucher did not give up, however. In May, 1991, he introduced another bill, entitled the Investment Advisors Disclosure and Enforcement Act of 1991, this time attacking the abuses of investment advisors and their use of forced PDAAs on customers.[142] The bill would have permitted private remedies for the enforcement of the Investment Advisors Act of 1940[143] and specifically proposed that these newly-created judicial rights and remedies may not be waived by any agreement relating to arbitration.[144] This bill also has not become law.

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137. 134 CONG. REC. E2,233 (daily ed. June 30, 1988).
138. *Id.*
139. *Id.*
140. Linda Greenhouse, *Supreme Court Backs Brokers on Arbitration*, N.Y. TIMES, May 16, 1989, at D2.
141. Reder, *supra* note 1, at 109.
142. H.R. 2412, 102d Cong., 1st Sess. (1991).
143. 17 C.F.R. §§ 275.0-2 to .206(4)-4 (1991).
144. H.R. 2412, 102d Cong., 1st Sess. (1991).

Securities firms, as well as investment advisors, are likely to vigorously oppose any bill seeking to change the status qou.

C. *SEC Action*

The SEC has "broad authority to oversee and to regulate the rules adopted by the SROs relating to customer disputes, including the power to mandate the adoption of any rules it deems necessary to ensure that arbitration procedures adequately protect statutory rights."[145] The Commission has the power to "abrogate, add to, and delete from" any SRO rule to further the objectives of the securities laws.[146] In *McMahon*, the Court concluded that "the SEC has sufficient statutory authority to ensure that arbitration is adequate . . . ."[147] This conclusion was reiterated in *Rodriguez De Quijas*.[148] Apparently the Commission could act in any manner it deems fit with the full backing of Congress and the Supreme Court, with the likely exception of banning PDAAs from the securities industry.

In this regard, the SEC could be particularly effective in correcting the perceived inequities confronting brokerage firm customers. It could act much more quickly than Congress and much more surely than state legislatures. The Commission has taken some measures in the recent past to improve the arbitration process. In May, 1989, the SEC approved a number of SRO rule changes that formalized the arbitration process.[149] The new rules affected accounts opened after September, 1989, and required that arbitration clauses be highlighted and clearly explained, which was made a requirement over strong objections from the securities industry.[150]

The SEC's actions thus far have been aimed at defusing the controversy

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145. *McMahon*, 482 U.S. at 233-34; *see* Securities Exchange Act of 1934, Registration, Responsibilities, and Oversight of Self-Regulatory Organizations, 15 U.S.C. § 78s (1981).

146. 15 U.S.C. § 78s(c).

147. 482 U.S. at 238. *But see supra* note 72 and accompanying text (discussing lack of review of arbitration proceedings by SEC).

148. 490 U.S at 480.

149. *See* Paul Duke, Jr., *SEC Rules on Investor-Broker Disputes*, WALL ST. J., May 11, 1989, § 3 (the rules are aimed at defusing controversy surrounding PDAAs).

150. *See, e.g.*, Letter from John M. Liftin, Senior Vice President and General Counsel, Kidder Peabody & Co., to Richard A. Grasso, NYSE President and CEO (Oct. 6, 1988) (on file with the NYSE) (Kidder Peabody alleged that customer initialling of arbitration clauses to signal awareness and agreement would be too costly and time consuming and would foster litigation); Letter from Jeffrey B. Lane, Executive Vice President, Shearson Lehman Hutton, to John J. Phelan, Jr., NYSE Chairman (Oct. 4, 1988) (on file with the NYSE) (Shearson Lehman Hutton opposes initialling requirement because it places undue emphasis on arbitration clause and encourages needless litigation).

surrounding PDAAs,[151] rather than at equalizing broker-customer relations. If the SEC wants to resolve the problem, it could require that PDAAs allow investors the option of selecting at least one independent arbitration forum that owes no allegiance to the securities industry. The SEC could also require arbitrators to write brief opinions consisting of their basic findings of fact and the rules of law they apply in making their decisions and awards. This requirement is supported by the Supreme Court's statement that "a party does not forgo the substantive rights afforded" by agreeing to arbitrate.[152]

D. *A Suggested Reform*

What is most troubling about *Rodriguez* is its judicial activism. The dissent points out that *Wilko*, having stood as precedent for three and one half decades had acquired a meaning "as clear as if the judicial gloss had been drafted by the Congress itself."[153] If *Rodriguez* is judicial legislation, the Court should finish the job and lay down sensible limitations on predispute arbitration. However, if the Court is not willing to finish the job that it started, Congress or the Commission should take up the task.[154]

The Commission should amend its rules so that all investors would have the following rights:

1. *A right to select a neutral arbitration forum.*

The Commission should require that all predispute arbitration agreements provide that the arbitration should be done only by arbitrators on a list approved by the Commission. If the present industry arbitrations are fair, then the industry would lose nothing by such a proposal. An individual investor would always be free to agree to an industry arbitration,

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151. Duke, *supra* note 149, at C1.

152. *Shearson/Am. Express, Inc.*, 482 U.S. at 229.

153. *Rodriguez De Quijas*, 490 U.S. at 486.

154. Indeed, in *McMahon*, the Court pointed out that the Commission has the authority, that it lacked when *Wilko* was decided, to regulate predispute arbitration.

> In 1953, when *Wilko* was decided, the Commission had only limited authority over the rules governing self-regulatory organizations (SROs)—the national securities exchanges and registered securities associations—and this authority appears not to have included any authority at all over their arbitration rules. Since the 1975 amendments to Sec. 19 of the Exchange Act, however, the Commission has had expansive power to ensure the adequacy of the arbitration procedures employed by the SROs.

McMahon, 482 U.S. at 233 (citation omitted).

provided such agreement was made after the dispute developed. The appearance of fairness is just as important as actual fairness. This measure alone would help to restore confidence in the securities industry.

2. *A right to a written opinion by the arbitrators; with findings of fact and conclusions of law.*

Arbitration without written opinions, or with only cursory opinions makes any judicial review meaningless. In securities arbitrations, the law is far more complex than in ordinary arbitrations, and errors in applying the law are far more likely unless there is some method of ascertaining that the arbitrators have done so correctly.

3. *All arbitrator's opinions would be filed with the Commission and would be a matter of public record.*

Unless the records of arbitration are easily accessible, it is impossible for the public or interested consumer groups to determine whether securities arbitrations are fair to the consumer.

4. *A right to have the proceedings recorded by a court reporter at the expense of the investor.*

An actual record of the proceedings is a potent method for protecting against misapplication of the law, but less expensive methods such as sound or video recordings could accomplish the same objective, so it would appear fair enough to require the investor to bear this cost, if he thinks it prudent.

5. *A right to a new arbitration if the arbitrators fail to apply the correct rules of law.*

This would appear to be the most prudent course, though on remand to a new board of arbitrators, the court or other reviewing authority should have the power to restrict the arbitrators to those with the necessary knowledge and experience. For example, in a very complex securities case, it might be appropriate to require that all of the arbitrators have law degrees as well as specific experience in securities law, assuming the complexity of the case results from legal as opposed to complex factual issues.

Presently, an investor's recourse after an arbitration is unsatisfactory. The grounds for vacating an award under the Federal Arbitration Act are extremely narrow. Although that policy may be rational for ordinary business litigation, it fails to take account of the special nature of securities litigation. The Securities Acts were adopted to change legal rules which were not protecting the average investor. Specifically, the common law

action of deceit, commonly referred to as common law fraud, had proved to be an inadequate method of protecting investors. In promulgating the Securities Acts, Congress intended to remedy the inadequacies of common law fraud.[155] If the Supreme Court has removed the investor's judicial remedy, the arbitration substitute for it should be fashioned in such a manner that the remedy is meaningful. *Wilko* may be interpreted in two different ways. The majority opinion suggests that incorrect interpretations of the law by the arbitrators, as opposed to manifest disregard are not subject to judicial review.[156] Realistically, however, if the opinion of the arbitrators is summary in nature, there is no practical way to show either manifest disregard of an applicable legal standard or misinterpretation. Justice Frankfurter's dissent in *Wilko* states:

> Arbitrators may not disregard the law . . . . On this we are all agreed. It is suggested, however, that there is no effective way of assuring obedience by arbitrators to the governing law. But since their failure to observe this law . . . [would constitute grounds for vacating the award], appropriate means for judicial scrutiny must be implied, in the form of some record or opinion, however, informal, whereby such compliance will appear, or want of it will upset the award.[157]

Frankfurter's assumptions about the possibility of meaningful judicial review, based on some kind of record cannot be tested because empirical evidence does not exist. To the extent that Frankfurter's assumptions about some kind of record that would permit review are the foundation of his opinion, it suggests that a system without a system of meaningful review would not be supported by his reasoning, or indeed, the reasoning of the Supreme Court in *Rodriguez*. For the Commission to follow these suggestions would not undermine *Rodriguez*, but merely strengthen its reasoning.

VI. CONCLUSION

The fairness of our judicial system is predicated on openness, impartiality, and appellate review. Securities arbitration in its current repute fails in these important respects. Proponents argue that by signing a PDAA

155. LOUIS LOSS, FUNDAMENTALS OF SECURITIES REGULATION, 812-13.
156. Wilko v. Swan, 346 U.S. 427, 436 (1953).
157. *Id.* at 440.

an investor agrees to be bound by these inequities. It can hardly be said, however, that investors wilfully enter into such contracts. As such, continued reform of securities arbitration is necessary. The benefits of arbitration should not be jeopardized by the self-interests of the securities industry.

Human nature is to be fearful of the unknown. The non-disclosure of securities arbitration awards and proceedings breed public distrust of a system essentially administered by the securities industry. Under such circumstances, public suspicion of forced securities arbitration is understandable and warrants redress. Required disclosure of awards is an important first step in changing negative public opinion, but full disclosure of arbitration proceedings is imperative if the public is ever to perceive the process as being fair, irrespective of whether current arbitrations are conducted fairly.

It also is crucial that the investing public be offered a meaningful choice of selecting a forum that can be perceived as being impartial and free from the influence of the securities industry. Asking aggrieved investors to accept assurances from the opposition that it will conduct the proceedings fairly and deliver a just result is too much to ask of any party, irrespective of whether the results are actually fair.

There may be valid concerns with allowing a Commission or judicial review of arbitrator decisions as a matter of right. One of the main purposes of arbitrating is to expedite final resolution of disputes. Allowing for a review could reduce this important attribute of arbitration. As such, there must be attendant restrictions to reduce potential abuses. This could be accomplished by allowing only discretionary review. If securities arbitration is as fair as the securities industry purports, there would be few reviews granted. The main effect would be an improved public perception of fairness.

Importantly, none of the above proposals would defeat the aim of the FAA to place arbitration agreements on the same footing as other contracts. PDAAs would still be fully enforceable. The advantages of less expensive, less time-consuming dispute resolution would still be realized. The only significant difference would be increased fairness and a commensurate improvement in the public's perception of the securities arbitration process.

Truth in Lending—Rescission and Disclosure Issues in Closed-End Credit

Elwin Griffith*

TABLE OF CONTENTS

I. INTRODUCTION 1253
II. RIGHT OF RESCISSION 1259
A. *Nature of the Right* 1259
B. *The Rescission Period* 1265
C. *Premature Performance* 1270
D. *Sale or Transfer of Property* 1276
E. *Refinancing and the Right to Rescind* 1278
F. *Obligations of the Parties* 1283
III. SECURITY INTERESTS: IDENTIFICATION 1287
IV. FINANCE CHARGE 1291
A. *The Hidden Charge* 1291
B. *Fees* 1298
C. *Insurance Coverage* 1308
V. CONSUMER OPTIONS 1313
A. *Damages* 1313
B. *Recoupment* 1320
C. *An Attorney's Fee* 1323
VI. CONCLUSION 1327

I. INTRODUCTION

The passage of the Truth in Lending Act[1] in 1968 was welcome news to consumers. For a long time, consumers had based their credit decisions on inadequate information. Rather than attempting to cure all ills in the marketplace,[2] Congress designed the Act to require lenders to make certain

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1. Truth in Lending Act of 1968, Pub. L. No. 90-321, 82 Stat. 146 [hereinafter TILA] (codified as amended at 15 U.S.C. §§ 1601-1667e (1988 & Supp. III 1991)).

2. *Truth in Lending—1967: Hearings on S. 5 Before the Subcomm. on Financial*

disclosures so that consumers could compare the terms of available credit. It was time to establish a uniform system of disclosure to help the average consumer make an informed decision because banks, merchants, finance companies and other creditors followed different practices in disclosing the cost of credit.[3] When the Federal Reserve Board published Regulation Z[4] to carry out the purposes of the Act, it completed the scheme for creditors' compliance with the new disclosure requirements.

The Act was not intended as a wholesale indictment of the credit industry.[5] Nevertheless, there was so much evidence of questionable credit practices that Congress recognized the need to protect the honest businessman from unethical competition by requiring disclosures in standard terminology.[6] Under this system, the reputable lender had nothing to fear; if anything, his disreputable counterpart would be exposed to the world at large.

The Act does not regulate loan rates. It merely deals with information about credit so that consumers can determine the reasonableness of a lender's charge.[7] Some creditors advertised a low interest rate while adding

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Institutions of the Senate Comm. on Banking and Currency, 90th Cong., 1st Sess. 1-2 (1967) (statement of Senator Proxmire).

3. The Report of the Senate Banking and Currency Committee put it this way:

> The committee believes that by requiring all creditors to disclose credit information in a uniform manner, and by requiring all additional charges incident to credit to be included in the computation of the annual percentage rate, the American consumer will be given the information he needs to compare the cost of credit and to make the best informed decision on the use of credit.

S. REP. NO. 392, 90th Cong., 1st Sess. 3 (1967).

4. Regulation Z, 12 C.F.R. §§ 226.1-.30 (1992). The Board of Governors of the Federal Reserve System issued Regulation Z in 1969 to carry out the purposes of the Act. TILA, Pub. L. No. 90-321, 82 Stat. 146 (1968). After Congress simplified the Act in 1980 through the Truth in Lending Simplification and Reform Act of 1980, Title VI, Pub. L. No. 96-221, 94 Stat. 168, the Board overhauled the Regulation in 1981.

5. The Senate Report on the Truth in Lending bill states that: "The bill contains no assumptions that consumer credit is bad or that the vast majority of those who extend consumer credit are engaged in deceitful practices. The bill contains no indictment of the credit industry as a whole." S. REP. NO. 392, 90th Cong., 1st Sess. 2 (1967).

6. *Id.*

7. The Senate Committee on Banking and Currency described the purpose of the legislation as follows:

> The basic purpose of the truth in lending bill is to provide a full disclosure of credit charges to the American consumer. The bill does not in any way regulate the credit industry nor does it prescribe ceilings on credit charges. Instead, it requires that full disclosure of credit charges be made so that the consumer can decide for himself whether the charge is reasonable.

miscellaneous charges to produce a better yield.[8] Other creditors merely gave a dollar figure, leaving consumers to their own devices in computing the loan rate.[9] A consumer who did not make the necessary computations for the percentage rate had no way of comparing a transaction with other available loans. This led to the requirement that lenders must disclose the finance charge as an annual percentage rate. In this way, consumers could determine not only the actual amounts they were paying, but also the exact price of the credit.[10] The consumers would, therefore, be more sensitive to rates and could make meaningful comparisons because all creditors would be bound by the same rules.

In addition, it was expected that the disclosure of an annual rate would not only restore competition among lenders but also improve the allocation

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Id. at 1.

Similar language found its way into the Act. Section 1601(a) states that "[i]t is the purpose of [Truth in Lending] to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit . . . ." TILA § 102(a), 15 U.S.C. § 1601(a); *see also Truth in Lending, 1967: Hearings on S. 5 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 1 (1967) (statement of Senator Proxmire).

8. S. REP. NO. 392, 90th Cong., 1st Sess. 3 (1967). One witness testified at the legislative hearings that there were three basic ways of stating a finance rate—the monthly system, the add-on system and the discount system. The lender could then add additional charges such as finder's fees, filing fees, credit insurance premiums, etc. *Truth in Lending, 1967: Hearings on S. 5 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 40-41 (1967) (statement of Paul H. Douglas, Chairman, National Commission on Urban Affairs).

9. The Senate Report on Truth in Lending states that: "Although most creditors do disclose the dollar cost of credit, testimony before the committee has revealed that there are some who quote only the monthly payments. When this is done the consumer has absolutely no idea of the amount of the finance charge or the rate." S. REP. NO. 392, 90th Cong., 1st Sess. 3 (1967). The same point was made at the hearings when one witness said that "[w]hile the consumer has some knowledge of the goods and services he is buying, and in almost all cases knows the price, few consumers are really aware either of the dollar cost or of the annual percentage rate paid for the use of credit." *Truth in Lending, 1967: Hearings on S. 5 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 84 (1967) (statement of Joseph W. Barr, Under Secretary, U.S. Treasury Department).

10. One legislator explained the Truth in Lending legislation this way:

> This legislation will enable the consumer to know what he is paying for credit. It does not regulate credit. It just makes the firms in the credit industry let the customer know what any transaction is going to cost him in terms of dollars and cents and also in terms of the equivalent interest rate.

114 CONG. REC. 14,394-95 (1968) (remarks of Mr. Minish).

of resources within the marketplace. Consumers were expected to gravitate towards those lenders whose rates were competitive and avoid those lenders whose rates were out of line.

Nevertheless, there have been occasional misunderstandings about the elements of the finance charge. In some respects, the Regulation has caused problems by allowing lenders to exclude certain items from the finance charge by itemizing them.[11] These problems have arisen frequently in credit insurance.[12] It has also been difficult for courts to determine if a seller's profit includes a finance charge because consumers often have uneasy feelings about the hidden charge in a transaction. In large measure, the question is whether the charge is "an incident to or a condition of the extension of credit."[13]

If a lender does not make the required disclosures, the consumer can

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11. Regulation Z allows a creditor to exclude the following charges from the finance charge if the creditor itemizes and discloses them to the customer:

(1) Taxes and fees prescribed by law that actually are or will be paid to public officials for determining the existence of or for perfecting, releasing, or satisfying a security interest.

(2) The premium for insurance in lieu of perfecting a security interest to the extent that the premium does not exceed the fees described in paragraph (e)(1) of this section that otherwise would be payable.

Regulation Z, 12 C.F.R. § 226.4(e)1-2.

12. Section 226.4(d) of Regulation Z provides in pertinent part:

Insurance. (1) Premiums for credit life, accident, health, or loss-of-income insurance may be excluded from the finance charge if the following conditions are met:

(i) The insurance coverage is not required by the creditor, and this fact is disclosed.

(ii) The premium for the initial term of insurance coverage is disclosed. If the term of insurance is less than the term of the transaction, the term of insurance also shall be disclosed . . . .

(iii) The consumer signs or initials an affirmative written request for the insurance after receiving the disclosures specified in this paragraph. Any consumer in the transaction may sign or initial the request.

Id. § 226.4(d)(1)(i)-(iii).

13. Regulation Z defines a finance charge as follows:

The finance charge is the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit. It does not include any charge of a type payable in a comparable cash transaction.

Id. § 226.4(a).

recover damages[14] for the lender's violation, but the consumer must bring this action within one year after the breach.[15] Nevertheless, the consumer may still recover through recoupment even if the one-year period has expired.[16] Recent queries have centered on the difference between recoupment, which is defensive in nature, and affirmative action to recover for a lender's violation.

Another major feature of the Act is the right of rescission.[17] Congress was concerned with abuses in the home improvement industry that resulted in a lien on a consumer's residence.[18] Quite often, a consumer would contract at exorbitant rates for work on his property without realizing the seriousness of the undertaking. The consumer has three business days to cancel the transaction[19] and the lender is not supposed to make any disbursements until the expiration of that period.[20] That is easier said than

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14. A person can recover any actual damage suffered plus a penalty not less than $100 nor more than $1,000. TILA § 130(a)(1)-(2), 15 U.S.C. § 1640(a)(2)(A)(i).

15. *Id.* § 1640(e).

16. *Id.*

17. With certain exceptions, a consumer has the right to rescind a credit transaction if a security interest is taken in his principal dwelling. TILA § 125, 15 U.S.C. § 1635; Regulation Z § 226.23(a)(1), 12 C.F.R. 226.23(a)(1). The right of rescission does not apply to a security interest that is created to finance the acquisition or initial construction of the consumer's principal dwelling nor to a refinancing or consolidation by the same creditor of credit already secured by that dwelling. TILA § 125(e), 15 U.S.C. § 1635(e); Regulation Z, 12 C.F.R. §§ 226.2(a)(24), 226.23(f)(1)-(2).

18. One of the House managers of the legislation explained this provision as follows:

> [A]nother provision of the bill is also vitally important. That is the Cahill amendment, or rather a series of amendments in the House, to strike at home improvement racketeers who trick homeowners, particularly the poor, into signing contracts at exorbitant rates, which turn out to be liens on the family residences. Any credit transaction which involves a security interest in property must be clearly explained to the consumer as involving a mortgage or lien; any such transaction involving the consumer's residence—other than in a purchase-money first mortgage for the acquisition of the home—carries a 3-day cancellation right.

114 CONG. REC. 14,388 (1968) (remarks of Rep. Sullivan).

19. TILA § 125(a), 15 U.S.C. § 1635(a); Regulation Z, 12 C.F.R. § 226.23(a)(3). The House version of the bill required a three-day waiting period before the credit contract could be signed. The conference substitute allowed the contract to be signed, but then gave the consumer three days in which to cancel. H.R. REP. NO. 1397, 90th Cong., 2d Sess. 26 (1968).

20. The Regulation requires a creditor to delay his performance by providing as follows:

> Unless a consumer waives the right of rescission under paragraph (e) of this section, no money shall be disbursed other than in escrow, no services shall be

done. A lender may think it necessary to accept a customer's assurance in advance that the customer will not rescind, thus diluting the ability of the consumer to make a serious review of the transaction.[21] Although the Regulation prescribes the procedure for restoring the parties to their previous positions after the consumer has exercised his right to rescind,[22] lenders have always been concerned about their insecurity once the mortgage lien is extinguished. Other difficulties arise when a lender does not act on the consumer's rescission, thus jeopardizing the lender's own chances of retrieving the property.[23] In such situations, the lender may find itself not only forfeiting that property, but also subjecting itself to liability for attorney's fees.[24]

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performed and no materials delivered until the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded.

Regulation Z, 12 C.F.R. § 226.23(c).

21. By taking an advance statement of non-rescission, a creditor satisfies himself that the consumer has not rescinded so that he can make a prompt disbursement at the end of the three-day period. Nevertheless, the question is whether the creditor must wait until the end of that period to entertain any statement from the consumer that the consumer has not rescinded. Even though a creditor does not disburse funds in the interim, the consumer's statement may operate to hamper a true exercise of his rescission option. If it is a true waiver situation where the consumer needs immediate funds, the creditor can use the waiver provision for the borrower to meet "a bona fide personal financial emergency." *See id.* § 226.23(e); 114 CONG. REC. 14,388 (1968) (remarks of Rep. Sullivan).

22. TILA § 125(b), 15 U.S.C. § 1635(b); Regulation Z, 12 C.F.R. § 226.23(d). Representative Sullivan explained this provision:

> I want to emphasize that the rights given to the buyer or borrower under the conference substitute have real teeth. When the debtor gives notice of intention to rescind, that voids the mortgage absolutely and unconditionally, regardless of whether either the debtor or the creditor does any of the things that section requires be done subsequent to the giving of notice of intention to rescind. This would be true even where the original creditor had meanwhile negotiated the paper to some third party.

114 CONG. REC. 14,388 (1968) (remarks of Rep. Sullivan).

The Conference Report agreed that "[u]pon exercise of this right, any security interests created under the transaction are voided, the creditor must refund any advances, and the obligor must tender back any property, or its reasonable value, which he has received from the creditor." H.R. REP. NO. 1397, 90th Cong., 2d Sess. 26 (1968).

23. Unless a court orders otherwise, a consumer has an obligation to return a creditor's property only if the creditor performs his obligations under the rescission provision. TILA § 125(b), 15 U.S.C. § 1635(b); Regulation Z, 12 C.F.R. § 226.23(d).

24. If a creditor does not take possession of his property within twenty days after the consumer tenders it, then the consumer may keep it. TILA § 125(b), 15 U.S.C. § 1635(b) (1988); Regulation Z, 12 C.F.R. § 226.23(d)(3). The creditor's liability for a reasonable attorney's fee arises in the case of "any successful action to enforce . . . liability or in any

This article will discuss these issues within the context of closed-end credit.[25] The article will also discuss the proper treatment of a creditor's security interest.[26] In conclusion, the article will suggest that there is room for expansion in the area of truth in lending, and will propose ways of making the disclosures more meaningful for the average consumer.

II. RIGHT OF RESCISSION

A. *Nature of the Right*

A consumer has the right to rescind a transaction that creates a lien on his home, but he must exercise that right within three business days following consummation, delivery of the notice of the rescission right, or delivery of all material disclosures, whichever occurs last.[27] Congress thought it necessary to give the consumer a chance to reflect on any transaction that would involve a security interest on the consumer's principal dwelling.[28] Many consumers fell victim to the temptation of encumbering their homes because of some scheme that they could ill afford. It was understandable, therefore, that rescission would be limited to a lien affecting current ownership and would not apply to a purchase-money mortgage, for in the latter case the loan would be used to secure housing for the consumer,

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action in which a person is determined to have a right of rescission." TILA § 130(a)(3), 15 U.S.C. § 1640(a)(3).

25. Closed-end credit means consumer credit other than open-end credit and the latter is defined as:

> [c]onsumer credit extended by a creditor under a plan in which:
> (i) The creditor reasonably contemplates repeated transactions;
> (ii) The creditor may impose a finance charge from time to time on an outstanding unpaid balance; and
> (iii) The amount of credit that may be extended to the consumer during the term of the plan (up to any limit set by the creditor) is generally made available to the extent that any outstanding balance is repaid.

Regulation Z, 12 C.F.R. § 226.2(a)(20).

26. In closed-end credit a creditor does not need to disclose in its general disclosure statement a security interest that arises solely by operation of law. *Id.* § 226.2(a)(25). However, the right of rescission does apply to such security interests and the creditor has to give the consumer a notice of that right. *Id.*

27. TILA § 125(a), 15 U.S.C. § 1635(a); Regulation Z, 12 C.F.R. § 226.23(a)(3).

28. S. REP. NO. 368, 96th Cong., 1st Sess. 28 (1978), *reprinted in* 1980 U.S.C.C.A.N. 236.

rather than to make shabby repairs or worthless investments.[29]

A consumer cannot rescind a transaction simply because there is a mortgage lien on his property. The lien must be on the consumer's principal dwelling[30] and the loan must be primarily for personal, rather than commercial uses.[31] Therefore, if most of the proceeds are used in some business venture, the loan would not be rescindable. This does not mean, however, that the consumer must use all the money for one purpose or the other. The emphasis is on the primary application of the funds, and the consumer may well commit some funds to one purpose, while using the major part of the loan for another purpose.[32] In assessing the purpose of the loan, the lender should rely generally on the consumer's loan application. Therefore, if the consumer actually commits the money to personal use after telling the lender that he needs it for his business, the lender should be excused for not making disclosures.[33] Otherwise, the lender would be required to supervise the borrower's business to ensure that the borrower used the money for the stated purpose.

An interesting question arises as to whether a consumer should have the right to rescind a loan secured by his home if he uses the proceeds to pay off another lender who was going to foreclose on a previous loan. In *Stillman v. First National Bank*,[34] the consumer advised the lender that he wanted the loan for business; the consumer subsequently tried to rescind.

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29. Rescission does not apply to a residential mortgage transaction. TILA § 125(e), 15 U.S.C. § 1635(e); Regulation Z, 12 C.F.R. § 226.23(f)(1). A residential mortgage transaction is one in which a mortgage is given to finance the acquisition or initial construction of a consumer's principal dwelling. Regulation Z, 12 C.F.R. § 226.2(a)(24).

30. Regulation Z, 12 C.F.R. § 226.23(a)(1). The term "dwelling" is defined as "a residential structure that contains 1 to 4 units, whether or not that structure is attached to real property." *Id.* § 226.2(a)(19). The Official Staff Interpretations (Commentary) explains that under this definition mobile homes, boats and trailers are regarded as dwellings if they are in fact used as residences. Official Staff Interpretations § 226.2(a)(19)-2 [hereinafter Commentary]. The Commentary represents the interpretations of Regulation Z by the Federal Reserve Board staff and each comment in the Interpretations is identified by a number and its corresponding Regulation Z section. *Id.* at Introduction-1.

31. Regulation Z applies only to consumer credit which is defined as "credit offered or extended to a consumer primarily for personal, family, or household purposes." *Id.* § 226.2(a)(12).

32. Heuer v. Forest Hill State Bank, 728 F. Supp. 1199, 1200 (D. Md. 1989), *aff'd*, 894 F.2d 402 (1990).

33. CIT Fin. Serv., Inc. v. Bowler, 537 So. 2d 4 (Ala. 1988) (loan not subject to Truth in Lending when borrower used part of the loan for personal debts but most of it to start a medical practice).

34. 791 P.2d 23 (Idaho Ct. App. 1990).

The consumer justified his right to rescind on the ground that he had secured the loan to save his home from foreclosure by the Small Business Administration, the previous lender, and that the new loan was therefore personal in nature.[35]

In *Stillman*, the lender's only indicator regarding the purpose of the loan was the debtor's statement in the loan application that the loan was for business. The lender did not have any information about the debtor's pressure to save his home from foreclosure; thus, the court was guided by the debtor's statement of purpose.[36] It is questionable whether the lender should have done anything different if it had known about the debtor's motivation to save his home from foreclosure. In a similar situation, one court distinguished the purpose of the loan from the motivation of the debtor and held that a loan that is used to pay off a business debt is really for a business purpose.[37] In *Stillman*, the original business loan was exempt from Truth in Lending even though the debtor's home was subject to forfeiture in the event of default.[38] There would be little basis, therefore, for granting rescission in such a case, although the enforcement of the lien would have grave consequences for the borrower and his family. Courts should look to see how the funds are to be used and not at the result of a default in the borrower's obligations.

If a consumer grants a security interest in his current principal dwelling, he has a right to rescind the transaction even if he intends to use the loan to buy a new home.[39] Sometimes a borrower will obtain short-term

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35. *Id.* at 25.

36. *Id.* at 26. However, the court rejected the consumer's explanation and held that the loan was primarily for a commercial purpose. *Id.*

37. Toy Nat'l Bank v. McGarr, 286 N.W.2d 376 (Iowa 1979). A refinancing consolidated a business loan of $12,035.26 with a personal loan of $1,016.83. The court held that the mere fact that the refinancing staved off foreclosure on the borrowers' residence did not make the loan a consumer loan. *Id.* at 378. However, in Anderson v. Lester, 382 So. 2d 1019 (La. Ct. App. 1980), *cert. denied*, 450 U.S. 1045 (1981), the court placed great emphasis on the borrowers' purpose in getting the loan, to prevent seizure of their home, even though some of the money was used to pay off business debts.

38. The Commentary provides some guidance on this point:

> Credit extensions that are not subject to the regulation are not covered by § 226.23 even if a customer's principal dwelling is the collateral securing the credit. For example, the right of rescission does not apply to a business purpose loan, even though the loan is secured by the customer's principal dwelling.

Commentary § 226.23-1; *see also The Exemption of Credit Primarily for Business*, CONSUMER CREDIT & TRUTH-IN-LENDING COMPLIANCE REP., Sept. 1990, at 6.

39. The Commentary provides that "[w]hen the consumer is acquiring or constructing a new principal dwelling, *any* loan secured by the equity in the consumer's current principal

financing to close his new home transaction before selling his current home and will offer both homes as security. In *Summit Trust Co. v. Chichester*,[40] a consumer took out a bridge loan to close the purchase of his new home. The lender took the position that the bridge loan was exempt from rescission because the borrower had used the loan to finance the new purchase. However, the court viewed the loan on the new home as rescindable because it was only a temporary arrangement which was not intended to finance the acquisition within "the spirit and intent" of the Act.[41] The court held that such bridge financing did not come within the definition of a "residential mortgage transaction" because the latter type was intended for long-term, permanent financing.[42]

The court was grateful for the guidance of the Official Staff Commentary which held that any loan secured by the equity in the consumer's current principal dwelling is rescindable even if the consumer is buying a new principal dwelling.[43] Although the Commentary mentions a bridge loan as an example of the application of the rule, it must be noted that the example given there relates to equity in the consumer's current dwelling; in that case, the transaction would hardly escape rescission because the mortgage would not be on the new dwelling.[44] Therefore, although the *Summit Trust* court looked to the Commentary for help, the Commentary did not really address the relevance of the new mortgage in the scheme of things. Therefore, the court must have felt that its differentiation between short-term and long-term financing was the salient element in its decision on rescission. However, nowhere does the Act or the Regulation provide a rationale for the court's distinction. In all fairness, the court should have asked the question whether the consumer could have closed the transaction without the bridge loan. If not, then the issue still remains whether the loan

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dwelling (for example, a bridge loan) is still subject to the right of rescission regardless of the purpose of that loan." Comentary § 226.23(a)(1)-4.

40. 559 A.2d 12 (1989).

41. *Id.* at 16.

42. *Id.* The Regulation defines a residential mortgage transaction as one in which "a mortgage . . . or equivalent consensual security interest is created or retained in the consumer's principal dwelling to finance the acquisition or initial construction of that dwelling." Regulation Z, 12 C.F.R. § 226.2(a)(24).

43. *See supra* note 39.

44. The Commentary makes the point that a consumer can have only one principal dwelling at any one time. It goes further and suggests that "[w]hen a consumer buys or builds a new dwelling that will become the consumer's principal dwelling within one year or upon completion of construction, the new dwelling is considered the principal dwelling when it secures the acquisition or construction loan." Comentary § 226.23(a)(1)-3.

was used to finance the purchase of the new dwelling.

It is questionable whether the loan period should be the determining factor in resolving the rescission issue, for it leaves the borrower in a quandary about the cut-off point between a rescindable and a non-rescindable transaction. One wonders whether the court would have characterized a one-year loan as a bridge loan, and therefore rescindable, even if it was definitely used to purchase the property. The Commentary provides no help on that issue because in the one-year example, the lien would be on the new property rather than the old. There is no hint in the legislation that the term or amortization of the loan should decide the question whether the loan is purchase-money.

In *Summit Trust*, there was a previous commitment from another lender for the usual purchase-money mortgage on the new house. This raises the question whether the availability of a previous loan foreclosed the possibility of having a second loan with the same objective of closing the transaction.[45] Even if the borrowers promised to repay the second loan when the old house was sold, this transaction would not be any different from one where the borrowers voluntarily prepaid the second mortgage because they found they could afford to do so subsequent to the closing.

If the bridge loan was not used to finance the purchase of the new house, why did the borrowers not proceed to closing without it?[46] The argument against treating the bridge loan this way is sustainable only if the position is taken that the proceeds from the old house would not have been used towards the new purchase, a theory without foundation, since the borrowers replaced the unavailable proceeds with the bridge loan in the new transaction. If the consumer needs a loan to consummate the purchase of his principal dwelling, then the repayment of the loan (short-term as it may be) should not detract from the underlying purpose of the transaction.

It was conceded in *Summit Trust* that the borrower could not close without the loan. He needed it to complete the transaction on his new

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45. For example, if one creditor provides construction financing and another creditor permanent financing for the consumer's principal dwelling, both transactions are treated as residential mortgage transactions and therefore non-rescindable. *Id.* § 226.2(a)(24)-4. Therefore, it is possible to have different extensions of credit to finance the initial construction or purchase of the consumer's principal dwelling.

46. One of the main points in *Summit Trust* was that the financing requirement could not be met because of the temporary nature of the loan. The court took a firm position that the rescission exemption does not cover "temporary bridge loan financing" even with respect to a mortgage on the new house. 559 A.2d at 16. This is even more curious when the court conceded that the consumer's old house would no longer be the principal dwelling. *See id.*

home. There is no rationale for extending the limited right of rescission simply because the borrower has an outstanding commitment for another loan on the new property. It is not the commitment that counts but rather the circumstances under which the loan is granted. Therefore, one lender's prior commitment may be overtaken by another lender's disbursement of funds. The Commentary is not exactly clear on the special rule covering a consumer's principal dwelling. Nevertheless, it can be argued that the rule relates only to the situation where the consumer grants a lien on his current principal dwelling in the transition period without involving the future principal dwelling.[47] If the consumer needs some funds to tide him over while he tries to sell his old property, then he may give a lien on his current principal dwelling to secure those funds. Maybe he needs money for his down-payment on the new property and he is prepared to encumber his current home to realize his goal. Therefore, the Commentary rightly suggests in that case that the right of rescission applies regardless of the *purpose* of that loan. Such broad language would therefore include the case where the consumer's purpose in subjecting his home to a lien is to secure funds for consummating the transaction on his new home sometime later.[48] However, if the same loan covers both properties, there should be a different result. The right of rescission cannot apply to both properties because the consumer can only have one principal dwelling at a time and the consumer's simultaneous grant of a lien on both properties would mean that the consumer had opted for one of those properties as the principal dwelling.[49]

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47. The rule makes no reference at all to a lien on the new dwelling. It can be read, therefore, as relating to the purpose of the loan rather than to the attachment of a lien to the new principal dwelling. It may be that the consumer does not intend to give a lien on that new dwelling or that the bridge loan on the current dwelling is treated as a separate transaction because the consumer is not yet ready to acquire the new house. The special rule would clearly cover those transactions. *See* Commentary § 226.23(a)(1)-4.

48. The Commentary recognizes that a combined-purpose transaction may be exempt from rescission if the loan is treated as one transaction. The pertinent section reads as follows:

> *Combined-purpose transaction.* A loan to acquire a principal dwelling and make improvements to that dwelling is exempt if treated as one transaction. If, on the other hand, the loan for the acquisition of the principal dwelling and the subsequent advances for improvements are treated as more than one transaction, then only the transaction that finances the acquisition of that dwelling is exempt.

Id. § 226.23(f)-3. Therefore, if the loan on the current principal dwelling is treated as a separate transaction, it should be regarded by analogy as rescindable without doing damage to the exemption principles.

49. The court in *Summit Trust* that the loan "was also secured by a mortgage on the old house which would no longer be the [consumer's] dwelling or principal dwelling." 559 A.2d

If one takes the view that in the two-lien transaction, the loan is not given to finance the new property and that the new property transaction is therefore rescindable, one is forced to ask a question about the loan on the old property. There would be a temptation to treat that part of the transaction as rescindable also because it seems to fit even more comfortably within the Commentary's special rule. But the rule does not take account of the existence of two liens in the same transaction, but rather suggests that where there is a lien on the consumer's current principal dwelling, the objective of securing a new home does not prevent the rescission rule from operating. The consumer's rescission would therefore affect that principal dwelling only and consequently there would be an automatic voiding of the security interest in connection therewith.[50] On the other hand, if two loans are involved, the other property would still have a lien on it and the consumer would have to take action to remove the lien because the statutory mechanism would not apply. The statute could hardly have contemplated this. Furthermore, if one argues for the proposition that both security interests are void in this scenario, then one must find that there are two principal dwellings; this seems an unlikely prospect even under the Commentary's formulation.

B. *The Rescission Period*

Under ordinary circumstances, a consumer has three days to rescind following consummation of the transaction, delivery of all material disclosures and delivery of the notice of the right to rescind, whichever comes last.[51] If the lender fails to meet his disclosure obligations, the consumer's rescission right can continue for as long as three years.[52] Quite often, a consumer will look for some basis to extend the rescission period, and he may find it by determining the consummation date of the transaction.

The Regulation describes "consummation" as "the time that a consumer becomes contractually obligated on a credit transaction."[53] It is clear that

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at 16; *see also* Commentary § 226.2(a)(24)-3.

50. When the consumer rescinds, the security interest affecting his property becomes void. TILA § 125(b), 15 U.S.C. § 1635(b); Regulation Z, 12 C.F.R. § 226.23(d)(1).

51. Regulation Z, 12 C.F.R. § 226.23(a)(3).

52. The right of rescission expires "three years after consummation, upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first." *Id.*

53. Regulation Z, 12 C.F.R. § 226.2(a)(13). State law determines when a contractual obligation is created. Commentary § 226.2(a)(13)-1.

if state law allows a contract to be formed by the consumer's acceptance of a lender's commitment, consummation will occur at that time. If not, consummation will not usually occur until closing.[54] Sometimes the determination of when consummation occurs is not that clear-cut. In *Jackson v. Grant*,[55] the loan documents designated the plaintiff as the borrower and Union Home Loans as the broker or arranger of credit. The loan documents and the disclosure statement clearly stated that Union Home Loans was not the lender and that there was no guaranty to the plaintiff that she would get a loan.[56] Union Home Loans could not find a lender and finally decided on April 28, 1983, that it would make the loan. Union assigned the loan to the defendants and the plaintiff rescinded the transaction on the ground that she did not receive notice of her rescission right within three business days after consummation, which in her view occurred in April, 1983.[57]

The court agreed with the plaintiff that consummation took place in April rather than February because when the parties signed the February documents there was no identifiable lender, and therefore, no commitment.[58] The consummation took place only when Union agreed to make the loan itself. Unfortunately, the lender did not give the plaintiff any notice of her rescission right at that time, and therefore, the plaintiff's right continued for three years beyond that date. Thus, the rescission was applicable against the lender's assignees even though the consumer had already received the benefit of the loan.[59]

The court in *Jackson* was not particularly enthusiastic about the result but followed the lead of *Semar v. Platte Valley Federal Savings and Loan Ass'n*[60] in not granting relief only to "sympathetic consumers." It was clear to the court that Congress intended to apply Truth in Lending to all consumers and the court did not find any justification for varying the rule on the ground that some consumers merited more sympathy than others.[61]

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54. *See* Murphy v. Empire of Am., 746 F.2d 931 (2d Cir. 1984); Waters v. Weyerhaeuser Mortgage Co., 582 F.2d 503 (9th Cir. 1978); Baxter v. Sparks Oldsmobile, Inc., 579 F.2d 863 (4th Cir. 1978) (approval of appropriate lender was condition precedent to consummation).

55. 890 F.2d 118 (9th Cir. 1989).

56. *Id.* at 119.

57. *Id.*

58. *Id.* at 121.

59. *Id.* at 122.

60. 791 F.2d 699 (9th Cir. 1986).

61. Jackson v. Grant, 890 F.2d 118, 122 (9th Cir. 1988).

This is understandable because the Act already provides for some equitable considerations in the bona fide error defense and a defaulting creditor may avoid liability on that ground.[62] In any event, Congress must have known that some borrowers would wait until the last minute to rescind. A lender is not entitled to much sympathy himself if a borrower's right of rescission continues beyond the three-day period simply because the lender did not comply with his statutory mandate. Therefore, there is no sound reason for criticizing a consumer who exercises his right long after consummation but nevertheless within the three-year period, because the creditor has it within his control to put the matter to rest through full compliance.

It is conceivable that consummation will not occur even thought the parties have signed the loan documents. For example, in *Thomas v. Leja*,[63] state law required disbursement of the proceeds for consummation to occur. The lender assigned the note and mortgage to a third party even though the lender had not given any money to the consumer. The consumer was quite surprised to find out that the assignee had filed a foreclosure action to recover on the loan. Nevertheless, the consumer rescinded in good time because the parties had never consummated the transaction and the assignee saw his foreclosure efforts frustrated by this peculiarity in the state law.[64]

There is a continuing right to rescind when a creditor does not make the right disclosures in a rescindable transaction. If the creditor makes the necessary corrections, the consumer should receive a new rescission notice at that time.[65] If not, the consumer would be unable to reconsider his position on the basis of the new disclosures. However, not every failure to disclose has an impact on the consumer's right of rescission. The rescission period is extended only if the creditor fails to make all *material* disclosures and does not give the necessary rescission notice.[66]

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62. The bona fide error defense allows a creditor to avoid liability if it can show by "a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid any such error." TILA § 130(c), 15 U.S.C. § 1640(c).

63. 468 N.W.2d 58 (Mich. 1991).

64. It must be recalled that state law determines when consummation occurs. *See* Commentary § 226.2(a)(13)-1.

65. *See* Semar v. Platte Valley Fed. Sav. & Loan Ass'n, 791 F.2d 699, 702 (6th Cir. 1986). *See generally* Williamson v. Lafferty, 698 F.2d 767 (5th Cir. 1983); Smith v. Wells Fargo Credit Corp., 713 F. Supp. 354 (D. Ariz. 1989).

66. Regulation Z, 12 C.F.R. § 226.23(a)(3). The material disclosures referred to are the annual percentage rate, the finance charge, the amount financed, the total of payments, and the payment schedule. *Id.* at n.48.

Nova Law Review, Vol. 17, Iss. 4 [1993], Art. 1

In point of fact, the creditor must give the borrower two copies of the right-to-rescind notice.[67] The rationale is that the borrower can use one copy to notify the creditor that he is rescinding, while retaining the other copy to keep himself abreast of his rights. Since the borrower can use any written statement to notify the lender that he is rescinding, one would think that the lender's failure to provide two copies of the notice would not be serious enough to extend the rescission period. There would be a more compelling case for an extension of the period if by giving only one copy of the notice, the lender deprives the consumer of the opportunity to submit a mandatory official form.

It is bad enough for the lender to experience a consumer's late rescission but it is even worse when the lender has assigned the note and mortgage to another party. The assignee runs the risk of feeling the effects of the lender's inefficiency long after the expiration of the normal three-day rescission period.[68] The usual rescission procedure can be tricky but it can be a nightmare if the consumer signs the loan documents without receiving any proceeds from the lender-assignor, and the latter then assigns the documents to the assignee, after receiving payment for the assignment. When the consumer rescinds, he has nothing to return to the assignee if he never received the loan proceeds from the lender. The assignee is therefore left holding the bag, as it were, even though he may be a true holder in due course.[69] Truth in Lending, which preempts state law in this regard, makes rescission available against any assignee.[70] An assignee will therefore bear the loss if he cannot recover from the lender-assignor. After all the consumer has nothing to tender on rescission because he received nothing from the lender in the first place.

This is an unfortunate state of affairs. In a situation like this where there are two apparently innocent parties, one should look to determine who was in the better position to prevent the loss.[71] It is arguable that the consumer set the transaction in motion by signing the documents without

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67. The creditor must give two copies of the notice to each consumer entitled to rescind. Regulation Z, 12 C.F.R. § 226.23(b).

68. A consumer who has the right to rescind a transaction may rescind as against any assignee. TILA § 131(c), 15 U.S.C. § 1641(c).

69. Stone v. Mehlberg, 728 F. Supp. 1341 (W.D. Mich. 1989); Elsner v. Albrecht, 460 N.W.2d 232 (Mich. Ct. App. 1990).

70. *Stone*, 728 F. Supp. at 1348; Thomas v. Leja, 468 N.W.2d 58, 61 (Mich. Ct. App. 1991).

71. *See Consumer Borrowers v. Consumer Assignees: Part 2*, CONSUMER CREDIT & TRUTH-IN-LENDING COMPLIANCE REP., Feb. 1991, at 3.

receiving any funds. Surely then if negligence can be attributed to anyone, it must be to the consumer. The assignee would not expect to have the consumer rescinding the transaction without a corresponding tender of the proceeds. In the final analysis, the assignee cannot rely on the mere assignment to protect his interest regardless of his good faith and he should confirm the nature of the transaction with the consumer before consummating the assignment. It would be more palatable for the assignee if he could enjoy similar protection to that which is available when the consumer seeks damages for a disclosure violation. Unless the violation is apparent from the face of the instrument, damages for such a violation do not lie against the assignee.[72] Unless there is something that puts the assignee on notice, it may be desirable to prevent the consumer from rescinding in this context. Perhaps this change would make the consumer more cautious in his dealings with the lender, who might be expected to assign the obligation to a third party.

It is the deficiency of the creditor's rescission notice that causes problems. The notice should disclose the date when the rescission expires.[73] It is not enough for the notice to give the date of the transaction and then to state that the rescission period expires three days from that date. The creditor must specify the actual date when the right of rescission ends.[74] The consumer should not be forced to compute the rescission period for himself. In any event, the period does not always expire on the third business day because the time to rescind does not begin to run until the transaction has been consummated and the consumer has received the proper notice and disclosures. Therefore, if the creditor gives the consumer a defective disclosure statement, the expiration date of the rescission right would not be known until the creditor provided a corrected disclosure statement. The original date in the notice would be inaccurate as a result.

The creditor may solve the problem by providing additional information in the notice of the right to rescind. The notice should not only specify the date of the third business day after consummation of the transaction but it should also indicate that the rescission period will be extended if there is a problem with the notice or the disclosure statement. Therefore, the last of those three events would dictate the expiration of the rescission period. The

72. TILA § 131(a), 15 U.S.C. § 1641(a).

73. Regulation Z, 12 C.F.R. § 226.23(b)(5).

74. Semar v. Platte Valley & Loan Ass'n, 791 F.2d 699 (9th Cir. 1986); Reynolds v. D & N Bank, 792 F. Supp. 1035 (E.D. Mich. 1992); Mayfield v. Vanguard Sav. & Loan Ass'n, 710 F. Supp. 143 (E.D. Pa. 1989).

period would therefore end on the third business day after the transaction, the date of receipt of the disclosure, or the date of receipt of the notice of the right to cancel, whichever occurs last.[75]

The lender must be sure that it does not contradict, either orally or in writing, any notice that it gives the borrower about the right to cancel the transaction. In *Jenkins v. Landmark Mortgage Corp.*,[76] an attorney caused some difficulty for his lender-client by making contradictory statements at the closing and in his covering letter that confused matters and made the notice unclear. Therefore, the three-day rescission period never started to run because the lender did not give a clear and conspicuous notice to the borrower, thus providing the latter with a continuing right to rescind.[77] Furthermore, even though the borrower had signed a statement acknowledging receipt of a disclosure statement, that did not prevent her from repudiating the statement and showing that she did not receive the disclosures on the alleged date.[78]

C. *Premature Performance*

In the absence of a proper waiver by the consumer, a lender should neither disburse any funds nor perform any services until the three-day rescission period has expired and the lender is reasonably satisfied that the consumer has not rescinded.[79] If the parties have taken no action, the consumer's withdrawal from the transaction should be a mere formality. Difficulties arise, however, when the lender throws caution to the wind with the expectation that the transaction will be completed quickly once the three-day period has expired. For example, in *Morris v. Lomas & Nettleton Co.*,[80] the consumers signed the usual documents at closing and also a form that they did not wish to exercise their right of rescission following the three-day period. The lender kept all the documents and waited until the end of the period to disburse the funds.[81] The consumers elected to rescind sometime later but the lender would not allow them to do so. The consumers argued that the lender had induced them to waive their right of rescission

75. *See* 12 C.F.R. pt. 226, app. H-8 (1992).
76. 696 F. Supp. 1089 (W.D. Va. 1988).
77. *Id.* at 1095.
78. *Id.* at 1093.
79. Regulation Z, 12 C.F.R. § 226.23(c).
80. 708 F. Supp. 1198, 1202-03 (D. Kan. 1989).
81. *Id.* at 1203.

by having them sign the form at closing that indicated that they did not intend to rescind the transaction.[82]

The court found no violation of Truth in Lending, and therefore, the consumers had no continuing right to rescind.[83] It is true that the lender did not violate the statute because the lender had performed no prohibited act during the three-day rescission period.[84] No waiver occurred because the lender did not advance any funds to the consumers for a financial emergency.[85] However, it would seem that permitting the lender to take the consumers' pre-signed form did affect the consumers' option of using the three-day period to mull over the transaction. The language of the *Morris* form provided some doubt about the consumers' intention. The consumers' sworn statement read as follows: "We have not exercised, and do not exercise, the right to rescind the credit transaction to which this Rescission Notice applies."[86] Since the form bore the same date as the other closing documents, it was accurate for the consumers to say that they had not exercised, and that they were not exercising, the right to rescind at the time they signed the documents. But that was not the important event, for that time came three days later. It seems, therefore, that if the rationale for accepting a form of this type was to disburse the funds quickly at the end of the three-day period, the consumers' statement of their past and present frame of mind did not provide any indication as to the consumers' future intent at the expiration of the period. The creditor still should have waited for a reasonable time thereafter to reassure itself that the consumers had not rescinded by obtaining a confirmation from them.[87]

As a matter of policy, therefore, this pre-clearance form does not add anything to the process, but may confuse matters if consumers are lulled

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82. *Id.* at 1204-06.

83. *Id.* at 1206.

84. A creditor cannot disburse any funds nor perform any services during the three-day waiting period, unless the parties have followed the procedure for the consumer's waiver. Regulation Z, 12 C.F.R. § 226.23(c).

85. The consumer can waive his right of rescission if he determines that he needs credit for a bona fide financial emergency. The consumer must give the creditor a signed, written statement to that effect and he cannot use a printed form. *Id.* § 226.23(e).

86. *Morris*, 708 F. Supp. at 1203.

87. The Regulation requires the creditor to delay its performance "until the rescission period has expired and the creditor is reasonably satisfied that the consumer has not rescinded." Regulation Z, 12 C.F.R. § 226.23(c). One of the ways in which a creditor may satisfy itself that the consumer has not rescinded is by getting a written statement from the consumer. But that statement should only come at the end of the rescission period. *See* Commentary § 226.23(c)-4.

into believing that they have already committed not to rescind and that the lender has a perfect right to take the consumers' written word as the final statement on the matter. It is difficult to give vitality to the consumer's statement that he is not rescinding when the period set aside for his review of the transaction has not yet expired.

If the above scenario appears problematic, there should be a similar reaction to a post-dated statement that the consumer has not rescinded the transaction. When the statement refers only to the time of closing, it does not pretend to address the end of the three-day period. But the present confirmation of future non-rescission obliterates the consumer's statutory right in one fell swoop. Therefore, when the court in *Curry v. Fidelity Consumer Discount Co.*[88] was confronted with a consumer's post-dated certificate that the consumer had not rescinded the transaction and also a post-dated check for the loan proceeds, it took the position that the lender had violated the statute by failing to provide the consumer with "clear notice . . . of her rescission rights."[89] There was some inconsistency in giving the consumer with one hand a notice of the three-day rescission period and then with the other hand taking a post-dated form indicating that the consumer was not rescinding. The Regulation requires the lender to disclose clearly and conspicuously the consumer's right to rescind and to provide a form for that purpose.[90] The court saw the post-dated documents as a problem because they sent mixed signals to the consumer. There seemed to be an implied understanding that the consumer would not rescind despite the three-day opportunity for reflection.

Although the *Curry* court lumped the post-dated check with the post-dated form, it is arguable that the form was more relevant to the consumer's rescission right because it contradicted the fact that the consumer had a three-day period to mull over the transaction. The post-dated check went more or less to the issue of premature performance rather than to the right of rescission.[91] This point was made by the court in *Smith v. Fidelity Consumer Discount Co.*[92] when the consumer endorsed a post-dated check

88. 656 F. Supp. 1129 (E.D. Pa. 1987).

89. *Id.* at 1132.

90. Regulation Z, 12 C.F.R. § 226.23(b). Among other things, the notice of the right to rescind must tell the consumer "[h]ow to exercise the right to rescind, with a form for that purpose, designating the address of the creditor's place of business." *Id.* § 226.23(b)(3).

91. The Commentary suggests that the creditor should not disburse loan proceeds to the consumer until the rescission period has expired and this includes not distributing the funds to the consumer as trustee or escrow agent. Commentary § 226.23(c).

92. 898 F.2d 896, 902-04 (3d Cir. 1990).

and gave it back to the lender pending expiration of the rescission period. The court viewed the endorsement as a violation of the provision prohibiting premature performance but not as a violation of the rescission provision.[93] The difference was significant because it meant that the lender's conduct in *Smith* did not result in an extension of the rescission period. The consumer had received all the disclosures to which he was entitled,[94] and his reliance on the lender's haste in preparing for a fast disbursement via the endorsed check after the expiration of the rescission period did not give him what he had hoped for—an opportunity to rescind at a later date.

It is possible, however, to distinguish *Smith* and *Curry*. In *Curry*, the consumer did sign a post-dated statement of non-rescission which was lacking in *Smith*. The court in *Curry* made no attempt to distinguish between the post-dated check and the post-dated statement, but one can only surmise what the court would have done if there had been no such statement. It might have seen the check as more akin to premature performance. On the other hand, the *Smith* court did not have to deal with a contradictory statement that went to the very heart of the rescission right, and therefore, it was able to isolate the single matter of the check endorsement.[95]

Additionally, the court in *Smith* ruled on the issue of whether the lender's premature performance constituted a failure to deliver material disclosures.[96] It seemed to be a rather perplexing question in this context because the right of rescission had little to do with the material disclosures required of the creditor and the court rightly held that the lender had not run afoul of the provision requiring such disclosures.[97] In finding for the lender on this point, the court acknowledged that it was disagreeing with the

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93. The court said that "[t]he premature performance in this case, while a violation of § 226.23(c), is most certainly not a violation of § 226.23(b)." *Id.* at 904.

94. The consumer is entitled to receive a notice of the right to rescind and also all material disclosures. Therefore, the consumer's rescission right will be extended only if the consumer is not given the required notice or material disclosures. Regulation Z, 12 C.F.R. §226.23(a)(3).

95. Although the lender in *Curry* disbursed the proceeds to a third party on the same day as the closing, this was an act of premature performance that could hardly be distinguished from that in *Smith* where the lender took back the endorsed check from the consumer. In both cases, the creditors failed to delay their performance as required. *See* Commentary § 226.23(c)1-3.

96. *See Smith*, 898 F.2d at 904-05.

97. *Id.* at 904. "The term 'material disclosures' means the required disclosures of the annual percentage rate, the finance charge, the amount financed, the total of payments, and the payment schedule." Regulation Z, 12 C.F.R. § 226.23(a)(3) n.48 (1991).

decisions of *In re Celona*[98] and *In re Gurst*.[99] However, the *Smith* court stated that those courts had dealt with a specific violation of section 226.23(c) which required a delay in the creditor's performance rather than with a violation of the material disclosure provision.[100] The court in *Celona* made this point when it had no hesitation in finding "a clear violation of 12 C.F.R. § 226.23(c) on [the] record."[101] Subsequently, the *Celona* court added that the violation was sufficiently *material* to give the debtors the right to rescind because the lender had attempted to reduce the three-day period.[102] This suggested that the court viewed the lender's conduct as such an egregious violation of the debtor's right of rescission that the rescission period should be regarded as continuing. In explaining its disagreement with the *Celona* court on that score, the *Smith* court thought that the *Celona* court had argued for an expansion of the definition of "material disclosures," just because the latter had deemed the lender's violation material.[103] Both courts believed that it was the premature performance provision that the lender had violated, although the *Celona* court believed that this violation was sufficiently material that the lender should have a right to rescind the transaction.[104]

The Regulation makes it clear that the lender should not disburse money other than in escrow, perform any services, or deliver any materials to the consumer until the rescission period has expired.[105] Nevertheless, the Commentary to Regulation Z explains that the creditor may take certain action during the period of delay, short of actual performance.[106] For example, the creditor may charge interest from the time the transaction is consummated, unless prohibited from doing so, such as by state law.[107] If the creditor does charge interest contrary to state law, the question arises whether that constitutes a violation of Regulation Z.

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98. 90 B.R. 104 (1988), *aff'd*, 98 B.R. 705 (Bankr. E.D. Pa. 1989).
99. 79 B.R. 969 (Bankr. E.D. Pa. 1987).
100. *Smith*, 898 F.2d at 904.
101. *Celona*, 90 B.R. at 110.
102. *Id.*
103. The Truth in Lending Simplification and Reform Act introduced the definition of the term "material disclosures." Pub. L. No. 96-221, § 612(a)(2), 94 Stat. 175 (1980).
104. This illustrated a difference between a material disclosure and a material or important violation. As emphasized by the *Celona* court, a creditor can provide all the material disclosures required by the Regulation, and technically, still be guilty of a material violation.
105. Regulation Z, 12 C.F.R. § 226.23(c).
106. Commentary § 226.23(c)-3.
107. *Id.*

In *Shelton v. Mutual Savings & Loan Ass'n*,[108] the court held that even if the creditor's accrual of interest violated state law or the Commentary, it would not necessarily violate the Act.[109] Accordingly, the court did not allow the consumer to recover damages.[110] However, the court reached the right conclusion while seeming to misinterpret the value of the Commentary. Since the Commentary is supposed to explain the meaning of the Regulation, if the court believed that the creditor had violated the Commentary, logically it should also have found a violation of the Regulation by the creditor. It was not a question whether the Act provided damages for a violation of the Commentary, but whether the creditor had violated the Regulation. The Commentary would have been helpful in making that decision.

The Commentary can be interpreted as simply drawing the creditor's attention to the fact that state law may forbid the collection of interest during the rescission period. However, collection of interest during this period, while possibly a violation of state law, is not necessarily a violation of the Regulation. The point is that the creditor may not disburse loan proceeds until it is reasonably satisfied that the borrower has not rescinded. Thus, while the Commentary regards the collection of interest as acceptable, there is always the possibility that some other law may forbid it.

A creditor may not always receive accolades for its restraint during the rescission period. In *Badie v. First Capital Mortgage Corp.*,[111] the creditor agreed to obtain credit life insurance for the consumer and pay the premium out of the loan proceeds.[112] The only problem was that the creditor delayed procuring the insurance until the expiration of the rescission period to see whether the consumer would sign an affidavit that he did not want to rescind the transaction.[113] Unfortunately, the consumer died in the interim and was left without coverage.[114] The consumer's disappointed spouse alleged breach of contract.[115] She was hard pressed to explain, however, how the creditor could have paid the insurance company if the

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108. 738 F. Supp. 1050 (E.D. Mich. 1990).
109. *Id.* at 1059.
110. *Id.* at 1060.
111. 576 So. 2d 191 (Ala. 1991).
112. *Id.* at 192.
113. The creditor correctly asserted that it was prohibited from using any of the loan proceeds to purchase the insurance during the three day rescission period until the debtor waived the right of rescission. *Id.* at 194.
114. *Id.* at 192.
115. *Id.* at 193.

premium was scheduled to come out of the loan proceeds, which had to remain untouched until the three-day period had expired.[116] In executing the loan transaction, the creditor had certainly adhered to the letter of the law, leaving nothing to chance. The creditor had even provided for an affidavit of assurance that the consumer had not rescinded, in order to complete the transaction at the end of the rescission period.[117] So precise was the arrangement between the parties that the creditor's responsibility to purchase the insurance out of the loan proceeds was conditioned upon the creditor's receipt of the affidavit.[118] Even if the creditor had disbursed money to the insurance company in escrow,[119] the insurance company hardly would have been willing to effect coverage since the consumer was not yet bound by the arrangement. The consumer could rescind and not be liable for any premium. Thus, even in its attempt to avoid problems of the *Morris* and *Curry* type, the creditor still was subjected to some grief. Nevertheless, the creditor stuck to the statutory script, even though it could not forecast this unique predicament.

D. *Sale or Transfer of Property*

It is clear that a sale or transfer of property terminates the right to rescind.[120] In ordinary circumstances, that would seem to be a mere transfer of ownership. However, in *Hefferman v. Bitton*,[121] the Ninth Circuit Court of Appeals held that a consumer's rescission came too late because it followed, rather than preceded, the consumer's agreement to sell the property that was subject to the security interest.[122] The court treated the "sale" as occurring at the time of contract rather than at closing of the

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116. The creditor could not disburse funds to a third party because that would be premature performance. Commentary § 226.23(c)-1. It was understandable, therefore, that the insurance company would not cover the consumer without the necessary premium payment.

117. This was quite consistent with the example given in the commentary on how the creditor can satisfy himself that the consumer has not rescinded. *See id.* § 226.23(c)-4.

118. *Badie*, 576 So. 2d at 194.

119. The commentary provides that "[t]he creditor may disburse loan proceeds during the rescission period in a valid escrow arrangement." Commentary § 226.23(c)-2. This is consistent with the Regulation that "[u]nless a consumer waives the right of rescission . . . no money shall be disbursed other than in escrow . . . ." Regulation Z, 12 C.F.R. § 226.23(c). An escrow arrangement is not intended to obligate the consumer at that point.

120. TILA § 125(f), 15 U.S.C. § 1635(f); Regulation Z, 12 C.F.R. § 226.23(a)(3).

121. 882 F.2d 379 (9th Cir. 1989).

122. *Id.* at 384.

transaction.

The court rationalized its interpretation by recognizing the interest of Congress in avoiding clouds on titles.[123] But if the congressional policy is best fulfilled by treating the time of contract as the benchmark for the end of the rescission period, one wonders why Congress did not specifically use the term "contract of sale" rather than "sale." The court did not think it necessary to answer the question. However, by taking the approach that it did, the court really treated the contract of sale as the sale. One can only guess what would have happened if the consumer had been unable to fulfill his contract. Would the rescission notice then have been revived?

Arguably, a consumer's rescission between the date of contract and the date of closing has the potential for creating problems for the purchaser. The purchaser's major concern should be the lien affecting the property. In the ordinary course of events, liens affecting title would be satisfied or removed no later than closing; therefore, rescission of the original transaction would not give the consumer any unfair advantage in the ensuing sale transaction.[124] Although the Act prescribes the routine for implementing a consumer's rescission, a court has the flexibility to change the sequence of events to achieve the objective.[125] Therefore, even if the consumer's action has the potential for upsetting the sale of the property, the danger is minimal because the lender must take steps to remove the lien. Moreover, if the lender has reservations about doing that because of suspicions regarding the consumer, the lender can nevertheless seek judicial relief.

The parties may also need judicial help in sorting out matters if the consumer sells or transfers the property after giving timely notice, but before the lender is able to complete the formalities of rescission. In that event, the consumer's substantive right to rescind should still be available, but a court may have to use its equitable discretion to vary the process in the same way that it might do when a contract of sale is pending.[126]

It should be noted that the rescission right will end even if the sale or transfer is not voluntary.[127] For example, it will end when there is a

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123. *Id.*

124. Once the legal title remains with the consumer, the lender will still have its interests protected because the consumer will have to pay off the lender. The rescission may give the consumer a greater incentive to hasten the sale to the purchaser. This would be contrary to the court's point that the consumer might ask to delay the sale. *See id.*

125. TILA § 125(b), 15 U.S.C. § 1635(b); Regulation Z, 12 C.F.R. § 226.23(d).

126. There is no reason why a court's discretion to modify the procedure should not operate in this case. *See id.*

127. Commentary § 226.23(a)(3)-3.

Nova Law Review, Vol. 17, Iss. 4 [1993], Art. 1

foreclosure sale or a sale in which the consumer takes back a purchase-money mortgage or keeps legal title through an installment device.[128] If the consumer files for bankruptcy, that should not affect his rescission rights because such rights should terminate only if there has been a transfer of all the consumer's interest in the property.[129] Additionally, since the consumer will usually have some right of possession or a homestead exemption, the consumer will still have the right to rescind.[130] However, the consumer will have a right to rescind only if a right to grant a security interest existed.[131] Therefore, if a consumer purports to grant a security interest in his property after filing for bankruptcy, his attempt to rescind thereafter will be unsuccessful because the security interest will be ineffective.[132]

E. *Refinancing and the Right to Rescind*

The right of rescission does not apply to a "refinancing or consolidation by the same creditor of an extension of credit already secured by the consumer's principal dwelling."[133] However, rescission is available with respect to any new advances made in the refinancing to increase the outstanding loan.[134]

Normally, a lender will refinance a transaction by extending new credit which pays off the outstanding loan and gives the consumer more money. Some creditors may inform their borrowers that the latter can rescind the entire loan because it is really a new transaction. However, the proper interpretation can be given to section 226.23(f) if one remembers that the basis for rescission is to give the consumer the opportunity to reflect on a transaction before subjecting his home to a lien.

For example, if the consumer's home already has a lien on it and the consumer seeks new funding, the rescission should be applied only to the extent of the new advance rather than to both the new advance and the old balance. The Board clarified this point in 1986 when it amended section 226.23(f)(2). As amended, the section provides that "[t]he right of rescission shall apply . . . to the extent the new amount financed exceeds the unpaid principal balance, any earned unpaid finance charge on the existing

128. *Id.*
129. NATIONAL CONSUMER LAW CENTER, TRUTH IN LENDING § 6.5.2.3 (1989).
130. *Id.*
131. *In re* Crevier, 820 F.2d 1553, 1556 (9th Cir. 1987).
132. *Id.*
133. Regulation Z, 12 C.F.R. § 226.23(f)(2).
134. *Id.*

debt, and amounts attributed solely to the costs of the refinancing or consolidation."[135]

Despite the new language, there may still be room for confusion about the refinancing exemption. Several courts contend that the term "refinancing" should be applied only to a transaction that is "already secured" by a current mortgage, as distinguished from the new mortgage.[136] Thus, under this scenario there would be no refinancing if the lender satisfies an old mortgage and takes a new mortgage on the borrower's principal dwelling; in that event the borrower would have the right to rescind the entire new transaction. The lender in *In re Porter*[137] argued the point because the borrower was convinced that the lender had failed to distinguish between an old loan and a new advance secured by the same property. The lender must have been led astray by the Board's model rescission forms. One of them dealt only with the borrower's right to rescind the new transaction and left the original mortgage in place to protect the lender's lien. This form was not satisfactory to the lender because it was not applicable to the situation where the original mortgage was satisfied and replaced by another. The only other alternative therefore was another form which purported to give the borrower the right to rescind the entire transaction.[138] Having decided to cast its lot with the form that related more closely to the transaction at hand, the lender nevertheless found itself in a quandary. It advised the borrower that the borrower had a legal right to cancel "*this transaction*."[139] The lender had yearned for truth in lending but had managed to confuse the borrower.

The court in *Porter* knew full well that there was an ambiguity here that could not be ignored. What was the meaning of "*this transaction*" in this context? It could have been interpreted as a transaction for new money, thus giving the borrower the right to cancel that new arrangement.[140] Nevertheless, it would be understood that the old security interest would remain in effect, untouched by the vagaries of the new transaction.

On the other hand, it was quite possible for one to interpret the lender's notice as affecting both the old and new security interests, thus giving the

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135. *Id.*

136. *See, e.g., In re* Melvin, 75 B.R. 952, 957 (Bankr. E.D. Pa. 1987); *In re* Tucker, 74 B.R. 923 (Bankr. E.D. Pa. 1987).

137. 961 F.2d 1066 (3d Cir. 1992).

138. It was a question of reconciling the Board's Model Form H-8 with Model Form H-9. *See* 12 C.F.R. pt. 226, app. H-9 (1992).

139. 961 F.2d at 1076.

140. *Id.* at 1077.

borrower the right to cancel the entire loan involving the old and new money.[141] In this context, therefore, "this transaction" had a wider connotation and gave the borrower the right to wipe the slate clean.

The lender thought it was doing the borrower a favor by giving her the right to rescind both the old and new transactions, thus in effect depriving her of any basis for complaint. This would not necessarily have been a boon for the borrower, for the exercise of the rescission right carries with it the obligation to return the lender's money and the borrower might not have been able to do that.[142] Thus the lender would not necessarily be right in assuming that the borrower would enjoy an advantage in rescinding both the old loan and the new advance. In this respect, the borrower may have been happy with a right of partial rescission.

In cases like *Porter*, the lender cannot afford to rely solely on the Board's model forms. The lender must be alert to the possibility that its transaction may require independent judgment about the form of disclosure required. One would have expected the Board's interest in providing the necessary guidance to lenders to lead the Board to some model covering these typical refinancing transactions. In *Porter*, the lender sought to attach a meaning to "refinancing" that could not be found in either the Act or the Regulation.

It is to be noted that section 226.23(f) covers not only a refinancing but also a consolidation and it is possible to interpret the latter as applying to a transaction that allows the current mortgage to remain in place, while recognizing the existence of the new transaction.[143] In any event, it is not necessary to interpret the Regulation so slavishly that the lender must retain precisely the same mortgage instrument as evidence of the security. There is nothing to be lost by recognizing the substance of the matter, which is that the lender will retain the same priority lien as security for the entire loan. If the creditor advances additional funds, however, the consumer's property would be subject to greater exposure and the Regulation therefore properly recognizes the consumer's right of rescission with respect to that amount.[144]

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141. *Id.*

142. *Id.* at 1077-78. The consumer has an obligation to return the creditor's property once the creditor has complied with his obligations. Regulation Z, 12 C.F.R. § 226.23(d)(3).

143. The right of rescission does not apply to "[a] refinancing or consolidation by the same creditor of an extension of credit already secured by the consumer's principal dwelling." Regulation Z, 12 C.F.R. § 226.23(f)(2). However, the right of rescission is applicable to any new advance. *Id.*

144. *Id.*

Although a consumer usually has a right to rescind beyond the normal three-day period because of the lender's delinquency, the lender may challenge that right if the consumer has refinanced the loan.[145] In *King v. California*, that challenge was successful because the court found that the new loan had superseded the original loan and that there was nothing left to rescind. Nevertheless, subsequent cases have taken the position that a consumer who has an extended right to rescind can do so as long as he acts no later than three years after consummation of the transaction.[146]

It is noteworthy that paying off a loan is not listed in the Act or the Regulation as a ground for terminating the right of rescission. It is questionable therefore whether the payoff should be read into the Act and the Regulation as one of the terminating events when there seems to be no ambiguity. If the argument is that the rescission right affects only the security interest, and that a security interest no longer exists because the consumer has paid off the loan, then the argument misses the other important ingredients of rescission. The lender must not only remove the lien on the consumer's property, but it must also return any money or property that the consumer has given it.[147] Furthermore, the consumer is not liable for any finance or other charge in connection with the transaction.[148] Nevertheless, there may still be a compelling reason why the consumer wants to rescind the loan, even though he may have refinanced or otherwise paid it off. That reason may be solely financial, given the fact that the consumer stands to recover the finance charges and other costs involved in the transaction.[149]

In addition, the consumer's remedy should not depend on whether the lender forgot to remove the lien from the record, for that would hardly affect the substance of the matter if the consumer has paid off the loan. The issue is whether the consumer should be able to rescind a loan that no longer exists. A similar question arises about a consumer's right to recover damages for a lender's faulty disclosures even though the consumer has

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145. King v. California, 784 F.2d 910, 913 (9th Cir. 1986), *cert. denied*, 484 U.S. 802 (1987).

146. *See, e.g.*, Abele v. Mid-Penn Consumer Discount, 77 B.R. 460, 464 (Bankr. E.D. Pa. 1987), *aff'd mem.*, 845 F.2d 1009 (3d Cir. 1988); Mayfield v. Vanguard Sav. & Loan Ass'n, 710 F. Supp. 143, 145 (E.D. Pa. 1989); Steinbrecher v. Mid-Penn Consumer Discount Co. (*In re* Steinbrecher), 110 B.R. 155, 161 (Bankr. E.D. Pa. 1990).

147. TILA § 125(b), 15 U.S.C. § 1635(b); Regulation Z, 12 C.F.R. § 226.23(d)(2).

148. Regulation Z, 12 C.F.R § 226.23(d)(1).

149. *See* RALPH J. ROHNER ET AL., LAW OF TRUTH IN LENDING § 8.03[2][a] & n.164.2 (Cum. Supp. 1989); NATIONAL CONSUMER LAW CENTER, *supra* note 129, § 6.5.2.4.

already paid the loan. Perhaps it is easier to concede the consumer's right in the latter case because the damage has already been done. But the argument is also compelling if the right of rescission is implicated, for the consumer may need to save his home from the effects of an imprudent transaction. Therefore, the consumer's remedy should not hinge solely on the continued existence of the lien on his property, but rather on whether he is still within the prescribed time limit for rescinding.[150]

If there is a series of refinancing transactions, there may be a question whether a Truth in Lending violation from one transaction will affect subsequent transactions. In *Steinbrecher v. Mid-Penn Consumer Discount Co.* (*In re* Steinbrecher),[151] the creditor failed to include the property insurance premium in the finance charge even though he did not disclose the necessary information about the insurance coverage.[152] This delinquency resulted in an understatement of the finance charge and the annual percentage rate in the first transaction.[153] There were three refinancings resulting in a total of four loans and the proceeds of each loan were used in part to pay the prior outstanding loan.[154] The problem was that the creditor had miscalculated the rebate of unearned interest due from the first transaction when the loan was paid off simply because it had omitted the insurance cost and this error carried through to the three subsequent transactions. The court had little difficulty, therefore, in finding that the borrower had a right to rescind all four loans because the creditor had failed to disclose the correct finance charge and annual percentage rate in each of them.[155]

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150. In the same way that the legislation provides that the sale of the consumer's property terminates the right of rescission, TILA § 125(f), 15 U.S.C. § 1635(f), then it could have covered the continued existence of the loan. The absence of such a condition leaves the issue open to question.

151. 110 B.R. 155 (Bankr. E.D. Pa. 1990).

152. *Id.* at 163. Property insurance premiums may be excluded from the finance charge if the creditor discloses that the consumer may obtain coverage from someone of the consumer's choice. Regulation Z, 12 C.F.R. § 226.4(d)(2)(i). If the consumer gets coverage from or through the creditor, the premium for the initial term must be disclosed. *Id.* § 226.4(d)(2)(ii).

153. *Steinbrecher*, 110 B.R. at 164. The creditor must disclose the finance charge, using that term, and a brief description such as "'the dollar amount the credit will cost you.'" Regulation Z, 12 C.F.R. § 226.18(d) (footnote omitted). The creditor must also disclose the annual percentage, using that term, and a brief description such as "'the cost of your credit as a yearly rate.'" *Id.* § 226.18(e) (footnote omitted).

154. *Steinbrecher*, 110 B.R. at 158.

155. *Id.* at 165.

F. *Obligations of the Parties*

The consumer's rescission sets in motion a sequence of events. The statute nullifies the lender's security interest but requires the lender to take any necessary action to remove the lien from the record within twenty days.[156] At the same time, the lender must also return the consumer's property[157] and the consumer need not tender the lender's property until the lender has fulfilled its obligations.[158] Furthermore, the consumer may keep the property if the lender does not take possession of it within twenty days after the consumer's tender.[159]

Although the sequence of events seems clear enough, difficulties arise when a creditor becomes concerned about a borrower's ability to meet its obligations. It is understandable that creditors would have this concern, for the secured creditor which loses its lien without any assurance of the borrower's compliance may find itself at a disadvantage. While the lien is in existence, the creditor can exert pressure on the borrower to perform. But when the borrower rescinds, the creditor's lien becomes automatically void and the creditor must act to clear the record.[160]

A procedural problem may arise because a borrower does not have to indicate his reason for rescinding. As a result the creditor may find itself in a quandary if the borrower's rationale for rescinding is not clear. The creditor can perform and dispute the matter later, or it may immediately seek a declaration of rights to protect its interests.[161] If the creditor performs and it does not take possession of his property within twenty days of the consumer's tender, the consumer may keep it without any obligation.[162]

When the creditor does not act on the consumer's rescission, the consumer has no obligation to tender and the question frequently arises whether a forfeiture should be implied under such circumstances.[163] In

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156. Regulation Z, 12 C.F.R. § 226.23(d)(1)-(2).
157. *Id.* § 226.23(d)(2).
158. *Id.* § 226.23(d)(3).
159. *Id.*
160. *Id.* § 226.23(d)(1)-(2).
161. *See* Aquino v. Public Fin. Consumer Discount Co., 606 F. Supp. 504 (E.D. Pa. 1985); ROHNER, *supra* note 149, § 8.04[2][a], at S8-28.
162. Regulation Z, 12 C.F.R. § 226.23(d)(3).
163. The creditor should return any money or property and do what is necessary to reflect the termination of the security interest. Regulation Z, 12 C.F.R. § 226.23(d)(2). It is only after the creditor has complied with those requirements that the consumer must make his tender. *Id.* § 226.23(d)(3).

one sense, an implied forfeiture seems harsh, but it may be justified if the idea is to encourage the creditor to treat the consumer's rescission seriously. This provides a rather clear incentive for the creditor to act if it knows that its inaction may prove expensive in the long run.

Two recent cases illustrate the difficulty of dealing with the forfeiture provision. In *Celona v. Equitable National Bank* (*In re* Celona),[164] the court took a rather straightforward view of the Regulation and read it as requiring a forfeiture unless the creditor could show some peculiar circumstance that exempted it from that fate.[165] This approach is commendable, for it spells out a seriousness of purpose in requiring the creditor to act lest it lose its property. Although there is provision for modifying the procedures by court order,[166] it seems reasonable that such modification should be reserved for special circumstances, thus lending further weight to the view that forfeiture should be the standard fare. The *Celona* court viewed forfeiture as the natural outcome of the creditor's conduct and did not subscribe to the view that a creditor should be overprotected in any way.

In *Mayfield v. Vanguard Savings & Loan Ass'n*,[167] it was a different story. The court decreed no forfeiture there, apparently because the consumer had made no tender. But the consumer has no obligation to tender until the creditor has performed. Since that tender obligation arises after the creditor has acted on the consumer's rescission, there is an explicit provision for forfeiture if the creditor does not take back its property within the appointed time.[168] There may also be a forfeiture when the creditor does not act, because unless it does so within the twenty-day period, the consumer has no obligation to tender.[169] It was surprising, therefore, that the *Mayfield* court would not allow the creditor's property to vest in the consumer because there was no tender.[170] In so doing, the court relied only on the explicit vesting right and did not consider the fact that the consumer could have benefitted from the implicit vesting which arises when the consumer has no tender obligation.[171] Therefore, while *Celona* paid

164. 90 B.R. 104 (Bankr. E.D. Pa. 1988), *aff'd*, 98 B.R. 705 (E.D. Pa. 1989).
165. *Id.* at 113.
166. Regulation Z, 12 C.F.R. § 226.23(d)(4).
167. 710 F. Supp. 143 (E.D. Pa. 1989).
168. Regulation Z, 12 C.F.R. § 226.23(d)(3).
169. *Id.* § 226.23(d)(2)-(3).
170. 710 F. Supp. at 147.
171. *Id.* at 147-48; *see also* NATIONAL CONSUMER LAW CENTER, TRUTH IN LENDING § 6.10.2 (1989).

greater respect to the consumer's implicit right to retain the property, thus putting the burden on the creditor, *Mayfield* preferred to accept the doctrine that there should be no forfeiture of the creditor's property unless there were some special circumstances that dictated that result. The *Mayfield* court was so confident of its approach that it viewed the absence of the creditor's fraud or deceit as one count in the creditor's favor.[172] This approach casts a different shadow on the right of rescission, for it protects the creditor as long as there is no evidence of other misconduct. However, there is no statutory requirement of such evidence for the creditor to suffer a forfeiture. The simple question is whether it has done what it was supposed to do. If it wishes to plead the equities of its case, there is a special provision for judicial modification.[173] But the presumption ought to be in favor of following the statutory procedure rather than offering routine modification.[174]

Some courts have been persuaded that they should consider the relative equities of the parties or the benefit obtained by the consumer before fashioning an appropriate rescission remedy.[175] This has led to questionable conclusions about the statutory scheme. For example, in *Shepeard v. Quality Siding & Window Factory, Inc.*,[176] the court conceded that neither creditor had performed its obligations, but the court felt compelled to consider whether the consumer had received any benefit from the improvement to her property. There was nothing unusual about this query because the rescission mechanism assumes some possibility of benefit to the consumer. That is why the consumer is expected to return the property

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172. *See* 710 F. Supp. at 148. In Reynolds v. D & N Bank, 792 F. Supp. 1035 (E.D. Mich. 1992) the court simply stated that the statute does not contemplate allowing the consumer to retain the creditor's property just because the creditor does not respond. 792 F. Supp. at 1040. Nevertheless the court saw the possibility of forfeiture if the creditor ignored the court's order to do what it was supposed to do in the first place. The creditor therefore had two chances to follow the statutory procedure. The court preferred the approach of the court in Rudisell v. Fifth Third Bank, 622 F.2d 243 (6th Cir. 1980), which emphasized the equitable nature of the rescission remedy, rather than the hard-nosed approach of the court in Celona v. Equitable Nat'l Bank (*In re* Celona), 90 B.R. 104 (1988), *aff'd*, 98 B.R. 705 (Bankr. E.D. Pa. 1989).

173. Regulation Z, C.F.R. § 226.23(d)(4).

174. *See* Gill v. Mid-Penn Consumer Discount Co., 671 F. Supp. 1021 (E.D. Pa. 1987), *aff'd*, 853 F.2d 917 (3d Cir. 1988); Celona v. Equitable Nat'l Bank (*In re* Celona), 90 B.R. 104 (1988), *aff'd*, 98 B.R. 705 (Bankr. E.D. Pa. 1989).

175. *See In re* Gurst, 79 B.R. 969 (Bankr. E.D. Pa. 1987); Brown v. National Permanent Fed. Sav. & Loan Ass'n, 683 F.2d 444 (D.C. Cir. 1982).

176. 730 F. Supp. 1295 (D. Del 1990).

obtained from the creditor. However, the court in *Shepeard* did not see any problem with including the cost of labor in determining the benefit that the consumer had received through the installation of the siding on her home.[177] The court could find no rationale for excluding labor costs from the concept of "reasonable value." However, the reasonable value of the home improvements was not synonymous with the reasonable value of the property which the creditor had given to the consumer. The Regulation merely facilitates the consumer's accounting for the reasonable value of the property if the consumer would find it impracticable to return the property itself.[178]

The *Shepeard* court took comfort from the fact that when the Sixth Circuit in *Rudisell v. Fifth Third Bank*[179] remanded that case to the district court for a determination of "reasonable value," it did not give any directions for deducting the costs of labor. The *Rudisell* court might have thought it unnecessary to cover that point inasmuch as it was dealing with the reasonable value of "property."[180] If the purpose of rescission is to return the parties to the *status quo ante*,[181] then it would be misleading to include the cost of labor in the calculations.[182] The creditor would enjoy an advantage not contemplated by the statute. What would be the purpose of allowing rescission if the consumer has to pay for the creditor's handiwork? It is intended that the parties be restored to their original positions. The creditor should get back his property or the reasonable value thereof in appropriate circumstances. It is only by taking this approach that courts will be able to provide incentive for creditors to comply with the

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177. *Id.* at 1307 n.20. It would be a strange construction indeed for the labor cost to come within the definition of "property." The court thought it strange that the consumer did not cite any authority for her view that labor cost should be excluded. *Id.* All that she needed to do, however, was to look to the language of the Regulation which required her to tender the property or "its reasonable value." *See* Regulation Z, 12 C.F.R. § 226.23(d)(3).

178. *See* Regulation Z, 12 C.F.R. § 226.23(d)(3).

179. 622 F.2d 243 (6th Cir. 1980).

180. *See id* at 254. The *Rudisell* court would have gone out of its way in dealing with the costs of labor because such costs had nothing to do with "property." Therefore, the *Shepeard* court read too much into the *Rudisell* court's failure to deduct the labor costs.

181. *See* James v. Home Constr. Co., 621 F.2d 727, 730 (5th Cir. 1980).

182. *See* Tri-West Constr. Co. v. Hernandez, 607 P.2d 1375, 1381 (Or. Ct. App. 1979) (defendants required to tender either original personal property items provided by plaintiff in connection with home improvements or reasonable value of this property, but not reasonable value of services furnished). If a creditor is able to recover his labor costs, he has really imposed the contract on the consumer, at least to the extent of his performance. That would seem to run counter to the purpose of rescission.

statutory requirements. Creditors should have to plead their case to secure equitable relief on account of special circumstances.

III. Security Interests: Identification

A creditor must disclose the existence of any security interest in property which the borrower is purchasing as part of the transaction and in the case of other property, he must identify the security by item or type.[183] A security interest does not include incidental interests, interests in after-acquired property, or security interests that arise by operation of law (except for purposes of rescission).[184] Some creditors experience problems not in recognizing a security interest, but rather in employing the proper terminology required by the Regulation.

When a creditor identifies a security interest differently in the security agreement and the disclosure statement, the resulting ambiguity may lead to a Truth in Lending violation. A good example occurred in *Doubet v. U.S.A. Financial Services, Inc.*,[185] when the agreement gave the creditor a security interest in consumer goods then owned by the borrower, whereas the disclosure statement identified the collateral by item.[186] There was a clash here between an overinclusive clause in the security agreement and the itemized list in the disclosure statement. If the agreement purported to give a security interest in all the consumer's goods, the statement could hardly do less. It was left to conjecture whether the listing accounted for all the borrower's goods. The creditor could have resolved that doubt by making the language in the disclosure statement as broad as that in the security

183. Regulation Z, 12 C.F.R. § 226.18(m).

184. *Id.* § 226.2(a)(25).

185. 714 F. Supp. 980 (C.D. Ill. 1987).

186. The disclosure statement gave a security interest in a "Quazar 25 inch color console television, Quazar VCR, McDonald receiver, Soundtech tape player, Soundtech speakers, 22 inch push lawnmower, and 1981 homemade flat bed trailer." *Id.* at 983. The security agreement covered collateral described as:

> Consumer goods now owned or hereafter acquired within 10 days of the date of this loan or any future loan, by the Borrower(s) in replacement of such consumer goods (and proceeds) now or hereafter located in or about the residence of the Borrower(s) above set forth including those items described on Schedule A, if such Schedule A is attached hereto, together with such non-consumer goods as described on Schedule A.

Id.

agreement.[187]

The lender explained the inconsistency by treating the language in the security agreement as an after-acquired property clause because the language covered "consumer goods now owned or hereafter acquired within ten days." It was not difficult for the court to separate the after-acquired property provision from the other provision covering the consumer's current goods. Therefore, although the lender did not have to disclose an after-acquired property clause because it was not a security interest under Truth in Lending,[188] that did not help the lender in this situation because the clause in the security agreement was clearly divisible.

There was a slight variation on the theme in *In re Stoneking*.[189] The security agreement covered the borrower's consumer goods, including specific items listed in a schedule, while the disclosure statement specifically mentioned the items only.[190] The court took the view that the use of the word "include" with respect to the items in the schedule suggested that the security agreement covered more than such items. If the parties had intended to restrict the security interest to the items in the schedule, the agreement would have used language of limitation.[191] Thus, by using language of inclusion in the security agreement, the lender in *Stoneking* seemed to put itself in a less defensible position than the lender in *Doubet*. The lender in *Doubet* may have had an argument that the items in the disclosure statement were all the consumer goods that the borrower owned. There was an element of ambiguity in *Doubet* that was lacking in *Stoneking*. Nevertheless, the lesson remained the same; the security agreement and the disclosure statement must carry the same message about the applicable security interest.

The creditor may be in a quandary if he refinances a purchase-money loan and secures the new loan with the same collateral. In *In re Hatfield*,[192] the creditor disclosed that the new loan was secured by the

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187. The court said that "[i]f the creditor had intended to take a security interest in only those items described in the Federal Disclosure Statement, then that should have been made clear on the Note and Security Agreement." *Id.* at 985; *see also* Teel v. Thorp Credit, Inc., 609 F.2d 1268 (7th Cir. 1979) (note and security agreement described much broader security interest than disclosure statement).

188. *Doubet*, 714 F. Supp. at 985 (citing comment 18(m)-4 of Official Staff Commentary).

189. 99 B.R. 892 (Bankr. C.D. Ill. 1989).

190. *Id.* at 895.

191. *Id.*

192. 117 B.R. 387 (Bankr. C.D. Ill. 1990).

make any immediate purchase with their new funds.

It is a clear lesson that the need to provide the consumer with Truth in Lending disclosures cannot be obscured with the demands of other statutory schemes. Although the consumers in *Hatfield* must have felt some discomfort with the seemingly inconsistent analysis, the court's characterizations were not irreconcilable. The lender had a duty under Truth in Lending to let the consumers know which property was subject to its lien and it could not realize that objective by the simple designation of "goods being purchased."[198] Since the consumers had already bought the goods, such a designation hurt, rather than helped the lender's cause. On the other hand, the court's purchase-money designation for bankruptcy purposes recognized the lender's infusion of capital for purchase of the goods.[199] Therefore, it was not a question of misleading the consumers about the nature of the security, but rather one of respecting the lender's priority in the scheme of things if the new loan was really a refinancing with hardly a change in terms, except for a reduction in monthly payments.[200]

Another conflict surfaced in *In re Dingledine*.[201] The lender listed eight items as collateral in the security agreement but merely described them in the disclosure statement as "certain household items."[202] The lender could not be faulted for attempting a description of the property by type, for the Act specifically requires that in loans that are not purchase-money transactions.[203] Nevertheless, the consumer was doubtful that "certain household items" included property such as a bicycle and fishing equipment,

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198. *Id.* at 390.

199. The debtors wanted to avoid the lender's lien under § 522(f) of the Bankruptcy Code. The issue was whether the refinancing was merely a renewal of the original obligation or a novation. *Id.* at 390. The court's test was whether the debtor's original obligation had changed, such as taking an additional loan. *Id.*; *see also In re* Gayhart, 33 B.R. 699 (Bankr. N.D. Ill. 1983).

200. *Hatfield*, 117 B.R. at 390. Even when there is an additional advance, some courts still find it possible to recognize the original purchase-money transaction. *See In re* Russell, 29 B.R. 270 (Bankr. W.D. Okla. 1983); *In re* Moore, 33 B.R. 72 (Bankr. D. Or. 1983); *see also* ROBERT E. GINSBERG, BANKRUPTCY: TEXTS, STATUTES, RULES § 6.02(c), at 498 (Supp. 1991).

201. 916 F.2d 408 (7th Cir. 1990).

202. *Id.* at 409. The security agreement described the security as follows: "camera, fishing equipment, bicycle, hoses, portable grill, cassette recorder/player, radio, VCR." *Id.*

203. *Id.* at 410. The Regulation requires the following disclosure: "The fact that the creditor has or will acquire a security interest in the property purchased as part of the transaction, or in other property identified by item or type." Regulation Z, 12 C.F.R. § 226.18(m).

which were among the collateral that was clearly itemized in the security agreement.[204] In the consumer's view, therefore, the disclosure statement was inaccurate and incomplete, for it did not match the items specified in the security agreement.

Here again, the resolution of the conflict lay in deciphering the different objectives of the Truth in Lending Act and the Bankruptcy Code. The court took the view that the Act's description of "household items" was broader than the description of "household goods" in section 522(f) of the Bankruptcy Code and that the lender's disclosure in its statement of the property listed in the security agreement as "certain household items" included a bicycle and fishing equipment.[205] Therefore, the narrow definition that would be given to "household goods" in section 522(f) by including only these items that were required for the debtor's household was not applicable to the Act's treatment of "household items."[206] The court relied on the Commentary's recognition that "certain household items" and "household goods" were two distinct categories.[207] In this way, the court could fit the items in the security agreement within the category of "certain household items," without disturbing the narrow definition contemplated for "household goods" in section 522(f) of the Bankruptcy Code.

IV. Finance Charge

A. *The Hidden Charge*

An important feature of the Act is that the creditor must tell the consumer the cost of credit by disclosing the finance charge.[208] The difficulty lies, however, in identifying the finance charge, because it may

204. *Dingledine*, 916 F.2d at 410.

205. *Id.* at 411.

206. *Id.* at 410. "Under the Bankruptcy Code, 'household goods' are defined in specific language in order that it might prevent insolvent debtors from avoiding liens on personal items of property other than those essential for the day-to-day operation of a household." *Id.*

207. *Id.* The Commentary advises that the disclosure of a non-purchase money security interest can be made by "a general disclosure of the category of property subject to the security interest, such as 'motor vehicles,' 'securities,' 'certain household items,' or 'household goods.'" Commentary § 226.18(m)-2. The court dealt with the meaning of "certain household items" but regarded the term as different from "household goods." *Dingledine*, 916 F.2d at 411.

208. 15 U.S.C. § 1601(a) (1992).

involve more than interest. The Regulation defines a finance charge as "any charge payable directly or indirectly by the consumer . . . as an incident to or a condition of the extension of credit."[209] This definition is broad indeed and it includes many charges that the consumer has to pay in order to consummate the transaction.[210] Its scope is not surprising because the congressional objective was to give consumers an accurate idea of financing costs so that consumers could make informed decisions.[211]

It was recognized early that creditors could bury "the cost of credit in the price of goods sold."[212] Creditors could accomplish this by merely including any finance charge in the cost of doing business and setting the price accordingly. The Federal Reserve Board recognized this possibility when it applied its Regulation to transactions that were payable in more than four installments.[213] When a creditor challenged the four-installment rule in *Mourning v. Family Publications Service, Inc.*,[214] it seemed confident that the Board had exceeded its mandate since the congressional statute required disclosures only when the creditor imposed a finance charge.[215] The creditor's view was that Congress had intended to restrict the Board by requiring disclosure in certain transactions.[216]

It was clear to the Court that Congress did not intend to list in the Act

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209. Regulation Z, 12 C.F.R. § 226.4(a).

210. *See id.* § 226.4(b) for examples of the finance charge. This § includes not only interest but service charges and points. *Id.*

211. The first § of the Act discloses the congressional findings and declaration of purpose:

> The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of [the] subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

TILA § 102(a), 15 U.S.C. § 1601(a).

212. Mourning v. Family Publications Serv., Inc., 411 U.S. 356, 366 (1973).

213. One of the criteria for regulatory coverage is that "the credit is subject to a finance charge or is payable by a written agreement in more that four installments." Regulation Z, 12 C.F.R. § 226.1(c).

214. 411 U.S. 356 (1973).

215. Pub. L. No. 93-495, § 146, 88 Stat. 1500, 1517 (1974) added a provision dealing with payment in more than four installments.

216. *Mourning*, 411 U.S. at 372.

all transactions to which the Board's Regulation might apply, for the Court knew full well that Congress could not foresee all the possible subterfuges of creditors.[217] Nevertheless, the Board had to use its power as the implementing agency to deter creditors from engaging in conduct that would prevent consumers from comparing credit terms. The question was whether the four-installment rule was reasonably related to congressional objectives. There was ample evidence that creditors would use a loophole of this type to collect a finance charge that was not specifically identified. Additionally, the Court did not believe the rule to be deficient simply because some creditors, who did not include a finance charge in an extended payment plan, might be subjected to it.[218]

It did not take long for the four-installment rule to prove its worth. For example, in *Killings v. Jeff's Motors, Inc.*,[219] the consumer agreed to pay $1805.28 in twenty-four installments for a used car which the seller had previously bought for $760. The seller indicated on its disclosure statement that it was imposing no finance charge.[220] The parties stipulated that the average retail price listed in the used car guide for that type of car was $1,780.[221] The buyer appealed the award of minimum statutory damages. The Fifth Circuit Court of Appeals was sympathetic to the buyer's claim that the finance charge could be readily ascertained despite the lower court's inability to fix the same.[222] The appellate court relied on the difference between the going retail price in the marketplace and the cash price paid by the buyer.[223] The consumer was vindicated, for just as she alleged, the creditor had buried its finance charge in the cash price and the generous installment arrangement did not tell the full story.

In *Killings*, the parties agreed on the average retail price for cars of the type in dispute.[224] When there is a substantial difference between the market price and the sales price and the parties cannot agree on the market price, the consumer must still produce evidence of the disparity. In *Vines v. Hodges*,[225] the court was mindful of the stipulation in *Killings* concerning the average retail price, but it did not rush to accept the *Killings*

217. *See id.*
218. *Id.* at 374.
219. 490 F.2d 865 (5th Cir. 1974).
220. *Id.* at 865.
221. *Id.*
222. *Id.* at 866.
223. *Killings*, 490 F.2d at 866.
224. *Id.* at 865.
225. 422 F. Supp. 1292 (D.C.C. 1976).

et al.: Nova Law Review Full Issue

formula. There was no stipulation in *Vines* and it was conceivable that the particular used car under consideration could have brought more than the average price.[226]

The tendency to regard the creditor's profit over the actual value as a finance charge can create some problems. If the creditor charges cash customers and credit customers the same price, then it is arguable that the creditor has included its costs and its profit in its price of the goods. If the creditor sets a price for all customers that includes the creditor's overhead and profit, it is difficult to require the creditor to apportion those items to each credit customer as a finance charge.[227] Nevertheless, in *Lawson v. Reeves*,[228] the Supreme Court of Alabama was persuaded that there must be a hidden finance charge somewhere "when the installment sales contract does not disclose an annual percentage rate, but the stated price exceeds the actual value of the item sold."[229] The *Lawson* court took its lead from the Fifth Circuit's decision in *Killings*, on the erroneous conclusion that *Killings* had affirmed the lower court's finding that there was an undisclosed finance charge.[230] However, although the district court in *Killings* found that such a charge existed, the creditor did not appeal that finding. Therefore, the *Lawson* court should not have looked to the Fifth Circuit's decision to support the view that there is a hidden finance charge whenever the sales price exceeds the actual value of the item. The Fifth Circuit had only to face the question of the amount of the finance charge.[231]

Sometimes a court will find its patience tested by a creditor's excessive mark-up, and as a result, will speedily identify a hidden finance charge. The question then becomes whether a court should use Truth in Lending to regulate the price that a seller may charge. This scenario is different from the case where the consumer agrees to pay in installments but the creditor

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226. *Id.* at 1300.

227. The Official Staff Commentary refers to the costs of doing business in this way:

> Charges absorbed by the creditor as a cost of doing business are not finance charges, even though the creditor may take such costs into consideration in determining the interest rate to be charged or the cash price of the property or service sold. However, if the creditor separately imposes a charge on the consumer to cover certain costs, the charge is a finance charge if it otherwise meets the definition.

Commentary § 226.4(a)-2.

228. 537 So. 2d 15 (Ala. 1988).

229. *Id.* at 17.

230. *Id.*

231. *The Hidden Finance Charge Reappears to Haunt Sellers*, CONSUMER CREDIT & TAXATION LEGISLATION COMPLIANCE REP., May 1989, at 5.

discloses that there is no finance charge involved. In the excessive mark-up case, the creditor will disclose a certain finance charge, but the consumer may claim that the finance charge disclosed is far less than the real finance charge.

In *In re Stewart*,[232] the purchasing retailer bought his goods from another retailer and then sold them on credit at a mark-up of over 100%. Then the selling retailer disclosed his finance charge on the basis of the new price, and that charge came to an annual rate of eighteen percent. The retailer justified the price on the ground that it was selling on credit to people who were poor credit risks and that it had to sell merchandise at a profitable price. The retailer could not sell at the same price as its supplier because the supplier sold for cash. Nevertheless, the court found that the creditor had overreached in this case.[233] The court was impressed by the fact that the consumers could have obtained the same goods for cash at less than half the price from the seller's supplier.[234]

The court was keen on requiring the creditor to disclose as its cash price the figure which retailers were using to sell their goods for cash.[235] In the court's view, anything in excess was in reality the cost of credit and therefore had to be disclosed as a finance charge.[236] Therefore, the seller had violated Truth in Lending requirements by not disclosing the full finance charge. The court seemed disturbed because the seller had exacted an unconscionable markup from the consumer and felt that it was necessary to look behind the disclosures to determine the seller's true profit. [237]

However, public policy considerations cannot be ignored. It is not unusual for creditors to impose high selling prices in certain inner-city areas; however, the court felt that it had to make a point that there was a limit to the prices that a seller could charge in a credit transaction, even in those areas where credit was not readily available.[238]

On the other hand, one must ask whether a seller, like the one in *Stewart*, provides such a valuable service to purchasers who cannot pay cash that courts must be more tolerant of their financing schemes. The only real test of the available cash price would be to have the seller engage in a few cash sales. When the seller is a credit specialist, it is difficult to show

232. 93 B.R. 878 (Bankr. E.D. Pa. 1988).
233. *Id.* at 884.
234. *Id.* at 885.
235. *See id.* at 886.
236. *Id.*
237. *Stewart*, 93 B.R. at 888.
238. *Id.* at 883-84.

that the sales price is the product of an excessive markup. Nevertheless, some courts feel justified in examining the differential between the seller's cost and the seller's price. As a matter of public policy, courts will doubtless be persuaded that there is a line that the creditor must not cross even if it means that certain consumers will be shut out of the marketplace.[239]

There is a difference, however, between selling at an abnormally high price to mask a finance charge and selling a defective item at a regular market price. In the latter case, if the consumer is dissatisfied with his purchase, his remedy really lies under a warranty theory rather than Truth in Lending. That did not stop the consumer in *Frazee v. Seaview Toyota Pontiac, Inc.*[240] from seeking a Truth in Lending remedy because her newly purchased car would not work. The consumer asked the court to recognize the difference between the fair market value and the purchase price of the defective car as a hidden finance charge. The court would not extend the approach of cases like *Killings* and *Vines*, because in those cases the problem was not dissatisfaction with the goods. It was a question of determining if the creditor's finance charge was included in the inflated price despite the creditor's assurance that there was none.[241]

In *Frazee*, the court would not grant the consumer any solace for her bad bargain, at least not through the Truth in Lending vehicle she desired. There was no evidence of an exorbitant price but the consumer was certainly upset with the bargain that she had struck. Nevertheless, it was an occasion for the court that remind the parties that Truth in Lending is a disclosure statute and not a device for salvaging bad bargains.[242]

It is at least understandable that a person will want to use Truth in Lending to protect his bargaining position in a genuine dispute. However, there is no requirement that there be any dispute between the parties before a consumer can invoke a Truth in Lending remedy. Therefore, a debtor can very well concede that he owes a debt while seeking such a remedy against the person whom he owes. It is not startling that a person may be anxious to reject the label of "creditor" in that context on the ground that the debt due him does not carry a finance charge or that is not payable by written agreement in more than four installments. But the person's desire to avoid

239. The court in *Stewart* viewed the transaction as "representative of the worst sort of exploitive tactics." *Id.* at 879.

240. 695 F. Supp. 1406 (D. Conn. 1988).

241. *Id.* at 1408.

242. *Id.*

the label may be complicated by the fact that the debtor may spread out his payments on his own initiative in the face of the other party's constant demand for payment. The debtor's failure to pay promptly creates a doubt about the arrangement between the parties and that is all the debtor needs to suggest the application of the disclosure requirements.

In *Porter v. Hill*,[243] a lawyer billed his client periodically and requested payment in full each time. Both the parties' agreement and the billing statement imposed a late payment charge if the client did not pay the total balance within thirty days. The only problem was that the debtor defaulted but the lawyer did not sue right away. The latter merely added on the late charge and kept up his billing. Eventually the lawyer could not stand it any longer and brought a collection action. The client counterclaimed for a breach of Truth in Lending. The court took note of several points. The parties' written agreement required payment "'in advance, or upon billing by Attorney.'"[244] This understanding was therefore inconsistent with the definition of credit, which gives the debtor the right to defer payment.[245] Therefore the debtor's action in stretching out the payments did not turn the lawyer into a creditor.[246] More importantly, both the agreement and the billing statement identified the extra charge which the lawyer collected as a late payment charge[247] rather than a finance charge. The debtor could have avoided such a charge by simply paying off the amount due within the thirty-day period. This was a case where compassion for the debtor may have come back to haunt the lawyer. In the end, his patience was rewarded but it underscores the need for vigilance in avoiding the finance charge label or the pitfall of having the parties' arrangement recognized as one that calls for payment in more than four installments.

When the creditor imposes a flat fee for a late payment, there should be little difficulty in rejecting it as a finance charge. In *Hahn v. Hanks Ambulance Service, Inc.*,[248] though, the Eleventh Circuit had some concern when the creditor categorized the charge as a time price differential. It was

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243. 838 P.2d 45 (Or. 1992).

244. *Id.* at 51.

245. Regulation Z defines credit as "the right to defer payment of debt or to incur debt and defer its payment." Regulation Z, 12 C.F.R. § 226.2(a).

246. A creditor is a person who regularly extends consumer credit that is subject to a finance charge or that is payable by written agreement in more than four installments. Regulation Z, 12 C.F.R. § 226.2(a)(17)(1).

247. Late payment charges are excluded from the finance charge. Regulation Z, 12 C.F.R. § 226.4(c)(2).

248. 787 F.2d 543 (11th Cir. 1986).

anybody's guess why this particular label was chosen, for it is one that usually refers to deferment of the debt. Nevertheless, the company wanted to provide some incentive for the debtor to pay promptly and to provide for the increased cost of carrying the overdue debts. The court did not recognize the charge as a finance charge but it was a close call in light of the company's label, "'time pay price differential.'"[249]

B. *Fees*

The definition of "finance charge" has caused some concern from time to time because of its broad scope.[250] No doubt it reflects the congressional will to include any charge that is remotely attached to the credit transaction.[251] Nevertheless, there is always that nagging question whether a particular charge can be legitimately characterized as one imposed directly or indirectly by the creditor. It is a tricky problem but it is helpful to query whether the creditor would make the loan if the charges in question were not paid.

This issue is particularly prevalent with attorney's fees. In *First Acadiana Bank v. Federal Deposit Insurance Corp.*,[252] the creditor required the borrower to use a bank-approved attorney to prepare a chattel mortgage on an automobile, the security for the loan. The attorney always set the fee, which the bank then included in the amount financed but not in the finance charge. The court held that the attorney's fee should be included in the finance charge[253] because it was a charge "'incident to the extension of credit.'"[254]

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249. *See id.* at 544; *see also* Bright v. Ball Memorial Hosp. Ass'n, 616 F.2d 328 (7th Cir. 1980).

250. The finance charge includes "any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit." Regulation Z, 12 C.F.R. § 226.4(a).

251. Truth in Lending captures the all-inclusive nature of a finance charge with the language: "sum of all charges, payable directly or indirectly." TILA § 106(a), 15 U.S.C. § 1605; *see also* RALPH J. ROHNER, LAW OF TRUTH-IN-LENDING § 3.02[1] (1984).

252. 833 F.2d 548 (5th Cir. 1987).

253. The amount financed is obtained by: "(1) Determining the principal loan amount or the cash price (subtracting any down payment), (2) Adding any other amounts that are financed by the creditor and are not part of the finance charge, and (3) Subtracting any prepaid finance charge." Regulation Z, 12 C.F.R. § 226.18(b).

254. 833 F.2d at 550 (attorney's fee is not "of a type payable in a comparable cash transaction" since there would be no chattel mortgage in a cash transaction, and therefore no attorney's fee for preparing such a document); *see also* Berryhill v. Rich Plan, 578 F.2d

The bank also tried to avoid any disclosure obligation because the attorney set the fee and retained it. However, there has never been a requirement that the creditor must keep the fees that are assessed as a condition of granting credit.[255] Both the Act and the Regulation recognize the possibility of the direct or indirect imposition of a charge[256] and therefore, the mere fact that the charge ends up in the hands of a third party does not detract from the condition attached to the loan that the consumer must pay the charge for the loan to be made. The important element here is that the creditor required the services to be rendered by a third party. If the creditor does not require such services, the third party's fee is not a part of the finance charge if the creditor does not keep it.[257]

It is not always easy to determine whether a charge has been imposed as a condition of the extension of credit. The easiest case is when the creditor will not grant a loan unless the consumer pays a certain charge. Some cases are not that clear. For example, in *Pendleton v. American Title Brokers, Inc.*,[258] the consumer pledged his car to the defendant in exchange for a loan. In order to have the continued use of his car, the consumer rented the car back from the defendant, paying a weekly rental of 10% of the loan amount. The court found that this weekly rental was a finance charge despite the fact that the consumer was not compelled to lease back her car as a condition of obtaining credit.[259] The court characterized the charge as one imposed "incident to the extension of credit."[260] The loan and the lease were part and parcel of the same transaction and the rental was not tied to anything other than the loan amount. The lender thought that it could avoid liability by showing that it did not impose the lease-back arrangement on the consumer as a condition of the loan. Nevertheless, it was significant that ninety percent of the consumers rented their vehicles back from the lender and the latter fully expected the consumers to be attracted to the lend-lease arrangement. Therefore, while the court

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1092, 1099 (5th Cir. 1978); Regulation Z, 12 C.F.R. § 226.4(a).

255. The Commentary states that "charges imposed on the consumer by someone other than the creditor are finance charges (unless otherwise excluded) if the creditor requires the services of the third party." Commentary § 226.4(a)-3.

256. *Id.* § 226.4(a).

257. *Id.* § 226.4(a)-3.

258. 754 F. Supp. 860 (S.D. Ala. 1991).

259. *Id.* at 863.

260. *Id.* at 864.

back[261] as incident to the extension of credit. It was all one package and the lender therefore had to tell the real story of the cost of this "auto pawn."

There are some transactions which provide some comfort for creditors because from their perspective the transactions produce profit without a hidden finance charge. A consumer will frequently feel some uneasiness when he learns about a discount arrangement between his original creditor and an assignee. Although discounts are a fact of commercial life, a consumer may feel that the discount figure should be disclosed to him as a part of the finance charge because the creditor-assignor takes that feature into account in negotiating the transaction with the consumer.

In *April v. Union Mortgage Co.*,[262] the consumers agreed to pay a contractor $20,000 as the cash price for work to be done. The consumers later refinanced the loan through Union Mortgage and used the proceeds to pay off the contractor and other parties. Union Mortgage paid the contractor only $16,700 rather than $20,000, thus benefitting from a discount of $3,300 which the consumers claimed should have been disclosed as a finance charge.

It was no surprise that the consumers did not prevail. The court took the view that charges which a creditor assumes as a cost of doing business are not a part of the finance charge even though the creditor takes such charges into account in setting his terms.[263] Furthermore, the court found that a discount in connection with an assignment is not a finance charge unless the discount is separately imposed on the consumer.[264] Even though the contractor encouraged the consumer to refinance through Union Mortgage and pay him off, that was no different from a mere assignment from the contractor to Union Mortgage with respect to the treatment of the discount.

A discount of this type is very much like another kind of charge known as seller's points that a seller sometimes pays to a lender for making a loan to a buyer.[265] The rationale for not treating such seller's points as a

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261. The lender's newspaper advertisement read: "'Pawn your title, keep your car.'" *Id.* at 861. The lender had in mind the idea of lending money to the borrower on the security of the automobile and then renting the automobile back to the borrower as a simultaneous transaction. *Id.* at 864; *see also Pawn Your Title: Keep Your Car*, 10 NCLC REP. 25, 27 (1991).

262. 709 F. Supp. 809 (N.D. Ill. 1989).

263. *Id.* at 813; *see also* Commentary § 226.4(a)1-2.

264. *April*, 709 F. Supp. at 813; *see also* Regulation Z, 12 C.F.R. § 226.4(b)(6).

265. Regulation Z, 12 C.F.R. § 226.4(c)(5); *Finance Charge for a Loan to Pay off Installment Purchases*, CONSUMER CREDIT & TRUTH-IN-LENDING COMPLIANCE REP., Aug.

finance charge is that they are imposed on the seller and not on the buyer; and that is the position even though the seller may increase his price to account for the possibility of paying this charge.[266]

In *April*, the mortgage company did not require the contractor to pay any charge or points directly to the company. However, the contractor had to accept a discounted price for the installment contract that he had made with the consumer and that put the contractor in the position of a seller in the normal sales-financing transaction. The discount was no more a finance charge than seller's points.[267]

There are other ways in which a creditor may increase its yield without running afoul of the disclosure provisions affecting the finance charge. Sometimes a creditor will require the consumer to deposit funds with it as a condition of granting the loan. If the creditor reduces the interest rate on the loan as a result of the consumer's deposit, such an escrow account is an additional finance charge because it is used to buy a lower rate.[268]

However, there are variations on the theme which do not produce a finance charge. One example is the payment escrow account which was used in *Therrien v. Resource Financial Group, Inc.*[269] The creditor required the consumer to deposit $11,846.24 from the loan proceeds into a payment escrow account for the payment of the first sixteen payments on the loan. The creditors paid the consumer five percent per annum on the payment escrow. The consumers believed that the creditor had violated Truth in Lending by not disclosing the amount of $11,846.24 as a finance charge, thus extending the period in which the consumers could rescind the loan.

The court took the view that the payment escrow account was a required deposit rather than a finance charge.[270] It noted that the escrow account still belonged to the consumers and that the creditor had paid the

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1989, at 6 [hereinafter *Finance Charge*].

266. Commentary § 226.4(c)(5)-1. If a non-creditor seller pays a commitment fee to a creditor, it should be treated as seller's points. However, points paid by the buyer to the creditor are part of the finance charge. *Id.*

267. *April*, 709 F. Supp. at 813; see also *Finance Charge*, *supra* note 265, at 6.

268. The Commentary explains this arrangement as a consumer buy down. The creditor must disclose the terms of the buy down agreement. The amount the consumer pays may be deposited in an escrow account or kept by the creditor. Commentary § 226.17(c)-4.

269. 704 F. Supp. 322 (D.N.H. 1989).

270. *Id.* at 326. If the creditor insists on a required deposit, the creditor must provide a statement that the annual percentage rate does reflect the effect of the required deposit. Regulation Z, 12 C.F.R. § 226.18(r); Commentary § 226.18(r)-1.

consumers interest on the account which was segregated in the consumers' name.[271] That was, therefore, a sign that the money was for the benefit of the consumers. If the account was a finance charge, then the creditor could commingle the funds and use them as its own. The escrow account was not used to buy a better interest rate but to make the monthly payments as they matured. It was, therefore, like a pledged account mortgage which allows a creditor to withdraw sums from the account to supplement the consumer's monthly payments.[272]

The court in *Therrien* expressed some discomfort with the arrangement because the consumers actually borrowed more money than they needed, especially when the interest rate was 20.25% and the consumers' escrow account earned only five percent.[273] It was a way for the creditor to increase the loan amount, and thus the interest earned, without parting with a significant part of the loan proceeds. In this respect, it was different from a deposit that sits in an account as a trade-off for a preferential interest rate. However, Truth in Lending does not require that a loan be fashioned to the consumer's advantage, but only that there be an accurate disclosure of the credit terms. In this respect, it is comforting that the Regulation requires the creditor to inform the consumer that the annual percentage rate on the loan does not take into account the required deposit arrangement.[274] At least in such circumstances, the consumer should know that the loan may be costing him a little more than he had anticipated.

Certain charges are excluded from the finance charge if they are itemized and disclosed. Among them are taxes and fees which are paid to public officials for perfecting, releasing, or satisfying a security interest.[275] The creditor may either disclose such charges as a lump sum or itemize them according to the specific fees or taxes imposed.[276] If a creditor imposes other charges on a customer that do not fall within the itemization

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271. *Therrien*, 704 F. Supp. at 326.

272. With respect to this arrangement the Commentary provides the following guidance:

> In these transactions, a consumer pledges as collateral funds that the consumer deposits in an account held by the creditor. The creditor withdraws sums from that account to supplement the consumer's periodic payments. Creditors may treat these pledged accounts as required deposits or they may treat them as consumer buy downs in accordance with the commentary to § 226.17(c)(1).

Regulation Z, 12 C.F.R. § 226.18(r)-2 cmt. 18(r)-2.

273. 704 F. Supp. at 326.

274. Regulation Z, 12 C.F.R. § 226.18(r).

275. *Id.* § 226.4(e)(1).

276. Commentary § 226.4(e)-2.

charges provision, such charges become part of the finance charge. Thus, if a creditor imposes charges on a consumer for making an assignment, they are not excludable from the finance charge even if disclosed.

The point arose in *In re Brown*[277] when the assignee argued that filing or recording an assignment of a mortgage was similar to filing or recording the mortgage itself and that the charge should be excludable from the finance charge once it was itemized and disclosed.[278] The court noted that the section 226.4(e)(1) exclusions all relate to charges for recording documents that affect the original transaction between the creditor and the consumer.[279] In no way could the perfection of the mortgage itself be regarded as the same thing as perfecting an assignment of that mortgage. Furthermore, there is no exception in section 226.4(b)(6) for assignment-type charges that the consumer must pay as a result of a third party's purchase or acceptance of the consumer's obligation.[280] Therefore, the assignee in *Brown* should have disclosed the cost of recording as a part of the finance charge.[281]

The finance charge does not include disclosed fees that are or *will be paid* to public officials for perfecting, releasing or satisfying a security interest.[282] It is arguable that if the creditor does not use the fees for the purpose intended, the fees should be a part of the finance charge. The problem arose in *Smith v. Fidelity Consumer Discount Co.*[283] when the creditor collected a thirteen dollar fee from the consumer for clearing a prior lien from the record. Unfortunately, the creditor could not obtain a release because it could not find the prior lienor. The creditor did not return the

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277. 106 B.R. 852 (Bankr. E.D. Pa. 1989).

278. *Id.* at 859.

279. *Id.*

280. The Regulation includes within the finance charge these "[c]harges imposed on a creditor by another person for purchasing or accepting a consumer's obligation, if the consumer is required to pay the charges in cash, as an addition to the obligation, or as a deduction from the proceeds of the obligation." Regulation Z, 12 C.F.R. § 226.4(b)(6).

281. *Brown*, 106 B.R. at 859. In its defense, the creditor referred to Shroder v. Suburban Coastal Corp., 729 F.2d 1371 (11th Cir. 1984), for the proposition that a recording fee for an assignment of mortgage was excludable from the finance charge. The *Shroder* court had relied on George v. General Fin. Corp., 414 F. Supp. 33 (E.D. La. 1976), where the court held that a notary fee that was properly disclosed could be excluded from the finance charge. Unfortunately, the *Shroder* court did not make the distinction between official fees paid by the original creditor in *George* and fees paid in connection with a later assignment in *Shroder*.

282. Regulation Z, 12 C.F.R. § 226.4(e)(1).

283. 898 F.2d 896 (3d Cir. 1990).

release fee and the consumer argued that the fee was therefore a finance charge.[284]

This argument may have prevailed in the absence of a provision that forgives disclosures rendered inaccurate by subsequent events.[285] There was no evidence that when the creditor took the release fee from the consumer, it had any inkling that it would be unable to obtain the release for filing.[286] The subsequent event that prevented the creditor from complying with the Regulation was the creditor's inability to find the lienor to sign the release. But the Regulation does not seem to make any provision for the creditor's inability to follow through with payment for the release. As a matter of fact, the Regulation allows exclusion from the finance charge if the fees "*actually* are or will be paid to public officials."[287] This suggests that the creditor must make the payment if he hopes to avoid the obligation of including the fees in the finance charge. If there is no actual payment, then the creditor should either refund the fee or include it within the finance charge if he does not intend to refund it. After all, payment to the official for releasing the lien from the public record is the event that satisfies the condition for omitting the fee from the finance charge.

If the creditor does not mention anything about a release at the time of the transaction but suddenly confronts the consumer with a demand for a release fee at the time of pay-off, the consumer may complain about the lack of disclosure. His complaint would be justified if the creditor knew at the time that the consumer would be unable to obtain credit unless the consumer agreed to pay the release charge. In that event, that would be a charge imposed as a condition of the extension of credit.

However, another issue arises if nothing is said about a release charge and the consumer is under no legal obligation to pay it. In *Adamson v. Alliance Mortgage Co.*,[288] the creditor demanded a charge as a condition of releasing the deed of trust covering the consumer's property. The creditor did not tell the consumer about any such charge at the time of the loan and the loan documents did not obligate the consumer to pay it. The

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284. *Id.* at 898-99.

285. *See* Regulation Z, 12 C.F.R. § 226.17(e).

286. This would be a relevant consideration if the creditor wishes to use the "subsequent event" section as a defense under section 226.17(e) of the Regulation. *See* NATIONAL CONSUMER LAW CENTER, *supra* note 129, § 3.6.2 & n.401.

287. *Id.* § 226.4(e)(1) (emphasis added); *see also* Commentary § 226.4(e)-1 ("[o]nly sums actually paid to public officials are excludable under § 226.4-(e)(1)").

288. 861 F.2d 63 (4th Cir. 1988), *overruled on other grounds*, Busby v. Crown Supply, Inc., 896 F.2d 833, 841 (4th Cir. 1990).

release charge, therefore, became an issue only after the consumer had paid off the loan. In all fairness, the charge imposed was not incident to the extension of credit, but rather incident to the satisfaction of the debt.[289] The creditor may have left out the release charge because Truth in Lending disclosures are based on the legal obligations of the parties.[290] If the consumer had no obligation for the charge, then the creditor should rightly not have been concerned about it. But it may simply have been an afterthought and the creditor must have believed that it had nothing to lose in reminding the consumer about this insignificant item.

The release problem is not insuperable. If the charge is going to be paid to a public official, then the Regulation allows it to be excluded from the finance charge as long as it is itemized. But the creditor should not really be overly concerned about the charge if it relates to the release of its lien. The debtor should have just as keen an interest in removing the lien from his property once he has paid his debt. Therefore, even if the creditor overlooks this matter at closing, it should not worry too much unless it is trying to collect some charge in excess of the amount due the public official. In that event, the item should properly be recognized as a finance charge and the creditor would be unable to justify the omission on the ground that it is a subsequent event. It should be able to fulfil this disclosure obligation by giving some estimate of the cost.[291]

Nevertheless, this problem leads to a more fundamental question concerning the necessity for the creditor to disclose the components of the finance charge. The Regulation provides examples of the inclusions and the exclusions but nowhere requires the creditor to tell the debtor the amount of the specific items.[292] The creditor fulfills its duty if it merely discloses the dollar amount of the finance charge.[293] Truth in Lending suggests that as long as the consumer knows the bottom line, it is not necessary to bore him with the details of the cost ingredients.[294] But yet the creditor can

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289. *Id.* at 65.

290. The Regulation requires the disclosures to reflect "the terms of the legal obligation between the parties." Regulation Z, 12 C.F.R. § 226.17(c)(1).

291. The creditor can make an estimate on the basis of the best information available and must state that the disclosure is an estimate. *Id.* § 226.17(c)(2).

292. *See id.* § 226.4(b)-(d).

293. *See id.* § 226.18(d).

294. The creditor must list any prepaid finance charge in the itemization of the amount financed. *Id.* § 226.18(c). A prepaid finance charge is "any finance charge paid separately in cash or by check before or at consummation of a transaction, or withheld from the proceeds of the credit at any time." 12 C.F.R. § 226.2(a)(23). Therefore, it is arguable that

exclude certain items from the finance charge if they are itemized.[295] Does this mean, therefore, that they become part of that charge if they are not itemized? The consumer needs to know what he is paying and the mere disclosure of the total finance charge does not really satisfy that requirement, particularly if the creditor may be relieved from itemizing the prepaid finance charge by the consumer's inaction.[296] The consumer should have the opportunity to reflect on the items included in the charge. The creditor may include a cost item that the consumer finds objectionable or that may even be a mistake. The consumer would not be able to discuss the matter without knowing the elements of the charge. There is a world of difference between a finance charge that includes an exorbitant finder's fee and one that merely reflects interest. The consumer may well want to weigh his options. His decision about the loan may well be affected by whether he intends to pay off the loan within a few years. The consumer can make a meaningful choice only if he has the necessary information at hand.

The creditor in *Steinbrecher v. Mid-Penn Consumer Discount Co.* (*In re* Steinbrecher)[297] got a taste of these disclosure requirements when it included a property insurance premium in the amount financed but not in the finance charge.[298] The court found a violation because the creditor did not provide some narrative information required for omitting the premium from the finance charge.[299] The evil sought to be cured was really the omission of insurance information that was critical to a full understanding of the transaction.[300] The remedy lay, therefore, not in making the premium an

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the itemization of the finance charge takes place when the creditor itemizes the amount financed. However, the creditor does not have to itemize the amount financed if the creditor provides a statement about the consumer's right to receive a written itemization and the consumer does not request it. *Id.* § 226.18(c)(2). Therefore, even under these circumstances, the creditor may be relieved of the obligation if the consumer does not act.

295. *See id.* § 226.4(e) (with respect to the itemization of certain security interest charges).

296. *See* Steinbrecher v. Mid-Penn Consumer Discount Co. (*In re* Steinbrecher), 110 B.R. 155 (Bankr. E.D. Pa. 1990). The finance charge would normally include interest and the prepaid finance charge. Nevertheless, it can include other items (such as private insurance premiums) and if the creditor avoids the itemization of the prepaid finance charge through the option allowed, the consumer really will know very little about the components of the finance charge.

297. 110 B.R. 155 (Bankr. E.D. Pa. 1990).

298. *Id.* at 158.

299. *Id.* at 163. The creditor failed to inform the borrowers that the insurance could be obtained from a person of the borrowers' choice and the creditor did not disclose the term of the insurance. *Id.*

300. *Id.*

automatic ingredient of the finance charge, but rather in making the creditor liable for not providing the necessary insurance information.

The consumers in *Blon v. Bank One, Akron, N.A.*,[301] however, were on the other side of the fence. The consumers were upset because they did not know about the fee that the creditor had paid to a broker for arranging the loan although the creditor had included it in the finance charge. The creditor did not have to draw the consumers' attention to the broker's fee because Truth in Lending did not require it.[302] At least in this case, the characterization of the fee as a finance charge did not depend upon some omission of collateral information. The fee was a part of the finance charge and there was a simple requirement of disclosing the dollar amount.[303] The lender certainly did not feel obligated to provide any details of its arrangement with the broker because it had no special relationship with the borrowers.[304] Nevertheless, it is all too easy to overlook this gap in the disclosure requirements on the pretext that nondisclosure of the fee did not affect the borrowers' ability to compare the loan terms with others available in the marketplace.[305] In the borrower's mind it may be a question of not only comparing terms, but also of ensuring that he is getting a fair deal.[306]

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301. 519 N.E.2d 363 (1988).

302. *See* TILA § 128(a), 15 U.S.C. § 1638(a)(3); Regulation Z, 12 C.F.R. § 226.18(d).

303. *See* Smith v. Fidelity Consumer Discount Co., 898 F.2d 896 (3d Cir. 1990).

304. *Blon*, 519 N.E.2d at 367. On this point the court made this observation: "[W]e find that reasonable minds could only conclude that Bank One had no special relationship of trust and confidence with the Blons and, therefore, had no duty to disclose the details of its financing fee arrangement with West." *Id.*

305. *Id.* at 366. The court seemed satisfied that the omission of a charge of the type involved did not undermine the intent of the Truth in Lending Act to promote consumers' informed use of credit. *Id.* The question is whether the informed use of credit relates only to the opportunity to compare credit terms. The borrowers might have obtained credit elsewhere but the availability of other credit sources should not detract from the borrowers' need to know the details of the transaction in question. *Id.* at 366-67.

306. In *Blon*, the borrowers must have been fairly upset that the broker did not tell them that lower interest rates were available or that the broker would receive a higher fee on a higher interest rate. 519 N.E.2d at 367. These details could have made a difference to the borrowers. In this respect the borrowers' concern may not have been unreasonable. In Besta v. Beneficial Loan Co., 855 F.2d 532 (8th Cir. 1988), the court took the view that a lender acted unfairly in not advising its customer that the customer could have obtained better loan terms by doing things differently. A similar view prevailed in Milbourne v. Mid-Penn Consumer Discount Co. (*In re* Milbourne), 108 B.R. 522 (Bankr. E.D. Pa. 1989) when the bankruptcy court held that the lender should have told the refinancing borrower that it would be more profitable for him to take out separate loans. *See also* Dwight Golann, *Beyond Truth in Lending: The Duty of Affirmative Disclosure*, 46 BUS. LAW. 1307 (1991).

These examples provide some evidence of the need for properly classifying the items in the finance charge for the consumer's benefit. This approach would further the cause of disclosure by letting the consumer know the details of the transaction.

C. *Insurance Coverage*

Creditors are often persuaded to facilitate insurance coverage for their customers by providing information about it in the disclosure form. The Regulation seems to encourage this procedure by allowing a creditor to exclude premiums for credit life insurance from the finance charge if the creditor informs the borrower that the insurance coverage is not required and also discloses the premium for the initial period.[307]

As a matter of policy, it is questionable whether this credit insurance option belongs in a disclosure statement. The point that has been made elsewhere in connection with other items of the finance charge applies equally here.[308] A credit insurance premium is either a finance charge or it is not and its characterization should not depend on whether the creditor informs the borrower of the voluntary nature of the insurance coverage. It is questionable whether the objective of Truth in Lending is properly fulfilled by providing for this half-hearted option in the disclosure statement.[309] Many borrowers will like this coverage. However, they may have a genuine doubt about their options in securing it. The borrower who arrives at his loan closing to find the insurance premiums already included in the closing statement may feel a little uneasy in upsetting the lender's handiwork. Therefore, even when the insurance coverage purports to be optional because it is not a condition of the loan, the borrower may find himself locked in because of pressure.[310] But where a borrower cannot

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307. Regulation Z, 12 C.F.R. § 226.4(d)(1)(i)-(ii).

308. *See supra* notes 228-29 and accompanying text.

309. The Regulation provides that the premium *may* be excluded from the finance charge. If the objective is to ensure that the borrower knows about his insurance options, then it will more likely be achieved by imposing a sanction for failure to disclose the insurance information rather than having the premium included in the finance charge. If the lender meets the requirements by such inclusion, the borrower may still not know about the insurance options. If the insurance premium provides a good return, the lender may choose to include it in the finance charge and still be competitive within the marketplace. *See* Golann, *supra* note 306, at 1320.

310. The Commentary provides that "[w]hether the insurance is in fact required or optional is a factual question." Commentary § 226.4(d)-5. An example of the kind of problems involved in this area is found in the Federal Trade Commission's Consent

show fraud or duress, he will have difficulty introducing evidence to counteract the disclosure statement.[311] There is an implied message that the borrower is responsible for reading what he signs, a message that may be lost on the unsophisticated consumer.

Despite some early disappointments, consumers have occasionally received sympathetic consideration. In *Kaminski v. Shawmut Credit Union*,[312] the borrowers faced clear language in a disclosure statement that credit life insurance was not required. The plaintiff showed that every borrower under seventy years of age had indeed bought such insurance and the court found it to be a requirement rather than an option for such borrowers, despite the contrary language in the instrument.[313] The plaintiff was unable to profit from this court's approach because he knew that he was buying insurance and would have bought it even in the absence of a requirement. Nevertheless, the court saw fit to recognize such a requirement despite the conflicting declaration in the documents that "credit life and/or disability insurance [was] not required to obtain this loan."[314] This opportunity to rebut the written word arises in the case where the lender orally misrepresents to its customers that insurance is required. However, as *Kaminski* shows, it is not easy for a consumer to make his case despite the opportunity to do so.

In *Milbourne v. Mid-Penn Consumer Discount Co. (In re* Milbourne)[315] the debtor showed that 99.5% of the lender's customers had bought credit life insurance. He did not provide any information on the number of people

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Agreement with Tower Loan of Mississippi, Inc. Tower Loan was ordered to "cease and desist" from requiring any consumer to sign or initial a statement that credit-related insurance has been voluntarily chosen if the consumer's purchase of such insurance was required. *See* 56 Fed. Reg. 57,656, 57,657 (1991); 57 Fed. Reg. 8457 (1992).

311. The parol evidence rule prevents the introduction of evidence to contradict the written disclosures in the absence of fraud or duress. *See* USLIFE Credit Corp. v. FTC, 599 F.2d 1387 (5th Cir. 1979); Anthony v. Community Loan & Inv. Corp., 559 F.2d 1363, 1369-70 (5th Cir. 1977); Kramer v. Marine Midland Bank, 559 F. Supp. 273 (S.D.N.Y. 1983). *But see* Kaminski v. Shawmut Credit Union, 494 F. Supp. 723, 729 (D. Mass. 1980) (fact that every borrower under seventy had purchased insurance suggested that there was an insurance purchase requirement attached to the loan); Milbourne v. Mid-Penn Consumer Discount Co. (*In re* Milbourne), 108 B.R. 522, 542 (Bankr. E.D. Pa. 1989) (evidence of the lender's 99½% credit life insurance penetration rate was probative of the voluntariness of the borrower's insurance coverage).

312. 494 F. Supp. 723, 729 (D. Mass. 1980).

313. *Id.*

314. *Id.*

315. 108 B.R. 522 (Bankr. E.D. Pa. 1989).

who had bought credit disability insurance from the lender although he contended that the lender had required both life and disability insurance. The court noticed the absence of figures about the disability insurance and further observed that if the lender had required any insurance at all, then every borrower would have signed up for coverage through the lender.[316]

Truth in Lending purports to solve the insurance problem by requiring the lender to include the premium in the finance charge if the lender does not itemize it in the disclosure statement. In effect, the legislation penalizes the non-itemizing lender by requiring the disclosure of a higher finance charge, which conceivably would put the particular lender at a competitive disadvantage. It is questionable whether the designation of the charge should change depending on the lender's conduct. If an insurance premium is not really a part of the finance charge because it does not fall within the definition thereof, then a lender's subsequent decision not to disclose the amount of that premium should not transform the item into something that it was never destined to be. The lender's transgression in the event of non-disclosure would be simply that, non-disclosure of the insurance information, and the lender then should be held accountable accordingly.

Steinbrecher v. Mid-Penn Consumer Discount Co. (In re Steinbrecher)[317] provided a recent example of a lender's violation. The consumers tried to rescind their transaction after declaring bankruptcy. Their successful complaint rested on the lender's underestimation of the finance charge because the lender did not make the disclosures necessary for it to exclude the fire insurance premium from the finance charge. The lender should have informed the borrowers that they could obtain the insurance from an insurer of their own choice and also should have disclosed the term of the insurance if the lender wanted to exclude the premium.[318] Even if the lender had adjusted the finance charge accordingly, the disclosure of the charge still would not have fulfilled the real purpose of the insurance provision, that is, to give the consumers the choice of

316. *Id.* at 542.

317. 110 B.R. 155 (Bankr. E.D. Pa. 1990).

318. *Id.* at 163. See also TILA § 106(c) which requires that:

> Charges or premiums for insurance, written in connection with any consumer credit transaction, against loss or damage to property . . . shall be included in the finance charge unless a clear and specific statement in writing is furnished by the creditor to the person to whom the credit is extended . . . and stating that the person . . . may choose the person through which the insurance is to be obtained.

TILA § 106(c), 15 U.S.C. § 1605(c).

making their own decision. This option, not to treat the item as a part of the finance charge, ultimately allows ample opportunity to confuse consumers.

Since the statute provides some flexibility in the treatment of the insurance arrangements between the lender and the consumer, there is no compelling argument for demanding that the finance charge be involved in a resolution of this disclosure problem. The realistic solution may be to treat insurance as a separate item so that the consumer will have the chance to consider the lender's insurance offer after the terms of the loan have been settled. This arrangement would not necessarily result in a perfect solution to the insurance problem, but a separate disclosure requirement might lead to an agreement on the factors to be disclosed.[319]

Another claim of exemption for an itemized insurance charge appeared recently in *Dixon v. S & S Loan Service, Inc.*[320] The provision allowed the lender to exclude from the finance charge any itemized premium paid for insurance coverage to protect the lender in the event of the lender's failure to perfect his security interest.[321] The Act gives the lender the choice of itemizing either the recording fees actually paid to a public official or the premium payable for insurance to protect the lender from non-recording. One may ask whether the designation of the cost should change depending on the lender's itemized disclosure. With respect to this provision, the question is even more poignant because the lender is not required to exclude the item from the finance charge even if it is itemized. The Act merely prescribes that "the creditor need not include [the] item in the computation of the finance charge . . . ."[322] Very few lenders would choose to include the item because it would put the lender at a disadvantage in the marketplace. Nevertheless, the disclosure option does have the potential for creating confusion if a lender decides for any reason to make the item a part of the finance charge.

It must also be observed that the lender can exclude the recording fees from the finance charge only if such fees are actually used for the purpose intended, that is for perfecting the lender's security interest.[323] There is no "actual payment" language in sub-section (2) dealing with the lender's

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319. *See* Golann, *supra* note 306, at 1321-22.

320. 754 F. Supp. 1567 (S.D. Ga. 1990).

321. *Id.* at 1572; *see also* TILA § 106(d), 15 U.S.C. § 1605(d).

322. TILA § 106(d), 15 U.S.C. § 1605(d).

323. The creditor does not have to include "[f]ees and charges . . . which actually are or will be paid to public officials." *Id.* § 106(d)(1), 15 U.S.C. § 1605(d)(1).

option of itemizing the premium payable for insurance.[324] Nevertheless, the Official Commentary makes the point that if the lender keeps the premium as a kind of "self-insurance against non-filing," then it must include the premium in the finance charge.[325] The premium cannot be excluded if the lender does not actually purchase the non-filing insurance. The Commentary's explanation would not have been necessary if sub-section (2), like sub-section (1), required the charge to be "actually" paid. Instead, the sub-section only requires that the premium be "payable for . . . insurance in lieu of perfecting any security interest." This phrase required the Commentary to confirm that the lender must actually purchase the insurance. It would have been much better if the actual payment requirement had been specifically included.

Some of the problems which have arisen in connection with these insurance provisions raise questions about the underlying purpose of the Act. Strictly speaking, the ultimate objective is "to assure a meaningful disclosure of credit terms."[326] One wonders whether the disclosure of this information contributes to this objective. The ultimate solution is to allow borrowers to make their own insurance arrangements. Arguably, however, lenders would want every opportunity to provide such service.

In *Sutton v. First National Bank*[327] the lender knew why it wanted to arrange the borrowers' credit insurance; it received forty percent of the premiums.[328] The only difficulty was that the bank had apparently forgotten to apply for the insurance coverage. The lender later tried to take advantage of the ambiguous form, for the borrower had signed in a place indicating that he wanted insurance while the date appeared in a place designated for those who did not want insurance.[329] The court viewed the section on credit insurance as "totally irrelevant to [the] loan unless it was intended . . . as an offer to procure credit insurance."[330] It was, therefore,

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324. Sub-section (2) refers to "[t]he premium payable for any insurance." *Id.* § 106(d)(2), 15 U.S.C. § 1605(d)(2).

325. Commentary § 226.4(e)-4.

326. TILA § 102(a), 15 U.S.C. § 1601(a).

327. 620 S.W.2d 526 (Tenn. Ct. App. 1981).

328. *Id.* at 530.

329. *Id.* at 527.

330. *Id.* at 530; *see also* Stone v. Davis, 419 N.E.2d 1094 (Ohio), *cert. denied*, 454 U.S. 1081 (1981) (banks using Regulation Z disclosure forms to ascertain a borrower's desire for insurance and negligently failing to tell the borrower to get the disclosure form himself, breaches its duty of disclosure); Hancock Bank v. Travis, 580 So. 2d 727 (Miss. 1991) (bank liable for failure to procure credit and liability insurance).

the bank's contractual duty to obtain the insurance for the borrower.

Similarly, in *Heinert v. Home Federal Savings & Loan Ass'n*,[331] the lender tried to make an issue of the ambiguity in the disclosure statement hoping to show that it was merely complying with the Act. The ambiguity concerned a peculiar sentence on the insurance coverage line: "I desire *assume other for now* insurance coverage."[332] One meaning of the phrase "assume other for now" could be that the borrower was willing to take over someone's insurance policy rather than taking any of the insurance listed in the disclosure statement. However, the statement indicated that no insurance would be provided unless the borrower signed in the appropriate place.[333] The borrower did sign, thus providing some conflict between the borrower's signature and the "assume other for now" clause.

It was not unreasonable for the court to construe this ambiguity against the bank. Since the bank had drafted the form, it was understandable that the court would accept it as the bank's offer to procure insurance. The bank fell into its predicament only because the Act allows a disclosure statement to include not only true credit terms, but also language about the availability of insurance through the lender. It is not surprising, therefore, that lenders grasp the opportunity to advertise this feature. Nevertheless, it is just one more reason for examining the real functions of the insurance provisions within the disclosure framework.

V. Consumer Options

A. *Damages*

In an appropriate case, a consumer may recover both actual damages and statutory damages for a Truth in Lending violation. The consumer may recover actual damages for a creditor's breach of any disclosure requirements but only statutory damages for failing to provide certain material disclosures.[334]

In closed-end transactions, a creditor who "fails to comply with any requirement . . . with respect to any person is liable to such person."[335]

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331. 444 N.W.2d 718 (S.D. 1989).
332. *Id.* at 719.
333. *Id.*
334. TILA § 130, 15 U.S.C. § 1640.
335. *Id.*

In closed-end transactions, a creditor who "fails to comply with any requirement . . . with respect to any person is liable to such person."[335] Therefore, the person to whom the duty is owed is the one who has the cause of action. For example, in a non-rescindable transaction, a surety has no claim for damages if the creditor provides the principal with inaccurate disclosures, although it is possible that a surety will rely on disclosures given to the primary obligor in determining whether he should undertake his obligation.[336]

In this respect, the surety is very much like a joint obligor in a transaction who may not receive any disclosures because Regulation Z does not require the creditor to give disclosures to more than one consumer.[337] Nevertheless, if the creditor gives erroneous disclosures to one obligor, the joint obligor who did not receive any disclosures still has a remedy.[338] In essence his complaint would be based on the creditor's failure to perform a clear, statutory obligation. Likewise, a surety does not have the right to demand disclosures from the creditor, but in good conscience may expect his principal to have access to proper and true information.[339]

A surety may have such expectations because of the statutory language that a creditor may have liability to "any person."[340] It is a curious deviation from the term "consumer" because it suggests that a broader group of beneficiaries was intended.[341] Had the statute mentioned only "consum-

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335. *Id.*

336. Commentary § 226.2(a)(11)-1; Aurora Firefighter's Credit Union v. Harvey, 516 N.E.2d 1028 (Ill. App. Ct. 1987).

337. If there is more than one consumer, the creditor may make disclosures to any consumer who is primarily liable. However, in a rescindable transaction, the creditor must make disclosures to each consumer who has a right to rescind. Regulation Z, 12 C.F.R. § 226.5(d).

338. Creditors are responsible for only one recovery of statutory damages but actual damages can be recovered by "any person" who suffers them. TILA § 130(d), 15 U.S.C. § 1640(d).

339. In the same way that the creditor expects the co-obligor to see a copy of the disclosures which he has given to the primary obligor, so too the creditor should not be surprised if the co-obligor obtains a copy of the disclosure statement. To that extent the co-obligor is a "person" for whom the creditor's attempt at compliance has failed. *See* TILA § 130(a), 15 U.S.C. § 1640(a); Barash v. Gale Employees Credit Union, 659 F.2d 765, 767 (7th Cir. 1981). The creditor has a duty not to provide faulty disclosures to multiple borrowers even though only one of them is actually entitled to the statement. *See also* NATIONAL CONSUMER LAW CENTER, *supra* note 129, § 2.2.1.2.

340. *See* TILA § 130(a), 15 U.S.C. § 1640(a).

341. *See* NATIONAL CONSUMER LAW CENTER, *supra* note 129, § 2.2.1.2. Prior to an amendment in 1985 an action under the Equal Credit Opportunity Act seemed to be restricted

ers," the problem of identifying possible plaintiffs would not arise. However, by using different language, the draftsmen may have been sending a message that consumers were not the only proper complainants. It is reasonably clear that a secondary party does not have any right to disclosures. Nevertheless, it may be logical to expect that such a person may rely on the disclosures which the primary obligor obtains from the creditor. If that reliance is sufficient to place an obligation on the creditor towards a secondary party, then that party has a right to complain if the creditor does not comply with the requirements. It is simply a question of determining whether a creditor's liability must be limited to the person to whom disclosures are made. In the case of joint obligors, the liability is not so limited because either obligor has a claim to disclosures, and the disclosure to one satisfies the disclosure obligation with respect to the other. In the case of a secondary party, there is no right to disclosures and even if the creditor gratuitously provides them, he is still not relieved of the obligation to take care of the primary obligor.[342] Therefore, any claim the surety has must be based not on his own statutory right to disclosures, but rather on his expectation that the creditor will make proper disclosures to the primary party. That would account for the use in the liability section of the term "any person" rather than "consumer."

Sometimes the question of damages arises from an unusual transaction. In *Hemauer v. ITT Financial Services*,[343] the consumers were interested in a loan for $10,000. Surprisingly, the creditor did not structure the transaction as a single loan but rather as two loans dated on successive days. The first loan was an unsecured loan at an annual percentage rate of 34.6% and the second loan was secured by the consumers' home at an annual percentage rate of eighteen percent. The creditor gave the consumers a disclosure statement for each loan and satisfied the first loan with the proceeds of the second.[344]

The structure of the transaction was deficient in many respects. The

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202.2(e) (1992). Under Regulation Z, disclosures must be made to "consumers." Regulation Z, 12 C.F.R. §§ 226.5(a), 226.17(a). However, a creditor who fails to comply with its obligation to any "person" is liable to such "person." TILA 130(d), 15 U.S.C. § 1640(d).

342. The underlying theory of this obligation is to ensure that the creditor does not bypass the primary party in making the disclosures. *See* NATIONAL CONSUMER LAW CENTER, *supra* note 129, § 2.2.1.2 n.12. The Commentary also confirms that a creditor's disclosure obligations are not met by making disclosures to a surety only. Commentary § 226.5(d)-2.

343. 751 F. Supp. 1241 (W.D. Ky. 1990).

344. *Id.* at 1242-43.

consumers had expressed an interest in a loan for $10,000 and ended up signing papers on December 10th for two loans, one of which had documents dated December 10th and the other December 11th. The court held that the creditor had not made clear disclosures as required.[345] This was hardly surprising because this was really one loan and the creditor obviously had some reason for transforming this single loan into two loans. The consumers had an idea that the creditor structured the transaction in such a way as to discourage the consumers from rescinding.[346] If the creditor had given only one secured loan, the consumers would have had the right to rescind and that would have been the end of the arrangement. However, as there were separate disbursements, the consumers' rescission of the second loan would have reinstated the prior unsecured loan. It was a theory worthy of support; at least it was a plausible explanation of the creditor's strategy.

Having recognized the problem, the court had to respond to the consumers' claim for damages. It was a dilemma that was quite unanticipated. Arguably, if the creditor should have treated the transaction as one loan, the consumers would be entitled to damages for one violation only. That was not to be the case. The court felt comfortable in awarding damages for each loan because the creditor itself had recognized two transactions.[347]

Apparently the creditor had not faltered in making the disclosures for each loan and the only basis for its liability was in treating the transaction as one loan. But the court wanted it both ways and so decided on damages for each loan, in effect, inflicting double liability for a single transaction. It was a fiction that went too far, for the arrangement could hardly be categorized as one loan for one purpose and two loans for another purpose.[348]

But the court's generosity did not end there. The court awarded damages to each consumer involved in the transaction.[349] This award must have surprised even the consumers, for as multiple obligors they were

345. *Id.* at 1244.

346. *Id.* Only the December 11th loan was rescindable because it was secured by the consumers' principal dwelling. Therefore, even if the consumers had rescinded, they would still have had to face the December 10th loan.

347. *Id.* at 1245.

348. *See Lender That Split One Loan into Two Gets Some Grief, but More Than It Should*, CONSUMER CREDIT & TRUTH-IN-LENDING COMPLIANCE REP., Apr. 1991, at 3.

349. *Hemauer*, 751 F. Supp. at 1245.

surely not entitled to more than one recovery.[350] This double recovery problem was solved when Congress simplified the Truth in Lending Act in 1980.[351] It was a step in the right direction for many a violator found himself in a difficult position, depending on the number of consumers in a particular transaction.[352] When the Act was eventually amended, it provided welcome relief for creditors, who then had a better idea of their exposure to liability.

Nevertheless, creditors may still be subject to double exposure in a sense because some states allow consumers to recover under state law for a breach of their Truth in Lending laws.[353] The federal Act does not prohibit recovery under state laws and the court in *Hemauer* was on sound ground in allowing additional recovery under state law, although the recovery should have been limited to one consumer.

The creditor exhibited a peculiar strategy in *Hemauer*. The consumers recovered for the creditor's deficiency, albeit too generously according to the statutory scheme. There are some occasions when the consumer may get nothing despite the irregularity of the creditor's conduct. It is a reminder that Truth in Lending was not designed to take care of all ills in consumer transactions.

The latest example came in *Jensen v. Ray Kim Ford, Inc.*[354] The parties settled on an installment contract that estimated the value of a trade-in automobile as $800. They agreed that they would make any necessary adjustments later if the estimate was inaccurate.[355] As it turned out, the

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350. TILA § 130(d), 15 U.S.C. § 1640(d). The court relied on Berryhill v. Rich Plan, 578 F.2d 1092 (5th Cir. 1978), which was decided before the Truth in Lending Simplification and Reform Act was passed. *See Hemauer*, 751 F. Supp. at 1244-45.

351. Truth in Lending Simplification and Reform Act, Pub. L. No. 96-221, § 615(d), 94 Stat. 168, 181 (1980). The new version emphasized the violation aspect rather than the ability of each and every obligor to recover. *See* Brown v. Marquette Sav. & Loan Ass'n, 686 F.2d 608, 615 (7th Cir. 1982).

352. *See* Barash v. Gale Employees Credit Union, 659 F.2d 765 (7th Cir. 1981); Anderson v. Farmers Bank, 640 F.2d 1347 (8th Cir. 1981); Berryhill v. Rich Plan, 578 F.2d 1092 (5th Cir. 1978); ROHNER, *supra* note 251, ¶ 12.04[2][b].

353. Some state statutes require a consumer to make an election of remedies. *See, e.g.*, S.C. CODE ANN. § 37-5-203(7) (Law. Co-op. 1976); TEX. REV. CIV. STAT. ANN. art. 5069-8.01(h) (West 1987). If state law is silent on this issue, the consumer can usually recover under both Truth in Lending and the state statute. *See* Cantrell v. First Nat'l Bank, 560 S.W.2d 721, 730 (Tex. Civ. App. 1977); Public Fin. Corp. v. Riddle, 403 N.E.2d 1316, 1320 (Ill. App. Ct. 1980); NATIONAL CONSUMER LAW CENTER, *supra* note 129, § 8.4.4.

354. 920 F.2d 3 (7th Cir. 1990).

355. *Id.*

trade-in was worth more and the creditor knew that it had to refund some money to the consumers.[356] Instead of doing so, the creditor allegedly forged the consumers' signatures to a second installment contract which took account of the full value of the trade-in but made other changes that reflected an increase in other charges.[357] When the consumers found out about this second contract, they sought Truth in Lending damages for the creditor's failure to give them disclosures covering that contract.

The creditor's conduct was inappropriate and resulted in a forged contract that did not bind the consumers. A creditor must provide disclosures to anyone who is *obligated* on a consumer credit transaction[358] Here, the consummation had already taken place when the creditor decided on its own to substitute new documents for the old, without the consumers' consent.[359] The substitution of the forged document was simply a device to mask the new figures so that the trade-in figure could properly be absorbed in the disclosure statement without drawing the consumers' attention to the event. The creditor did not intend to share its strategy with the consumers and so there was no plan in sight for the new transaction to be consummated. The *Jensen* court took the view that there was no consummation of the second installment contract, and therefore, no obligation of discharge.[360] The second installment contract was void and the consumers could do nothing to rescue it, even for the purpose of imposing Truth in Lending liability on the creditor.[361]

Nevertheless, the consumers tried to justify their claim for damages. They thought it best to do so by ratifying the forged document in order to impose a disclosure obligation on the creditor. However, disclosure was required before consummation of the transaction and that occurred when the parties signed the original documents. The creditor could not have expected a forged document to bind the consumers and therefore it really did not expect any obligation to ensue from the subsequent documentation. After all, the purpose for a disclosure statement is to allow consumers to compare the available financing options and there would be no point in allowing

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356. *Id.*

357. *Id.* at 4.

358. TILA § 121(a), 15 U.S.C. § 1631(a). Generally, that obligation arises only when the transaction is consummated and the creditor has a duty to disclose before consummation of the transaction. Regulation Z, 12 C.F.R. § 226.17(b).

359. Consummation "means the time that a consumer becomes contractually obligated on a credit transaction." Regulation Z, 12 C.F.R. § 226.2(a)(13).

360. 920 F.2d at 4.

361. *Id.*

damages in a *Jensen*-type case, just because a consumer might wish to avenge a creditor's forgery.[362] If the creditor never intended the consumers to be bound, there was no chance of the transaction being consummated. There was no need for the consumers to review the second option because there was no intention for them to be obligated on the forged documents. The creditor was not interested in bringing the documents to the consumers' attention and the consumers did not know about them. It was not possible, therefore, for the creditor to make its disclosures before consummation because the creditor was not negotiating with the consumers about a new transaction and did not expect any agreement to materialize.

If the rationale for a disclosure statement is to be maintained, then disclosure should precede consummation of the arrangement between the parties. A subsequent void event should not be allowed to upset the original contract between them solely to chastise the creditor. The remedy for such conduct lies elsewhere and not in Truth in Lending.[363]

If a creditor does not take the necessary action to implement a consumer's rescission, it will be liable for damages.[364] A creditor's inaction may be evidenced by the creditor's failure to return a consumer's commitment fee or to terminate the security interest on the consumer's property.[365] However, in *Manor Mortgage Corp. v. Giuliano*,[366] the consumer rescinded the transaction and the lender nevertheless sued for the commitment fee. The lender did not question the consumer's right to rescind but believed itself entitled to the commitment fee, perhaps on the

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362. *See id.*; *see also Consumers May Not Ratify Forged Documents to Obtain Truth-in-Lending Damages*, CONSUMER CREDIT & TRUTH-IN-LENDING COMPLIANCE REP., Apr. 1991, at 5 [hereinafter *Truth-in-Lending Damages*].

363. The court said, "[r]eprehensible as it would be for a lender to concoct and forge a more onerous substitute and sell it to a credit company in the hope that the consumer would fail to notice the difference, we do not find that the Act prohibits or provides a civil remedy for such conduct." *Jensen*, 920 F.2d at 4. The consumers favored an interpretation of the Truth in Lending statute that would have required the creditor to make disclosures obligated by either the original contract or a later forged contract that was ratified by them. *See Truth-in-Lending Damages*, *supra* note 362, at 5.

364. In an individual action a creditor will be liable for any actual damage and twice the amount of any finance charge. However, the liability cannot be less than $100 nor greater than $1,000. A consumer can also recover a reasonable attorney's fee and costs in any successful action to enforce a lender's liability or in any action in which a court determines that the consumer has a right of rescission. TILA § 130(a), 15 U.S.C. § 1640(a).

365. A creditor must take the necessary action within twenty days to return the obligor's property and to terminate the security interest. TILA § 125(b), 15 U.S.C. § 1635(b); Regulation Z, 12 C.F.R. § 226.23(d)(2).

366. 596 A.2d 763 (N.J. Super. Ct. App. Div. 1991).

theory that rescission of the transaction did not affect the consumer's obligation to pay for the lender's commitment.

It is noteworthy that the creditor had not failed to return the consumer's property, for the consumer had paid the lender nothing. Nevertheless, the court saw no distinction between a lender's wrongful retention of a consumer's money and a lender's wrongful attempt to collect a commitment fee, which the lender would have had to return in any event if the consumer had paid it.[367] Both acts violated the rescission provision and the court allowed $1,000 damages plus costs and attorney's fees.[368]

This view leads to another query about how the lender committed the violation. The statute does not literally demand the creditor to refrain from suing the consumer for a fee or other charge which is not due; however, it does provide that a consumer is not liable for any "finance or other charge" when he rescinds a transaction.[369] Therefore, a consumer's rescission should also discharge the consumer from any promise to pay any such charge and the lender's attempt to recover it puts the lender in violation because of the failure to recognize the termination of the consumer's liability.[370] The New Jersey Superior Court put it best when it said that "[t]o distinguish a wrongful withholding of improperly retained charges from a wrongful attempt to collect such barred charges would be to elevate form over substance."[371] The lender cannot acknowledge the consumer's right to rescind on the one hand and then seek to ignore it on the other by asserting an unfounded claim for a charge not due. The substance of the matter is that the consumer owes nothing and the creditor should not be able to frustrate the rescission procedure by putting the consumer in this bind.

B. *Recoupment*

Truth in Lending requires a consumer to bring an action for damages within one year after a breach.[372] Nevertheless, if a lender brings an action against the consumer, the consumer may recoup his Truth in Lending

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367. *Id.* at 766.

368. *Id.* The court levied the maximum penalty of $1,000 and took the view that such a penalty was intended to deter not only "egregious conduct" but "all violations of the Act." *Id.*

369. TILA § 125(b), 15 U.S.C. § 1635(b).

370. *See Don't Sue for Commitment Fee After Rescission*, CONSUMER CREDIT & TRUTH-IN-LENDING COMPLIANCE REP., Feb. 1992, at 3.

371. *Manor Mortgage Corp.*, 596 A.2d at 766.

372. TILA § 130(e), 15 U.S.C. § 1640(e).

damages as long as state law does not prevent recoupment of stale claims.[373] Some recent decisions which have dealt with this recoupment remedy have reached different conclusions on its availability, perhaps based in part on a misunderstanding of applicable state law.

The difficulty was accentuated in *New York Guardian Mortgage Corp. v. Dietzel*,[374] when the court would not allow a consumer to assert a Truth in Lending counterclaim in a mortgage foreclosure action. The *Dietzel* court took the view that a consumer's recoupment was available only in a lender's action for money damages against the consumer rather than in a foreclosure action where the primary mission was to sell the collateral and satisfy the debt.[375] Although section 130(e) allows recoupment in "an action . . . to collect the debt,"[376] the *Dietzel* court would not characterize a foreclosure action as an action to collect a debt because it was an *in rem* proceeding.[377] Its failure to do so ignored the real purpose of the statute. After all, the purpose of a foreclosure action is to allow the lender to realize on its security and it should not matter whether the lender does so through a personal judgment against the consumer or through a sale of the collateral.

It took a case like *Dangler v. Central Mortgage Co.*[378] to point out the error of the *Dietzel* court. The *Dangler* court recalled that *Dietzel* had classified a foreclosure as an *in rem* proceeding, the purpose of which was only to sell the mortgaged property. The *Dangler* court saw this as "a brief lapse in reasoning"[379] and could not be persuaded to follow *Dietzel*. In any event, the *Dangler* situation was a little different. It was not recoupment in a foreclosure action but rather in a proof of claim filed by the mortgagor in the mortgagor's bankruptcy proceeding. Therefore, even if the *Dangler* court had any doubts about the *Dietzel* categorization of a foreclosure action, it had no difficulty in identifying the proof of claim transaction as an attempt to collect a debt.[380] Thus, recoupment was

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373. *Id.*

374. 524 A.2d 951 (Pa. Super. Ct. 1987).

375. The court explained that "[a] judgment in a mortgage foreclosure action is not a judgment for money damages and therefore cannot be 'an action to collect amounts owed' or 'an action to collect the debt' as required under § 1640(h) and (e) of the Truth in Lending Act." *Id.* at 953.

376. TILA § 130(e), 15 U.S.C. § 1640(e).

377. 524 A.2d at 952.

378. 75 B.R. 931 (Bankr. E.D. Pa. 1987).

379. *Id.* at 936.

380. The *Dangler* court stated that "irrespective of what might be true as a mortgage foreclosure action, the filing of a Proof of Claim clearly *is* an attempt 'to collect amounts owed' . . . ." *Id.* at 937 (emphasis added); *see* Werts v. Federal Nat'l

clearly in order.

The debtor in *Dangler* pressed his recoupment claim by initiating an adversary proceeding in bankruptcy, thus reducing the lender's claim by the Truth in Lending damages. If it seemed that the debtor was asserting an affirmative claim here, that would be no surprise. This was the way that the debtor could resist the lender's proof of claim in bankruptcy. In this way the debtor hoped to reduce the lender's recovery.

A debtor should not necessarily be successful simply by initiating an adversary proceeding. Unless there is a proof of claim in the bankruptcy proceeding, the debtor does not really have a basis for recoupment. Therefore, if the lender does not file a proof of claim, the debtor may have to do so in order to treat his Truth in Lending claim as recoupment. In *Jones v. Progressive-Home Federal Savings & Loan Ass'n (In re Jones)*,[381] the debtor really wanted a judgment for Truth in Lending damages from the bankruptcy court although the lender had not filed a proof of claim. Having already secured a judgment of foreclosure in state court, the lender made a motion in the bankruptcy proceeding to remove the automatic stay which had affected its foreclosure proceeding as a result of the bankruptcy filing.[382] It was obviously content to rely on the foreclosure proceeding in the state court and wanted it to proceed. Therefore, it had no interest in filing a proof of claim in bankruptcy. However, the debtor would not be outdone. He not only filed a proof of claim for the lender, but he also brought an adversary proceeding against the lender in opposition to the lender's claim and later included a claim for a Truth in Lending violation.[383] It was the consumer's way of making his case for Truth-in-Lending damages. The only problem was that the one-year statute of limitations had long passed and the consumer could succeed only if he made his Truth in Lending claim through recoupment and thus was in a defensive posture.

The court in *Jones* made the point that filing a proof of claim was very much like bringing a collection action and that similarity did not disappear simply because the consumer was the one who had filed the proof of claim for the lender.[384] The basis of the consumer's objection to the lender's

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Mortgage Ass'n, 48 B.R. 980 (Bankr. E.D. Pa. 1985).

381. 122 B.R. 246 (Bankr. W.D. Pa. 1990).

382. *Id.* at 248.

383. *Id.*

384. *Id.* at 250. The Bankruptcy Code allows a debtor to file a proof of claim on the creditor's behalf if the creditor does not file. 11 U.S.C. § 501(c) (1988).

claim was the Truth in Lending violation and the consumer had hoped to reduce that claim by the damages to which he was entitled. This was recoupment rather than set-off because both the consumer's claim and the lender's claim were grounded in the same transaction. However, section 130(e) of the Truth in Lending Act allows a consumer to assert a Truth in Lending claim beyond the one-year limitation through recoupment or set-off, unless state law provides otherwise.

In the ordinary collection action, one should look to state law to ascertain whether a Truth in Lending defensive claim is regarded as one based on recoupment or set-off.[385] Section 130(e) suggests the same approach for a Truth in Lending claim asserted defensively in bankruptcy proceedings. If a consumer's claim is made in response to a creditor's proof of claim, then it is protected by the statute and can only be countered by state law. Curiously enough, the court in *Jones* did not seem too bothered by the language "except as otherwise provided by state law." It seemed to be satisfied with a resolution based on federal law and treated the old Truth in Lending claim as one involving recoupment without any consideration of the state law implications of section 130(e). The exclusion of the state law aspects left some questions unanswered about the role of that statutory exception.

C. *Attorney's Fees*

The Truth in Lending Act requires a creditor to pay costs and attorney's fees for the consumer in any successful action brought by the consumer to recover damages or to enforce the right of rescission.[386] This provision is helpful in encouraging a consumer to seek his statutory remedy. On the other hand, it is arguable that some consumers take advantage of this mechanism to lodge questionable claims. That is the obvious sacrifice produced by a provision of this sort. It is understandable that Congress wanted to facilitate the enforcement of the Act by allowing a consumer to recover attorney's fees in a successful action. Many consumers are unable to afford the cost of a lawsuit and it was the congressional will to create

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385. *See* ROHNER, *supra* note 251, § 12.05[4][6], at 12-58. In Vikowsky v. Savannah Appliance Serv. Corp., 345 S.E.2d 621 (Ga. Ct. App. 1986), the court accepted the state law characterization of a Truth in Lending claim as a setoff and held it to be time barred under state law. On the other hand, in First State Bank v. Phillips, 681 S.W.2d 408 (Ark. Ct. App. 1984), the court viewed the Truth in Lending claim as one in recoupment without reference to state law.

386. TILA § 130(a)(3), 15 U.S.C. § 1640(a)(3).

rights in consumers as private attorneys-general. It would be pointless for consumers to have these statutory rights if they were nevertheless unable to enforce them because of a lack of resources.

Nevertheless, it is difficult sometimes for a court to decide when a consumer's action has been successful. For example, in *Jones v. Mid-Penn Consumer Discount Co.*[387] a consumer obtained a loan and then refinanced it with another loan. The consumer brought an action in the bankruptcy court to enforce rescission of the two loans. The court took the view that the consumer could rescind the second loan but not the first. However, the court did not award any attorney's fees for the time that the attorney spent on rescission of the first loan. The court took a rather strict view of the statutory language in restricting recovery to the second loan but one that might be defended on the ground that the first loan was no longer in existence when the consumer sought rescission. The consumer had already refinanced it with the second loan.[388]

When the consumer offers two bases for the rescission of a loan and only one is sustained, the consumer should still be able to get attorney's fees for the work done to justify both grounds.[389] If courts did not allow such a recovery, it would have a chilling effect on an attorney's bona fide efforts to present alternative arguments in support of his client's position. The situation should be different if the attorney submits a whole list of unreasonable arguments in the hope that one will succeed. Even if one ground prevails under this scenario, the consumer would have a weaker argument in trying to recover for work done on the unsuccessful claims.[390] A consumer should act in good faith in asserting alternative grounds for rescission. This is but a small price to pay for the right to recover attorney's fees.

Sometimes there is no trial because the parties agree on a settlement. Bearing in mind that a reasonable attorney's fee can be awarded only in a successful action, one might ask whether a court can nevertheless make an award even if there is no trial. If the court enters judgment based on a

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387. 93 B.R. 66 (Bankr. E.D. Pa. 1988).
388. *Id.* at 67.
389. *Id.*
390. *See* Kramer v. Marine Midland Bank, 577 F. Supp. 999, 1000 (S.D.N.Y. 1984) (attorney's fee denied for unrelated, unsuccessful claims (citing Hensley v. Eckerhart, 461 U.S. 424, 434 (1983))). If a consumer's action is frivolous, the defendant may recover double costs and reasonable attorney's fees. Rush v. Macy's N.Y., Inc., 775 F.2d 1554 (11th Cir. 1985).

stipulation of settlement, the consumer should be entitled to attorney's fees.[391] This recovery would be based on the agreement for damages in the stipulation of settlement, for there would be no doubt that the consumer's action was successful in statutory terms. The consumer is not required to carry his claim through to trial if the creditor is willing to admit his liability and avoid a trial. This would be advantageous to both parties; the consumer prevails on his right to rescind and the creditor avoids large attorney's fees.

Difficulties arise, however, when the parties agree on a settlement but fail to make provision for attorney's fees. The failure to deal with this issue can be interpreted as a waiver.[392] It is preferable, therefore, for the parties to provide explicitly for attorney's fees, either by settlement in the agreement itself or by leaving it for further negotiation. If an attorney waives his fees, it must be a true waiver.[393] Therefore, an attorney cannot waive his fees in a settlement agreement, and then try to recover them later on the ground that the waiver bound the client and not the attorney.[394] Since the right to attorney's fees resides in the consumer, the consumer is the only one who can bring an action for them. Therefore, it is left to the consumer to invalidate the entire settlement if he wants to reverse himself and obtain attorney's fees.

The consumer's action should also be regarded as successful if the consumer obtains a default judgment.[395] Although there may be some

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391. Gram v. Bank of La., 691 F.2d 728 (5th Cir. 1982); *see also* Freeman v. B & B Assoc., 595 F. Supp. 1338 (D.D.C. 1984), *rev'd on other grounds*, 790 F.2d 145 (D.C. Cir. 1986); *In re* Szostek, 93 B.R. 399, 407 (Bankr. E.D. Pa. 1988) (stating that even if the creditor does not admit a Truth in Lending violation and agrees to settle because of other claims of the consumer, an attorney's fee should still be awarded); Poussard v. Commercial Credit Plan, Inc., 479 A.2d 881 (Me. 1984); NATIONAL CONSUMER LAW CENTER, *supra* note 129, § 8.6.2.4.1, at 317.

392. Young v. Powell, 729 F.2d 563 (8th Cir. 1984); Jennings v. Metropolitan Gov't, 715 F.2d 1111 (6th Cir. 1983). *Contra* Muckleshoot Tribe v. Puget Sound Power & Light Co., 875 F.2d 695 (9th Cir. 1989).

393. In Evans v. Jeff D., 475 U.S. 717 (1986), the Supreme Court looked with disfavor upon an attorney's waiver of fees subject to a court's approval of the settlement. The attorney had hoped that the court would approve the settlement but then also make provision for an attorney's fee. The Supreme Court held that the trial court would have to accept or reject the settlement in toto. *Id.*

394. Freeman v. B & B Assoc., 790 F.2d 145 (D.C. Cir. 1986) (attorney unsuccessful in bringing an independent action for his fee which claimed that the settlement waiver bound the client only).

395. *See* NATIONAL CONSUMER LAW CENTER, *supra* note 129, § 8.6.2.1, at 316 (citing City Finance Co. v. Boykin, 358 S.E.2d 83 (N.C. Ct. App. 1987)); Rodriguez v. Holmstrom,

et al.: Nova Law Review Full Issue

question about the reason for the default judgment, the consumer should not be prejudiced by the creditor's failure to respond. One might characterize this as success by default, but the rationale for an attorney's fee is consistent with an award in the face of the creditor's silence. Otherwise, the creditor could undermine the scheme by ignoring the consumer's claim, even if the consumer is on solid ground.

Although a creditor will usually pay attorney's fees to the consumer and not to the attorney directly, it is proper for a court to acknowledge an attorney's independent right to fees if the creditor is trying to offset his counterclaim against the attorney's fees. In that case, a court would find it consistent with the objectives of Truth in Lending to pay the fees directly to the attorney.[396] The same approach is justified if a bankrupt consumer recovers on a Truth in Lending claim. The fees would properly be paid to the attorney. If not, the consumer's creditors would lay claim to them as part of the bankruptcy estate and the attorney would find himself deprived of his fees.

An attorney should also not lose his fees simply because his consumer-client has obtained a generous award for damages. In *De Jesus v. Banco Popular de Puerto Rico*,[397] the creditor must have thought that the consumer was amply rewarded with a recovery of $30,000 and that the consumer's recovery for attorney's fees would be taking things too far. It was an argument destined to failure, for the court ruled that the consumer was statutorily entitled to attorney's fees once he had succeeded with his lawsuit.[398] There was no basis on which the court could deny recovery for such fees simply because the jury had given the consumer a handsome sum for the creditor's violation. Otherwise, the attorney's fees would depend upon the size of the award of damages to the consumer.

Leaving nothing to chance, the creditor tried to persuade the court that the consumer was not really successful in his lawsuit because the jury had awarded him less than he had sought at settlement.[399] This was a new criterion for success that the court would not accept. In any event, the argument highlighted the inconsistency of the creditor's position, because it alleged on one hand that the consumer had received more damages than he

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627 S.W.2d 198 (Tex. Ct. App. 1981).

396. *See* Plant v. Blazer Fin. Servs. Inc., 598 F.2d 1357, 1365-66 (5th Cir. 1979); *In re* DiCianno, 58 B.R. 810, 814 (Bankr. E.D. Pa. 1986).

397. 918 F.2d 232 (1st Cir. 1990).

398. *Id.* at 235.

399. *Id.* at 234.

was entitled to, while on the other hand it trumpeted the consumer's recovery as a lack of success. The creditor's argument did not succeed in light of the statutory entitlement to attorney's fees.[400]

If a consumer asserts a Truth in Lending claim as a defense to a creditor's suit, a successful consumer can recover attorney's fees. Moreover, such fees are allowable even if they turn out to be more than the consumer's recovery.[401] The courts attempt to ensure that the attorney is not deprived of his fees by a technical application of the statute. Therefore, although the statute of limitations can prevent an action to enforce a Truth in Lending action, it cannot prevent a consumer's recoupment defense. An attorney would be entitled to reasonable fees in that event, for otherwise the consumer would be denied a real opportunity to present his defense.

VI. CONCLUSION

The Truth in Lending Act has proven to be successful in clarifying the terms of consumer credit. Consumers have profited from the informed use of credit. The consumer's ability to compare the cost of credit has led to a healthy competition in the marketplace. Nevertheless, there is always room for improvement in the scheme of things and even more success is possible if Truth in Lending disclosures can be tailored to provide just enough information without overkill.

While it may be helpful to inform a consumer about every conceivable charge involved in a transaction, there is a point of diminishing returns. It is, therefore, a challenge for the regulators to keep the disclosure requirements within reasonable bounds so that consumers will be able to make effective use of the information provided. In this respect, it is confusing for the Regulation to exclude an item from the finance charge simply because the lender chooses to itemize it. The lender's failure to itemize should not

400. The court referred to the language of a civil rights statute, 42 U.S.C. § 1988 (1988), which expressly allows a court to award a prevailing party a reasonable attorney's fee "in its discretion." *De Jesus*, 918 F.2d at 233-34. Even with that discretionary language, a court cannot deny a reasonable attorney's fee in the absence of special circumstances. *Id.* (citing Hensley v. Eckerhart, 461 U.S. 424, 429 (1983)).

401. Carr v. Blazer Fin. Servs. Inc., 598 F.2d 1368 (5th Cir. 1979); *In re* DiCianno, 58 Bankr. 810 (Bankr. E.D. Pa. 1986). In Manor Mortgage Corp. v. Giuliano, 596 A.2d. 763 (N.J. Super. Ct. App. Div. 1991), the defendant-consumer recovered legal fees and costs when the lender lost its bid to obtain a commitment fee from the consumer after the latter had rescinded the transaction.

magically convert the item into a part of the finance charge. The availability of this choice destroys the uniformity envisioned by Truth in Lending and puts the consumer in a quandary that prevents an effective comparison of terms. If an item is not actually part of the finance charge, the lender should disclose it in its proper category. The Lender's failure to do so should not result in another designation of the item, but rather in an appropriate sanction for his failure to comply with the Regulation.

Furthermore, between a lender and consumer, any insurance transaction should be separated from the financing transaction. If the consumer has to provide insurance to secure the lender's investment, he should be able to do so without having this separate requirement affect the finance charge in the credit transaction if the premium is not really part of that charge. It is questionable whether the inclusion of the insurance information on the disclosure form serves the purpose of giving the consumer an opportunity to evaluate the insurance offer. Many consumers are lulled into signing up through the lender for the required insurance coverage because they think that it is too late to make another choice or that they are simply getting a good deal through the lender. The insurance problems can be avoided by the adequate disclosure of price information and by treating the insurance transaction separately. It has been suggested that the information about price can be provided through an insurance cost index that could be applied to the kind of coverage.[402] That index and a review period for the consumer might be an effective combination to solve the insurance concerns.

Some improvement can also be made in the rescission process. The rationale given for making the right of rescission a part of Truth in Lending is as good today as it was when the statute was enacted. The consumer needs some time to think about subjecting his home to a lien. If a creditor abridges the consumer's right to reflect about the transaction by taking the consumer's signed form indicating no rescission prior to the expiration of the period, then the creditor has not met the regulatory requirement of giving proper notice. As a matter of clarification, an amendment is in order to make the point that any notice of non-rescission that the consumer signs in advance of the expiration of the three-day period will make ineffective the notice of the right to rescind that the creditor gives to the consumer. There is really no need for the creditor to insist on the consumer's signing such a form in advance. If the creditor wishes to have the consumer's assurance of no rescission, he should wait until the three-day period has expired. If the consumer needs his money immediately, he may waive the

402. *See* Golann, *supra* note 306, at 1321.

right of rescission in a genuine emergency. However, even then, the consumer must describe the emergency in a statement that cannot be in printed form.[403] This waiver procedure is available, therefore, in exceptional circumstances and the pre-signed form of non-rescission was not intended as a substitute merely to hasten the disbursement of the funds.

403. Regulation Z, 12 C.F.R. § 226.23(e) (1992). The objective here is to ensure that the waiver is treated as an exception rather than as a routine transaction.

Florida Criminal Procedure—Eighteen Months of Appellate Decisions . . . Defining Directions for the Nineties

Bruce A. Zimet*
Erica J. Massaro**

TABLE OF CONTENTS

I. INTRODUCTION 1332
II. GRAND JURY 1333
III. DISCOVERY 1339
IV. BRADY VIOLATIONS 1342
V. SEARCH AND SEIZURE 1346
A. *Anonymous Tips* 1346
B. *Florida Stop and Frisk Law* 1347
C. *Search of Person* 1349
D. *Scope of Search* 1350
E. *Scope of Search of a Residence* 1351
F. *Searches in Public Places* 1352
G. *Abandonment* 1353

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VI. SEVERANCE 1355
VII. PROSECUTORIAL MISCONDUCT 1357
VIII. ABUSE OF JUDICIAL DISCRETION 1362
IX. SPEEDY TRIAL 1363
X. CONCLUSION 1365

I. INTRODUCTION

National and international attention focused upon state criminal proceedings in Florida during the past eighteen months.[1] The print and electronic media feasted upon the sexual assault trial of William Kennedy Smith,[2] the indictment of the alleged University of Florida mass murderer[3] and the sexual assault investigation of several New York Met baseball players.[4] While these cases dominated the marquee of public focus,[5] Florida appellate courts produced an explosion of dramatic developments during the identical eighteen month period. The Florida appellate decisions will no doubt formulate the terrain of criminal advocacy for years to come and will likely produce consequences which survive long after the "marquee" cases become little more than the subjects of trivia questions.

This article will concentrate upon criminal procedure developments in Florida appellate courts during the past eighteen months.[6] Rather than indulging in sophomoric esoteric exercises, the authors will seek to provide

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1. The eighteen month period addressed in this article spans between January 1991 and August 1992.

2. The case of William Kennedy Smith was tried in West Palm Beach, Florida. Mr. Smith was acquitted of sexual assault charges which arose from events at the Kennedy family estate in Palm Beach. The trial included the testimony of Mr. Smith's uncle, United States Senator Edward Kennedy, and was the subject of intense media coverage, including live national television coverage.

3. The University of Florida mass murder case involved the deaths of five Gainesville, Florida residents. The murders remained unsolved until the 1992 indictment of Danny Rollings, who is currently awaiting trial.

4. The New York Met investigation arose from allegations of sexual assault occurring near the Met's spring training complex in New Port Richey, Florida.

5. Marquee level criminal cases of international and national caliber were not limited to Florida state courts. Florida federal courts were the venue for the trials of former Panamanian leader Manuel Noriega, former General Development Corporation executives, three former Dade County Circuit Court Judges and the former Mayor of Miami Beach and Hialeah.

6. This article will include appropriate references to certain legislative developments as well as decisions from federal courts which impact upon Florida criminal practice.

a realistic overview of significant decisions in an attempt to assist practitioners including prosecutors, defenders and judges. Thematically, this article will abstain from merely cataloguing and digesting decisions. Instead, an attempt will be made to provide context and perspective to appellate determinations, with particular attention energized toward unresolved and potentially novel issues which will form the foundation of future appellate review.

The scope of this article has been defined by the published opinions issued by the Florida Supreme Court and the five Florida intermediate appellate courts.[7] While traditional issues such as discovery, search and seizure and speedy trial continue to attract appellate attention, the spectrum of judicial scrutiny has expanded issues involving the grand jury and judicial misconduct.

Presentation of topics in this article will attempt to correspond to significant areas of importance to the mainstream criminal practitioner. Certain specialized issues involving the death penalty and sentencing, merit individual separate attention and will be withheld from this article.

II. GRAND JURY

The Florida Rules of Criminal Procedure permit prosecutors to directly file non-capital criminal charges without the need of a grand jury indictment.[8] The availability of direct filing of criminal charges by means of an Information has traditionally limited the use of the grand jury to either capital cases or politically sensitive cases such as allegations involving law enforcement officers or public officials.[9]

Recently, an additional component in the grand jury equation developed due to the matriculation of the Florida Statewide Prosecutors Office.[10] The

7. The Florida appellate decisions discussed in this article were reported in the Southern Reporter. The Florida Supreme Court maintains mandatory jurisdiction of all final judgments of trial courts imposing the death penalty. FLA. CONST. art. V, § 3(b)(1). The Florida Supreme Court also maintains discretionary jurisdiction of all non-death penalty criminal procedure cases. *See id.* The discretionary Supreme Court jurisdiction has led certain commentators to conclude that the five geographically located intermediate District Court of Appeals are the main sources of final decisions. *See Florida Courts of Appeals Intermediate Courts Become Final*, 13 STETSON L. REV. 479 (1984).

8. FLA. R. CRIM. P. 3.140(a)(1), (2).

9. Since Florida State Attorneys are elected officials, FLA. CONST. art. V, § 17, the decision to utilize the grand jury in non capital cases becomes a political decision as opposed to a legal decision.

10. The Statewide Prosecutor is authorized by the Florida Constitution. FLA. CONST.

primary vehicle to initiate Statewide Prosecutors cases is by means of the Statewide Grand Jury.[11] The Statewide Grand Jury is strictly structured by statute.[12] The Statewide Grand Jury can only be seated following gubernatorial petition to the Florida Supreme Court.[13]

The jurisdiction of the Statewide Grand Jury is specifically defined and limited by statute.[14] The primary jurisdictional limitation relates to the type of crimes which may be investigated by the Statewide Grand Jury.[15] The specific types of crimes are particularly set forth within the authorizing statute. In 1992 the Florida legislature amended the jurisdictional limitation and dramatically expanded the potential scope of the Statewide Grand Jury.[16] This significant change was achieved by merely replacing the offense of "criminal fraud" with "any crime involving, or resulting in, fraud or deceit upon any person;" in the list of offenses within the Statewide process.[17]

While appearing insignificant on its face, the amendment could result in offenses which previously maintained no nexus in law or logic to the statewide process becoming the subject of charging documents. Good faith arguments that crimes such as "misleading advertising,"[18] fraudulently changing marks on an animal,[19] providing false police reports,[20] as well as a score of relatively minor offenses are now ripe for statewide prosecutor

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art. IV, § 4(e) provides:

> There is created in the office of the attorney general the position of statewide prosecutor. The statewide prosecutor shall have concurrent jurisdiction with the state attorneys to prosecute violations of criminal laws occurring or having occurred, in two or more judicial circuits as part of a related transaction, or when any such offense is affecting or has affected two or more judicial circuits as provided by general law.

The statutory implementation of the constitutional authorization is found in § 16.56 of the Florida Statutes, which was passed by the legislature in 1985 to take effect in 1986. *See* R. Scott Palmer & Barbara M. Linthicum, *Statewide Prosecutor: A New Weapon Against Organized Crime*, 13 FLA. ST. U. L. REV. 653 (1985).

11. The use of the grand jury as the primary source of prosecution has evolved by practice. Statewide prosecutors are permitted to sign Informations and accordingly directly file non capital offenses. FLA. STAT. § 16.56(3) (1992).
12. *See id.* §§ 905.31-.40.
13. *Id.* § 905.33.
14. *Id.* § 905.34.
15. *Id.*
16. Ch. 92-108, 1992 Fla. Laws 906.
17. *Id.*
18. FLA. STAT. § 817.41 (1992).
19. *Id.* § 817.26.
20. *Id.* § 817.49.

consideration. The most obvious effect of the amendment should be an increase in cases presented by the Statewide Prosecutor. This increase could develop jurisdictional "turf wars" between the statewide prosecutors and local State Attorneys' offices. While those battles are not relevant to this article, practitioners should be aware of a new fertile area of litigation which has previously been relatively unaddressed, that being the operation of the Statewide Prosecutor, as well as the Grand Jury itself.[21]

Practitioners should take particular notice of the recent developments in the areas of jury selection and the use of peremptory challenges to define areas necessary for their attention. It should take little creativity to transform issues from those areas to viable grand jury applications.

A second dramatic grand jury development occurred during the 1992 legislative session. It was at that time that the statutory provision relating to the persons who may be present during grand jury sessions was amended.[22] Specifically, grand jury witnesses are now permitted to be represented by legal counsel before the grand jury.[23] The scope of representation is limited to advising and counselling a witness.[24] The attorney may not raise objections, make arguments or address the grand jury.[25] The amended statute further prohibits any conduct which "otherwise disrupt[s] proceedings before the grand jury.[26]

It is unclear how this particularly ambiguous standard will be defined. The drafters of the amendment clearly designate that the ability of a grand jury to receive legal counsel and advise is "permissive" in nature and not the creation of a right to counsel.[27] It would seem logical that indigent witnesses would therefore not be able to secure appointed counsel.

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21. State Grand Jury abuses cannot be challenged on federal due process grounds. *See* Alexander v. Louisiana, 405 U.S. 625, 633 (1977); Hurtado v. California, 110 U.S. 538 (1884). In fact, there is a paucity of grand jury litigation within Florida appellate decisions. The absence of federal constitutional grounds, as well as a history of litigation, offer lackluster justification to abstain from aggressive motion practice. One bright area for potential litigation arose with the Florida Supreme Court's application of the Florida Due Process Clause to the grand jury in the context of an Indictment allegedly based on false material evidence. Anderson v. State, 574 So. 2d 87 (Fla. 1991). For a more through discussion of *Anderson*, see *infra* notes 35-44 and accompanying text.

22. Ch. 92-154, 1992 Fla. Laws 1633.

23. FLA. STAT. § 905.17(1) (1992).

24. *Id.* § 905.17(2). Witnesses are only permitted to be represented by one attorney. Additionally, an attorney or law firm may only represent one person or entity in any particular investigation. *Id.*

25. *Id.*

26. *Id.*

27. FLA. STAT. § 905.17(2) (1992).

Additionally, unavailability of counsel for a particular grand jury session would not present viable grounds to adjourn a grand jury proceeding. The statute imposes no obligation for the State or the grand jury to advise the witness that they are permitted to bring an attorney into the grand jury.

Inexplicably the amendment permitting grand jury witnesses to receive the advice of counsel does not apply to the Statewide Grand Jury.[28]

The amended statute contains certain built in protections which provide contempt protection as well as the opportunity to exclude attorneys from the grand jury room for their noncompliance with the proscribed limitations of the statute.[29]

The impact of the new grand jury legislation probably will not be measurable for several years. A strong argument can be made that prosecutors, who are naturally anxious to perpetuate the exclusion of attorneys from investigative forums, will attempt to avoid the use of regular grand jury sessions to question civilian witnesses who might utilize attorneys. Consequently, prosecutors might be more inclined to use the State Attorney Investigative process to provide civilian witnesses since that mechanism permits the exclusion of attorneys.[30] Prosecutors might be expected to limit grand jury presentations to law enforcement non-civilian witnesses who will not bring lawyers with them. Law enforcement witnesses could testify concerning the results of investigative interviews with witnesses and thus avoid the witness and attorney appearing in the grand jury. It is also likely that prosecutors will be reluctant to expose the identity of grand jurors and the operational inner workings of the grand jury process to criminal lawyers for fear that investigations might be compromised. Should a grand jury forum be necessary to an investigation, prosecutors might be able to utilize the Statewide Grand Jury as a means to escape the provisions of the newly amended statute.[31] Prosecutors might also advise grand jurors to avoid questioning witnesses represented by counsel within the grand jury, and instead to discuss potential grand juror questions with the prosecutor outside the presence of the witness and attorney. Of course,

28. *Id.* § 905.17(5).

29. *Id.* § 905.17(4).

30. The authority for State Attorneys to summon witnesses for testimony as part of an investigation at the State Attorney's Office is found in FLA. STAT. § 27.04.

31. Statewide Grand Juries are specifically excluded from the amended provisions of the § 905.107(5) of the Florida Statutes. FLA. STAT. § 905.107(5) (1992).

Although the statute offers the availability of counsel as a "permissive" opportunity as opposed to being a right and although the Statewide Grand Jury is excluded, practitioners should attempt to seek relief from the court to permit counsel to attend the Statewide Grand Jury with a witness.

the other side of the anticipated chilling effect prosecutors probably anticipate from the newly amended statute is the likely defense attorney analysis that the amended statute will open up the grand jury process and insure that grand jury proceedings are more responsible and responsive to the rights and interest of persons being investigated.

It is difficult to contemplate that defense attorneys are going to easily conform their conduct to the limitations set forth in the amended statute and merely act as an advisor to the witness without any interaction with the grand jury.[32] Defense attorneys representing witnesses should be expected to seek a *de facto* expansion of their role once they are inside of the grand jury room. These anticipated expansion sojourns will likely produce a flurry of litigation and ultimate appellate review.

Another interesting issue should be the available remedy, if any, for a prosecutor's non-compliance with the amended statute.[33] In particular, the amended statute's labelling of the availability of counsel as being "permissive" as opposed to being a "right" brings into issue whether the noncompliance with the statute affords any viable remedy to a witness.[34] Even more questionable is whether a defendant indicted by a grand jury would have any standing or recognizable claim to litigate the failure of the prosecutor to comply with the amended statute while questioning a witness. Defendants would appear to be limited to applying for a contempt order against the offending prosecutor as opposed to any remedy such as the exclusion of witnesses or the dismissal of an indictment.

The third significant grand jury development was set forth in the Florida Supreme Court's holding in *Anderson* v. *State*.[35] In *Anderson*, the court concluded that the due process clause of the Florida Constitution[36] is violated if a prosecutor permits a trial to proceed based upon an indictment which the prosecutor knows is based on perjured, material testimony without informing the court, opposing counsel and the grand jury.[37] Although the false testimony in *Anderson* was not materially false and not violative of a due process right,[38] the supreme court unequivocally

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32. *See id.* § 905.17(1), (2).

33. The authors do not seek to encourage or advocate noncompliance. Obviously, any intentional noncompliance raises significant ethical questions.

34. *See id.* § 905.17(1), (2).

35. 574 So. 2d 87 (Fla. 1991).

36. The Florida Constitution provides that "[n]o person shall be deprived of life, liberty or property without due process of law." FLA. CONST. art. I, § 9.

37. 574 So. 2d at 91-92.

38. *Id.* at 92.

concluded that a viable due process claim would result in the dismissal of an indictment.[39]

The significance of *Anderson* must be measured in terms of the supreme court's willingness to apply the Florida due process clause to grand jury proceedings. With the unavailability of federal due process claims[40] to state grand juries, the *Anderson* decision potentially molds an entire area of grand jury litigation based upon state due process violations.

The importance of *Anderson* was accentuated following the recent holding of the United States Supreme Court in *United States* v. *Williams*.[41] In *Williams*, the Supreme Court determined that a federal court had no power to enforce the prosecutor's obligation to protect the fundamental fairness of proceedings before the grand jury by offering known exculpatory evidence to the grand jury.[42] In reaching its conclusion, the Supreme Court rejected the argument that the inherent supervisory power of the judiciary could be utilized to require the presentation of exculpatory evidence to the grand jury.[43] In a particularly stinging dissent, Justice Stevens, joined by Justices Blackmun, O'Connor and Thomas, stated:

> We do not protect the integrity and independence of the grand jury by closing our eyes to the countless forms of prosecutorial misconduct that may occur inside the secrecy of the grand jury room. After all, the grand jury is not merely an investigatory body; it also serves as a "protector of citizens against arbitrary and oppressive governmental action."[44]

While the federal court's "supervisory powers" do not extend to state court proceedings, the reluctance to intercede in federal grand jury matters reflects a basic hesitancy to utilize any federal judicial power to correct any grand jury abuse. Thus, the Florida Supreme Court's willingness to utilize

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39. *Id.* The *Anderson* court specifically concluded that:
> The state violates [the Florida Constitution's Due Process clause] when it requires a person to stand trial and defend himself or herself against charges that it knows are based upon perjured, material evidence. Governmental misconduct that violates a defendant's due process rights under the Florida Constitution require dismissal of criminal charges.

Id. at 91-92 (citing State v. Glossom, 462 So. 2d 1082, 1085 (Fla. 1985)).

40. *See supra* note 21.

41. 112 S. Ct. 1735 (1992).

42. *Id.* at 1745-46.

43. *Id.* at 1743-44.

44. *Id.* at 1753 (citation omitted).

the Florida State Constitution to remedy grand jury abuse should be viewed by practitioners as an attractive arena to litigate questionable grand jury practices.

III. DISCOVERY

Florida trial and appellate courts are frequently called upon to resolve disputes relating to discovery.[45] The attention addressed to these disputes provides an enormous unnecessary commitment of judicial energies. It would be impossible to calculate either the quantity or percentage of judicial resources utilized during the past eighteen months to resolve discovery problems. However, it is possible to identify the areas in which discovery issues resulted in significant appellate decisions.

Three basic issues dominate appellate decisions concerning discovery. Initially, courts have determined whether a party has in fact withheld information which they were required to disclose. A second line of cases concerns whether a trial court properly considered the alleged discovery violation. Generally, these cases concern whether the court conducted an appropriate *Richardson* hearing.[46] The final area of consideration involves whether the remedy employed by the court for the discovery violation was appropriate. During the past eighteen months, Florida appellate courts have addressed each of these three areas.

One area of viable litigation relates to the scope of a party's obligation within the discovery rules. In *State* v. *Mashke*,[47] the Second District Court of Appeal reviewed the necessity of the State of Florida to reveal the identity of a confidential informant at an *in camera* hearing. In *Mashke*, the State refused to disclose the identity of the informant and the trial court dismissed the Information. The Second District reversed the dismissal order and determined that the State of Florida had no obligation to reveal the identity of an informant it did not intend to call as a witness at trial.[48] Additionally, the burden rested with the defendant to establish with sworn testimony the particularized need of the defense to utilize the informant.

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45. The basic foundation for the rules of discovery in Florida criminal cases is found in Rule 3.220. FLA. R. CRIM. P. 3.220.

46. The *Richardson* hearing is based upon the 1971 Florida Supreme Court ruling in Richardson v. State, 246 So. 2d 771 (Fla. 1971).

47. 577 So. 2d 610 (Fla. 2d Dist. Ct. App. 1991).

48. *Id.* at 612.

Since the defendant in *Mashke* failed to satisfy that burden, disclosure was not mandated.[49]

Balancing the *Mashke* decision is the Florida Supreme Court's ruling in *State* v. *Tascarella*.[50] In *Tascarella*, the court affirmed the lower court's exclusion of federal agents from testifying at trial when the agents refused to appear at pre-trial depositions.[51] The Supreme Court rejected the State of Florida's argument that the defendant was obligated to seek the approval of the United States Department of Justice to permit the two federal agents to testify. The court concluded that since Tascarella's case arose in State court, State procedural rules controlled the disposition of the case.[52] Accordingly, despite the existence of contrary federal regulations which restricted federal agents from appearing at the depositions, the Supreme Court determined that the State had violated its discovery obligations through the agents non-appearance.[53]

Two significant cases during the past eighteen months concern the failure of the prosecution to provide the defendant, prior to the time of trial, with an accurate and complete description of oral statements made by the defendant. In *White v. State*,[54] the Fourth District Court of Appeal reversed a conviction when a witness at trial testified about an oral statement of the defendant which was radically dissimilar to the oral statement provided on discovery. In *Rainey v. State*,[55] a conviction was reversed due to the nondisclosure of a statement by a state's witness to the defense. The Second District Court of Appeal followed the Fourth District Court of Appeal[56] in determining that the failure of a defendant to depose a known witness does not mitigate the state's failure to disclose the existence of the statements to the defendant as part of discovery.[57]

The appropriate procedure for a court to follow once it is determined that a party has failed to comply with a required discovery obligation is to conduct a hearing pursuant to the Florida Supreme Court's holding in *Richardson v. State*.[58] This inquiry which is commonly known as a *Richardson* hearing, requires that:

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49. *Id.*
50. 580 So. 2d 154 (Fla. 1991).
51. *Id.* at 155.
52. *Id.* at 157.
53. *Id.*
54. 585 So. 2d 1050 (Fla. 4th Dist. Ct. App. 1991).
55. 596 So. 2d 1295 (Fla. 2d Dist. Ct. App. 1992)
56. *See* A.M. v. State, 593 So. 2d 316 (Fla. 4th Dist. Ct. App. 1992).
57. *Rainey*, 596 So. 2d at 1296.
58. 246 So. 2d 771 (Fla. 1971).

> At a minimum the scope of this inquiry should cover such questions as whether the state's violation was inadvertent or willful, whether the violation was trivial or substantial, and, most importantly, whether the violation affected the defendant's ability to prepare for trail.[59]

In practical terms, a *Richardson* hearing is not complex nor time consuming. From the context of judicial economy, a trial judge is always more prudent in conducting a *Richardson* hearing as opposed to refusing to inquire and make findings. Incredibly, during the past eighteen months, trial judges in Florida have ignored the prudent approach and refused to conduct *Richardson* hearings. In many of those incidents, the refusals resulted in reversals of convictions. For instance, in *Livingston v. State*,[60] a defendant's conviction was reversed due to the trial judge's refusal to conduct a *Richardson* hearing and the resultant exclusion of an essential defense witness. Defense counsel had only learned of the defense witness during *voir dire* examination and had offered to agree to a continuance in order to offset any prejudice.[61] The defense counsel also requested a *Richardson* hearing to demonstrate his lack of culpability in the late disclosure as well as to offer alternative remedies short of exclusion of the essential witness.[62] The action of the trial court in refusing a *Richardson* hearing request, as well as excluding the witness, illustrates the imprudence of a trial court refusing to take the short period of time to follow the law. Of course, for the criminal defendant who is convicted and incarcerated pending appeal, the refusal of the trial court to take only a few moments to conduct a *Richardson* hearing can have monstrous effects.

In *McLymont v. State*,[63] a manslaughter and attempted murder conviction were reversed due to the trial judge's refusal to conduct a *Richardson* hearing concerning a shotgun which the State utilized as part of a trial demonstration concerning the alleged offense.[64] The trial court incredibly refused to conduct the *Richardson* hearing even though the demonstration gun had not been provided in discovery.[65] Similarly, the

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59. State v. Hall, 509 So. 2d 1093, 1096 (Fla. 1987) (citing *Richardson*, 246 So. 2d at 775).
60. 575 So. 2d 1349 (Fla. 4th Dist. Ct. App. 1991).
61. *Id.*
62. *Id.* at 1349-50.
63. 592 So. 2d 708 (Fla. 2d Dist. Ct. App. 1991).
64. *Id.* at 710.
65. *Id.*

First,[66] Fourth,[67] and Fifth[68] each reversed convictions due to the failure of the trial court to conduct an appropriate *Richardson* hearing.

Trial courts continue to experience difficulty in determining the appropriate sanction for discovery violations. In *Griffin v. State*,[69] the First District Court of Appeal reversed a conviction based upon the trial court's refusal to grant a continuance to a defendant based upon the late disclosure of a new material witness the day before trial. Likewise, in *State v. Theriault*,[70] the Fifth District Court of Appeal determined that dismissal of an information was not an appropriate sanction where there was insufficient proof of prejudice to the defendant based upon the discovery violation as well as the failure of the trial court to evaluate alternative, less onerous sanctions short of dismissal. Similarly, the exclusion of two defense witnesses due to late disclosure was the basis of reversal of a conviction by the Third District Court of Appeal in *McDugle v. State*.[71] The Third District concluded that the trial court had failed to consider the prejudice flowing from the late disclosure as well as the appropriateness of alternative sanctions.[72]

IV. BRADY VIOLATIONS

One of the most basic components of the criminal justice system imposes upon the prosecution the duty to disclose favorable evidence to the accused which is both material and exculpatory.[73] Failure of the prosecutor to satisfy this duty is commonly described as a *Brady* violation, based upon the legendary United States Supreme Court case.[74] The evidence must be material to the guilt or punishment of the accused.[75] Evidence is considered material only if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.[76] The Court has defined a "reasonable probability" as one which

66. Brown v. State, 579 So. 2d 760 (Fla. 1st Dist. Ct. App. 1991).
67. Walker v. State, 573 So. 2d 1075 (Fla. 4th Dist. Ct. App. 1991).
68. Hasty v. State, 599 So. 2d 186 (Fla. 5th Dist. Ct. App. 1992).
69. 598 So. 2d 254 (Fla. 1st Dist. Ct. App. 1992).
70. 590 So. 2d 993 (Fla. 5th Dist. Ct. App. 1991).
71. 591 So. 2d 660 (Fla. 3d Dist. Ct. App. 1991).
72. *Id.* at 661.
73. Brady v. Maryland, 373 U.S. 83 (1963).
74. *Id.*
75. *Id.* at 87.
76. U.S. v. Bagley, 473 U.S. 667 (1985).

is sufficient to undermine the confidence in the outcome.[77] Therefore, "the mere possibility that an item of undisclosed information might have helped the defense, or might have helped the outcome of the trial, does not establish 'materiality' in the constitutional sense."[78]

The United States Supreme Court has held that the prosecution's suppression of evidence favorable to the accused violates due process of law where the evidence is material to the defendant's guilt or punishment.[79]

> To establish a *Brady* violation, a defendant must prove the following: (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceeding would have been different.[80]

The four-pronged *Brady* test leaves the Court with broad discretion in determining the existence of *Brady* violations. In the past eighteen months, the Supreme Court of Florida has addressed the issue of the existence of *Brady* violations in cases ranging from possible suppression by the prosecution to the possible effect upon the outcome of the case.

In *Hegwood v. State*,[81] the Court reviewed the prosecution's suppression of the initial telephone interview of a State witness where the witness could not identify the defendant. The witness made a positive identification during a later photo-lineup.[82] The Court reasoned that the State is not responsible for actively assisting the defense in investigating its case, and that the prosecution had disclosed the existence of the witness and the witness's positive identification in a timely manner.[83] Under this rationale, the Court denied acknowledgement of a *Brady* violation and upheld conviction for first-degree murder.[84] It should be obvious from the court's holding in *Hegwood* that the right of a defendant to conduct depositions in

77. *Id.*
78. U.S. v. Agurs, 427 U.S. 97, 109-110 (1976).
79. *Brady*, 373 U.S. at 83.
80. Hegwood v. State, 575 So. 2d 170, 172 (Fla. 1991) (quoting U.S. v. Meros, 866 F.2d 1304, 1308 (11th Cir.), *cert. denied*, 493 U.S. 932 (1989)).
81. 575 So. 2d 170 (Fla. 1991).
82. *Id.* at 171.
83. *Id.* at 172.
84. *Id.*

criminal cases requires that practitioners aggressively attempt to investigate all potential exculpatory evidence. Practitioners should also consider the availability of the Bill of Particulars to flush out beneficial evidence.[85]

One of the traditional *Brady* issues involves the suppression of exculpatory evidence by the prosecution. The Florida Supreme Court has repeatedly observed that "[i]n the absence of actual suppression of evidence favorable to the accused . . . the state does not violate due process in denying discovery."[86] In *Breedlove v. State*,[87] the defendant claimed that the State had suppressed knowledge of the criminal activities of the detectives who testified on behalf of the State, and that information was necessary to impeach the credibility of the detectives.[88] The Florida Supreme Court acknowledged that "the state may not withhold favorable evidence in the hands of the police, who work closely with the prosecutor."[89] However, the Court reasoned that the prosecution did not have knowledge of the detective's criminal activities for which they were later indicted, and therefore, could not be held to have constructive notice of the information.[90] Thus, due to the absence of suppression of evidence by the prosecution, the Supreme Court of Florida did not acknowledge the existence of a *Brady* violation.[91]

Similarly, in *Steinhorst v. State*,[92] the Florida Supreme Court refused to find a *Brady* violation where the defense claimed that certain summaries of various witness interviews taken by the Florida Department of Law Enforcement in the course of its investigation were necessary for impeachment purposes but were suppressed by the prosecution.[93] The Florida Supreme Court reviewed the alleged *Brady* material and concluded that a portion of the summaries were unnecessary for impeachment purposes and the remaining portion would probably not be admissible at trial anyway.

Broader discretion has been practiced by the Court when determining the materiality of evidence suppressed by the prosecution. As previously stated, in order to prevail on a *Brady* claim, one factor the defendant must

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85. Bill of Particulars are provided in FLA. R. CRIM. P. 3.140.

86. Delap v. State, 505 So. 2d 1321, 1323 (Fla. 1987) (quoting James v. State, 453 So. 2d 786, 790 (Fla.), *cert. denied*, 469 U.S. 1098 (1984)).

87. 580 So. 2d 605 (Fla. 1991).

88. *Id.*

89. *Id.* at 606 (quoting Arango v. State, 467 So. 2d 692, 693 (Fla.), *vacated on other grounds*, 474 U.S. 806 (1985)).

90. *Id.* at 606-07.

91. *Id.* at 609.

92. 574 So. 2d 1075 (Fla. 1991).

93. *Id.* at 1076.

establish is that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.[94] In *Cruse v. State*,[95] the defendant appealed a first-degree murder conviction claiming that the State's failure to disclose necessary psychiatric evidence violated the defendant's due process rights. At an *in camera* hearing prior to trial, the State disclosed the names of two mental health experts who had been consulted but would not be testifying at trial.[96] The trial judge determined that this information was not *Brady* evidence and would not have to be disclosed to the defense.[97] During review, the Supreme Court of Florida used its broad discretionary power to determine the importance of such testimony for the defense and concluded that it would have been "merely cumulative in light of the tremendous amount of expert testimony at trial . . . ." Therefore, the court affirmed the decision of the lower court.[98] Similarly, in *Routly v. State*,[99] the Court found that documentary evidence suppressed by the prosecution relating to the immunity granted to a State witness was not *Brady* evidence in that it would have been cumulative impeachment evidence. After review of the record, the Court further concluded that there was no reasonable probability that had the evidence been disclosed, the outcome of the trial would have been different.[100]

A further example of the Court's restrictive *Brady* analysis was set forth in *Jennings v. State*,[101] where the Florida Supreme Court affirmed the trial court's decision that a taped interview of a State witness which was suppressed by the State was not a *Brady* violation. The trial court stated that the evidence would not have aided the defense theory initially asserted by the defendant and that, in the court's opinion, better evidence was available to the defense regarding this theory.[102] The Supreme Court of Florida agreed with the trial court's analysis and further stated that there was not a reasonable probability that the tape would have caused a different outcome at the trial.[103] It is clearly evidenced by the cases discussed that the discretionary authority given to the Court has grown from simply

94. *Hegwood*, 575 So. 2d at 172.
95. 588 So. 2d 983 (Fla. 1991).
96. *Id.* at 987.
97. *Id.*
98. *Id.* at 988.
99. 590 So. 2d 397 (Fla. 1991).
100. *Id.* at 399.
101. 583 So. 2d 316 (Fla. 1991).
102. Jennings v. State, 583 So. 2d 316, 318 (Fla. 1991).
103. *Id.* at 319.

determining if the evidence had been suppressed by the prosecution to the effect the evidence would have had on the trial had it been disclosed in a timely manner to the defense.

While some practitioners might pessimistically claim that the appellate court's focus upon the "effect" of the withheld evidence reduces the likelihood of relief for *Brady* violations by creating a "harmless" violation standard, practitioners should attempt to present trial and appellate courts with persuasive factual authority concerning the effect of the withheld information. For instance, it would be helpful for an advocate to present expert testimony from other attorneys concerning the effect upon trial strategy of a *Brady* violation, as well as the results of a "mock jury" reviewing a case with and without the withheld evidence.

V. Search and Seizure

A. *Anonymous Tips*

In *Illinois v. Gates*,[104] the Supreme Court addressed the issue of anonymous tips in relation to probable cause. The Court abandoned the *two-prong* test previously used,[105] and established the "totality of the circumstances" approach to determine whether an informant's tip is sufficient to establish probable cause.[106] The factors considered when examining the totality of the circumstances include the informant's veracity, reliability and basis of knowledge.[107] In *Gates* the Court examined the tip in light of the totality of the circumstances and additionally considered the officers personal observations and independent police work executed in the case.[108]

The factors examined when applying the "totality of the circumstances" approach to establish probable cause are also used to meet the lesser standard of reasonable suspicion. In *Alabama v. White*,[109] the Supreme Court determined that the anonymous telephone tip, as corroborated by independent police work, exhibited sufficient indicia of reliability to provide

104. 462 U.S. 213 (1983).

105. The "two-prong test" was established in Aguilar v. Texas, 378 U.S. 108, 113 (1964) and Spinelli v. United States, 393 U.S. 410, 413 (1969). *Gates* took the elements established in *Aguilar*, and broke them into factors. *Gates*, 462 U.S. at 214

106. *Id.* at 214.

107. Illinois v. Gates, 462 U.S. 213, 229-30 (1983).

108. *Id.*

109. 496 U.S. 325 (1990).

reasonable suspicion to permit the investigatory stop of the vehicle.[110] The Court acknowledged that "[r]easonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability. Both factors—quantity and quality—are considered in the "totality of the circumstances . . . ."[111] Probable cause may be established through information supplied by an anonymous tipster if that information appears sufficiently reliable because of the surrounding circumstances or the nature of the information given in the tip, and the information establishes reasonable suspicion that the defendant is committing or has committed a crime.[112] Since the Supreme Court's application of the "totality of the circumstances" approach in *Gates* and its further application in *White*, Florida courts have considered the same factors to apply this approach in its most recent cases. Specifically, the First,[113] Second,[114] and Third[115] District Courts of Appeal have employed these standards during the past eighteen months. These applications have resulted in extended opportunities for law enforcement intrusions and potential abuses.

B. *Florida Stop and Frisk Law*

Florida's Stop and Frisk Law,[116] authorizes the temporary detention of a person when an officer has reasonable suspicion to believe the person has committed, is committing or is about to commit a crime. The stop and frisk law also permits the officer to conduct a limited search of a person where there is reasonable suspicion that the detainee is armed with a dangerous weapon.[117] However, seizure of the object is only permitted where the officer reasonably believes the object felt during the pat-down is a weapon.[118]

A stop is unjustified when based solely upon an officer's observation of a black person who leans into the window of a white man's car stopped in a high crime area and then walks away when the officer approaches.[119]

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110. *Id.* at 330.
111. *Id.*
112. *Id.*
113. Swanson v. State, 591 So. 2d 1114 (Fla. 1st Dist. Ct. App. 1992).
114. Cunningham v. State, 591 So. 2d 1058 (Fla. 2d Dist. Ct. App. 1991).
115. State v. Diaz, 595 So. 2d 969 (Fla. 3d Dist. Ct. App. 1992); State v. Cash, 595 So. 2d 279 (Fla. 3d Dist. Ct. App. 1992).
116. FLA. STAT. § 901.151 (1989).
117. *Id.*
118. Winters v. State, 578 So. 2d 5, 6 (Fla. 2d Dist. Ct. App. 1991).
119. Dames v. State, 566 So. 2d 51, 52 (Fla. 1st Dist. Ct. App. 1990).

Nor is a stop justified merely because the individual had engaged in such activity in the presence of known drug dealers or because such person had been present at other drug transactions.[120] Similarly, an officer lacks founded suspicion to detain an individual who he merely observes riding a bicycle at 2 a.m. in the area of on ongoing burglary,[121] however, the officer may develop a founded suspicion to detain an individual based upon the officer's observation, training and experience.[122] Accordingly, an officer is justified to detain an individual upon the observation of that individual leaning into a vehicle in a high crime area and exchanging money or drugs.[123] Further, an officer is believed to have well founded suspicion of unlawful activity when the officer obtains knowledge that the registered owner of the vehicle does not possess a valid driver's license.[124]

A limited search of the detainee is permissible when the officer has probable cause to believe the individual is armed with a dangerous weapon.[125] "The Supreme Court has construed the term probable cause to mean reasonable belief in the context of the stop and frisk law."[126] It is impermissible for an officer to stop and frisk an individual where the officer does not reasonably believe the individual is armed with a dangerous weapon but proceeds on the basis of routine.[127] Nor may an officer search into the contents of a package carried by the detainee when based on a generalized view of the circumstances and therefore lacking any reasonable belief of a threat of safety.[128] Thus, in the past eighteen months, courts have enforced the expressly limited scope permitted by Florida Statutes.

C. *Search of Person*

During the course of a legitimate frisk for weapons, an officer is only permitted to seize objects which the officer reasonably believes could be

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120. Shackelford v. State, 579 So. 2d 306 (Fla. 2d Dist. Ct. App. 1991).

121. Moore v. State, 584 So. 2d 1122 (Fla. 4th Dist. Ct. App. 1991).

122. State v. Warshan, 580 So. 2d 317 (Fla. 3d Dist. Ct. App. 1991) (officer's observation, training and experience led him to have a founded suspicion that the defendant was inhaling cocaine).

123. *Winters*, 578 So. 2d at 5.

124. Smith v. State, 574 So. 2d 300 (Fla. 5th Dist. Ct. App. 1991); *see also* Mitchell v. State, 559 So. 2d 243 (Fla. 1st Dist. Ct. App. 1990); Castillo v. State, 536 So. 2d 1134 (Fla. 2d Dist. Ct. App. 1988).

125. FLA. STAT. § 901.151 (1989).

126. Lemon v. State, 580 So. 2d 292, 294 (Fla. 2d Dist. Ct. App. 1991) (citing State v. Webb, 398 So. 2d 820 (Fla. 1981)).

127. *Id.*

128. Lencsak v. State, 579 So. 2d 882 (Fla. 2d Dist. Ct. App. 1991).

weapons, despite the officer's suspicion that the object may be evidence of a crime.[129] However, the officer may lawfully seize contraband if the officer develops probable cause during the stop and frisk.[130] To determine whether a police officer has sufficient probable cause to believe that a suspect is carrying illegal contraband, one must look to the totality of the circumstances existing at the time.[131] When considering the totality of the circumstances, an officer's training and experience are relevant to provide specific facts from which the officer could reasonably conclude the existence of unlawful activity.[132] In *Doctor v. State*,[133] the Supreme Court of Florida reviewed the seizure of contraband during the course of a stop and frisk. The pat-down for a weapon was the result of an obvious bulge in the detainee's groin area.[134] The Supreme Court found that, had the initial stop been valid, the search of the detainee's groin area and the seizure of the contraband would have been justified based upon the officer's specific significant experience with this particular aspect of drug trafficking.[135]

However, in the case of a random and suspicionless stop in a public airport, voluntary consent to search one's person does not extend to a pat-down of the groin area.[136] Once it is determined that the consent given was voluntary, the standard for measuring the scope of a detainee's consent is whether a reasonable person would have understood that the consent given encompassed a search as intrusive as the search of that person's groin area.[137] Due to the expectation of privacy with respect to a person's groin area, an officer must obtain specific consent for such an intrusive search.[138] Specific consent to search the groin area of a detainee is also required during a random search of persons on a public bus.[139] However, a strip search of a detainee is permissible as long as the officer has reliable detailed information which under the totality of the circumstances was

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129. Dunn v. State, 382 So. 2d 727 (Fla. 2d Dist. Ct. App. 1980).
130. *Id.* at 728 n.1.
131. Doctor v. State, 596 So. 2d 442, 445 (Fla. 1992) (citing P.L.R. v. State, 455 So. 2d 363 (Fla. 1984), *cert. denied*, 469 U.S. 1220 (1985)).
132. *Id.*
133. *Id.* at 444.
134. *Id.*
135. *Id.* at 445.
136. Davis v. State, 594 So. 2d 264, 265 (Fla. 1992).
137. *See* Florida v. Jimeno, 111 S. Ct. 1801 (1991).
138. *Davis*, 594 So. 2d at 266 (specific consent was not required for search of detainee's groin area because the contraband was taped two to three inches below the groin area).
139. State v. Menefield, 575 So. 2d 296 (Fla. 4th Dist. Ct. App. 1991).

sufficient to establish probable cause for a formal arrest.[140]

D. *Scope of Search*

The scope of a suspect's consent should be measured under a standard of objective reasonableness.[141] The issue to be determined is what would have been understood by the typical reasonable person regarding the exchange between the officer and the suspect.[142] This standard has been applied to determine the scope of a person's consent to search their person and further extended to determine the scope of consent to search a vehicle.[143]

In *Florida v. Jimeno*,[144] the Supreme Court addressed the issue of whether a person's consent to search a vehicle may extend to closed containers found inside the vehicle. The Court reasoned that the scope of the search is generally defined by its expressed object and the person may delimit the scope of the search as he or she chooses.[145] In this case, the officer expressly requested consent to search the vehicle because he had reason to believe there were narcotics in the car.[146] The Court concluded that it was objectively reasonable for the officer to believe that the general consent to search the vehicle included a search of any container in the vehicle which could conceal narcotics.[147] However, the Court expressly noted that it would be unreasonable for the consent to search to extend to a locked briefcase within the trunk.[148]

Yet, an officer is justified in extending the search if, while conducting the consent search, the officer develops probable cause to believe contraband may be present.[149] Once an officer develops probable cause, a warrantless search may be conducted of every part of the vehicle and its contents,

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140. State v. Brown, 586 So. 2d 473 (Fla. 4th Dist. Ct. App. 1991).

141. *Jimeno*, 111 S. Ct. at 1803-04.

142. *Id.*

143. *Id.*; *see* State v. Jones, 592 So. 2d 363 (Fla. 5th Dist. Ct. App. 1992); Minnis v. State, 577 So. 2d 973 (Fla. 4th Dist. Ct. App. 1991).

144. 111 S. Ct. 1801 (1991).

145. *Id.* at 1804.

146. *Id.* at 1802.

147. *Id.* at 1804.

148. *Id.* (citing State v. Wells, 539 So. 2d 464 (Fla. 1989), *aff'd on other grounds*, 495 U.S. 1 (1991)).

149. U.S. v. Ross, 456 U.S. 798 (1982); *see* State v. Reeves, 587 So. 2d 649 (Fla. 5th Dist. Ct. App. 1991) (officer is permitted to inspect closed containers during inventory search simply for safety of officers).

including anywhere the object of the search may be concealed.[150] In *State v. Jones*,[151] after being given permission to search the vehicle, the officer inspected the exterior of the vehicle and observed a modified gas tank containing contraband. The court held that the officer developed probable cause during the consent search to extend the search beyond the interior of the vehicle.[152] Further, in *Minnis v. State*,[153] the warrantless search of the vehicle to disclose contraband was impermissible because probable cause was focused on the vehicle in general and not on a particular container.

E. *Scope of Search of a Residence*

A search warrant is valid when issued by a neutral magistrate on the basis of an affidavit which specifically sets forth facts establishing probable cause. The Fourth Amendment of the United States Constitution requires that a warrant "particularly describ[e] the place to be searched, and the . . . things to be seized."[154] Particular care must be taken when the warrant will be issued in order to search a private dwelling. A private dwelling is a place where people enjoy the highest reasonable expectation of privacy.[155] When an affidavit lacks a factual basis to establish probable cause, it falls short of constitutional requirements.[156] As such, the scope of the warrant does not extend beyond the specifications in the probable cause affidavit.[157]

Yet, "[w]hen a person invites an undercover [police] officer into his or her home to conduct unlawful business, the person waives any right to privacy to the extent that the home is considered a commercial center where warrantless arrests upon probable cause are lawful."[158] Once a police officer is invited into a home to participate in the commission of a felony, a search warrant is not required for back-up officers to enter the residence

150. *Ross*, 456 U.S. at 822.
151. 592 So. 2d 363 (Fla. 5th Dist. Ct. App. 1992).
152. *Id.* at 365.
153. 577 So. 2d 973 (Fla. 4th Dist. Ct. App. 1991).
154. U.S. CONST. amend. IV.
155. *See* Payton v. New York, 445 U.S. 573 (1980).
156. Getreu v. State, 578 So. 2d 412 (Fla. 2d Dist. Ct. App. 1991).
157. Bergeron v. State, 583 So. 2d 790 (Fla. 2d Dist. Ct. App. 1991) (officer may not search a person on the curtilage when the search warrant authorizes search of a home and persons within the home).
158. State v. Gonyo, 578 So. 2d 445, 446 (Fla. 2d Dist. Ct. App. 1991) (citing State v. Cantrell, 426 So. 2d 1035, 1038 (Fla. 2d Dist. Ct. App. 1983), *cert. denied*, 464 U.S. 1047 (1984)).

and assist in the arrest.[159] Further, it has been established that an undercover officer who enters a residence to purchase illegal drugs and departs with the understanding he will return with the money, has implied consent to reenter the premises with back-up officers in order to assist in the arrest.[160] Yet, where the consensual entry of the undercover officer is limited to certain areas of the residence, the officer may not roam throughout the dwelling in order to observe the commission of a felony and effectuate an arrest without a warrant.[161]

However, a police officer may conduct a search of private property without a duly issued search warrant only under a few specifically established exceptions, such as consent to search the dwelling.[162] The State has the burden of establishing by clear and convincing evidence that the consent was given freely and voluntarily.[163] Consent which is simply an acquiescence to the authority displayed by the police officer's presence is not considered voluntary consent.[164] Therefore, where consent has been merely an acquiescence to authority, any subsequent consent obtained to conduct a complete search of the premises is considered invalid.[165]

F. *Searches in Public Places*

Recently, the United States Supreme Court addressed the issue of whether the Fourth Amendment permits police officers to approach individuals at random on buses to ask them questions and to request consent to search their luggage.[166] The Court stated that the crucial test is whether, taking into account all of the surrounding circumstances, a reasonable person would feel free to decline the officer's requests or terminate the

159. *Id.*

160. State v. Lopez, 590 So. 2d 1045 (Fla. 3d Dist. Ct. App. 1991); *see also* State v. Fernandez, 538 So. 2d 899 (Fla. 3d Dist. Ct. App. 1991); State v. Steffani, 398 So. 2d 475 (Fla. 3d Dist. Ct. App. 1981), *aff'd*, 419 So. 2d 323 (Fla. 1982).

161. Soldo v. State, 583 So. 2d 1080 (Fla. 3d Dist. Ct. App. 1991) (warrantless search and seizure was not valid where undercover agent defied limits of consensual entry to observe drug transaction between confidential informant and defendant).

162. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).

163. Gonzalez v. State, 578 So. 2d 729, 733 (Fla. 3d Dist. Ct. App. 1991).

164. *Id.*

165. *Id.* at 734.

166. Florida v. Bostick, 111 S. Ct. 2382 (1991) (The Supreme Court remanded case and the Florida Supreme Court affirmed the district court's ruling that no *per se* violation of defendant's Fourth Amendment rights occurred because defendant had voluntarily consented to search of luggage while on bus.).

encounter.[167] the Court reasoned that the seizure of an individual has occurred when the officer restrains the person by means of physical force or by a display of authority.[168] Accordingly, during a consensual encounter, the officer may ask the individual questions and request consent to search the person's luggage as long as they inform the individual that they have a right to refuse to consent.[169] Therefore, where the consent to search is free from any intimidation and a reasonable bus passenger would feel free to refuse continuing the encounter, the search and subsequent seizure does not violate the guarantees of the Fourth Amendment.[170]

This standard has been consistently applied to encounters occurring in public places such as airport terminals and train stations.[171] However, even when the initial encounter may be valid, there may be an unlawful seizure when the facts do not establish reasonable suspicion or probable cause.[172] Accordingly, the seizure of a passenger's luggage at an airport can only be justified on the basis of probable cause.[173] Similarly, under the totality of the circumstances, an investigatory detention of a person's luggage must be supported by factors which establish reasonable suspicion of criminal activity.[174]

G. *Abandonment*

Until the recent Florida Supreme Court decision in *Anderson v. State*,[175] the courts have been split on the issue of whether an abandonment made after an illegal stop was considered involuntary. Some courts found that evidence seized after improper police action is considered the fruit of an illegal detention; while other courts have held that an abandonment after an illegal stop is voluntary because the person has no expectation of privacy in the area where the object has been discarded.[176] However,

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167. *Id.* at 2389.
168. *Id.* at 2386.
169. *Id.* at 2386-88.
170. *See* State v. Florius, 587 So. 2d 1160 (Fla. 4th Dist. Ct. App. 1991); State v. Kuntzwiler, 585 So. 2d 1096 (Fla. 4th Dist. Ct. App. 1991).
171. *See* Powell v. State, 593 So. 2d 1110 (Fla. 1st Dist. Ct. App. 1992); Aderhold v. State, 593 So. 2d 1081 (Fla. 1st Dist. Ct. App. 1992).
172. *See Powell*, 596 So. 2d at 1111; *Aderhold*, 593 So. 2d at 1084.
173. *Aderhold*, 596 So. 2d at 1084.
174. *Powell*, 596 So. 2d at 1112.
175. 591 So. 2d 611 (Fla. 1992).
176. *See* State v. Oliver, 368 So. 2d 1331 (Fla. 3d Dist. Ct. App. 1979), *cert. dismissed*, 383 So. 2d 1208 (Fla. 1980).

in *Anderson* the supreme court affirmatively answered the issue of whether abandonment of property after an illegal police stop, but not pursuant to a search, can be considered involuntary.[177] The court, following the reasoning in *United States v. Beck*,[178] stated that, "while it is true that a criminal defendant's voluntary abandonment of evidence can remove the taint of an illegal stop or arrest, it is equally true that for this to occur the abandonment must be truly voluntary and not merely the product of police misconduct."[179] Therefore, the court found that, "[a]n abandonment which is the product of an illegal stop is involuntary, and the abandoned property must be suppressed."[180]

The issue at hand in abandonment cases is whether the detention was lawful or unlawful resulting in suppression of the seized evidence. Under the totality of the circumstances the officer must have a founded suspicion of criminal activity in order to justify a detention. Under the totality of the circumstances, an officer lacks a reasonable suspicion of criminal activity simply because a person in a high crime area walks from the approaching officer.[181] However, a brief detention is justified when a police officer observes a person in a high crime area engage in several hand transactions with others and then discard an object when the officer approaches.[182]

In cases where the encounter is consensual, the abandonment of property is considered voluntary since the individual has no expectation of privacy in the area where the item has been discarded.[183] When an individual consents to speak with a police officer and abandons a piece of property in the course of the conversation, the abandonment is considered voluntary.[184] These actions constitute voluntary abandonment in that they are not responses to any police request or demand. Thus, property which is abandoned voluntarily or seized as a result of a lawful detention is admissible in a criminal proceeding.

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177. *Anderson*, 591 So. 2d at 613.
178. 602 F.2d 726 (5th Cir. 1979).
179. *Anderson*, 591 So. 2d at 613 (quoting *Beck*, 602 F.2d at 729-30 (citations omitted)).
180. *Id.*
181. *See* Grant v. State, 596 So. 2d 98 (Fla. 2d Dist. Ct. App. 1992);
182. *See Anderson*, 591 So. 2d at 611.
183. *See* State v. Hollinger, 596 So. 2d 521 (Fla. 5th Dist. Ct. App. 1992); Wade v. State, 589 So. 2d 322 (Fla. 1st Dist. Ct. App. 1991); State v. Starke 574 So. 2d 1214 (Fla. 2d Dist. Ct. App. 1991).
184. *See Hollinger*, 596 So. 2d at 521; *Wade*, 589 So. 2d at 322; *Starke*, 574 So. 2d at 1214.

VI. SEVERANCE

The Florida Rules of Criminal Procedure provide two primary types of severance. Severance of offenses, as set forth in Rule 3.152(a), allows for severance of two or more offenses improperly charged in the same charging document or if two or more related offenses tried together would retard a fair determination of guilt or innocence.[185] Severance of defendants as set forth in rule 3.152(b), permits for severance and separate trials of multiple defendants in order to protect a defendant's speedy trial right or to promote fair determinations of a defendant's guilt or innocence.[186] Rule 3.152(b) additionally sanctions severance of defendants if a codefendant's statements make references to a defendant and are inadmissible against a defendant.[187]

Surprisingly, given the volume of multiple offenses and/or multiple defendant cases, the past eighteen months reflected a relatively small number of severance decisions. Appellate attention focused primarily upon the issue of severance of offenses. In *Crossley v. State*,[188] the Florida Supreme Court reversed a defendant's robbery convictions based upon a finding that the trial court had abused its discretion in refusing to sever allegations of the two robberies occurring within hours of one another and only a few miles apart. In reaching its conclusion, the Supreme Court carefully attempted to guide trial courts who would be required to determine severance of offense motions. The need for guidance and caution is reflected in the Supreme Court's concern that the evidence of one offense might have the effect of bolstering the proof of the other offense.[189]

The *Crossley* Court required that a "meaningful relationship" between the two offenses exist before permitting a joint trial.[190] The requirement of a meaningful relationship mandates that trial courts find more than a mere overlap of facts between the two offenses or as in *Crossley*, a proximity in time and location of the multiple offenses.[191] *Crossley* also rejected the proposition that severance would not be mandated where a defendant possessed a vehicle stolen in an initial robbery at the time of the defendant's arrest for a second robbery.[192] The supreme court reasoned that a joint

185. FLA. R. CRIM. P. 3.152(a).
186. *Id.* 3.152(b).
187. *Id.*
188. 596 So. 2d 447 (Fla. 1992).
189. *Id.* at 449.
190. *Id.* at 450.
191. *Id.*
192. *Id.*

trial could not be sanctioned if the evidence failed to establish that the stolen vehicle from the first robbery was utilized in the second robbery.[193]

While the *Crossley* decision resolved an apparent conflict between the First District Court of Appeal and the Third District Court of Appeal, its precedential value might be limited to the unique facts of the case. More significant than its ultimate conclusion that the trial court abused its discretion is the supreme court's sensitivity and adherence to the protection of a defendant's right to a fair trial absent unfair bolstering. This sensitivity is particularly significant given the convenience and judicial economy afforded by a joint trial.

In *May v. State*,[194] the Fifth District Court of Appeal applied the holding of *Crossley* and reversed a conviction of multiple drug conspiracies where the two transactions were separated in time, geographic location and did not involve one continuous sequence of events. The *May* court rejected the proposition that similar offenses committed by the same two persons justifies the joinder of the offenses for trial.[195]

The holding in *Crossley* should not be misinterpreted to conclude that appellate courts discount the significance of judicial economy in determining severance issues. Reflecting appellate concern for judicial economy was the holding in *Velez v. State*.[196] In *Velez*, the Third District Court of Appeal endorsed the utilization of a dual jury system to diffuse the severance issue. According to *Velez*, only two other Florida courts, the First and Second District Court of Appeals, had previously permitted two juries to jointly hear a case where one of the juries would be excused and therefore insulated from inadmissible evidence concerning the defendant that the second jury would be considering.[197] The *Velez* opinion strongly endorsed the dual jury system as an innovative exercise of judicial economy. The concept of dual trials should be cautiously approached, however, because it requires a delicate balancing of issues to insure the prevention of prejudice and error.[198] The fact that the concept has been endorsed so vehemently by the Third District should alert practitioners of its potential. The implicit dangers of dual trials should afford fertile issues of future appellate review.

193. *See Crossley*, 596 So. 2d at 450.
194. 600 So. 2d 1266 (Fla. 5th Dist. Ct. App. 1992).
195. *Id.*
196. 596 So. 2d 1197 (Fla. 3d Dist. Ct. App. 1992).
197. *Id.* at 1199-00.
198. *See id.*

VII. PROSECUTORIAL MISCONDUCT

No aspect of criminal procedure generates more prolific responses than the issue of prosecutorial misconduct. The past eighteen months of Florida appellate decisions has done nothing to tarnish the attention addressed to the actions of prosecutors. While it would be unfair to castigate all prosecutors for the actions of a relative few, certain actions described in recent Florida decisions reveal that the "win at all cost" mentality is not foreign to Florida prosecutions.

In *Brown v. State*,[199] the Fifth District Court of Appeal reversed a defendant's second degree murder conviction following a prosecutor's improper use of a defendant's six prior felony convictions during closing argument. The six felony convictions to unspecified crimes which were utilized to impeach the defendant during cross-examination were argued to the jury in summation as evidence of propensity to commit violent crimes. The prosecutor somewhat subtly attempted to establish bad character and propensity when he stated that a person with six felony convictions was "'prone to be a little hotheaded, maybe a little irrational, maybe go over the handle a little bit.'"[200]

In *Killings v. State*,[201] the First District Court of Appeal strongly condemned a prosecutor's comments in which he was "essentially waging war against the Colombian drug lords through . . . prosecution of the defendant."[202] The guilt by association trial tactics were not sufficient to mandate reversal since inexplicably no objection or motion for mistrial were made.[203] The First District even went as far as to warn that attorney discipline proceedings might be appropriate in response to "intemperate and inflammatory statements."[204]

In a concurring opinion in *Killings*, the Court warned that the "prosecutorial excess" displayed could eventually result in a *per se* rule of reversible error. As the Court quite bluntly stated:

> I trust and fully expect that Florida's prosecutors are too intelligent and disciplined a lot to require a lick between their collective eyes by such a two by four to get their attention as did the proverbial mule of

199. 580 So. 2d 327 (Fla. 5th Dist. Ct. App. 1991).
200. *Id.*
201. 583 So. 2d 732 (Fla. 1st Dist. Ct. App. 1991).
202. *Id.* at 733.
203. *Id.*
204. *Id.*

jokelore.[205]

Perhaps the strongest example of judicial intervention to cure an instance of the "win at all cost" brand of prosecutorial misconduct was displayed by the Fourth District Court of Appeals in *State v. Nessim*.[206] In *Nessim*, the Fourth District affirmed the trial court's order dismissing an indictment based upon the refusal of the State of Florida to impose "use" immunity upon a critical witness whose testimony was essential to the presentation of an individual's defense.[207] The *Nessim* court adopted the rationale set forth in *State v. Montgomery*,[208] that government misconduct resulting in a distortion of the fact-finding process was adequate grounds for the trial court to give the State of Florida an option to either impose statutory "use" immunity or suffer dismissal of criminal charges.[209] In *Nessim*, the prosecutor had allegedly instructed the critical witness not to become involved as a witness in the case.[210] The abhorrence and impropriety of the prosecutor withholding the opportunity of a critical witness to testify on behalf of a defendant is self-evident. However, the determination of both the trial court and the appellate court to remedy that impropriety should offer encouragement to advocates who can successfully present both the necessity of the requested testimony as well as the participation of the prosecution in the alleged misconduct.

Another component of the prosecutorial misconduct "win at all cost" arsenal is the production of testimony which is prejudicial and inflammatory. Illustrative of this methodology was a First District Court of Appeals case which involved the prosecutor's infatuation with racial "evidence" during prosecution of a black man accused of raping a white woman.[211] Included in the prosecutor's racial prosecution game plan were questions of the rape victim concerning dating a "black boy or black man before," consorting with "black men or boys" or fighting with "a black man before."[212] The prosecutor also asked witnesses whether the defendant had ever been known to date or have romantic relationships with a "white girl."[213]

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205. *Id.* at 733 (Miner, J., concurring).
206. 587 So. 2d 1344 (Fla. 4th Dist. Ct. App. 1991).
207. *Id.* at 1346.
208. 467 So. 2d 387 (Fla. 3d Dist. Ct. App. 1985).
209. *Nessim*, 587 So. 2d at 1346.
210. *Id.*
211. Reynolds v. State, 580 So. 2d 254 (Fla. 1st Dist. Ct. App. 1991).
212. [illegible]
213. *Id.* at 256 n.2.

In *Gonzalez v. State*,[214] the Third District Court of Appeal reversed a conviction for sexual battery upon a child twelve years old or younger based in part upon the prosecutor's cross-examination of the defendant.[215] In a truly amazing example of misconduct, which was labelled by the appellate court as "adducing highly inflammatory and irrelevant evidence,"[216] the prosecutor sought to establish that the defendant desired to marry the sixteen year old sister of the victim and was, therefore, a sexual pervert.[217]

One of the slickest means that prosecutors have attempted to improperly inflame jurors is by producing reputation testimony concerning "the area" in which a crime allegedly took place. The thrust of the tactic is to have a law enforcement officer claim that the area in which the offense allegedly occurred had the reputation as a narcotic or high crime area. The testimony is not based upon any observation on the day of the alleged offense and has no nexus to the defendant. The jury is left to conclude that since the defendant was located in an area with a reputation of criminal activity, the defendant was involved in the alleged offense. Florida Appellate Courts have repudiated this tactic.[218]

Traditional efforts by prosecutors to gain an unfair advantage surfaced in several prosecutions. Illustrating the "win at all cost" attitude was a prosecutor's attempt to introduce past contacts between a law enforcement officer and a defendant which were calculated to suggest the bad character of a defendant.[219] The Third District Court of Appeals rejected the impropriety and reversed a resisting arrest without violence conviction.[220] The same court reversed a conviction due to the prosecutors following question:

> Q. Did Mr. Hicks make any statements to you after he was finally subdued or during the process of being induced.
>
> A. No.[221]

The testimony constituted an impermissible comment on the defenda-

214. 588 So. 2d 314 (Fla. 3d Dist Ct. App. 1991).
215. *Id.* at 315.
216. *Id.*
217. *Id.*
218. *See, e.g.*, Hicks v. State, 590 So. 2d 498 (Fla. 3d Dist. Ct. App. 1991).
219. *Id.* at 499.
220. *Id.*
221. *Id.* at 500.

nt's post arrest silence. The fact that the silence was not induced by *Miranda* warnings does not remove the prosecutors actions from the scope of a state constitutional violation.[222]

Prosecutorial misconduct most frequently occurs during closing arguments. While traditional misconduct such as "Golden Rule" violations were relatively rare,[223] prosecutors seemed intent upon becoming advocates for the war on crime as opposed to mere advocates for the State of Florida. The primary weapons in this war were attacks upon the defense and the insertion of prosecutor's personal opinions.

Each of the Florida appellate courts addressed improprieties in prosecutor's closing arguments during the past eighteen months. Perhaps the most flagrant example of prosecutorial misconduct was revealed in *Alvarez v. State*,[224] in which *fourteen* specific examples of improper closing argument comments are described. Included in the "top fourteen" list of comments every prosecutor should never make were the following classics. "Don't let them [the defense] confuse you, because all you will get from the defense is tearing down. You will not get anything substantive only inconsistencies . . . ."[225] "They see a madman, a violent animal come up to the window making demands."[226] "I went nuts every time the defense asked . . . ."[227] "So if you are nitpicking and trying to insult somebody's intelligence, as the defense is really doing today . . . ."[228] "I would certainly be surprised if you don't believe . . . ."[229] "What the defense wants you to do is walk him, find him not guilty and turn him loose again."[230] "He is a robber and a burglar, and don't go for anything less . . . Can you live with the decision?"[231] "Don't let them confuse you or insult your intelligence . . . . Use your common sense. Do your part. Excise this cancer from society."[232]

While not approaching the recklessness described in *Alvarez*, the Second District Court of Appeal revealed an analogous level of misconduct

222. *Id.* (citations omitted).
223. *See* Brown v. State, 575 So. 2d 1363 (Fla. 3d Dist. Ct. App. 1991).
224. 574 So. 2d 1119 (Fla. 3d Dist. Ct. App. 1991).
225. *Id.* at 1120.
226. *Id.*
227. *Id.*
228. *Id.*
229. *Alvarez*, 574 So. 2d at 1120.
230. *Id.*
231. *Id.*
232. *Id.* at 1121.

in *Brown v. State*.[233] In *Brown*, the prosecutor's closing argument began with a claim that "it seemed to him that there was something wrong with the criminal justice system when a victim of a crime has to be victimized again by having to testify concerning the events of a crime and have his character impugned."[234] The prosecutor later stated that when the case was over, he "wanted to be able to call the victim and say that the jury had the courage to see the truth and that he was not victimized a second time."[235] The prosecutor's trifecta of impropriety concluded with the comment that the jurors were the "only ones that could give the victim back his dignity."[236]

Similarly, in *State v. Ramos*,[237] the Fourth District Court of Appeal reversed a conviction based upon a prosecutor's closing argument in which the defendant was described as "the very type of person he was looking for" as targets of ongoing narcotics investigations.[238] The prosecutor continued that "[s]ociety's best interest is served by convicting the kingpin over the supplier in this case . . . ."[239] Finally, the prosecutor stated, "[a]nd Susan testified, I believe she testified totally truthfully to you."[240]

The most disturbing aspect of the reversed cases is that a trial court deemed it appropriate to deny the requested relief of a mistrial and thus sanctioned the cited misconduct. It would appear that practitioners should aggressively litigate the propriety of prosecutors' comments during the State's closing arguments. Apparently, many prosecutors have not gotten the message that the "win at all cost" war on crime mentality will not be tolerated by Florida Appellate Courts. Perhaps the implementation of Florida Bar disciplinary actions will assist in communicating the need for reform. It would also be appropriate for State Attorney's Offices to require attorneys who are accused of improper argument to personally brief that issue and appear before the Appellate Court to argue the propriety of their comments. Then prosecutors, knowing that they will be held personally accountable and must personally justify their comments, might adjust their "win at all cost" short-term thinking.

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233. 593 So. 2d 1210 (Fla. 2d Dist. Ct. App. 1992).
234. *Id.* at 1211.
235. *Id.*
236. *Id.*
237. 579 So. 2d 360 (Fla. 4th Dist. Ct. App. 1991).
238. *Id.* at 362.
239. *Id.*
240. *Id.*

VIII. ABUSE OF JUDICIAL DISCRETION

While Florida courts recognize the tremendous adversity confronting trial judges in the administration of justice, appellate courts have not ignored the unsuitability of abuses in the discretion exercised by the trial courts. During the past eighteen months, numerous actions of trial judges were found to be abusive and requiring relief. Although difficult to categorize, these abuses of discretion merit individual discussion.

In *Love v. State*,[241] the Third District Court of Appeal reversed a conviction based upon a trial court's initial instruction to the jury panel during jury selection that "the defendant does not have to testify, will probably not testify, *you will not hear both sides of the story*."[242] The *Love* court concluded that the trial court's comment constituted an impermissible comment on the defendant's right not to testify.[243]

The Fourth District Court of Appeal concluded in *Lamar v. State*,[244] that the trial court abused its discretion by limiting closing argument to fifteen minutes. *Lamar* relied upon the analysis of the Third District Court of Appeal[245] that under ordinary circumstances closing arguments limited to thirty minutes or less were suspect meriting judicial scrutiny.

Abuses of discretion were also defined in terms of adverse rulings to the State of Florida. In *State v. Macon*,[246] the trial court's dismissal of an Information was deemed to be an abuse of discretion mandating reversal of a conviction. In *Macon*, the trial court refused to accept a defendant's guilty plea and consequently inquired whether the State was prepared for trial. The prosecution answered in the negative and prior to an opportunity to apply for a continuance, the trial judge dismissed the Information.[247]

The *Macon* decision must be viewed within the context of the Fourth District Court of Appeal decision in *State v. McCarthy*,[248] in which the court affirmed the trial court's denial of the State of Florida's application for a continuance of a suppression hearing when subpoenaed State witnesses failed to appear. The failure of the witnesses to appear and testify resulted in suppression of evidence.[249]

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241. 583 So. 2d 371 (Fla. 3d Dist. Ct. App. 1991).
242. *Id.* at 371 (emphasis added).
243. *Id.*
244. 583 So. 2d 771 (Fla. 4th Dist. Ct. App. 1991).
245. Foster v. State, 464 So. 2d 1215 (Fla. 3d Dist. Ct. App. 1984).
246. 584 So. 2d 218 (Fla. 4th Dist. Ct. App. 1991).
247. *Id.* at 219.
248. 585 So. 2d 1167 (Fla. 4th Dist. Ct. App. 1991).
249. *Id.* at 1167.

A trial court's dismissal of an Indictment due to the non-presence of a victim at trial following several previous defense continuances was also defined as an abuse of discretion by the Fourth District Court of Appeal in *State v. Ottrock*.[250]

A trial court's removal of a public defender from representation of a defendant was declared an abuse of discretion in *Finkelstein v. State*.[251] In *Finkelstein*, the assigned public defender refused to proceed with an evidentiary hearing relating to the admissibility of evidence until the court concluded an evidentiary hearing concerning the competency of the defendant to stand trial.[252] The Fourth District determined that instead of removal of counsel, the appropriate remedy would have been commencement of contempt proceedings to compel compliance of court orders.[253]

In *Thornton v. State*,[254] a trial court's *sua sponte* removal of all individuals from a courtroom during the testimony of a minor victim of a crime mandated reversal of a conviction.

In *Garcia v. State*,[255] the Fourth District Court of Appeal reversed a conviction based upon the failure of the trial court to have a court reporter present to record an *in camera* hearing involving a determination of disclosing the identity of the confidential informant.

The judicial equivalent of a television series concerning one's most embarrassing moments, whether styled "Candid Camera," "America's Funniest Home Videos" or "Famous Bloopers," generally includes matters involving juries. To the experienced practitioner, the most likely occurrence to finish the phrase "just when you thought that you had seen everything . . ." will no doubt relate to jurors. From that context, the following judicial actions involving jurors were reported within the past eighteen months.

In *Young v. State*[256] the First District Court of Appeal reversed a cocaine distribution conviction when the trial judge failed to deliver an answer to a jury question which arose during deliberation.[257] A written response to the jurors question was signed by the prosecution and defense attorney but not by the trial judge.[258] The trial judge had left the courthouse to run

250. 573 So. 2d 169 (Fla. 4th Dist. Ct. App. 1991).
251. 574 So. 2d 1164 (Fla. 4th Dist. Ct. App. 1991).
252. *Id.*
253. *Id.* at 1169.
254. 585 So. 2d 1189 (Fla. 2d Dist. Ct. App. 1991).
255. 578 So. 2d 325 (Fla. 4th Dist. Ct. App. 1991).
256. 591 So. 2d 651 (Fla. 1st Dist. Ct. App. 1991).
257. *Id.* at 651, 653.
258. *Id.* at 652.

an errand.[259]

In *Porr v. State*,[260] the Second District Court of Appeal found that the trial judge committed reversible error when the trial judge, in violation of rule 3.410 of the Florida Rules of Criminal Procedure, provided a written answer to a jury question without ever notifying counsel for the State or the Defense.[261]

Additionally, in *McKinney v. State*,[262] the Supreme Court of Florida found harmless error where the bailiff had ex parte communication with the jury regarding the law.[263] In *McKinney*, the jury summoned the bailiff to ask a question regarding the use of separate verdict forms for premeditated and felony first-degree murder.[264] Instead of directing the question to the court, the bailiff instructed the jury, "[premeditated murder] was part of the instructions. They were not to rule on premeditated murder."[265] The Supreme Court of Florida found harmless error due to the immediate corrective instruction given by the trial judge and the nonprejudicial nature of the bailiff's comments.[266]

Florida appellate courts have continued to illustrate that trial judges have the uncanny ability to commit error during jury selection for criminal cases. Perhaps the most flagrant example of this error occurs when the trial judge refuses to excuse a perspective juror for cause where a reasonable doubt exists as to whether the juror possesses the state of mind necessary to render an impartial recommendation. Illustrating the fetish for error were decisions from the First and Fourth District Court of Appeals. In *Noe v. State*,[267] a defendant's first degree murder conviction was reversed due to the trial court's refusal to strike for cause two jurors who expressed particular problems with the insanity defense.[268] In *Chapman v. State*,[269] the Fourth District Court of Appeal reversed a defendant's armed kidnapping conviction in which the trial judge had refused to excuse for cause a juror who during *voir dire* admitted that she would have a difficult time being impartial given the fact that her mother had been murdered in a convenience

259. *Id.* at 651.
260. 585 So. 2d 944 (Fla. 2d Dist. Ct. App. 1991).
261. *Id.* at 944-45.
262. 579 So. 2d 80 (Fla. 1991).
263. *Id.* at 83.
264. *Id.*
265. *Id.*
266. *Id.*
267. 586 So. 2d 371 (Fla. 1st Dist. Ct. App. 1991).
268. *Id.* at 379.
269. 593 So. 2d 605 (Fla. 4th Dist. Ct. App. 1992).

store holdup when the juror was eight years old.[270]

Judicial abuses resulting in reversals of criminal dispositions place a heavy burden upon the criminal justice system. While the variety of abuses appear to coincide with the frailties of human nature, practioners must be alert to protect the interests of their clients and preserve instances of abuse for appellate review. Appellate courts will likely seek to remedy individuals whose rights have been tarnished by judicial conduct.

IX. SPEEDY TRIAL

No area of criminal practice has been as dramatically altered as litigation concerning the State Speedy Trial Act (Act).[271] Unlike most areas of litigation, speedy trial matters have been dramatically reduced in recent years. The primary causation of this change has been the 1984 abolition of the automatic discharge provision of the Speedy Trial Rule. Instead of automatic discharge, the State of Florida is provided with what amounts to a ten day grace period to commence trial of a defendant after the speedy trial period has expired.[272]

The amended Act has prevented defendants from sitting back and attempting to have their cases "slip through the cracks" of an overburdened court system. Instead of waiting until the speedy trial time has expired and then moving for discharge of their case, the defendant can only seek judicial intervention and the imposition of the ten day grace period in which the defendant must then be tried.

Relatively few appellate decisions were generated during the past eighteen months concerning the Act.[273] Those cases presented relatively

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270. *Id.* at 605-06.

271. FLA. R. CRIM. P. 3.191.

272. *Id.* at 3.191(p)(3).

273. Illustrating the nature of Florida Appellate Speedy Trial decisions in the past eighteen months are the following decisions: State v. Rohm, 596 So. 2d 1271 (Fla. 4th Dist. Ct. App. 1992) (Discharge under speedy trial rule reversed when trial court failed to allow state fifteen days to bring defendant to trial from date of defendant's motion for discharge. Fact that the speedy trial time had previously been extended for exceptional circumstances did not forfeit the State's window of opportunity to bring defendant to trial.); Jones v. State, 573 So. 2d 185 (Fla. 1st Dist. Ct. App. 1991) (Defendant's convictions reversed and an order for discharge mandated where trial court erroneously concluded that defendant's failure to appear at pretrial hearing waived the speedy trial rights. Defendant had been incarcerated in another county on other charges with the knowledge of both the court and the prosecutor.); State v. Agee, 580 So. 2d 600 (Fla. 1st Dist. Ct. App. 1991) (Defendant discharged from attempted murder allegation where state had entered nolle prosse instead for moving for an

unique factual scenarios which probably forebear an even smaller volume of litigation. While not the high profile topic of litigation of past years, "speedy trial" must still be considered and evaluated by all practitioners.

XIV. CONCLUSION

The past eighteen months of Florida criminal appellate procedure has seen a constant adherence to basic principles of individual rights. While the direction of federal appellate decisions might be travelling on a clearly restrictive path, the Florida courts appear dedicated to utilizing their independent judgment and tools, including the Florida Constitution, to promote justice. Practitioners must realize that Florida appellate courts will provide significant safeguards to protect the rights and interests of criminal defendants.

extension of speedy trial. State found to have abandoned case.); State v. Martinez, 586 So. 2d 1285 (Fla. 3rd Dist. Ct. App. 1991) (Defendant's speedy trial discharge reversed since defendant's motion for continuance waived speedy trial right.); Williams v. Shapiro, 575 So. 2d 1368 (Fla. 3rd Dist. Ct. App. 1991) (Unindicted murder suspect's motion for discharge filed prior to filing of any charging document did not invoke Speedy Trial Act or remedies.).

Abolishing the Peremptory Challenge: The Verdict of Emerging Caselaw

TABLE OF CONTENTS

I. INTRODUCTION 1368
II. BACKGROUND 1369
A. *The Jury* 1369
B. *Origins and Use of the Peremptory Challenge* 1371
III. DISCRIMINATION AND THE JURY 1374
A. *Pre-Batson* 1374
B. *Batson v. Kentucky* 1375
IV. IMPLEMENTATION BY LOWER COURTS 1378
A. *Cognizable Groups* 1378
B. *The Prima Facie Case* 1381
C. *Rebutting the Inference and Pretext* 1383
D. *Standard of Review* 1386
V. THE SIXTH AMENDMENT AND THE CROSS-SECTION OF THE COMMUNITY 1388
VI. THE SIXTH AMENDMENT AND THE PEREMPTORY CHALLENGE 1389
VII. THE PEREMPTORY CHALLENGE AND THE COMMUNITY 1394
VIII. THE HOLES IN THE REBUTTAL ARGUMENT 1395
IX. BALANCING THE COSTS 1400
X. A DIFFERENT KIND OF CHALLENGE FOR CAUSE 1401
XI. AND THEN THERE WERE NONE 1402
XII. CONCLUSION 1403

"One of the most fundamental social interests is that the law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness . . . ."[1]

1. Jim Hampton, *Abolish Peremptory Challenges*, MIAMI HERALD, Mar. 18, 1984, at 2E (quoting Benjamin Cardozo, NATURE OF THE JUDICIAL PROCESS (1921).

Nova Law Review, Vol. 17, Iss. 4 [1993], Art. 1

I. INTRODUCTION

In *Batson v. Kentucky*,[2] the 1986 Supreme Court decision that made it unconstitutional to use the peremptory challenge to reject jurors on the basis of race, Justice Thurgood Marshall applauded the majority for its holding.[3] In his concurrence, however, he expressed fear that without totally eliminating the peremptory challenge, discrimination would continue to pervade the jury selection process, albeit through pretextual guises.[4] Since *Batson*, state and federal courts have grappled with over 700 cases applying the standards it established.[5]

The echoes of Justice Marshall's opinion can still be heard resounding through recent state court decisions in New York[6] and Florida.[7] Significant are concurring opinions in both cases which recognize both the constitutional anomaly that the peremptory challenge represents and its undermining

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2. 476 U.S. 79 (1986).

3. *Id.* at 102.

4. *Id.* at 102-08 (Marshall, J., concurring). Prophetically, Marshall predicted "[t]he decision today will not end the racial discrimination that peremptories inject into the jury-selection process." *Id.* at 102-03.

5. Stephanie Goldberg, *Batson and the Straight-Face Test*, A.B.A. J., Aug. 1982, at 82, 82. The Court set forth a three part test under which a defendant could establish a prima facie case of discrimination in the exercise of a peremptory challenge. *See Batson*, 476 U.S. at 96. The defendant must show 1) that he is a member of a cognizable group, 2) that the prosecution's use of the peremptory challenge resulted in the exclusion of members of the defendant's race from the jury, and 3) facts and other relevant circumstances sufficient to raise an inference that the prosecution used the challenge for discriminatory purposes. *Id.* Once the defendant makes a prima facie showing, the burden shifts to the prosecution to present racially neutral explanations for the challenges. *Id.* at 97. It cannot rebut the defendant's prima facie case by merely alleging its good faith or by claiming the stricken jurors would be biased because they shared the defendant's race. *Id.* at 97-98.

Subsequently, the Court has applied *Batson* to criminal defendant's use of the peremptory challenge, Georgia v. McCollum, 112 S. Ct. 2348 (1992), and to civil litigation, Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077 (1991). In addition, in Powers v. Ohio, 111 S. Ct. 1364 (1991), the Court held that the defendant need not share the same race as the excluded juror in order to assert a violation of the Fourteenth Amendment Equal Protection Clause on behalf of an excluded juror who is a member of a cognizable racial group.

6. People v. Bolling, 591 N.E.2d 1136 (N.Y. 1992) (where the court remitted a case to the trial court to inquire into the prosecutor's possible impermissible use of peremptory challenges based on Equal Protection analysis and framework established in *Batson*).

7. Alen v. State, 596 So. 2d 1083 (Fla. 3d Dist. Ct. App. 1992) *aff'd*, 18 Fla. L. Weekly 223 (Fla. Apr. 8, 1993) (where the court, finding prosecutorial misuse of peremptory challenges, reversed a defendant's conviction and directed a new trial based upon violation of Florida's constitutional guarantee to an impartial jury).

effects on the ideals of a democratic, representational and impartial trial system.[8] Both opinions call for the elimination of the peremptory challenge.[9]

This note will examine the peremptory challenge and its inherent conflict between the constitutional guarantees of equal protection and an impartial jury.[10] It will discuss how attempts of the judiciary to reconcile these opposing forces have been inadequate, undermining public confidence in the trial system and creating far more confusion and inconsistency than they sought to relieve. This note will argue that the peremptory challenge should be abolished as incompatible with both the Equal Protection Clause of the Fourteenth Amendment as well as the cross section requirement implicit in the Sixth Amendment guarantee to an impartial jury.[11] Furthermore, this note will illustrate that the peremptory challenge injures rather than protects impartiality and the democratic ideals and perceptions of fairness in the American trial system. Finally, this note will suggest an alternative which balances the concerns of constitutionality and discrimination as well as the expectations and mechanics of fairness which jury trials must represent.

II. BACKGROUND

A. *The Jury*

Any discussion about the peremptory challenge must necessarily begin with the concept of the jury as well as the individual members that comprise it. In his commentary on American institutions, de Tocqueville saw the jury as a political institution which protected individuals from arbitrary state power, allowed citizens to participated directly in decisions regarding property and punishment, enabled them to judge and create standards of conduct for private and public agencies alike, conferred legitimacy on

8. *See id.* at 1086-91 (Hubbart, J., concurring); *Bolling*, 591 N.E.2d at 1142-46 (Bellacosa, J., concurring).

9. *See Bolling*, 591 N.E.2d at 1142 (Bellacosa, J., concurring); *Alen*, 596 So. 2d at 1086 (Hubbart, J., concurring).

10. *See* U.S. CONST. amend VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."; U.S. CONST. amend XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

11. *See* Holland v. Illinois, 493 U.S. 474 (1990); Taylor v. Louisiana, 419 U.S. 522 (1975).

institutions of law and political justice, and elevated public consciousness of popular rights and responsibilities.[12] In essence, the jury represents the legal conscience of the community and acts as a barometer for accepted standards of social conduct. "It must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it."[13] Arguably, the most critical of the constitutional rights pertaining to the jury is that which guarantees an impartial jury.[14]

It is common sense that impartiality is a paramount virtue for the jury to accomplish its function. As a legal institution, the jury is designed to render verdicts based upon the evidence presented, exclusive of the personal and social characteristics of the litigants and exclusive of such characteristics on the part of jurors.[15] Realistically, however, given the personal experiences and individual biases every person brings to the courtroom, this ideal is unattainable.[16] Much evidence suggests that "many potential jurors enter the courtroom with views that may undermine their ability to be fair."[17] That is why jury selection is an important stage of the trial process. The

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12. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 270-76 (J.P. Mayer ed., 1969).

13. *Taylor*, 419 U.S. at 529 n.7 (citing H.R. REP. NO. 1076, 90th Cong., 2d Sess. 8 (1968)).

14. U.S. CONST. amend. VI. The jury has also been described as the bulwark of protection for the criminal defendant since juries acquit 33% of defendants while bench trials acquit only 17% of trials. HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 58 (Univ. of Chic. 1971) (1966).

15. Cookie Stephan, *Selective Characteristics of Jurors and Litigants: Their Influences on Juries' Verdicts*, *in* THE JURY SYSTEM IN AMERICA 97 (Rita Simon ed., 1975).

16. *See, e.g.*, JON M. VAN DYKE, JURY SELECTION PROCEDURES: OUR UNCERTAIN COMMITMENT TO REPRESENTATIVE PANELS xiii at Introduction (1977) ("No individual is totally objective; all people have their own personal views and experiences. That is why the decision of a group of twelve is considered more reliable . . . than that of one person, even a person well-versed in the law.").

17. *See* 1 NATIONAL JURY PROJECT, JURYWORK: SYSTEMATIC TECHNIQUES § 2.04[2][a] (Elissa Krauss & Beth Bonora gen. eds., 2d ed. 1992) (discussing that the majority of those surveyed in national polls believed defendants should have to prove their innocence and that defendants should be required to testify on their own behalf) [hereinafter JURYWORK]; *see also* Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 121 n.583 (1990) (citing a National Jury Project and National Lawyers Guild study "finding that 60% of prospective jurors were unable to follow court instructions that a defendant is presumed innocent and that the prosecution, not the defense, has the burden of proof in a criminal case"); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 MICH. L. REV. 1611 (1985) (arguing that minority defendants are largely unprotected from persistent racial bias which infiltrates jury decisionmaking).

Supreme Court has stated that "[j]ury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice or predisposition about the defendant's culpability."[18]

The term "jury selection" is actually a misnomer.[19] No party gets to select a jury. Instead, parties "deselect" prospective jurors who they feel are predisposed to siding with the opposing party.[20] In this search for an impartial jury, the peremptory challenge has been characterized as one of the attorney's most valuable tools.[21] Its purpose is to eliminate prospective jurors who may have hidden biases about the defendant, the prosecution, or the case itself, and who thus might threaten the jury's impartiality.[22] It permits the removal of a juror whose partiality is suspected but not conclusively established.[23]

B. *Origins and Use of the Peremptory Challenge*

As originated in English law, the peremptory challenge was seen as a right of the criminal defendant.[24] It "allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all . . . ."[25] The United States subsequently adopted this right under both statutory and common law, making it available to both prosecution and defense.[26] Although the peremptory challenge is not

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18. *Powers*, 111 S. Ct. at 1371 (1991) (citations omitted).

19. Newton N. Minow & Fred H. Cate, *Justice: Is Impartiality Really Possible?*, USA TODAY, Jan. 1992, (Magazine), at 58, 60.

20. *Id.*

21. *See, e.g.*, Swain v. Alabama, 380 U.S. 202, 212 (1965) (The peremptory challenge "affords a suitable and necessary method of securing juries which in fact and in the opinion of the parties are fair and impartial." "The persistence of peremptories and their extensive use demonstrate the long and widely held belief that peremptory challenge is a necessary part of trial by jury." *Id.* at 219); *Batson*, 476 U.S. at 91 ("those challenges traditionally have been viewed as one means of assuring the selection of a qualified and unbiased jury.").

22. *See Swain*, 380 U.S. at 219 ("The function of the challenge is not only to eliminate the extremes of partiality on both sides, but to assure the parties that the jurors . . . will decide on the basis of the evidence placed before them, and not otherwise.").

23. JAMES J. GOBERT, JURY SELECTION § 8.13, at 309 (2d ed. 1990).

24. *See* VAN DYKE, *supra* note 16, at 147 (discussing the historical background of the peremptory challenge). The prosecutor's right to exercise the peremptory challenge is of more recent origin. *Id.* at 147-50.

25. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 353 (G. Sharswood ed. 1859).

26. *See Swain*, 380 U.S. at 214-18; *see also* FED. R. CRIM. P. 24(b); FLA. STAT. § 913.08 (1991).

required by the Constitution,[27] throughout American history it has been forcefully protected[28] and its "very old credentials" are acknowledged in the most recent of Supreme Court decisions.[29] Thus, it may be viewed as a routine and fundamental part of the trial landscape.[30]

Ordinarily, attorneys base their challenges on information garnished during *voir dire*. Since *voir dire* elicits less than perfect information about predispositions and hidden biases of prospective jurors, trial attorneys tend to rely on their own perceptions, if not their own prejudices, in deciding whether a juror with a given race, sex, age, religion, ethnic background, occupation or socio-economic status will act impartially in a particular trial.[31] Some attorneys even employ jury consultants to assist them in identifying a juror's likely predispositions.[32] Any number of characteristics

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27. Stilson v. United States, 250 U.S. 583, 586 (1919) ("There is nothing in the Constitution of the United States which requires the Congress to grant peremptory challenges . . . . The number of challenges is left to be regulated by the common law or the enactments of Congress.").

28. *See, e.g.*, Pointer v. United States, 151 U.S. 396, 408 (1894) ("The right to challenge a given number of jurors without showing cause is one of the most important rights secured to the accused . . . . Any system for the empaneling of a jury that pre[v]ents or embarrasses the full, unrestricted exercise by the accused of that right must be condemned."); Lewis v. United States, 146 U.S. 370, 376 (1892) ("The right of challenge . . . has always been held essential to the fairness of trial by jury.").

29. Georgia v. McCollum, 112 S. Ct. 2348, 2358 (1992) (referring to the Court's holding in *Swain*, 380 U.S. at 212).

30. In ordinary practice, peremptory challenges are exercised at the final stage of jury selection. There are several stages in the selection process, including assembling jury "pools," randomly selecting "venires" from those pools for service during a particular court term, and finally, selecting from the venire the jury "panel" to be seated for a particular trial. *See* Stephen A. Saltzburg & Mary Ellen Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 MD. L. REV. 337, 339 (1982).

Prospective jurors comprising the *venire*, are first subject to *voir dire*, a preliminary face-to-face examination by the court and attorneys, where the juror's qualifications and suitability are determined. BLACK'S LAW DICTIONARY 1575 (6th ed. 1990). Thereafter, relying on knowledge gained through *voir dire*, attorneys may choose to remove a prospective juror either through a challenge for cause or a peremptory challenge.

Challenges for cause are "narrowly specified, provable and legally cognizable" reasons subject to judicial control. *Swain*, 380 U.S. at 220 (citations omitted). They might rest on a juror's relationship with the litigation itself or his inability to apply established law to the facts of the case. For examples of challenges for cause see FLA. STAT. § 913.03 (1991). Peremptory challenges, however, may be employed without stating reasons and without judicial approval. *Swain*, 380 U.S. at 220.

31. Saltzburg & Powers, *supra* note 30, at 342. Attorneys look at these qualities not only to identify jurors who may favor the opposing side but to identify jurors who will favor their own position.

32. One notable case where a jury consultant was used involved the rape trial of

which uniquely identifies a particular prospective juror can become the basis for deciding who to challenge. For these reasons, peremptory challenges may at best be called educated guesses. At worst, they are unfounded hunches based on prejudice and unsupported stereotypes.

Even so, the Supreme Court has historically portrayed the peremptory challenge as a near sacred means for assuring a fair trial.[33] However, acknowledging that this privilege has been used unconstitutionally, the Supreme Court in *Batson v. Kentucky*,[34] employing the Equal Protection Clause, took its first significant step to curbing racially discriminatory jury selection practices.[35] Similarly, a number of states, including Florida, have attempted to eradicate the discriminatory use of peremptory challenges in criminal trials, instead relying on their own state constitutional requirements for an impartial jury.[36] Regrettably, neither approach adequately resolves the problem since the goals of ensuring impartiality and representativeness, as well as attempts to eliminate racial discrimination, directly collide with the exercise of the peremptory challenge. Furthermore, under the Equal Protection Clause, both federal and state approaches ought to be extended

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William Kennedy Smith. It was well reported in news accounts that Miami defense attorney Roy Black utilized jury consultants to help win acquittal for Smith. *See generally* Margaret Covington, *Use of Expert Assistance in Jury Selection*, 90 CASE & COM. 20 (July-Aug. 1985); Shari Seidman Diamond, *Scientific Jury Selection: What Social Scientists Know and Do Not Know*, 73 JUDICATURE 178 (1990).

33. *See supra* notes 21, 28 and accompanying text.

34. 476 U.S. 79 (1986).

35. *Id.* at 99 ("The reality of practice amply reflected . . . shows that the challenge may be, and unfortunately at times has been, used to discriminate . . . ." "The Equal Protection Clause forbids prosecutors to challenge potential jurors solely on account of their race . . . ." *Id.* at 89).

36. *See, e.g.*, *Ex parte* Branch, 526 So. 2d 609 (Ala. 1987); People v. Wheeler, 583 P.2d 748 (Cal. 1978); Riley v. State, 496 A.2d 997 (Del. 1985), *cert. denied*, 478 U.S. 1022 (1986); State v. Neil, 457 So. 2d 481 (Fla. 1984); Commonwealth v. Soares, 387 N.E.2d 499 (Mass.), *cert. denied*, 444 U.S. 881 (1979); State v. Gilmore, 511 A.2d 1150 (N.J. 1986); *see also* State v. Crespin, 612 P.2d 716 (N.M. Ct. App. 1980) (indicating in dicta that it was leaning towards this approach); People v. Thompson, 435 N.Y.S.2d 739 (App. Div. 1981) (applying state constitutional guarantee to an impartial jury).

State approaches based on state constitutional impartial jury requirements are in direct opposition to the Supreme Court's own Sixth Amendment approach. *Compare* Holland v. Illinois, 493 U.S. 474 (1990) (holding that use of the peremptory challenge to eliminate jurors who are members of distinct groups does not violate the cross section of the community requirement implicit in the impartial jury guarantee of the Sixth Amendment *with, e.g.*, State v. Neil, 457 So 2d 481 (Fla. 1984) (holding that the peremptory challenge was not to be used to encroach upon the state's constitutional guarantee of an impartial jury); *see also infra* discussion in Sections V and VI.

beyond their original "racial" applications to prohibit exclusion of jurors from *any* distinct group that may be subject to discriminatory treatment in jury selection. Such extension is necessary to eliminate the peremptory challenge altogether as a device "uniquely suited to masking discriminatory motives," whether racially or non-racially based.[37]

III. Discrimination and the Jury

A. *Pre-Batson*

The Supreme Court first attempted to eliminate unconstitutional discrimination in the assembly of juries over a hundred years ago in *Strauder v. West Virginia*.[38] In *Strauder*, the Court struck down, as a violation of the Equal Protection Clause, a West Virginia state statute which allowed only white men to serve on juries.[39] Although *Strauder* prohibited the exclusion of blacks from jury pools, it did nothing to prevent them from being discriminatorily excused from the jury panel through peremptory challenge.

It wasn't until the civil rights movement in the 1960's that the United States Supreme Court, in *Swain v. Alabama*,[40] finally reached the issue of discriminatory use of the peremptory challenge. In *Swain*, after the prosecutor peremptorily struck all six black jurors remaining on the venire, an all-white jury in Talladega County, Alabama convicted a black man of raping a white woman and sentenced him to death.[41] The Supreme Court rejected Swain's claim that the prosecutor's use of peremptory strikes constituted an equal protection violation, holding that the peremptory challenge was not subject to the strictures of the Equal Protection Clause and that the prosecutor's use of peremptory challenges must be given a presumption of validity unless the defendant could show the prosecutor "consistently and systematically" removed black jurors so as to prevent blacks from ever serving on juries.[42] The presumption is not overcome even if every black

37. State v. Slappy, 522 So. 2d 18, 20 (Fla.), *cert. denied*, 487 U.S. 1219 (1988).

38. 100 U.S. 303 (1879).

39. *Id.* at 310. The Court's holding reflected the recently ratified Fourteenth Amendment. *Id.* at 306, 307.

40. 380 U.S. 202 (1965).

41. *Id.* at 205.

42. *Id.* at 223. No black had survived *voir dire* challenges in any trial since 1950, although black men over 21 constituted 26% of the males in the county. *Id.* at 205.

venireperson is excluded.[43] Unfortunately, with this presumption, the Court exacerbated the problem of racial discrimination and legitimized the discriminatory assumption that a black cannot impartially try the case of a black defendant.[44] It also created an evidentiary burden that was virtually impossible for the defendant to carry and undermined any advances in civil rights made by *Strauder*. As such, the discriminatory use of the peremptory challenge went virtually unimpeded until 1986.[45]

B. *Batson v. Kentucky*

The *Swain* decision was condemned by nearly all commentators.[46] Thus, sensing a need to readdress the *Swain* decision, the Supreme Court revisited the peremptory challenge system in *Batson v. Kentucky*.[47] In *Batson*, the Supreme Court held the Equal Protection Clause forbids the prosecutor from challenging prospective jurors "solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."[48] The Court, rejecting *Swain* because it "placed on defendants a crippling burden of proof" thereby allowing the prosecutor's challenge to be "largely immune from constitutional scrutiny,"[49] observed that the peremptory challenge constitutes a jury selection practice which permits "those to discriminate who are of a mind to discriminate."[50] In order to eradicate discriminatory use of the peremptory challenge the Court fashioned a new test which lowered the threshold of proof required by the defendant and shifted the

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43. *Swain*, 380 U.S. at 222.

44. *See* Theodore McMillan, Batson v. Kentucky: *A Promise Unfulfilled*, 58 UMKC L. REV. 361, 365 (1990) (Theodore McMillan is a United States Court of Appeals Judge, Eighth Circuit, St. Louis, Mo.).

45. Research has revealed only two cases where defendants were able to mount the requisite showing to establish discriminatory practices by the prosecutor. *See* State v. Washington, 375 So. 2d 1162 (La. 1979); State v. Brown, 371 So. 2d 751 (La. 1979).

46. *See* McMillan, *supra* note 44, at 365 & n.31. In fact, a number of states, as well as two federal circuits, circumvented the Court's holding by applying constitutional guarantees to an impartial jury to control racial discrimination in jury selection. *See* cases cited *supra* note 36; *see also* Booker v. Jabe, 775 F.2d 762 (6th Cir. 1985), *vacated and remanded sub nom.* Michigan v. Booker, 478 U.S. 1001, *aff'd on remand*, 801 F.2d 871 (6th Cir. 1986), *cert. denied*, 479 U.S. 1046 (1987); McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984), *vacated*, 478 U.S. 1001 (1986).

47. 476 U.S. 79 (1986).

48. *Id.* at 89.

49. *Id.* at 92-93.

50. *Id.* at 96 (quoting Avery v. Georgia, 345 U.S. 559, 562 (1953)).

Nova Law Review, Vol. 17, Iss. 4 [1993], Art. 1

burden to the prosecutor to show he had race-neutral reasons for excluding jurors.[51]

The Court was by no means unified in reversing its holding of *Swain*. Chief Justice Burger, in a dissenting opinion, argued that the peremptory challenge should remain unmodified.[52] Noting past decisions had invalidated classifications based on gender, religious or political affiliation, mental capacity, number of children, living arrangements, and employment or profession, he feared the present decision would also be extended to these equal protection classifications, thereby subjecting every peremptory challenge to Fourteenth Amendment scrutiny.[53] Consequently, he argued, the majority's requirement of an explanation would in effect collapse the peremptory challenge into a challenge for cause.[54]

Chief Justice Burger also argued that because the peremptory challenge could not survive the application of basic equal protection standards, it should be exempted from conventional equal protection analysis.[55] He felt nothing should reduce the function and application of the peremptory challenge.[56]

That the peremptory challenge does not survive basic equal protection analysis itself should have guided the Court further in its application. In essence, under the Equal Protection Clause, arbitrary classifications by government which treat similarly situated individuals differently are forbidden without some overriding rational purpose.[57] However, as an

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51. *See supra* note 5. In essence, *Batson* was a reversal of *Swain* in the sense that the Court recognized that the peremptory challenge constitutes a practice which "permits those to discriminate who are of a mind to discriminate." *Batson*, 476 U.S. at 96 (quoting *Avery*, 345 U.S. at 562). Thus, since the peremptory challenge requires no explanation, a defendant objecting to its discriminatory use is entitled to rely on this assumption in establishing prima facie proof of discrimination by the prosecutor exercising the peremptory privilege.

52. *Id.* at 133 (Burger, C.J., dissenting) (It "is a part of the fabric of our jury system [that] should not be casually cast aside.").

53. *Id.* at 124. The author sees no reason why *Batson* should not have such wide application.

54. *Id.* at 127.

55. *Id.* at 123 ("[U]nadulterated equal protection analysis is simply inapplicable to peremptory challenges exercised in any particular case. A clause that requires a minimum 'rationality' in government actions has no application to 'an arbitrary and capricious right.'") (quoting *Swain*, 380 U.S. at 319).

56. *See, e.g., id.* at 127 ("Analytically, there is no middle ground: A challenge either has to be explained or it does not.").

57. Traditionally, where equal protection issues are concerned, the Court identifies a particular level of scrutiny that it will apply in its analysis, depending on the type of discrimination involved. Equal protection issues dealing with invidious racial discrimination

"arbitrary and capricious right" often based on "seat of the pants instincts" and "unaccountable prejudices," the peremptory challenge, as authorized by the state, would not appear *rationally* related to the goal of empaneling an impartial jury.[58] Thus, it could not pass lower level, let alone strict scrutiny of equal protection analysis. Applying the Equal Protection Clause to the jury selection process in the same way the Court has applied it to other government activities would eliminate the peremptory challenge altogether, just as Chief Justice Burger recognized. Such a result, however, was avoided by the *Batson* majority. Rather, the peremptory challenge was seen, and still is seen, as a necessary tool in the trial system.[59]

Contrary to Chief Justice Burger's reasoning, Justice Marshall found the Court did not go far enough in its holding.[60] To him, merely allowing the defendant an opportunity to challenge racially discriminatory use of peremptory challenges was insufficient to prevent its illegitimate use.[61] Racially discriminatory jury selection was forbidden, he argued, thus the remedy of the majority left prosecutors free to discriminate so long as it remained at an "acceptable level."[62] Furthermore, once the defendant establishes the prima facie case, prosecutors could easily proffer facially neutral reasons, which the inquiring court would be ill-equipped to second-guess.[63] To Marshall, the protection by the Court would be illusory unless the peremptory challenge was eliminated entirely.[64]

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are subject to the highest (strict) scrutiny, where discriminatory government action will only be permitted if it is necessary to fulfilling a compelling interest. *See* Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273-74 (1986). Under the lowest level of scrutiny, usually applied to discrimination which is a result of government attempts at social or economic reform, the government action will be permitted if it is rationally related to a legitimate goal. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

58. *But see* People v. Furman, 404 N.W.2d 246, 255 (Mich. App. 1987); Odom v. State, 355 So. 2d 1381, 1383 (Miss. 1978). Both cases noted that *voir dire* gives counsel a "rational basis" for exercising peremptory challenges.

59. *Batson*, 476 U.S. at 98 ("[T]he peremptory challenge occupies an important position in our trial procedures . . . .").

60. *Id.* at 102-03 (Marshall, J., concurring) ("The decision today will not end the racial discrimination that peremptories inject into the jury-selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.").

61. *Id.* at 105.

62. *Id.*

63. *Id.* at 105-06.

64. *Batson*, 476 U.S. at 106.

IV. Implementation by Lower Courts

The *Batson* majority's compromise, while easing the defendant's burden of proving discrimination, left a maze of conflicting interpretation and unresolved questions for lower courts to unravel.[65] By declining to formulate for lower courts particular implementation of the *Batson* test,[66] the Court, in effect, assured nearly as many interpretations as there were courts faced with its application. Each aspect of the *Batson* inquiry—cognizable group, prima facie case, and the race-neutral explanation—has been subject to speculation and varying interpretation by lower courts.[67] Moreover, each aspect of the test reveals the shortcomings and constitutional inadequacies of the *Batson* framework. Thus, it is not difficult to understand why one commentator remarked that "[i]f one wanted to understand how the American trial system for criminal cases came to be the most expensive and time consuming in the world, it would be difficult to find a better starting place than *Batson*."[68]

A. *Cognizable Groups*

Batson required the defendant and the excluded jurors to be members of the same cognizable racial group.[69] Clarifying this scope of *Batson* has become an ongoing practice since lower courts have pointedly disagreed upon the proper standard to apply in determining cognizability and have struggled in deciding whether a particular group satisfies the standard.[70]

Cognizability presents a troubling aspect since the Court has only

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65. For example, the Court did not state whether *Batson* applied to criminal defendants' use of peremptories or whether it applied to civil litigants. Nor did it formulate particular procedures for implementation of the test it established.

66. *Id.* at 99-100 ("We decline, however, to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges.") ("[W]e make no attempt to instruct [state and federal trial] courts how best to implement our holding today." *Id.* at 100 n.24.).

67. Many commentators cited herein have addressed the varying interpretations of each part of the *Batson* inquiry. For a concise overview of these problems see McMillan, *supra* note 44.

68. William T. Pizzi, *Batson v. Kentucky: Curing the Disease But Killing the Patient*, 1987 Sup. Ct. Rev. 97, 155 (1987).

69. *Batson*, 476 U.S. at 96. In Powers v. Ohio, 111 S. Ct. 1364, 1373 (1991), the Court held that only the excluded juror need be a member of a cognizable racial group in order for the defendant to allege misuse of the peremptory challenge.

70. Note, *Due Process Limits on Prosecutorial Peremptory Challenges*, 102 Harv. L. Rev. 1013, 1020 (1989).

established cognizable *class* standards for analysis of violations of the Sixth Amendment impartial jury requirement,[71] not cognizable *racial group* standards for Fourteenth Amendment purposes. Thus, lower courts have no directly applicable or uniform standard.

One federal circuit borrowed "distinct group" guidelines for Sixth Amendment analysis and applied them as cognizability standards for *Batson* purposes.[72] Under this test, cognizibility of the group exists when the group: 1) can be defined and limited by some clearly identifiable factor; 2) has a common thread of attitudes, ideas or experiences running through it; and 3) there exists a community of interests among the members such that the group's interests cannot be adequately represented if the group is excluded from the jury selection process.[73]

Under this application, many other groups, racial and non-racial alike, including the ones enumerated by Chief Justice Burger, would qualify for *Batson* protection. More importantly, there is no reason why the standard should not include non-racial "cognizable groups." Members of non-racial groups with distinctive characteristics are just as injured by discriminatory stereotypes when they are excluded from juries solely on the basis of perceived group bias as blacks are when they are excluded from juries based solely on their race. For example, Democrats arguably represent a cognizable group under the above standard. To challenge a juror who is a Democrat based on the idea that Democrats will be more liberal toward defendants or toward a Democratic defendant is to assign a stereotyped notion of group bias that is unrelated to the juror's individual ability to be impartial. Thus, attorneys who systematically exclude a juror based on such an unfounded notion of group bias just as surely violate equal protection as when they exclude blacks based on their race. The injury occurs whether the group is described by racial qualities or otherwise. Therefore, in

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71. *See* Thiel v. Southern Pac. Co., 328 U.S. 217, 220 (1946) (where the Court stated that the concept of a "cognizable class" includes at least "economic, social, religious, racial, political, and geographical groups of the community").

72. United States v. Sgro, 816 F.2d 30 (1st Cir. 1987), *cert. denied*, 484 U.S. 1063 (1988); *see also* Murchu v. United States, 926 F.2d 50 (1st Cir. 1991) (following *Sgro*).

73. *Sgro*, 816 F.2d at 33. In *Sgro* the defendant claimed Italian-Americans, who were excluded from the jury, were a cognizable group. *Id.* The court did not deny that Italian-Americans were a cognizable group, but held the defendant had failed to supply evidence, other than conclusory allegations, that they were. *Id.*; *see also Murchu*, 926 F.2d at 54-55 (where the court made a similar conclusion with respect to Irish-Americans after adopting the above standard, stating also "[t]he important consideration for equal protection purposes is not whether a number of people *see themselves* as forming a separate group, but whether others [treat them] unequally, *put them* in a distinct group") (citations omitted).

keeping with the protective nature of the Constitution and the expansive scope of the Equal Protection Clause, *Batson*'s reference to "racial" discrimination should not foreclose a wider application of its essential premise: That factors involving a person's affiliation with a distinct cognizable group are not, in and of themselves, legitimate reasons for excluding them from juries.

In practice, however, while attempts to extend *Batson* to non-racial areas have been made,[74] lower courts have rarely found cognizability outside narrow ethnic or racial areas. Some courts have found, for example, that Mexican-Americans[75] and Spanish-surnamed jurors[76] constitute a cognizable group, while others have denied comparable claims for Italian- and Irish-surnamed Americans.[77] Strangely, the Supreme Court has recognized that "Hispanics" represent a cognizable group,[78] although arguably, Hispanics constitute a group of multi-national origin rather than a racial group. Thus, even within these "racial" areas, cognizability has been inconsistently recognized.[79] Such inconsistency demonstrates that the cognizability requirement inexplicably excludes certain groups while it includes others. Moreover, problems of proving the existence of a cognizable group creates further obstacles which further defeat the *Batson* goal of eliminating juror discrimination.[80]

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74. *See* Donald C. Hanratty, Jr., Note, *Moving Closer to Eliminating Discrimination in Jury Selection: A Challenge to the Peremptory*, 7 N.Y.L. SCH. J. HUM. RTS. 204, 228 n.209 (1989) (listing attempts to assert age, gender and religious affiliation as a cognizable group).

75. *See, e.g.*, Bueno-Hernandez v. State, 724 P.2d 1132 (Wyo. 1986), *cert. denied*, 480 U.S. 907 (1987).

76. *See* Fields v. People, 732 P.2d 1145, 1153 (Colo. 1987) (en banc) (where excluded Spanish surnamed jurors constituted a cognizable group under both Fourteenth Amendment and state constitution impartial jury requirements).

77. *See* cases cited *supra* note 73; *see also* Hanratty, Note, *supra* note 74, at 228 n.208 (listing cases where Puerto Ricans, whites, Alaskan natives, and persons with French surnames have alleged peremptory abuse, with varying success).

78. *See* Hernandez v. New York, 111 S. Ct. 1859 (1991).

79. Additionally, still unresolved is whether *Batson* applies to gender-based discrimination, as three state appellate courts and the Ninth Circuit have held recently. *See* Goldberg, *supra* note 5, at 82 (citing cases finding that gender was a cognizable group). For an extensive survey of court opinions addressing gender-based discrimination in jury selection, see S. Alexandria Jo, *Reconstruction of the Peremptory Challenge System: A Look at Gender-Based Peremptory Challenges*, 22 PAC. L.J. 1305 (1991). Furthermore, courts are split whether groups described by economic or social status, religious or political belief, or age constitute "cognizable classes," for purposes of Sixth Amendment analysis. *See* JURYWORK, *supra* note 17, at 92-97 (1979) (listing a number of cases where non-racial groups have been found to be "cognizable groups").

80. Note, *supra* note 70, at 1020.

B. *The Prima Facie Case*

Under the *Batson* standard, before the burden shifts to the prosecutor the defendant must first show that all the facts and circumstances raise an inference that the challenges are based on racial considerations.[81] Embodied in this requirement is the Court's attempt to accommodate the interests of eliminating racial discrimination while delicately protecting the peremptory challenge. Again, the Court provided little more than vague and ambiguous guidance, leaving the task to the discretion of the trial judges.[82]

In applying the Supreme Court's vague framework, trial courts have adopted a variety of numbers games for deciding whether a prima facie case has been shown.[83] These games essentially focus on how many members of the defendant's race remain on the jury after all peremptory challenges, how many members of the defendant's race were removed through prosecutor's peremptories, or whether the ratio of peremptories against members of the relevant racial group was proportionate to the their total population on the venire.[84]

Sheer numbers analysis, though, is inadequate since it overlooks the very conduct of the attorney or juror during *voir dire* as well as the underlying reasons for the peremptory challenge. Furthermore, the Supreme Court itself has opposed statistical analysis as a litmus test or bright-line indicator.[85] Thus, lower courts are still left with little guidance.

A number of Florida cases aptly illustrate conflicting application by state trial courts.[86] In one case the trial court found an inference of

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81. *Batson*, 476 U.S. at 96. With the Supreme Court's recent decision in Georgia v. McCollum, 112 S. Ct. 2348 (1992), the prosecution may also assert peremptory abuses exercised by the defendant. Generally, states applying their own constitutional guarantees to an impartial jury similarly require the complaining party to raise an inference of discrimination before the burden shifts to the offending party. *See, e.g.*, State v. Neil, 457 So. 2d 481, 486-87 (Fla. 1984).

82. Justice Powell provided two examples of relevant circumstances which would allow such an inference: 1) that a "pattern" of strikes against black jurors had occurred, or 2) that a prosecutor's *voir dire* examination of certain jurors who were later eliminated peremptorily focused on racial issues. *Batson*, 476 U.S. at 97.

83. Brian J. Serr & Mark Maney, *Racism, Peremptory Challenges, and the Democratic Jury: The Jurisprudence of a Delicate Balance*, 79 J. CRIM. L. & CRIMINOLOGY 1, 27 (1988).

84. *Id.* at 27-28. Clearly, discrepancies between actual and expected rates of exclusion, while often significant indicators, are not necessarily conclusive.

85. Craig v. Boren, 429 U.S. 190, 204 (1976) ("[P]roving broad sociological propositions by statistics is a dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause.").

86. In Florida, the complaining party must show there is a "strong likelihood" that the

discrimination when the only black member of the venire was excluded.[87] In another case, however, no inference was found when the state eliminated all blacks from the venire.[88] The inconsistency is acknowledged by the Florida Supreme Court which stated: "[O]ne of the most frequently litigated issues in both federal and state courts is the burden of proof, its nature and who must bear it."[89]

Federal trial courts have been similarly inconsistent. Some found no inference of discrimination because the prosecutor did not exclude all black members from the venire when he could have.[90] Other courts, including the Ninth Circuit, have been unwilling to find that striking a small number of minority jurors itself exhibits enough of a "pattern" to establish a prima facie case of discrimination.[91] Conversely, some courts, including the Eighth and Tenth Circuits, have found a violation when as few as one or two minority venire members were excluded.[92] Still other courts made no finding whether sufficient proof was raised, assuming, for the sake of argument, that the defendant raised the relevant inference.[93] Through these

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challenged individuals were excused because of their race. *Neil*, 457 So. 2d at 486. Such a standard begs the question of what is a "strong liklihood." Florida's Supreme Court seems to have resolved the question by clarifying the "*Neil*-inquiry" with its recent decision in State v. Johans, 18 Fla. L. Weekly 124 (Fla. Feb. 18, 1993). In *Johans*, the court held that trial judges are required to conduct an inquiry into the legitimacy of a peremptory challenge *anytime* an objection is raised that the challenge is being used in a racially discriminatory manner. *Id.* at 125. This would seem to place an additional burden on already overworked trial courts.

87. Parrish v. State, 540 So. 2d 870 (Fla. 3d Dist. Ct. App.), *review denied*, 549 So. 2d 1014 (Fla. 1989).

88. Pearson v. State, 514 So. 2d 374 (Fla. 2d Dist. Ct. App. 1987), *review dismissed*, 525 So. 2d 881 (Fla. 1988) (remanded on appeal). Both *Pearson* and *Parrish* were subject to Florida's version of the *Batson* inquiry established in *Neil*.

89. State v. Slappy, 522 So. 2d 18, 21 (Fla.), *cert. denied*, 487 U.S. 1219 (1988). *Compare id.* (where the court stated that number alone is not dispositive of misuse of peremptory challenges) *with* Reynolds v. State, 576 So. 2d 1300 (Fla. 1991) (where the court found that striking the sole black venireman created a "strong liklihood" of discriminatory use of peremptory challenges). As previously noted, *Johans* seems to have resolved this problem. 18 Fla. L. Weekly at 125.

90. United States v. Montgomery, 819 F.2d 847, 851 (8th Cir. 1987); United States v. Dennis, 804 F.2d 1208, 1211 (11th Cir. 1986).

91. *See* McMillan, *supra* note 44, at 369 (citing United States v. Vaccaro, 816 F.2d 443, 457 (9th Cir. 1986), *cert. denied*, 484 U.S. 914 (1987)).

92. *See* Serr & Maney, *supra* note 83, at 369 n.65.

93. *See, e.g.*, United States v. Woods, 812 F.2d 1483, 1485 (4th Cir. 1987) (where the trial judge found the defendant had failed to raise an inference, yet "allowed" the government to offer race-neutral explanations. The reviewing court stated "we may examine [the

examples, it is evident that both federal and state courts have inconsistently interpreted and applied, if not completely ignored, *Batson*'s prima facie requirement.

An even greater problem emerges when trial judges are tempted to inquire *sua sponte* into the prosecutor's motives.[94] While this exercise would certainly aide in the elimination of discrimination in jury selection, it has far reaching implications. In effect, it would require a prosecutor to explain every peremptory challenge should the judge so require.[95] Thus, it obliterates the protection accorded to peremptories through *Batson*'s prima facie case requirement, reducing the peremptory challenge to a challenge for cause. This result would not be objectionable if not for the inference it conveys: Such heightened awareness highlights the aspects of the juror that are inherent to his cognizable group, possibly raising the specter that group affiliation somehow relates to the ability to be impartial and thereby undermining *Batson*'s goal of making the courtroom "colorblind."

Unfortunately, without any bright-line standard, lower courts will continue to yield inconsistent results. Yet, any bright-line standard would enable either side to insulate itself by staying under the proscribed "trigger" levels.[96] The result is that *Batson*'s inherently unworkable framework produces inconsistent judicial interpretation thereby enabling some defendants to raise objections to discriminatory jury selection while preventing other meritorious claims from being heard. Thus, the prima facie case requirement's dual goal of easing the defendant's burden of proof and preserving the peremptory challenge serves neither intended objective adequately nor the goal of eliminating racist jury selection. Eliminating the peremptory challenge would remove this problem altogether. It would also remove discrimination that the prima facie case procedures do not recognize.

C. *Rebutting the Inference and Pretext*

Regrettably, *Batson* was "also ambiguous as to how much the prosecutor's rebuttal explanations should be scrutinized."[97] "Ineffective scrutiny of . . . [neutral] explanations is the single greatest problem

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prosecutor's] reasons under *Batson*, and we may leave for another day the question of whether the defendant made out a prima facie case." *Id.* at 1487. The reviewing court upheld the trial judge's ultimate finding that the defendant had not proved intentional discrimination. *Id.*

94. *See* Serr & Maney, *supra* note 83, at 39-43.
95. *Id.* at 42.
96. *Id.* at 36.
97. McMillan, *supra* note 44, at 369.

hindering the effective implementation of *Batson*" as well as state constitutional counterparts.[98] As Justice Marshall predicted, courts are constantly struggling to distinguish between legitimate reasons for the use of peremptory challenges and mere excuses or pretexts for discrimination.[99] Moreover, since any offered explanation is likely to be treated in return with skepticism by the complaining party, appellate proceedings and retrials have become the rule rather than the exception.[100] Simply, race-neutral reasons may be pretexts for racially based motives.

The term "race-neutral explanation" has such a formless and indefinite meaning that there are a number of ways attorneys can circumvent this *Batson* procedural hurdle. For example, when subjective explanations like a juror's poor attitude or indifference during *voir dire* are offered, it is virtually impossible for a judge to determine whether other jurors acting similarly have been challenged, nor is it likely that the judge will keep track of such minute details.[101] While one court accepted a prosecutor's explanation that a prospective black juror failed to maintain eye contact,[102] another court allowed the explanation that the juror maintained too much eye contact.[103] Courts rarely reject explanations like these absent obvious uneven application to black and white jurors no matter how tenuous the relationship between the given explanation and the case at trial.[104]

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98. *Id.* at 369.

99. *Id.*

100. *See, e.g., Bolling*, 591 N.E.2d at 1142 (Bellacosa, J., concurring) ("[t]he proliferation and permutation of problems in the appellate pipeline point inexorably to the need for a broader remedy . . . .").

101. Serr & Maney, *supra* note 83, at 59.

102. *See* McMillan, *supra* note 44, at 370 (citing United States v. Cartlidge, 808 F.2d 1064, 1070-71 (5th Cir. 1987)).

103. *See* McMillan, *supra* note 44, at 371 (citing United States v. Mathews, 803 F.2d 325, 331 (7th Cir. 1986) (where the venireman stared at the prosecutor throughout *voir dire*)).

104. Serr & Maney, *supra* note 83, at 58. A recent survey of seventy-six federal appellate decisions, which reviewed district court judges' evaluations of proffered race-neutral reasons, revealed only three cases that were reversed because the reasons offered were found to be pretextual. Joshua E. Swift, Note, *Batson's Invidious Legacy: Discriminatory Juror Exclusion and the "Intuitive" Peremptory Challenge*, 78 CORNELL L. REV. 336, 357-58 & nn. 185-89 (1993). The lawyers' stated reasons in these cases focused consistently on such qualities as body language, appearance, employment, education, and residence, among others. *Id.* at 359. Even when uneven application appears to exist, appellate courts tend to defer to trial court findings. *See, e.g.*, Files v. State, 586 So. 2d 352 (Fla. 1st Dist. Ct. App. 1991), *aff'd*, 17 Fla. L. Weekly 742 (Fla. Dec. 10, 1992) (where both the district and supreme court affirmed the trial judge's finding that the prosecutor's challenge of an unemployed, black divorcee with five children was not racially motivated, even though other white jurors, who were either unemployed or divorced, but not both, were not challenged). In what appears

Inevitably, it enables attorneys to mask racially motivated challenges by offering racially neutral explanations. Just as Justice Marshall observed, "[a]ny prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons."[105]

A race-neutral explanation may also be used unconsciously as a surrogate or proxy for race. While several courts have upheld peremptory challenges of minorities who live in the same neighborhood as, or one similar to, the defendant, or have educational or employment backgrounds similar to the defendant,[106] such rulings may overlook that in a city where the burden of unemployment, low income, poor education, or substandard housing is likely to fall disproportionately upon minorities, a race-neutral reason based upon these characteristics can merely be a cover for racial discrimination, whether the attorney is conscious of this relationship or not.[107] That is exactly the conclusion of the Ninth Circuit in *United States v. Bishop*[108] as well as the Eighth Circuit in *Garrett v. Morris*.[109] In

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to be form over substance, the supreme court, in seeming approval, echoed the district court's explanation that had the prosecutor offered *only* divorce *or* unemployment, instead of *both*, there may have been abuse of discretion by the trial judge in accepting the reason as nondiscriminatory. *Files*, 17 Fla. L. Weekly at 742-43 (citing *Files*, 586 So. 2d at 356-57). *But see* United States v. Chinchilla, 874 F.2d 695, 698-99 (9th Cir. 1989) (where the court held that the prosecutor's "race-neutral" reason was pretextual because he failed to strike non-Hispanic jurors with the same traits as Hispanic jurors who were peremptorily struck).

105. *Batson*, 476 U.S. at 106.

106. McMillan, *supra* note 44, at 370.

107. Serr & Maney, *supra* note 83, at 53-54. Justice Marshall's concerns that protections erected by *Batson* "may be illusory" was not directed simply at dishonesty on the part of a prosecutor, but at "unconscious racism" as well. *Batson*, 476 U.S. at 106. This may be the most subtle if not most violative type of discrimination since it represents a type people may not be aware or admit they have. *See* Barbara Allen Babcock, *Voir Dire: Preserving "It's Wonderful Power,"* 27 STAN. L. REV. 545, 554 (1975). Professor Babcock states that "jurors are simply not aware of their prejudices or underestimate their biases . . . ." *Id.* Logically, there is no reason to believe the same cannot be said for attorneys and judges. Thus, unconscious prejudice could be the attorney's underlying motivation for exercising a peremptory challenge despite the availability of "race neutral" reasons. These same unconscious biases may also influence the decision of the inquiring judge. *Batson*, 476 U.S. at 106.

108. 959 F.2d 820 (9th Cir. 1992) (where court concluded that the reason offered, that the juror lived in a high crime area plagued by uneasy police relations, was really a proxy for race).

109. *See* McMillan, *supra* note 44, at 370 (citing Garrett v. Morris, 815 F.2d 509 (8th Cir.), *cert. denied*, 484 U.S. 898 (1987) (where the challenges based on "education experience and background" were rejected since the prosecutor had not revealed these factors during *voir dire*, nor challenged uneducated whites)).

these cases, residency and educational characteristics shared by the defendant and challenged jurors was deemed tantamount to racial discrimination.[110]

In contrast, the Supreme Court rejected the argument that the ability to speak Spanish was used as a proxy for race in *Hernandez v. New York*,[111] although it admitted that had the prosecutor explained that he did not want Spanish speaking jurors, it might raise an issue of racial discrimination.[112] Strangely, the Court saw no need to delve into the prosecutor's underlying motivation, stating that "[u]nless the intent is *inherent* in the prosecutor's explanation, the reason offered will be deemed race-neutral."[113] The Court's lax application of *Batson* would seem to produce exactly what Marshall had feared: it would seem to encourage pretextual explanations so long as discriminatory intent was not apparently *inherent* in them. Thus, the Court's rhetoric actually dilutes *Batson*'s objective since attorneys "with a mind to discriminate" could more easily do so knowing courts may not look beyond facially neutral explanations.[114] Ultimately, this application neither eliminates nor fully accounts for discriminatory practices in jury selection.

D. *Standard of Review*

An even more troubling problem is the standard of review to be given a trial judge's findings. "It has become virtually impossible for appellate

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110. *See supra* notes 108, 109. One commentator has proposed eliminating all use of "soft data" reasons like body language, appearance and demeanor since they can mask overt and covert discrimination. Swift, Note, *supra* note 104, at 361-62. This remedy, he argues, would force prosecutors to offer more objective, articulable "hard data" reasons like residence and education which have a verifiable "substantial-nexus" to the case. *Id.* at 363-64. However, such an approach fails to account for the possibility that "hard-data" reasons are themselves proxies for race.

111. 111 S. Ct. 1859 (1991).

112. *Id.* at 1872-73 ("We would face quite a different issue if the prosecutor had justified his peremptory challenges with the explanation that he did not want Spanish speaking jurors. It may well be . . . that proficiency in a particular language . . . should be treated as a surrogate for race under equal protection analysis."). For a thorough discussion of this issue see Ronnie Savar, Comment, *Hernandez v. New York: Applying Batson to Peremptory Strikes of Bilinguals—Should Language Ability Be a Surrogate for Race?*, 16 NOVA L. REV. 1567 (1992).

113. *Hernandez*, 111 S. Ct. at 1866 (emphasis added). While the Court stated that disparate impact should be a factor in considering whether an explanation is race-neutral, it is not conclusive. *Id.* at 1875. The unfortunate reality is that when jurors are excluded under these circumstances, they are penalized for the effects of discrimination.

114. *See Batson*, 476 U.S. at 96.

courts or trial courts to discern proper gradations and variations to provide meaningful procedural guidance guaranteeing some measure of consistent application."[115] Furthermore, since a trial court's findings are usually given great deference, many legitimate appeals may not receive adequate inquiry.[116] Even when appellate courts establish relevant factors for trial courts to consider in weighing the legitimacy of a proffered race-neutral explanation, such tests may actually serve as jury selection discrimination "how-to" guides and often pose no obstacle to anything but the most blatant discrimination.[117]

As a result, racial and non-racial discrimination continues to invade the jury selection process since the delicate balance *Batson* sought, between preserving the peremptory challenge and eliminating discrimination, teeters between competing interests which cannot be adequately and simultaneously preserved. Constitutionally, they are incompatible. One must be sacrificed.

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115. *Bolling*, 591 N.E.2d at 1144 (Bellacosa, J., concurring).

116. *See Batson*, 476 U.S. at 98 n.21 ("Since the trial judge's findings . . . largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference."); *see also* People v. Clay, 200 Cal. Rptr. 269, 279 (Ct. App. 1984) ("We must rely on the good judgment of the trial courts to distinguish bona fide reasons . . . from sham excuses . . . .") (quoting *Wheeler*, 583 P.2d at 765); Fotopoulis v. State, 608 So. 2d 784, 788 (Fla. 1992) ("[A] trial court is vested with broad discretion in determining whether peremptory challenges are racially motivated.").

The Florida Supreme Court, though, has delineated five factors that trial courts should consider as weighing against the legitimacy of a race-neutral explanation:

> 1) the alleged group bias is not shared by the juror in question, 2) failure to examine the juror or perfunctory examination . . . , 3) singling the juror out for special questioning to evoke a certain response, 4) the prosecutor's reason is unrelated to the facts of the case, and 5) a challenge based on reasons equally applicable to jurors who were not challenged.

State v. Slappy, 522 So. 2d 18, 22 (Fla.), *cert. denied* 487 U.S. 1219 (1988). Surprisingly, the court did not go on to designate a specific standard of review for appellate courts investigating a trial court's application of these factors. *See* Files v. State, 586 So. 2d 352, 357 (Fla. 1st Dist. Ct. App. 1991) (where, after applying the "abuse of discretion" standard, the court certified a question to the state supreme court inquiring: "WHAT IS THE STANDARD OF APPELLATE REVIEW OF A TRIAL COURT'S FINDING THAT THE STATE'S USE OF PEREMPTORY CHALLENGES . . . WAS . . . NON-PRETEXTUAL?"). Florida's Supreme Court affirmed, designating the "abuse of discretion" standard as appropriate unless instances where a strict rule of law as defined by the "*Slappy*-factors" applied to the facts of the case. 17 Fla. L. Weekly 742, 742 (Fla. Dec. 10, 1992). Yet, the court seemed to dilute the effect of its ruling by conceding "[i]t is difficult if not impossible to establish a strict rule of law in this sensitive area and still 'achieve the delicate balance between eliminating racial prejudice and the right to exercise the peremptory challenge.'" *Id.* at 744 (citations omitted).

117. Serr & Maney, *supra* note 83, at 60.

V. THE SIXTH AMENDMENT AND THE CROSS-SECTION OF THE COMMUNITY

This note also suggests that the peremptory challenge is incompatible with the impartial jury guarantee of the Sixth Amendment.[118] Additionally, the Court's interpretations of the impartial jury guarantee reveal contradictory reasoning which belies its attempts to portray the Sixth Amendment as truly meaningful. The Court's decision in *Taylor v. Louisiana*[119] provides a starting place.

In *Taylor*, the Supreme Court attempted to insure the Sixth Amendment guarantee of jury impartiality by requiring that the jury reflect a cross section of the community.[120] The Court recommended that "[t]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility."[121] Arguably, the Court's views on "diffused impartiality" may also be based on the perception that unbalanced representation can significantly affect trial outcomes.[122] This perception may have led it to require in *Taylor* that "jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof."[123]

Taylor, while confined to the issue of omission of women from jury pools,[124] represents the Courts' broadly painted assertion that a fair cross

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118. The Sixth Amendment to the United States Constitution states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

119. 419 U.S. 522 (1975).

120. *Id.* at 530 ("We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment . . . .").

121. *Id.* at 530-31 (citing Thiel v. Southern Pac. Co. 328 U.S. 217, 227 (1946)).

122. For example, when Baltimore jury commissioners switched in 1969 from a jury service selection method which yielded 70% white jurors to one that yielded up to 47% black jurors, the trial conviction rate dropped from over 80% to less than 70%. VAN DYKE, *supra* note 16, at 33. Similarly, a temporary change of jury service selection methods in Los Angeles County that led to the inclusion of more black and Hispanic jurors produced lower conviction rates. *Id.* at 35. The conviction rates rose again after the previous system was reinstated. *Id.*

123. *Taylor*, 419 U.S. at 538.

124. The defendant in *Taylor*, a male, challenged the constitutionality of womens' under-representation in jury pools; women were exempt unless they volunteered for duty. *Id.* at 524-25.

section of the community is an implicit requirement to maintaining the impartial jury guarantee of the Sixth Amendment. *Taylor* intimated that the exclusion of women from jury *pools* in turn produces jury *venires* and ultimately jury *panels* with a "slanted view of the community they are supposed to represent."[125] By insisting that women as a distinct group, offer a unique quality unshared by men, the Court in *Taylor* seemed to indicate that: 1) a jury composed of one gender is less impartial than a jury comprising both genders, 2) men and women, as isolated groups, possess a perspective unique to and universal among their respective members, and 3) those perspectives counterbalance bias inherent within the other gender, thus forming a more impartial jury.[126] Evidently, the Court felt that because women are distinctly different from men, their omission from juries depletes representiveness and thus harms impartiality. If this inference is correct, it would seem the Court's reasoning was based on the idea that group bias, which is inherent in groups as distinct as each gender, requires balance. Ironically, the Court would seem to adopt completely opposite reasoning when confronted with the argument that the same impartial jury guarantee is violated when the peremptory challenge is used.[127]

VI. The Sixth Amendment and the Peremptory Challenge

In *Holland v. Illinois*,[128] the Court first addressed the peremptory challenge in the context of the Sixth Amendment. The Court refused to apply the cross section requirement to the peremptory challenge, stating: "A prohibition upon the exclusion of cognizable groups through peremptory challenges has no conceivable basis in the text of the Sixth Amendment . . . and would undermine rather than further the constitutional guarantee of an impartial jury."[129] Instead, narrowly interpreting the cross section require-

125. *Id.* at 529 n.7 (quoting H.R. Rep. No. 1076, 90th Cong., 2d Sess. 8 (1968)).

126. Robert L. Harris, Jr., Note, *Redefining the Harm of Peremptory Challenges*, 32 Wm. & Mary L. Rev. 1027, 1050-51 (1991).

127. *See* Holland v. Illinois, 493 U.S. 474 (1990).

128. *Id.*

129. *Id.* at 478. Ironically, Holland, who was white, pressed the Sixth Amendment argument instead of the equal protection argument anticipating that the Court might not extend him standing since he did not share the same race as the excluded black jurors. *See* Gobert, *supra* note 23, § 8.12, at 32 (2d ed. Supp. 1991). The Court, however, not only stated he had standing to raise a Sixth Amendment claim, it intimated he would have standing to raise and equal protection claim. *Holland* 493 U.S. at 487. Thus, while Holland prevailed on his standing issue, it would seem he lost his appeal because he invoked the

ment as applying only to the *venire* but not to the jury *panel*, the Court, in seeming contradiction to its holding in *Taylor*, inexplicably asserted that a cross section requirement need only assure an *impartial* jury, not a *representative* one.[130]

In *Holland*, the Court stated that impartiality only required a cross section of the *venire*, insisting there was no constitutional requirement that the jury actually chosen must "mirror the community and reflect the various distinctive groups in the population."[131] Essentially, as long as the venire was drawn from a cross section of the community, litigants were free to diminish the representativeness of the jury panel through the use of peremptory challenges.[132] Taken in conjunction with its holding in *Batson*, the Court would seem to be saying that attorneys are free to discriminate in jury selection as long as it is not racially based. In effect, by limiting the role of the Sixth Amendment, the Court has seemingly placed constitutional provisions in gratuitous conflict: the Sixth Amendment allows what the Fourteenth Amendment forbids.[133]

The *Holland* decision seems to contradict both *Batson* and *Taylor* and reveals the Court's struggle to avoid capture by its own rhetoric.[134] In *Holland*, the Court's logic seems to say: 1) jurors are selected individually for their impartiality regardless of their group affiliation, and 2) it follows that this individual impartiality will assure an overall impartial jury, regardless of the exclusion of any particular distinct segment of the community. However, such logic ignores previous acknowledgments by the Court. First, attorneys often select jurors based upon stereotyped notions of their ability to be impartial. As *Batson* recognized, attorneys often excuse jurors based solely on race (if not other characteristics representative of a distinct group). Second, by allowing the representative nature of the venire to be diminished by peremptory challenges, the Court abandons the virtues of representativeness that were so important to it in *Taylor*:

> When any large and identifiable segment of the community is excluded

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wrong constitutional language, a matter the Court could have easily corrected.

130. *Id.* at 480.

131. *Id.* at 483. Apparently, the Court seems to have overlooked that the Sixth Amendment guarantees an impartial *jury* not an impartial *venire*.

132. *See id.* at 480 ("[The fair cross section requirement] has never included the notion that . . . representativeness cannot be diminished by allowing both the accused and the State to eliminate persons thought to be inclined against their interests—which is precisely how the traditional peremptory-challenge system operates.").

133. GOBERT, *supra* note 23, § 8.12, at 34 (2d ed. Supp. 1991).

134. Harris, Note, *supra* note 125, at 1047.

> from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.[135]

The internal conflict is obvious. In *Taylor*, the Court seems to be saying that representativeness is important since it provides impartiality through balance and perspective, while in *Holland*, it seems to be saying that the elimination of these qualities through the peremptory challenge does not injure impartiality.

Arguably, if the Court's true motivation for requiring community representativeness is in the democratic underpinnings of trial by jury, such a motivation should extend all the way to the jury panel itself and not be limited to the venire. It should reflect the full range of the community, and incorporate a prohibition on exclusion of any representative member of the community who is qualified to sit as a juror. It should necessarily reject the peremptory challenge as a device whose design enables the jury's representativeness and impartiality to be manipulated based on unsupported perceptions that impartiality is defined as a function of one's group affiliation. In Justice Marshall's strong dissenting words: "A defendant's interest in obtaining the 'commonsense judgment of the community' is impaired by the exclusion from his jury of a significant segment of the community; whether the exclusion is accomplished in the selection of the venire or by peremptory challenge is immaterial."[136]

Justice Marshall recognized that the jury system exists to bind the court to reality. Although each juror as an individual is not automatically a representative of an ethnic, racial or other distinct segment of the community, that juror necessarily brings to the jury experiences and perspectives that do in part depend on such factors as socioeconomic status, age, and ethnic

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135. *Taylor* 419 U.S. at 532 n.12 (citing Peters v. Kiff, 407 U.S. 493 (1972)). The Court's reasoning in *Holland* also seems to contradict its portrayal of the jury as having evolved from democratic and representative government and it being a body truly representative of the community. *See, e.g.*, Glasser v. United States, 315 U.S. 60, 85 (1942) ("Our notions of what a proper jury is have developed in harmony with our basic concepts of a democratic society and a representative government. For 'It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.'") (citation omitted).

136. *Holland*, 493 U.S. 474, 496 (Marshall, J., dissenting).

background.[137] To ignore these differences is to deny the diversity of society as well as the fundamental character of the community whose voice is to be represented by the jury.[138] To allow the peremptory challenge to diminish the representativeness of the jury is to undermine the essence of diffused impartiality and the jury's democratic foundation.

With the *Holland* decision, though, the Court seems to be sawing off the very branch on which it is sitting. The Court preserves the peremptory challenge by claiming that an unrepresentative jury nevertheless affords impartiality while simultaneously ignoring that community perception of impartiality is governed more by the appearance of impartiality than doctrinal remarks about it.[139] The Court itself once commented that "justice must satisfy the appearance of justice."[140] *Holland*, though, seems to ignore this very idea by limiting the Sixth Amendment protections and subjecting the peremptory challenge to the inadequate limitations set for it in *Batson*. As a result, the jury panel, the defendant, and the community all are denied the same democratic and representative qualities that are required of the venire and which are seen as the foundation of our legal and political institutions. Even more troublesome is that this interpretation of the Sixth Amendment directly conflicts with state supreme court interpretations of impartial jury guarantees contained in state constitutions.[141]

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137. VAN DYKE, *supra* note 16, Introduction at xiv.

138. *Id.*

139. *See* Toni Massaro, *Peremptories or Peers?—Rethinking Sixth Amendment Doctrine, Images & Procedures*, 64 N.C. L. REV. 501, 517 (1986) ("[A] jury's fairness is determined not only by its verdict but also by its visual appearance . . . .").

140. *Batson*, 476 U.S. at 1736 (Burger, C.J., dissenting) (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)).

141. Florida's interpretation of the impartial jury guarantee in its state constitution illustrates the contrast. In State v. Neil, 457 So. 2d 481, 486 (Fla. 1984), the court stated:

> The primary purpose of peremptory challenges is to aid and assist in the selection of an impartial jury. It was not intended . . . [to] be used solely as a scalpel to excise a distinct racial group from a representative cross-section of society. It was not intended . . . [to] be used to encroach upon the constitutional guarantee of an impartial jury.

However, Florida's "impartial jury" approach to eliminating discriminatory use of the peremptory challenge is equally flawed since it relies on the same requirements of a cognizable racial group, prima facie case, and race-neutral explanation, as *Batson* does. *See id.* at 486-87. Furthermore, the impartial jury foundation laid by *Neil* seems to be eroding with a recent case recognizing Hispanics as a cognizable group. *See* Alen v. State, 596 So. 2d 1083 (Fla. 3d Dist. Ct. App. 1992). In *Alen*, concurring Judge Phillip Hubbart characterized the extension as the death knell for the peremptory challenge since, by crossing over the line to give protection to an ethnic group rather than a racial one, the court would have no principled basis for refusing to extend the same rule to peremptories exercised on the basis

Applying the cross sectionality requirement only to the venire raises an even greater concern when jury pools themselves are not representative of a fair cross section of the community. A study commissioned by the National Association of Criminal Trial Attorneys, including over 15,000 jurors in the North California Federal Court District, found that jury pools contained fewer ethnic minority members than truly representative of the population base of the community.[142] The study concluded that "in a jury of only twelve members that is significant."[143] Applying the Court's very reasoning from *Taylor*, when the jury pool itself is less representative, it follows that impartiality is affected. This indication is more reason to prohibit peremptory challenges from making the jury any less representative than it already is.

To be sure, that the jury system in its entirety fails to be representative is damaging enough to the community's sense of justice. To allow the peremptory challenge to manipulate impartiality and further reduce

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of ethnic origin, nationality, gender, religion, wealth, or age—all groups subject to invidious discrimination. *Id.* at 1086-88. The same argument could be made of the Supreme Court's recognition of Hispanics as a cognizable racial group for *Batson* purposes.

On appeal, the Florida Supreme Court affirmed the District Court of Appeal, stating: "The time has now come in Florida to extend *Neil* to protect potential jurors from being excluded from the jury solely on the basis of ethnicity." State v. Alen, 18 Fla. L. Weekly 223, 223 (Fla. Apr. 8, 1993). While acknowledging that neither the United States Supreme Court nor Florida law provides any precise definition of a cognizable class, the court was by no means any more specific, stating merely that cognizability inherently demands "that the group be objectively discernible from the rest of the community" and adopting a cognizability standard similar to the one advanced in *Sgro*. *Id.* at 224 (citations omitted) ("First, the group's population should be large enough that the general community recognizes it as an identifiable group in the community. Second, the group should be distinguished from the larger community by an internal cohesiveness of attitudes, ideas, or experiences that may not be adequately represented by other segments of society.") Even more revealing is the court's intimation that gender constitutes a cognizable class, which has not yet been established by Florida caselaw for peremptory purposes. *Id.* ("When an identifying trait is a physically visible characteristic such as race or gender, the process of defining a class is comparably less arduous . . . ."). The court, however, did not address the premise raised by Judge Hubbart. Thus, given the court's cognizability standard, its holding regarding ethnicity and its dicta regarding gender, it appears that the peremptory challenge in Florida may yet be faced with the very case-by-case strangulation that Judge Hubbart forewarned. In fact, the assistant attorney general who argued the state's appeal, while agreeing philosophically with the court's holding, feared that extending protection to a juror's ethnicity could lead to objections on almost any peremptory challenge. *See Hispanics Can't Be Barred from Juries, Court Rules*, SUN-SENTINEL, Apr. 10, 1993, at A13.

142. USA TODAY, Aug. 1988, (Magazine), at 5.

143. *Id.*

representativeness is an even greater injury. Allowing attorneys to entertain their own unsupported perceptions of group bias through the peremptory challenge injures the excluded juror since it legitimizes the unfounded perception that somehow distinct group membership affects one's ability to be impartial. Furthermore, it impacts on the community's sense of justice.

VII. The Peremptory Challenge and the Community

In addition to the doctrinal argument for extending protection to any cognizable group which may be subject to discriminatory treatment, eliminating the peremptory challenge may also be seen as addressing community perception of fairness and impartiality. As so many contemporary cases have illustrated, whether exercised by the prosecutor or defense attorney, or condoned by the judge, the use of the peremptory challenge affects the community's perception of the fairness of the verdict.[144] That perception is shaped by the view that discrimination continues to haunt the judicial system and that the deck is stacked against minority interests. For example, in nearly every court in America, the judge, prosecutor, defense attorney, clerk, stenographer, bailiff and jurors are overwhelmingly white and the defendant is likely to be black or Hispanic.[145] The presence of impartiality and equality in the judicial system seems further obscured in light of the Arthur McDuffie,[146] Luis Alvarez,[147] and William Lo-

144. *See infra* notes 145-48.

145. Talbot D'Alemberte, *Racial Injustice and American Justice*, A.B.A. J., Aug. 1992, at 58.

146. Arthur McDuffie, a black insurance executive, was beaten to death in 1980 by Miami Police officers after his arrest for a traffic violation. The officers were later acquitted by an all-white jury of manslaughter charges, touching off one of the worst racial riots in Miami history. The riots caused $200 million in property damages and fifteen people were killed. Approximately 3600 National guardsmen were called in to calm the outrage of the black community. The Florida Governors report on the disturbance specifically identified the exclusion of blacks from juries as a contributing cause of the riots and the reason for blacks in Dade County to distrust the criminal justice system. *See generally* Albert V. Alschuler, *The Supreme Court and the Jury: Voir Dire, Peremptory Challenges and the Review of Jury Verdicts*, 56 U. Chi. L. Rev. 153, 195-96 (1989); Pizzi, *supra* note 68, at 153; Andrews v. State, 438 So. 2d 480, 482 n.4 (Fla. 3d Dist. Ct. App. 1983).

147. In 1984, Luis Alvarez, an Hispanic Miami police officer, killed a black suspect while on patrol. After defense counsel removed both black veniremen, Alvarez was acquitted of manslaughter charges by an all-white jury which deliberated only three hours following a nine-week trial, again provoking public outrage and civil unrest. *See generally* Pizzi, *supra* note 68, at 153-54; *Jury Finds Alvarez not Guilty*, Miami Herald, Mar. 16, 1984, at A1.

zano[148] cases in Miami and the Rodney King case[149] in Los Angeles.

When discrimination in jury selection occurs, it results in injury to the trial system and casts doubt on the entire judicial process if not the democratic ideal reflected in the legal process.[150] "The harm from discriminatory jury selection extends beyond that inflicted on the defendant and the excluded juror to touch the entire community."[151] It also creates the appearance of bias if not actually increasing it. Conversely, when a community perceives that a jury has been selected in a way that represents the community, the verdict will be more likely accepted and respected. This perception, however, cannot be maintained as long as the peremptory challenge enables discrimination to invade the jury selection process.

VIII. THE HOLES IN THE REBUTTAL ARGUMENT

Opponents to eliminating peremptory challenges argue that challenges

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148. William Lozano, another Hispanic officer, killed a black motorcyclist and his passenger in 1989, sparking three days of rioting. Lozano was found guilty, yet on appeal, was granted a new trial. Ongoing issues involving a change of venue currently delay the resolution of this case, as the trial has been five times moved from Miami in efforts to assure a jury uninfluenced by public reaction to a possible acquittal: from Miami to Orlando, Orlando to Tallahassee, Tallahassee back to Orlando, Orlando back to Tallahassee, and finally back to Orlando. Defense counsel's concern has been that Lozano may not receive a fair trial in a city where the population base is not closely representative of the population base of Miami. *See generally* Mark Hansen, *Different Jury Different Verdict?*, A.B.A. J., Aug. 1992, at 54, 56; Darlene Ricker, *Holding Out—Juries vs. Public Pressure*, A.B.A. J., Aug. 1992, at 48, 51; *Judge: Lozano retrial moves back to Orlando*, SUN-SENTINEL, July 28, 1992, at A1; Rachel L. Swarns, *Lozano trial moved again—to Orlando*, MIAMI HERALD, Mar. 11, 1993, at A1, 15A, col. 1.

149. The acquittal by an all-white jury of officers accused of beating Los Angeles motorist Rodney King, a black man, touched off one of the most costly and widely reported riots in American history. The riot caused nearly $1 billion in property damage and left 53 dead. Ultimately, the officers were retried by the United States Department of Justice for violating Rodney King's civil rights. In the federal trial, which took place almost a year to the day after the state trial and its resulting riots, two officers were convicted by a jury comprised of nine whites, two Blacks, and one Asian. Amongst the jurors, was a white man who said the omission of Blacks from the jury in the first trial may have been one of the causes of the riot. *See generally Anxiety Evaporates with King Verdicts*, SUN-SENTINEL, Apr. 18, 1993, at A1; Linda Deutsch, *The Rodney King Decisions—Differences in Trials Rested with Juries*, SUN-SENTINEL, Apr. 18, 1993, at A7; *Verdict in Trial of Police Officers Shows U.S. Justice System Works*, SUN-SENTINEL, Apr. 19, 1993, at 10A.

150. *See* Peters v. Kiff, 407 U.S. 493, 502-04 (1972).

151. *Batson*, 476 U.S. at 87.

for cause are too narrow to eliminate all but the most blatantly biased jurors.[152] Furthermore, prospective jurors will evade or misconstrue, unconsciously or deliberately, general *voir dire* questions in order to avoid answering and possibly being struck,[153] thus "hidden bias" may persist. The judge's role of authority figure tends to exacerbate this problem since many prospective jurors are afraid to say anything that might displease the judge let alone admit racist or prejudicial feelings in an open courtroom.[154] Strategically, a peremptory challenge provides a "fallback" position.[155]

In practice, however, the peremptory challenge fails to distinguish extreme "hidden bias" from that which merely forms the representative nature of the jury.[156] While extreme bias may affect impartiality on juries, bias itself does not necessarily imply impartiality. Purging all hidden biases may eliminate jurors who, despite their personal outlooks and experiences will still be impartial. To the extent that some bias remains, the "harm" that may result is intrinsic to the jury system itself and is the essence of having individuals unschooled in the law serving as triers of fact. Those individual biases are exactly what comprises the "diffused impartiality" necessary for an impartial jury. It enables jurors to view the evidence from a variety of perspectives, gaining insights from other jurors who may view the evidence differently, thereby enhancing the fact-finding goal.[157] Most importantly, it will likely make the decision of the jury more rooted in the values represented by the cross section of the community.

At a more fundamental level, to argue that peremptory challenges are necessary to remove hidden bias presupposes that lawyers are capable of accurately identifying it. Since *voir dire* provides only limited information, peremptory challenges are essentially hunches, based on intuition, conscious

152. Saltzburg & Powers, *supra* note 30, at 340.

153. Babcock, *supra* note 107, at 547.

154. JURYWORK, *supra* note 17, § 17.01[3].

155. Barbara D. Underwood, *Ending Race Discrimination in Jury Selection: Whose Right is it Anyway?*, 92 COLUM. L. REV. 725, 771 (1992). However, the way that lawyers conduct *voir dire* and exercise their challenges indicates they do not seek to empanel "impartial" jurors, but instead try to eliminate those partial to their opponents, or even preserve those jurors partial to their particular interests. Abraham Brody, *Selecting a Jury—Art or Blind Man's Buff* [sic], 4 CRIM. L. REV. (New York) 67, 68 (1957). "Of course lawyers proclaim sanctimoniously that they only seek a fair and impartial jury, but pious protestations aside, what they really want is a jury that will favor their side and help them win." *Id.*

156. Brent J. Gurney, *The Case for Abolishing Peremptory Challenges in Criminal Trials*, 21 HARV. C.R.-C.L. L. REV. 227, 249 (1986).

157. *See* Minow & Cate, *supra* note 19, at 60.

or unconscious prejudice, or simply "sudden impressions" based upon "bare looks and gestures of another."[158] Inevitably, not only might such speculation be a facade for conscious or unconscious discrimination, it is likely a completely inaccurate assessment of a juror's ability to be impartial. Many of the common beliefs and stereotypes prevalent among trial attorneys are simply untrue as shown by studies on jury behavior.[159]

One of the best known jury studies examined the effectiveness of the peremptory challenge in twelve federal criminal trials.[160] The experiment compared the verdicts of tree different jury panels: the actual trial jury, another composed of challenged jurors, and a third comprised randomly.[161] By comparing votes of the trial jurors with those whom a lawyer had excluded, the researchers were able to make some generalized observations. First, they found that prosecutors generally did not improve their position through the use of peremptory challenges.[162] Second, attorneys performed erratically, sometimes using their challenges well and sometimes poorly.[163] Third, when one side performed well and the other did not, the disparity "seriously affected, if not determined" the result.[164]

This study, though far from conclusive because of its limited sample base, suggests that lawyers hunches are frequently incorrect. Furthermore, they are unable to accurately and consistently remove jurors with "hidden bias." The study also revealed that when one lawyer performs well and the other performs poorly, peremptories skewed the jury composition and verdict toward the side represented by the more accurate attorney.[165]

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158. *Swain*, 380 U.S. at 220 (citations omitted).

159. *See* VAN DYKE, *supra* note 16, at 23-42 (listing a number of jury behavior studies).

160. Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in Federal District Court*, 30 STAN. L. REV. 491 (1978).

161. *Id.* at 498.

162. *See* Alschuler, *supra* note 146, at 203 (commenting on Zeisel and Diamond's study). Prospective jurors whom prosecutors excluded were as likely to favor conviction as the jurors actually seated. Zeisel & Diamond, *supra* note 160, at 513-18. Defense attorneys were only somewhat more effective, but only marginally better than random guesses. *Id.* According to one English survey, however, conviction rates actually *increased* by seven percent when defense attorneys exercised their peremptory strikes as compared to trials where defense attorneys exercised no peremptory strikes. James J. Gobert, *The Peremptory Challenge—An Obituary*, 1989 CRIM. L. REV. 528, 531 (1989).

163. Zeisel & Diamond, *supra* note 160, at 517.

164. *See id.* at 518-19. Such an outcome suggests not that an impartial jury had been selected, but that a one-sided jury had caused a miscarriage of justice. The study concluded that counsels' collective performance was "not impressive." *Id.* at 517.

165. Gurney, *supra* note 156, at 252. *See also* Saltzburg & Powers, *supra* note 30, at 365 (discussing the opportunity costs of using peremptory challenges for the wrong reason).

Thus, peremptories frustrate the law's expectation that the adversary allocation of peremptory challenges will benefit each side equally.[166] Rather, sometimes the peremptory pendulum swings in only one direction. By eliminating the peremptory challenge, however, the probability pendulum need not swing to unduly favor either side. Instead, impartiality would be left to the balancing effects of the cross section of the community.

Another argument offered for preserving the peremptory challenge is that it provides a shield for the exercise of the challenge for cause.[167] Questioning during *voir dire* may have antagonized or alienated the juror so that, although the inquiring attorney has not established any basis for removal, he may find it necessary to strike the juror peremptorily.[168] Without the peremptory challenge, it is argued, a party would be less able to search for cause challenges for fear of being "stuck" with jurors he has provoked.[169]

However, post trial interviews suggest that most people respect a lawyer who pursues *voir dire* seriously, even if the questioning produces some tension in the courtroom.[170] As long as a lawyer does not bully or badger the juror, most would accept the procedure as part of the normal course of affairs.[171] Attorneys who use *voir dire* effectively not only enable more legitimate challenges for cause, but they perform a didactic function as well. Effective *voir dire* enables an attorney to strategically position the issues and curry favor with the jury before the actual trial proceeding begins.[172] In fact, a number of studies show that attorneys use *voir dire* less to elicit bias than to prepare the jury about the issues to be decided and to endear themselves to the jury panel.[173] Consequently, the

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166. *See* Zeisel & Diamond, *supra* note 160, at 529. While many attorneys believe that trials can be won and lost through *voir dire*, a survey of trial judge's reveals that this too may be more based on perception than reality. When asked to specify aspects of trial performance likely to produce inequality, trial judges did not even mention jury selection practices. KALVEN & ZEISEL, *supra* note 14, at 362-72. Thus, it could be concluded that the judges surveyed believed that the differences in jury selection skills had little impact on trial outcomes compared to other advocacy skills.

167. Babcock, *supra* note 107, at 554.

168. *Id.* at 554-55.

169. *Id.* at 555.

170. JURYWORK, *supra* note 17, § 17.02.

171. *Id.* § 17.02.

172. GORDON BERMANT, CONDUCT OF THE VOIR DIRE EXAMINATION: PRACTICES AND OPINIONS OF FEDERAL DISTRICT JUDGES 27 (Federal Judicial Center 1977).

173. SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL 51 (1988). In one study, researchers observed that lawyers only spent twenty percent of their time trying to differentiate prejudiced and unprejudiced jurors. *Id.* Another study revealed

argument that peremptories are essential as a shield or fallback is unpersuasive. Without the peremptory challenge, attorneys would be forced to adopt more efficient and effective approaches to their inquiries thereby improving the quality of *voir dire*, surely a benefit.[174] At most, the argument that the peremptory challenge is a necessary shield seems better suited for expanding challenges for cause than resisting its elimination.

The contention that some biased jurors will end up on juries cannot be argued. However, that occurrence is equally possible under the current challenge system. Without any magic formulas for jury selection, an attorney can just as easily "deselect" a "good" juror as he can bypass a "bad" juror. It is impossible to know which person will be a "good" or "bad" juror for any particular case.[175] In fact, peremptories are admittedly based on "seat of the pants instincts" that may be "crudely stereotyped" and in many cases are "hopelessly mistaken."[176] Therefore, the belief held by trial attorneys as well as the Supreme Court that the peremptory challenge is essential seems more based on an illusory perception than proven results.

Even if attorneys were accurate in exercising their challenges, demographic, sociological and psychological factors rarely predict how individual jurors will vote in specific cases.[177] Every juror appraises testimony and evidence differently, from a distinctively different vantage point and life experience. The process of jury deliberation involves a complex combination of varied traits and attitudes and their interplay. An attorney's hunch or the Gestalt psychology of jury consultants could never take into account

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that more statements were made by attorneys than by venirepersons and that the majority of questions were instructional rather than designed to elicit information. *Id.*

174. Gurney, *supra* note 156, at 253.

175. JURYWORK, *supra* note 17, § 18.02[a]. Senior Federal District Judge Raymond J. Broderick, of the Eastern District of Pennsylvania, incitefully points out that the "objective" observations of social scientists tend to take the form of sweeping generalizations akin to the offensive stereotypes embraced by some trial attorneys. Raymond J. Broderick, *Why the Peremptory Challenge Should Be Abolished*, 65 TEMP. L. REV. 369, 414 (1992). In addition, Judge Broderick argues that psychological or sociological portraits and empirical propositions that "certain classes of people statistically have predispositions" making them "bad" jurors is irrelevant to the legal and political structure of a pluralistic democracy and reinforces demeaning stereotypes. *Id.* at 415-16 (citations omitted).

176. *Batson*, 476 U.S. at 138 (Rehnquist, J., dissenting).

177. JURYWORK, *supra* note 17, § 18.02[a]. In actuality, in all literature and caselaw, no proof has been set forth that peremptories effectively identify or eliminate bias. Furthermore, that attorneys and jury consultants claim to be accurate in their assessments is inherently unprovable since, outside the type of study conducted by Zeisel and Diamond, there is no way of knowing if such assessments led to an acquittal any more than they may have contributed to a conviction.

the overall reasoning process that occurs in the jury room.[178]

IX. BALANCING THE COSTS

The costs of eliminating the peremptory challenge are less than one might imagine. Supporters of the peremptory challenge argue that its absence will produce more unchecked bias possibly creating more deadlocked juries.[179] In practice, only five percent of jury deliberations end in mistrial.[180] When mistrials do occur, studies show that only seven percent were due to juror's "sentiments about the defendant." Rather, the majority of disagreement centers on evidentiary matters.[181] Thus, deadlocks would appear unrelated to juror bias. Moreover, hung juries usually result from an initial "massive minority" of holdouts, most often favoring acquittal.[182] Even if unchecked bias were to increase as a result of the elimination of the peremptory challenge, logically, it would still center around evidentiary matters and it would occur on both sides. Thus, the "massive minority" required to produce a hung jury would probably remain unaffected. Arguably, while a more diverse group might have greater difficulty reaching a consensus, this is hardly a burdensome cost compared to the injury to public confidence that occurs when peremptory challenges produce what is perceived to be unjust verdicts, to say nothing of the civil unrest that may result. In fact, the extra time spent in deliberation enhances the quality and thoroughness of the discussion, benefiting all parties and the trial system as a whole.[183]

Another concern is that increased judicial burden would result from increased challenges for cause.[184] While an increase in the number of attempted challenges for cause would probably occur, they would be

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178. JURYWORK, *supra* note 17, § 18.02[a]. For a behind the scenes view of the deliberating process, illustrating the complicated if not surprising interplay between jury members, see Gay Jervey, *Charles Keating, Meet Your Peers*, AM. LAW., Mar. 1992, at 100 (providing a day-by-day diary account of jury deliberations in Lincoln Savings & Loan Association head Charles Keating's trial).

179. Gurney, *supra* note 156, at 255.

180. KALVEN & ZEISEL, *supra* note 14, at 453.

181. Kalven & Zeisel, *supra* note 14, at 456.

182. *Id.* at 460-62.

183. Gurney *supra*, note 156, at 256.

184. Rosemary Purtell, Note, *the Continued Use of Discriminatory Peremptory Challenges After Batson v. Kentucky: Is the Only Alternative to Eliminate the Peremptory Challenge?*, NEW ENG. L. REV. 221, 252-53 (1988).

confined to defined limits and would be more easily adjudicated than current peremptory challenge applications under *Batson* and its progeny. Thus, whatever burden that might result would be more than offset by the elimination of *Batson*'s procedural and appellate albatross.[185]

X. A Different Kind of Challenge for Cause

In order to realistically serve the goal of removing true articulable bias, this note advocates adopting an expanded system of challenge for cause similar to the one proposed by Florida District Court of Appeal Judge Phillip Hubbart in *Alen v. State*.[186] Under the plan proposed by Judge Hubbart, cause challenges would be expanded slightly to embrace a narrow, case related area of "sound, strategic, nondiscriminatory reason[s] why trial counsel might doubt a juror's impartiality or capacity to perform as a juror."[187] This includes the juror's: 1) inability to follow the law; 2) intellectual infirmity; 3) associations with persons involved with the case; 4) associations with law enforcement; 5) past criminal prosecution or involvement in conduct being tried; and 6) illness or physical impairment.[188]

In addition, judges should be able to exercise a "catch-all" challenge which encompasses when a juror's "state of mind" prevents him from acting impartially or without prejudice.[189] Such an expansion could accommodate the attorney's concern for impartiality as well as narrow the focus of jury selection to those specific areas that are directly tied to the case at hand. It would also banish invidious discrimination of any kind, providing a simpler, more predictable system free of disputes and less reliant on

185. *See* United States v. Thompson, 827 F.2d 1254, 1263 (9th Cir. 1987) (Sneed, J., dissenting) (where the dissenting judge opined that in light of the encumbrances of time-consuming *Batson* hearings, it might be far better to eliminate the peremptory challenge as "preferable to the costs elaborate *Batson* litigation will impose").

186. 596 So. 2d 1083 (Fla. 3d Dist. Ct. App. 1992), *aff'd*, 18 Fla. L. Weekly 223 (Fla. Apr. 8, 1993).

187. *Id.* at 1090.

188. *Id.* at n.11.

189. *See, e.g.*, IND. CODE ANN. § 35-37-1-5(a)(11) (Burns 1992 Supp.) ("That the person is biased or prejudiced for or against the defendant."); LA. CODE CIV. PROC. ANN. art 1765 Challenges for cause (2) (West 1990) ("When the juror has formed an opinion in the case or is not otherwise impartial . . . ."); MASS. ANN. LAWS ch. 234 § 28 (West 1986) (if a juror "has expressed or formed an opinion or is sensible of any bias or prejudice" another juror shall be called instead).

appellate resolution.[190] It might even shorten *voir dire* since the inquiry will only be focused on specific areas.[191] Most importantly, it would address the constitutional collision between the peremptory challenge and the Sixth and Fourteenth Amendments.

XI. And Then There Were None

A number of other solutions have been suggested including reducing the number of peremptory challenges,[192] eliminating peremptory challenges for just the prosecution,[193] instituting a plan of "peremptory holds,"[194] even penalizing a party for the improper use of a peremptory challenge by "surcharging" him on remaining challenges.[195] However, each of these proposals fails to address the underlying problem with the peremptory challenge: it enables discrimination of individuals based on unsupported perceptions of group bias which are wholly unrelated to the case or with the prospective juror's ability to be impartial. By eliminating the peremptory challenge, jury selection will not be subject to needless manipulation, nor arbitrary, injurious discrimination.

This solution has already been attempted by at least one state legislature.[196] In 1974, the Massachusetts House of Representatives defeated a

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190. *Alen*, 596 So. 2d at 1091.

191. *Id.* Expanded *voir dire* may be an illusory solution if jurors are still inclined to conceal their beliefs or are unaware of or underestimate their own biases. If *voir dire* is good for anything, it can impress upon the prospective juror the importance of his civic duty to impartially consider the case before him.

192. *See, e.g.*, Note, *Limiting the Peremptory Challenge: Representation of Groups on Petit Juries*, 86 YALE L.J. 1715, 1740 (1977); James Jorgenson, *Back to the Laboratory with Peremptory Challenges: A Florida Response*, 12 FLA. ST. U. L. REV. 559 (1984). The Dade County Bar Association Task Force on Jury Selection recommended the number of peremptory challenges be reduced for both sides in 1984. *Id.* at 581 n.149. In addition, in 1976, the Supreme Court proposed an amendment to the Federal Rules of Criminal Procedure 24(b), to reduce the number of peremptory challenges. However, Congress opposed the amendment. *See* Gurney, *supra* note 156, at 282.

193. Massaro, *supra* note 139, at 560.

194. Richard Singer, *Peremptory Holds: A Suggestion (Only Half Specious) of a Solution to the Discriminatory Use of Peremptory Challenges*, 62 U. DET. L. REV. 275, 287-88 (1985). In light of his observations that the peremptory challenge gives neither party what it really wants, the author advocates allowing each party to peremptorily "hold" certain jurors, making them immune to challenge by the opposing party and providing a jury composed of "quasi-advocates" for both sides.

195. *See id.* at 287.

196. *See* Frederick L. Brown et al., *The Peremptory Challenge as a Manipulative Device*

bill that would have eliminated peremptory challenges in all civil and criminal trials.[197] Although the legislation did not pass, the fact that it was considered would seem to foreshadow the emerging acceptance and recognition that peremptories have been perverted into tools of bias. In addition, when asked in 1984 if she would object to the abolition of the peremptory challenge, United States Attorney General Janet Reno, then Dade State Attorney, replied: "No, so long as the defense and state were treated equally."[198] The proposal has also been supported by a number of judges and commentators cited herein[199] and was adopted in England in 1989 by Act of Parliament.[200]

XII. CONCLUSION

The peremptory challenge, once used as a tool to insure impartiality on juries, is probably the most significant means by which prejudice and bias are injected into the jury system.[201] Instead of preserving impartiality, it distorts the representativeness of and thus the impartiality of the jury and

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in Criminal Trials: Traditional Use or Abuse, 14 NEW ENG. L. REV. 192, 234 (1978).

197. *Id.*

198. *See* Hampton, *supra* note 1. The office of the Dade State Attorney, while headed by Janet Reno, prosecuted the Luis Alvarez and William Lozano cases.

199. *See also* Broderick, *supra* note 176, at 422-23; Colbert, *supra* note 17, at 128; Judge Carolyn Clause Garcia, *Strike Three and It's Out—There Goes the Peremptory*, 29 HOUS. LAW. 22 (1991); Gurney, *supra* note 156, at 230; Harris, *supra* note 126, at 1029; McMillan, *supra* note 44, at 374; Jonathan B. Mintz, Note, *Batson v. Kentucky: A Half-step in the Right Direction (Racial Discrimination and Peremptory Challenges Under the Heavier Confines of Equal Protection*, 72 CORNELL L. REV. 1026 (1987); Marvin B. Steinberg, *The Case for Eliminating Peremptory Challenges*, 1989 CRIM. L. BULL. 216 (1989) (Marvin Steinberg is a Circuit Court Judge for the city of Baltimore, Maryland).

In a recent interview, just prior to his death, Justice Thurgood Marshall reiterated his opposition, stating: "I would not use them, . . . I would be opposed to them. They are there, and I have used them, but I have talked to a hundred prominent, practicing lawyers who quietly will tell you they are willing to take the first 12." Gary A. Hengstler, *Justice Thurgood Marshall: Looking Back—Reflections on a Life Well-Spent*, A.B.A. J., June 1992, at 57, 59.

200. Effective January 5, 1989, under the 1988 Criminal Justice Act, Parliament abolished the defendant's use of peremptory challenges. Gobert, *supra* note 162, at 528, 530. The prosecutor's use of peremptory challenges has not been permitted in England since 1825. *See* Gurney, *supra* note 156, at n.262 (citing Juries Act, 1825, § 29). Thus, the peremptory challenge, as originating in English Law, has come full circle.

201. *See* Carl H. Imlay, *Federal Jury Reformation: Saving a Democratic Institution*, 6 LOY. L.A. L. REV. 247, 270 (1973).

dilutes the goal of assembling a jury comprised of a spectrum of community experiences and perspectives. Moreover, the presumption that peremptories even aid in providing an impartial jury is founded more on perception and anecdotal evidence than any articulable proof. Rather, peremptory challenges would seem to be trial alchemy, pursued more out of the quest to manipulate the outcome than for the preservation of impartiality or the pursuit of justice. Abuse of the peremptory challenge puts the rights and expectations of defendants, lawyers and society in conflict and it is the cause of retrial and riot. To preserve it would seem anachronistic given the Supreme Court's declared dedication to eradicating discrimination and upholding representativeness. Thus, it is time for legal and legislative forces to admit that peremptory challenges cannot coexist with notions of equal protection or representativeness. As the Supreme Court stated in *Palmore v. Sidoti*:[202] "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."[203] To return to Cardozo's words, the peremptory challenge not only savors of prejudice or arbitrary whim, it reeks of it.[204]

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202. 466 U.S. 429 (1984) (where the Court found a child custody award based on the race of the remarried mother's husband was a violation of the Equal Protection Clause).

203. *Id.* at 433.

204. *See* Hampton, *supra* note 1.

RED ALERT: The *D'Oench* Doctrine's Expansion Can Cause Financial Ruin for Borrowers When Insured Lenders Become Insolvent

TABLE OF CONTENTS

I. INTRODUCTION 1405
II. ORIGIN OF THE *D'OENCH* DOCTRINE 1408
III. CODIFICATION IN THE FEDERAL DEPOSIT INSURANCE ACT OF 1950 1410
IV. EXPANSION OF *D'OENCH*: A REFLEX TO THE BANKING CRISIS OF THE EIGHTIES 1414
A. *The Outcome in Langley v. F.D.I.C.* 1414
B. *The Financial Institution Reform, Recovery and Enforcement Act of 1989 (F.I.R.R.E.A.)* ... 1417
C. *Judicial Overgloss: The Federal Holder in Due Course Doctrine* 1421
D. *Recent Developments* 1427
V. *SUNCHASE APARTMENTS V. SUNBELT SERVICE CORP.* .. 1429
A. *Facts* 1429
B. *Analysis of the Court's Decision* 1432
VI. RECOMMENDATIONS TO ALLEVIATE BORROWERS' WOES AND CURB FURTHER EXPANSION OF *D'OENCH* 1434
VII. CONCLUSION 1438

I. INTRODUCTION

During the early 1930's, legislation was passed which created the Federal Deposit Insurance Corporation (F.D.I.C.) and the Federal Savings and Loan Insurance Corporation. (F.S.L.I.C.) to restore public confidence in the banking and thrift industries respectively.[1] Each year, financial

1. *See* D'Oench, Duhme & Co. v. F.D.I.C., 315 U.S. 447, 473 (1942); H.R. REP. NO. 101-54(I), 101st Cong., 1st Sess. (1989), *reprinted in* 1989 U.S.C.C.A.N. 86, 89 (time and demand deposits became insured up to $5,000 to encourage the public to reinvest in depository institutions).

The F.D.I.C. and F.S.L.I.C. both can operate in three distinct capacities when a bank faces insolvency. Both can act as receiver, conservator, or in a corporate capacity. In a receiver or corporate capacity, both can sue and be sued.

institutions that have been approved for federal deposit insurance are assessed premiums which theoretically function to restore any loss to these insurance funds caused by member bank or thrift failure.[2]

The viability of these funds critically depends on government employees who perform bank "safety and soundness" examinations to determine risks that particular banks pose to the fund.[3] Unnecessary risks are avoided if these examinations reveal the true value or CAMEL rating of the bank.[4] But effective examinations are not possible if the bank's official files do not contain written documentation that discloses the true value of assets and liabilities.[5] If resort to oral or written conditions outside the

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During liquidation of a failed institution, each can act as receiver to collect and dispose of bank assets. This sometimes involves litigation with debtors to collect on bad loans. Typically, in a liquidation, general creditors are paid by the receiver if there are collected funds available after payment is made to insured depositors. However, in a depositor preference jurisdiction, uninsured depositors have priority over general creditors.

Only in a corporate capacity does each actually pay insured depositors. If the insolvent institution is purchased by another healthy institution, then any bad loans that were not part of the sale are collected and litigated by these agencies in a corporate capacity. As a conservator, the F.D.I.C. and F.S.L.I.C. assume the powers of the members, officers, and directors in an attempt to preserve bank or thrift operations without liquidation. *E.g.*, Barry Zisman & Hugh Spears, *F.D.I.C./R.T.C. Superpowers and their Affect on Creditors and Shareholders*, *in* LITIGATING FOR AND AGAINST THE F.D.I.C. AND THE R.T.C. 1991, at 371, (PLI Com. Law and Practice Course Handbook Series No. 588, 1991).

2. 1990 F.D.I.C., ANNUAL REPORT (1991). The theory of distributing all loss to the funds to member institutions does not seem to be working. As of 1987, the Bank Insurance Fund (B.I.F.) had a balance of $18.3 billion. After three straight years of heavy loss, the fund's ending balance in 1990 was a mere four billion. *Id.* at 1. To recapitalize the near-bankrupt fund, President Bush signed into law the Federal Deposit Insurance Reform Act of 1991 which will increase the borrowing powers of the fund from government. *E.g.*, Janet Novack, *Son of Credit Crunch*, FORBES, May 25, 1992, at 102.

3. *See generally* George French, *Early Corrective Action for Troubled Banks*, F.D.I.C. BANKING REV. 1 (1991). These examinations determine whether a bank or thrift is financially qualified to become a federally-insured member. They also serve the important function of providing essential information necessary to determine the correct course of action when a member bank or thrift is facing insolvency. An inaccurate examination can lead to an unqualified bank gaining "insured" status or an improper course of action upon insolvency. In either situation, an unnecessary burden or risk is placed on the public funds with the danger that the ultimate bearers will be innocent taxpayers. *See* Langley v. F.D.I.C., 484 U.S. 86, 91 (1987).

4. "CAMEL" is an acronym for capital, asset quality, management, earnings, and liquidity. Each of these five components is rated by the examiner and a composite rating, the CAMEL rating, is assigned. French, *supra* note 3, at 5.

5. *D'Oench, Duhme & Co.*, 315 U.S. at 460 ("The genuineness of assets *ostensibly* held by a bank is certainly germane to a determination of solvency . . . . [A] secret agreement .

bank's records is needed to evaluate the health of an institution, the constructive results of a thorough examination become impossible to obtain.[6] The Court in *D'Oench* created a federal common law doctrine that disciplined borrowers and lenders to memorialize their lending transactions.[7] Failure to include the material terms of a note in a bank's official files constitutes an arrangement likely to mislead bank examiners. Under *D'Oench*, when a bank becomes insolvent, the borrower is barred from asserting any defense against the F.D.I.C. that is based on a secret agreement.[8] Although the doctrine's origin was based on equitable principles, judicial expansion during the recent banking crisis to further public policy (protecting the federal insurance program and innocent taxpayers) has ignored the concept of balancing the equities to see if the borrower's claim or defense justifiably prevails.[9]

In areas such as Texas and Florida, where the collapse of the real estate market has caused a great number of banks and thrifts to fail, the Fifth and Eleventh United States Circuit Courts have imputed "federal holder in due course" status to federal insurance agencies.[10] The federal holder in due course doctrine, as applied to federal insurance agencies, either arose out of an unwarranted alchemy of federal common law or a mutant interpretation of the holding in *Langley v. F.D.I.C.*, the Supreme Court's most recent instruction on the codification of *D'Oench*.[11] In imputing this status, these courts have disregarded two fundamental building blocks of democracy, the separation of powers doctrine and the concept of federalism, in an officious attempt to alleviate the drain on federal insurance funds.[12]

This note first traces the history of the *D'Oench* doctrine and then analyzes and delineates what constitutes proper and improper application of this law. Section two discusses the seminal case, *D'Oench, Duhme & Co. v. F.D.I.C.*[13] Section three deals with the legislative intent and result of the codification of *D'Oench*. Section four reveals the expansion and overexpansion of the doctrine during the last ten years. The fifth section analyzes a

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. . will conceal the truth from the vigilant eyes of the bank examiners.") (emphasis added).

6. Langley v. F.D.I.C., 484 U.S. 86, 92 (1987).
7. *D'Oench, Duhme & Co.*, 315 U.S. at 459.
8. *Id.* at 461.
9. Marsha Hymanson, Note, *Borrower Beware: D'Oench, Duhme and Section 1823 Overprotect the Insurer when Banks Fail*, 62 S. CAL. L. REV. 253, 275 (1988).
10. *See* Campbell Leasing, Inc. v. F.D.I.C., 901 F.2d 1244, 1248 (5th Cir. 1990); Gunter v. Hutcheson, 674 F.2d 862, 872 (11th Cir.), *cert. denied*, 459 U.S. 826 (1982).
11. Hymanson, Note, *supra* note 9, at 302, 309.
12. *Id.* at 293.
13. 315 U.S. 447 (1942).

proper application of the *D'Oench* doctrine in *Sunchase Apartments v. Sunbelt Service Corp.* The sixth section recommends ways to tame the doctrine's overexpansion in the future and safeguards to protect borrowers in the present. Section seven concludes this note by finding that the *D'Oench* doctrine and its codification are ample protection to protect the banking and savings insurance funds without imputing federal holder in due course status to these agencies.

II. ORIGIN OF THE *D'OENCH* DOCTRINE

Approximately sixty-five years ago, a securities broker, D'Oench, Duhme and Co., sold the Belleville Bank and Trust Co. some bonds which later defaulted.[14] So that the bank would not have to show any past due bonds on its books, D'Oench, Duhme and Co. agreed to execute demand notes to the bank.[15] D'Oench, Duhme and Co. never received any consideration for the notes. This occurred because the receipts contained the statement, "This demand note is given with the understanding it will not be called for payment. All interest payments to be repaid."[16] Subsequently, interest payments were made on the note by D'Oench, Duhme and Co. so the notes would appear "as live paper" in the bank's records.[17] Shortly thereafter, state banking authorities examined the Belleville Bank and Trust Co.'s assets and qualified the bank to receive insurance on deposits from the newly created F.D.I.C.[18] Then, financial trouble arose and the bank became insolvent.[19] The F.D.I.C. acquired the notes during the insolvency proceeding and demanded payment from D'Oench.[20] D'Oench asserted

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14. *D'Oench, Duhme & Co.*, 315 U.S. at 454 (1942).
15. *Id.*
16. *Id.*
17. *Id.*
18. *D'Oench, Duhme & Co.*, 315 U.S. at 459.
19. *Id.* at 454.
20. *Id.* The insolvency proceeding involved a purchase and assumption agreement whereby the F.D.I.C. secured the notes as collateral for a $1,000,000 loan to the bank in connection with another bank's assumption of the latter's deposit liabilities. *Id.* Typically, when an insured bank or thrift faces insolvency, the F.D.I.C. has four courses of action to choose between. *See* Barry Zisman, *Availability of the "Superpowers" to Collecting Banks, Indemnified Institutions, and Other Third Parties, in* CIV. & CRIM. LIAB. OF OFFICERS, DIRECTORS, AND PROFESSIONALS: BANK & THRIFT LITIG. IN THE 1990'S, at 637 (PLI Com. Law and Practice Course Handbook Series No. 595, 1991) at 637. The first option is liquidation. *Id.* The institution is closed and the F.D.I.C. is appointed as receiver to sell off the assets and sue to collect on the bank's bad loans. *Id.* All insured deposits are paid up

failure of consideration as their defense, offering the receipts as evidence.[21] But the F.D.I.C. lacked knowledge of these receipts since they were never in the official bank files.[22] Thus, the bank had misrepresented its assets to the examiners in order to be being qualified to receive federal insurance.

Although the F.D.I.C. had not yet been created when the notes were originally executed, D'Oench's subsequent acquiescence in making the notes look "alive" by making false interest payments caused the F.D.I.C. to be misled when it approved the bank for insurance.[23] At the time, it was a statutory violation for any party to *knowingly* or *willfully* overvalue any asset

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to the $100,000 limit by F.D.I.C. Corporate, and the corporation is subrogated to the depositor's claims against the failed institution's estate. *Id.* The disadvantages of liquidation are the loss in market value of the bank as a going concern and erosion of public confidence due to cessation in banking operations. Gunter v. Hutcheson, 674 F.2d 862, 865-66 (11th Cir.), *cert. denied*, 459 U.S. 826 (1982).

The second option is a purchase and assumption transaction. *See* Zisman, *supra*, at 637 The bank is closed only in form as the F.D.I.C. is appointed as receiver. *Id.* Normally, the receivership accepts bids and then agrees to sell to the highest bidding bank the assets along with the liabilities of the failed bank. *Id.* There are two types of transactions. *Id.* The "whole bank" purchase and assumption means the purchasing bank receives all bank assets and liabilities in "as is" condition usually at a discounted price. The second type is the "clean bank" purchase and assumption in which the purchasing bank only acquires the good assets from the receivership. The bad assets or loans are transferred from F.D.I.C.-receiver to F.D.I.C.-corporate for collection. *Id.* Recently, a third hybrid has been utilized in which a "whole bank" transaction occurs with the purchasing bank having the option for "asset put-back" (giving non-performing loans back to the receivership within an agreed time period). F.D.I.C. 1988 ANN. REP. (1989). Under all types, the acquiring bank assumes full liability for all deposit amounts of the failed bank. This results in 100% "de facto" insurance on insured and uninsured deposits. *See* Hymanson, Note, *supra* note 9, at 261.

The third course of action is an "insured deposit transfer" in which all insured deposits are transferred to another bank which acts as an agent for the F.D.I.C. to pay insured depositors or convert the depositors' accounts to its own account. *E.g.*, Zisman, *supra*, at 637. If conversion occurs, the F.D.I.C. will often charge a premium to the acquiring institution as it usually does in a purchase and assumption transaction. *Id.*

The fourth option is open-bank assistance. *Id.* To avoid closure, the bank presents a plan to the F.D.I.C. to restore the health of the institution based on private investment coupled with financial aid from the F.D.I.C. *Id.*

When an institution fails, the F.D.I.C. must quickly analyze, using a "cost test," which option will be the least expensive to the insurance fund. *Id.* By statute, the least expensive option must be chosen unless it is essential that open bank assistance be pursued to maintain adequate banking services to the community. *See* 12 U.S.C. § 1821 (1991).

21. *D'Oench, Duhme & Co.*, 315 U.S. at 456.
22. *Id.* at 454.
23. *Id.* at 459.

to the F.D.I.C. in an attempt to procure federal insurance.[24] The Court had already announced a policy that any party that violates this statutory provision could not rely on his own wrongful act as a defense to defeat the obligation of the note as against the receiver of the bank.[25]

The Court in *D'Oench* drew from their power to create federal common law and held that a defendant's knowledge or willfulness was no longer a prerequisite for estopping that defendant from asserting his wrongful act to defeat the obligation of the note as against the corporation.[26] The Court found that the Federal Reserve Act revealed a federal policy to protect the F.D.I.C.[27] The genesis of the *D'Oench* doctrine occurred as the Court stated:

> The test is whether the note was designed to deceive . . . the public authority or would *tend to have that effect.* It would be sufficient in this type of case that the maker lent himself to a scheme or arrangement whereby the banking authority on which respondent relied in insuring the bank was or *was likely* to be misled.[28]

In short, for the *D'Oench* doctrine to bar a defendant's wrongful act as a defense to an obligation on a note as against the corporation, three elements are required: there must be a secret arrangement; there must be a possibility that the corporation could suffer loss (but proof of such is not required); and the borrower need not have fraudulent intent, it is enough that his actions might cause the authorities to be misled.[29]

III. Codification in the Federal Deposit Insurance Act of 1950

In 1950, the Federal Deposit Insurance Act was enacted. Section 1823(e) of the act provides:

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24. *Id.* at 456 (emphasis added).
25. *Id.* at 457 (citing Deitrick v. Greaney, 309 U.S. 190 (1936)).
26. *D'Oench, Duhme & Co.*, 315 U.S. at 460.
27. *Id.* at 457.
28. *Id.* at 460 (emphasis added).
29. Thomas Mayer & Beatrice Kahn, *Enter Leviathan: The F.D.I.C. as Supercreditor, in* Real Est. Workouts & Bankr. 1992, at 9 (PLI Real Est. Law and Practice Course Handbook Series No. 379, 1992).

> No agreement which tends to diminish or defeat the right, title, or interest of the Corporation [F.D.I.C.] in any asset acquired by it under this section . . . shall be valid against the Corporation unless such agreement (1) shall be in writing (2) shall have been executed by the bank and the . . . obligor contemporaneously with the . . . asset . . . (3) shall have been approved by the board . . . of the bank or its loan committee . . . reflected in the minutes . . . and (4) shall have been, continuously, from the time of its execution, an official record of the bank.[30]

The majority of jurisdictions view section 1823(e) as a codification of the *D'Oench* doctrine[31] but not a preemption.[32] The *D'Oench* doctrine can be asserted by any receiver or public banking authority against a secret arrangement by a bank;[33] but section 1823(e) was enacted to apply only to the F.D.I.C. in its corporate capacity.[34]

A requirement of *D'Oench* is that a secret arrangement must exist.[35] Unlike *D'Oench*, section 1823(e) places the focus on whether the "agreement" meets all four criteria and disregards an analysis of the "borrower's conduct or participation in a scheme likely to deceive the insurer."[36] Furthermore, when an agreement violates any of the four criteria in section 1823(e), the F.D.I.C. can bar affirmative claims as well as defenses asserted by the defendant against the corporation.[37] The holding in *D'Oench* barred

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30. Langley v. F.D.I.C., 484 U.S. 86, 90 (citing Federal Deposit Insurance Act of 1950 § 13(e), 64 Stat. 889 (as amended 12 U.S.C. § 1823(e) (1982))).

31. *See, e.g.*, Langley v. F.D.I.C., 484 U.S. 86, 92-93 (1987); Adams v. Madison Realty & Dev., Inc., 937 F.2d 845, 852 (3d Cir. 1991) (citing F.D.I.C. v. Blue Rock Shopping Ctr., Inc., 766 F.2d 744, 752 (3d Cir. 1985)); F.S.L.I.C. v. T.F. Stone-Liberty Land Assoc., 787 S.W.2d 475, 479 (Tex. Ct. App. 1990).

32. F.D.I.C. v. McClanahan, 795 F.2d 512, 514 n.1 (5th Cir. 1986); *see also* Hymanson, Note, *supra* note 9, at 270.

33. *D'Oench, Duhme & Co.*, 315 U.S. at 458, 460. A majority of courts have held that the *D'Oench* doctrine applies to the F.S.L.I.C. *See, e.g.*, Firstsouth, F.A. v. Aqua Constr. Inc., 858 F.2d 441 (8th Cir. 1988). *See generally* Hymanson, Note, *supra* note 9, at 267.

34. This is no longer true. *See* Financial Institution Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989).

35. *See supra* text accompanying note 28.

36. Hymanson, Note, *supra* note 9, at 270-71. In *Langley v. F.D.I.C.*, the Court interpreted the word "agreement" in a much broader fashion. It is now a rare occasion when a violation of § 1823(e) no longer exemplifies a scheme or arrangement likely to mislead banking authorities. *Langley*, 484 U.S. at 93.

37. Castleglen, Inc. v. Commw. Sav. Ass'n, 728 F. Supp. 656 (C.D. Utah 1989).

only defenses.[38]

Although the legislative history of section 1823(e) is sparse, Congress' intent is readily apparent.[39] It was a last second amendment to the Federal Deposit Insurance Act which covered the entire scope of the F.D.I.C.'s function. There is no record of congressional intent that section 1823(e) was a preemption of *D'Oench*.[40] The only mention of a limit on affording the F.D.I.C. protection came from Representative Francis E. Walter, a member of the House Judiciary Committee, who was motivated by one of his constituents that lost an earlier suit against the F.D.I.C. based on *D'Oench*.[41]

There was much opposition to Representative Walter's bill and it never left the House Judiciary Committee.[42] Shortly thereafter, the House Banking and Currency Committee hearings were conducted on section 2822 which was the framework for the formation of the Federal Deposit Insurance Act.[43] As introduced, section 2822 did not contain the writing of section 1823(e).[44] But subsequent discussion ensued between Representative Multer and F.D.I.C. Director H. Earl Cook concerning the earlier Judiciary Committee hearings.[45] From this discussion grew an intent to protect the

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38. *D'Oench, Duhme & Co.*, 315 U.S. at 461. *But see* Timberland Design, Inc. v. First Serv. Bank for Sav., 932 F.2d 46 (1st Cir. 1991) (*D'Oench* bars affirmative claims as well as defenses); Beighley v. F.D.I.C., 868 F.2d 776, 783 (5th Cir. 1989).

39. Brief for Respondent, Langley v. F.D.I.C. 484 U.S. 86 (1987) (No. 86-489).

40. Hymanson, Note, *supra* note 9, at 269.

41. Representative Walter noted:

> It was never the intention of Congress to give the Corporation a stronger position than that of the bank and the adoption of . . . my amendment is offered to prove that heretofore it was the intent of Congress that any agreement in the absence of fraud was binding on the corporation.

Hymanson, Note, *supra* note 9, at 277-78 (citing 96 CONG. REC. 10,732 (1950)).

42. Brief for Respondent, *supra* note 39.

43. *Id.*

44. *Id.*

45. The following is what occurred:

> Mr. Multer: There has been considerable litigation through the years during the existence of the corporation in which contentions have been made that agreements between the banks and debtors have not been lived up to after the banks were closed down, and that the F.D.I.C., in collecting the assets of the bank, was put in a more favorable position than the bank itself would have been and that the F.D.I.C. could ignore the agreements with debtors. I think some legislation has been introduced in a hearing held before another committee of the House on the subject. Can you tell us briefly whether or not there is any objection to putting into this proposed law an amendment to require the F.D.I.C. to comply with any such agreements that have been made in good faith and

F.D.I.C. beyond requiring just a writing between bank and borrower. Consequently, the bill that left the House Committee on Banking and Currency contained the provisions of section 1823(e).[46]

It is a fundamental tenet of statutory construction that absent express legislative intent to the contrary, the plain literal meaning of an unambiguous statute must be given effect.[47] Thus, the four requirements of section 1823(e) must be stringently applied to protect the Corporation.[48]

Strict application of some of the requirements of section 1823(e) seems to deny a sense of practicality.[49] The second requirement of section 1823(e) mandates a contemporaneous execution of all loan documents that constitute part of the overall agreement between bank and borrower.[50] If

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which are *properly recorded* between the debtors and the banks closed up, or taken over, or merged?

Mr. Cook: I think that statement of yours covered the ground entirely—where you are properly supported by such agreements and *not dependent upon oral agreements* that have no binding effect. If the bars are once let down on that, there would not be a safe bank in the United States today, because anybody could claim that so-and-so had happened and there would be no evidence to support it . . . .

Mr. Multer: I think the policy of your bank is to honor any such bona fide agreement.

Mr. Cook: We never back away from a bona fide agreement, and when the record is clear, we inherit that obligation to stand by it. We cannot be bound when there is no record.

Brief for Respondent, *supra* note 39 (quoting from Amendments to the F.D.I. Act, 1950: Hearings on § 2822 before the House Committee on Banking and Currency, 81st Cong., 2d Sess. 41-42 (1950)) (emphasis added).

46. *Id.* (citing 96 CONG. REC. 10,671 (1950)).

47. U.S. v. Turkette, 452 U.S. 576, 580 (1981).

48. *Langley*, 484 U.S. at 95 ("The short of the matter is that Congress opted for the certainty of the requirements set forth in sec. 1823(e). An agreement that meets them prevails . . . and an agreement that does not meet them fails . . . ."). The only recorded spot of congressional intent contrary to § 1823(e) was Representative Walter's bill which never made it out of the House Judiciary Committee. (note that "Isolated remarks (of members of Congress) are entitled to little or no weight in interpreting legislative history." Murphy v. Empire of Am., FSA, 746 F.2d 931, 935 (2d Cir. 1984)).

49. *See, e.g.*, R.T.C. v. McCrory, 951 F.2d 68, 69 (5th Cir. 1992) (borrower's release of liability barred as a defense by § 1823(e) because the document was kept in bank attorney's office rather than official bank files); R.T.C. v. Crow, 763 F. Supp. 887, 892 (N.D. Tex. 1991).

50. *Langley*, 484 U.S. at 90 (citing 12 U.S.C. § 1823(e)(2) (1982)).

read literally, this invalidates all amendments and releases from guaranties since these are changes that typically occur after the execution of the original agreement.[51]

The fourth requirement of section 1823(e) requires that all loan documents to the agreement be continuously kept in the bank's official files.[52] Proving compliance with this requirement places an undue burden on a borrower asserting the validity of an agreement against the F.D.I.C. To compensate, some courts have created a presumption that the document has continuously been in the official bank files if the other three requirements of section 1823(e) are met.[53] But most courts refrain from deviation and apply the provisions of section 1823(e) in their strictest sense.[54] Courts favor public policy protecting the F.D.I.C. because underlying this is a sense that the public benefits in a dual capacity, as depositor and taxpayer. Additionally, the Supreme Court has already shown a desire for strict compliance.[55]

IV. Expansion of *D'Oench*: A Reflex to the Banking Crisis of the Eighties

A. *The Outcome in Langley v. F.D.I.C.*

In 1987, the United States Supreme Court decided *Langley v. F.D.I.C.*[56] Its analysis identified the congressional purpose behind section 1823(e) in order to define the scope of its application.[57] The Langleys purchased a tract of land through Planters Trust and Savings Bank (Planters). They borrowed $450,000 from Planters in consideration for which they executed a note, mortgage, and personal guaranties. Subsequent-

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51. *See* F.D.I.C. v. Manatt 922 F.2d 486, 488 (8th Cir.), *cert. denied*, 111 S. Ct. 2889 (1991) ("[W]e do not reach the contemporaneousness issue resolved by the district court, and, in fact, have serious misgivings about its interpretation . . . ."). *But see* R.T.C. v. Crow, 763 F. Supp. 887, 893 (N.D. Tex. 1991) (written proposals for work-out of defaulted loans were invalid for precisely failing to be contemporaneous with the note).

52. *Langley*, 484 U.S. at 90 (citing 12 U.S.C. § 1823(e)(4) (1982)).

53. F.D.I.C. v. Cremona Co., 832 F.2d 959, 963 (6th Cir. 1987), *cert. dismissed sub nom.* Gonda v. F.D.I.C., 485 U.S. 1017 (1988).

54. "These criteria are stringent and failure to show satisfaction of each and every requirement is fatal to any claim or defense." Talmo v. F.D.I.C., 782 F. Supp. 1538, 1540 (S.D. Fla. 1991) (citing *Langley*, 484 U.S. at 95).

55. *See* cases cited *supra* note 48.

56. *See Langley*, 484 U.S. at 86.

57. *Id.* at 91.

ly, the Langleys defaulted on the note and Planters filed suit. During litigation, Planters was declared insolvent and the F.D.I.C. was appointed receiver. The F.D.I.C., as receiver, arranged for a purchase and assumption agreement with another bank; however, Langley's note was not included. Instead, the note was transferred from F.D.I.C.-receiver to F.D.I.C.-corporate who was substituted as plaintiff in this lawsuit. The district court granted summary judgment for the F.D.I.C. on the basis that section 1823(e) bars Langley's defense of fraud in the inducement.[58]

The Langleys alleged that Planters fraudulently induced them into purchasing the land by orally misrepresenting the number of acres and mineral leases on the property. Langley's contention was that section 1823(e) bars only "agreements" and not warranted facts (the number of acres) that fail to meet the four requirements of section 1823(e). The Langleys argued that the word "agreement" in section 1823(e) encompasses only an express promise to perform an act in the future and not factual representations.[59] However, the Court disagreed by stating:

> One purpose of section 1823(e) is to allow the federal and state bank examiners to rely on a bank's records in evaluating the worth of bank assets . . . . [N]either the FDIC. nor state banking authorities would be able to make reliable evaluations if bank records contained seemingly unqualified notes that are in fact subject to undisclosed conditions [such as undisclosed warranted facts].[60]

To preserve the Congressional purpose of section 1823(e), the Court defined "agreement" as the "bargain of the parties in fact . . . ."[61] The parties' bargain consists of all its conditions (warranted facts) as well as its promises.[62] The Court found that to define "agreement" as to exclude warranted facts would fail to serve the codified principle of *D'Oench*.[63] *D'Oench's* purpose is defeated if defenses from secret arrangements of undisclosed warranted facts are immune from the doctrine's power.[64]

Langley's fallback position was that assuming, arguendo, misrepresented facts can constitute an "agreement," the presence of fraud and the F.D.I.C.'s knowledge of such a defense at the time it acquired the note

58. *Id.* at 88.
59. *Id.* at 90.
60. *Id.* at 91.
61. *Langley*, 484 U.S. at 91 (citing U.C.C. § 1-201(3)).
62. *Id.* (citation omitted).
63. *Id.* at 92.
64. *Id.*

makes section 1823(e) inapplicable to this case.[65] To bar agreements in violation of section 1823(e), the language requires that the agreement must "tend[] to diminish or defeat the right, title, or interest" of the F.D.I.C. in the asset.[66] If the F.D.I.C. acquires void title of an asset, then section 1823(e) is inapplicable because no "right, title, or interest" of the F.D.I.C. could be diminished.[67] There are several real defenses that cause an asset to have void title.[68] Fraud in the factum is one such defense.[69]

Langley's assertion of fraud involved reliance on factual misrepresentations or fraud in the inducement. Fraud in the inducement is a personal defense.[70] Personal defenses result in voidable title, not void title.[71] The Court found that Planters had voidable title which they transferred to the F.D.I.C.[72] Nonetheless, voidable title constituted an amount of "title or interest" in the note sufficient to satisfy the requirement of section 1823(e).[73] Furthermore, the Court stated that the F.D.I.C.'s knowledge of the alleged fraud during its acquisition of the note is irrelevant to whether section 1823(e) applies:

> The F.D.I.C. is an insurer of the bank, and is liable for the depositors' insured losses . . . . The harm to the F.D.I.C. caused by the failure to record occurs no later than the time at which it conducts its *first bank examination* that is unable to detect the unrecorded agreement and to prompt the invocation of available protective measures, including termination of the bank's deposit insurance.[74]

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65. *Id.* at 93.

66. *Langley*, 484 U.S. at 90 (citing 12 U.S.C. § 1823(e) (1982)).

67. *Id.* at 93-94 (citing RESTATEMENT (SECOND) OF CONTRACTS § 163 cmt. a, c; E. FARNSWORTH, CONTRACTS § 4.10, at 235 (1982)).

68. The real defenses are incapacity, infancy, duress, illegality, fraud in the factum, discharge in insolvency proceedings, or any discharge known to the holder in due course. *See* F.S.L.I.C. v. Griffin, 935 F.2d 691, 697 n.3 (5th Cir. 1991), *cert. denied sub nom.* Griffin v. First Gibraltar Bank, F.S.B., 112 S. Ct. 1163 (1992).

69. *Langley*, 484 U.S. at 93 (citing U.C.C. § 3-305(2)(c)) (fraud in the factum occurs when a person "procures a party's signature to an instrument without knowledge of its true nature or contents . . . .").

70. Some personal defenses are breach of contract, breach of fiduciary duty, negligence, estoppel and waiver, failure of consideration, economic duress, and unconscionability. *See* Stephen Lake, Note, *Banking Law: The D'Oench Doctrine and 12 U.S.C. § 1823(e): Overextended But Not Unconstitutional*, 43 OKLA. L. REV. 315, 321 (1990).

71. *Id.*

72. *Langley*, 484 U.S. at 94.

73. *Id.*

74. *Id.* at 95 (emphasis added).

In dicta, the Court sent out a message that the plain meaning of section 1823(e) should be given full effect.[75] The requirement of contemporaneous execution of all loans documents along with recordation in the bank board's or loan committee's minutes ensures that all loan transactions undergo prudent consideration prior to fruition. The requirement of continuous possession in the official bank files prevents the evil tendency of bank officials or borrowers to collusively reconstruct the loan terms prior to insolvency.[76]

Throughout the Court's analysis, no mention was ever made granting the F.D.I.C. holder in due course status.[77] The opinion was simply a plain meaning interpretation of the statute to accomplish congressional objectives. When a federal statute addresses the issue in contention, federal common law should not be created or applied.[78] The Court abided by this "separation of powers" maxim by not referencing the F.D.I.C. as a federal holder in due course.

In sum, *Langley* stands for several propositions. First, a borrower's real defenses or affirmative claims that result in void title of an asset cause section 1823(e) to be inapplicable. Second, a borrower's personal defenses or affirmative claims have no effect since voidable title is sufficient "interest" for the statute to apply. Third, that knowledge by the F.D.I.C. of the borrower's alleged defense upon acquisition of the bank asset is irrelevant to a section 1823(e) analysis. Fourth, an agreement under section 1823(e) encompasses all promises, conditions, and warranted facts that were part of the parties' bargain. Lastly, the opinion reaffirms that section 1823(e) is a codified expansion of the original principle in *D'Oench*, with overlapping and nonoverlapping applications.

B. *The Financial Institution Reform, Recovery and Enforcement Act of 1989 (F.I.R.R.E.A.)*

President Bush signed F.I.R.R.E.A. into law on August 9, 1989.[79] This act was the initial counterattack to control the banking and thrift crisis of the eighties. The cause of this crisis can be attributed to several blunders besides a downturn in the economy.[80] In 1979, thrift industry funds were

75. *Id.*
76. *Id.*
77. *See Langley*, 484 U.S. at 86.
78. Bayshore Exec. Plaza v. F.D.I.C., 943 F.2d 1290, 1292 (11th Cir. 1991).
79. *See* F.I.R.R.E.A., Pub. L. No. 101-73, 103 Stat. 183 (1989); F.S.L.I.C. v. T.F. Stone-Liberty Land Assoc., 787 S.W.2d 475, 480 (Tex. Ct. App. 1990).
80. H.R. REP. NO. 101-54(I), 101st Cong., 1st Sess. (1989), *reprinted in* 1989

locked into long term fixed mortgages when Paul Volcker, head of the Federal Reserve, switched from a policy of stabilizing interest rates to an anti-inflation policy of restricting the growth of the money supply.[81] This caused interest rates to sky-rocket.[82] As a result, the cost of funds (i.e., deposit interest rates) for thrifts increased dramatically.[83] Thrift profit margins suffered because of this "negative interest rate."[84]

Second, the Depository Institutions Deregulation and Monetary Control Act of 1980 (D.I.D.M.C.) phased out Regulation Q which had historically allowed thrifts a twenty-five to fifty basis points differential on interest rates on times and savings deposits over banks.[85] Without this statutory advantage, thrifts were forced to compete for funds on an equal basis with banks. This competition increased the cost of funds for thrifts as well as banks. Once again, profit margins were sliced.[86]

Third, the Garn-St. Germain Depository Institution Act of 1982 allowed thrifts far greater flexibility in investing their money; however, thrift managers lacked the investment expertise necessary to handle this new freedom.[87] This resulted in a flux of unnecessary commercial loans destined to fail.[88]

Fourth, the Federal Home Loan Bank Board, which controlled the F.S.L.I.C., and was the regulating and chartering arm of the thrift industry, did little to prevent the future crisis since they were heavily influenced by private parties in the industry.[89] It is unfortunate that up to forty percent of thrift failures during this crisis would involve some form of fraud and insider abuse.[90]

The Federal Home Loan Bank Board's failure to require that thrifts operate under generally accepted accounting principles (G.A.A.P.) caused a false sense of security to be created. Through the use of Regulatory Accounting Principles (R.A.P.), thrifts were allowed to use accounting

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U.S.C.C.A.N. 86.

81. *Id.* at 91.

82. *Id.*

83. *Id.*

84. *Id.*

85. H.R. REP. NO. 101-54(I), 101st Cong., 1st Sess. (1989), *reprinted in* 1989 U.S.C.C.A.N. 86, 92.

86. *Id.* at 92.

87. *Id.*

88. *Id.* at 93.

89. *Id.* at 98.

90. H.R. REP. NO. 101-54(I), 101st Cong., 1st Sess. (1989), *reprinted in* 1989 U.S.C.C.A.N. 86, 96.

gimmicks to inflate their balance sheets which only aided this cover-up. This "masked the true magnitude of the thrift industry's woes and the level of insolvency of the F.S.L.I.C."[91] Finally, infrequent "safety and soundness" examinations of banks and thrifts (especially in Texas) set the course of what was to follow.[92]

Enter F.I.R.R.E.A. A primary purpose of the Act was to place federal deposit insurance funds in sound financial condition for the future.[93] This objective called for expanding the enforcement powers of federal regulators.[94] Step one abolished the Federal Home Loan Bank Board and the bankrupt F.S.L.I.C.[95] The Office of Thrift Supervision was created and given F.H.L.B.B.'s regulatory and chartering function for the thrift industry.[96] The Resolution Trust Corporation was formed to handle all thrift failures occurring after January 1, 1989.[97] Management of thrift failures prior to January 1, 1989 was assigned to a new arm of the F.D.I.C., the F.S.L.I.C. Resolution Fund.[98]

It became the sole responsibility of the F.D.I.C. to insure thrift deposits as well as bank deposits of member institutions.[99] To accomplish this mandate, the F.D.I.C. set up two funds, the Bank Insurance Fund (B.I.F.) and the Savings Association Insurance Fund (S.A.I.F.).[100]

Aside from defining the F.D.I.C.'s role as insurer, F.I.R.R.E.A. changed the scope of section 1823(e).[101] Apparently, the Court's broad interpreta-

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91. *Id.* at 94.

92. *Id.* at 97; *see also* F.D.I.C. 1990 ANN. REP. 31 (1991) (there was a 50% decrease in examinations of Texas Banks during the crucial years of 1983-85).

93. H.R. REP. NO. 101-54(I), 101st Cong., 1st Sess. (1989), *reprinted in* 1989 U.S.C.C.A.N. 86, 103-07.

94. *Id.* at 107.

95. F.I.R.R.E.A., Pub. L. No. 101-73, § 401, 103 Stat. 183, 354 (1989) (although the F.S.L.I.C. was abolished, its rights and obligations were transferred to either the F.D.I.C. or the R.T.C.).

96. H.R. REP. NO. 101-54(I), 101st Cong., 1st Sess. (1989), *reprinted in* 1989 U.S.C.C.A.N. 86, 136.

97. F.I.R.R.E.A., Pub. L. No. 101-73, § 501, 103 Stat. 183, 369-72 (1989) (the R.T.C. can also function in three capacities, as receiver, conservator, or corporate).

98. *Id.* § 215.

99. H.R. CONF. REP. NO. 222, 101st Cong., 1st Sess. 394, *reprinted in* 1989 U.S.C.C.A.N. 432.

100. 1990 F.D.I.C., ANNUAL REPORT (1991).

101. The amended § 1823(e) now reads:

> No agreement which tends to diminish or defeat the interest of the Corporation in any asset acquired by it under this section or section 1821 of this title, either as security for a loan or by purchase or *as receiver of any depository institution*

tion of section 1823(e) in *Langley v. F.D.I.C.* agreed with Congress, since the F.I.R.R.E.A. amendments effectuated a further expansion of the codification of *D'Oench*.[102] Prior to F.I.R.R.E.A., section 1823(e) applied only to the F.D.I.C. in its corporate capacity.[103] F.I.R.R.E.A. expressly extended the protection of section 1823(e) to "a receiver of any insured deposit institution."[104]

Moreover, section 1823(e) was expanded to apply to the R.T.C. in either its corporate or receiver capacities.[105] Section 212 of F.I.R.R.E.A. expanded the F.D.I.C.'s powers as a conservator and assumingly conferred the protection of section 1823(e) to the F.D.I.C. as conservator.[106] This protection may also be claimed by the R.T.C. as conservator.[107] F.I.R.R.E.A. also expressly extended section 1823(e)'s protection to "bridge banks" without conferring similar protection to "new banks."[108]

The importance of F.I.R.R.E.A. is that it was Congress' first response to the banking crisis. Congress made it clear that federal regulators were to

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shall be valid against the Corporation unless such agreement

(1) is in writing

(2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution

(3) was approved by the board of directors of the depository institution or its loan committee which approval shall be reflected in the minutes of said board or committee, and

(4) has been continuously, from the time of its execution, an official record of the depository institution.

12 U.S.C. § 1823(e) (1991) (emphasis added).

102. Adams v. Madison Realty & Dev., Inc., 937 F.2d 845, 854 (3d Cir. 1991).

103. F.D.I.C. v. McClanahan, 795 F.2d 512, 516 (5th Cir. 1986) (section 1823(e) not available to F.D.I.C. as a receiver); F.D.I.C. v. Gulf Life Ins. Co., 737 F.2d 1513, 1514 (11th Cir. 1984).

104. 12 U.S.C. § 1823(e).

105. F.I.R.R.E.A., Pub. L. No. 101-73, § 501, 103 Stat. 183, 369-72 (1989); *see also* 1990 F.D.I.C., ANNUAL REPORT (1991).

106. Lake, Note, *supra* note 69, at 324.

107. *Id.*

108. Bridge Banks and "New Banks" are temporary structural creations used by the F.D.I.C. These interim banks allow banking operations of the failed institute to continue until a final course of action is decided. *See* 12 U.S.C. § 1821 (1991). Unlike "New Banks", bridge banks may be treated as being in default for certain purposes. *Id.* One purpose that Congress expressed was to confer § 1823(e) protection upon bridge banks. *Id.* It is an oddity that Congress refrained from granting § 1823(e) protection to "New Banks" since the F.D.I.C. remains fully liable for all losses incurred by "New Banks" until its dissolution/termination. *See* 12 U.S.C. § 1821(m)(13) (1991).

have more power to accomplish stabilization in the banking industry and future soundness of the insurance funds. And so, the codification of *D'Oench* was given teeth to bar the claims and defenses of borrowers into the nineties.[109]

C. *Judicial Overgloss: The Federal Holder in Due Course Doctrine*

The main event in the origin of imputing "federal holder in due course" status to the F.D.I.C. occurred when the United States Eleventh Circuit Court of Appeals in *Gunter v. Hutcheson* held:

> [A]s a matter of federal common law, the FDIC has a complete defense to state and common law fraud claims on a note acquired by the FDIC in the execution of a purchase and assumption transaction, for value, in good faith, and without actual knowledge of the fraud at the time the FDIC entered into the purchase and assumption agreement.[110]

Although the *Gunter* court did not expressly label the F.D.I.C. as a federal holder in due course,[111] the reasoning behind its decision was obviously drawn from pertinent sections of the Uniform Commercial Code dealing with a holder in due course.[112]

Subsequently, *Langley* was the perfect opportunity for the United States Supreme Court to confirm the position that the F.D.I.C. has the rights of a federal holder in due course. However, the *Langley* decision was a plain

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109. This is contingent upon these claims or defenses arising from an agreement in violation of § 1823(e).

110. 674 F.2d 862, 873 (11th Cir.), *cert. denied*, 459 U.S. 826 (1982).

111. Since then, other courts have expressly labeled the F.D.I.C. as a federal holder in due course. *E.g.*, F.D.I.C. v. Wood, 758 F.2d 156, 158 (6th Cir.), *cert. denied*, 474 U.S. 944 (1985).

112. The pertinent §§ are U.C.C. 3-302 and 3-305. Section 3-302 states that a holder in due course is one who takes an instrument for value, in good faith, and without notice of any defense against or claim to it on the part of any person. U.C.C. § 3-302 (1992).

Section 3-305 describes the rights of a holder in due course as one who takes an instrument free from all claims to it on the part of any person, and all defenses of any party to the instrument with whom the holder has not dealt except infancy, and such other incapacity, duress, illegality or misrepresentation that would cause the holder of the instrument to have void title. U.C.C. § 3-305 (1992).

meaning interpretation of section 1823(e) that failed to reference the F.D.I.C. as a federal holder in due course.[113]

A proper analysis of the federal holder in due course doctrine involves a comparison with section 1823(e) and the *D'Oench* doctrine. Although void title nullifies the protections afforded to both a holder in due course[114] and the F.D.I.C. under section 1823(e),[115] the statute and the common law doctrine are otherwise distinct. According to *Langley*, the F.D.I.C.'s knowledge of the borrower's claim or defense at the time of acquisition of the asset is irrelevant to granting the F.D.I.C. protection under section 1823(e).[116] However, all fifty states, in their adoption of the U.C.C.'s provision of "holder in due course,"[117] require that the holder take the instrument "without knowledge . . . of any defense against or claim to it on the part of any person . . . ."[118] Unlike section 1823(e), holder in due course protection does not apply if the instrument was purchased as part of a bulk transaction outside the regular course of business of the transferor.[119]

The federal holder in due course doctrine is also distinct from the common law *D'Oench* doctrine. In *D'Oench*, a scheme or arrangement likely to deceive banking authorities must exist.[120] Under the federal holder in due course doctrine, a secret arrangement between bank and borrower is not a requirement.[121] If the F.D.I.C. is a federal holder in due course, it can bar any personal defense asserted by the borrower, notwithstanding the absence of a scheme or arrangement to deceive the authorities.[122] Thus, those courts that have imputed federal holder in due course status to the F.D.I.C., have enlarged the corporation's enforcement powers against borrowers without Congress' consent or Supreme Court direction.[123]

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113. *See* Mayer & Kahn, *supra* note 29, at 9; *see also* Langley v. F.D.I.C., 484 U.S. 86, 95 (1987) (Congress intended that § 1823(e) be given its literal meaning).

114. F.S.L.I.C. v. Griffin, 935 F.2d 691, 697 n.3 (5th Cir. 1991), *cert. denied sub nom.* Griffin v. First Gibraltar Bank, F.S.B., 112 S. Ct. 1163 (1992).

115. *Langley*, 484 U.S. at 93.

116. *Id.* at 94.

117. Hymanson, Note, *supra* note 9, at 297 (citing R. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 3-302 (3d ed. 1984)).

118. U.C.C. § 3-302 (1991).

119. *Id.*

120. D'Oench, Duhme & Co. v. F.D.I.C., 315 U.S. 447, 460 (1942).

121. *See* Campbell Leasing, Inc. v. F.D.I.C., 901 F.2d 1244, 1248-49 (5th Cir. 1990).

122. *See Griffin*, 935 F.2d at 697 n.3.

123. *See supra* text accompanying notes 112-16.

To analyze whether these courts have improperly created a federal common law doctrine, the test that the Supreme Court fashioned in *United States v. Kimbell Foods, Inc.*[124] is the appropriate tool. In *Kimbell*, the Court announced three qualifying factors on whether a federal court should create or apply a federal common law doctrine to determine a case involving a federal program. The first factor is whether the federal program by its nature requires nationwide uniformity. The second factor is whether the adoption of state law would frustrate specific objectives of the federal program. Finally, the third factor is whether applying federal common law would disrupt commercial relations predicated on state law.[125]

As an example, the *D'Oench* doctrine is a federal common law creation that passes the muster of the *Kimbell* test.[126] First, protection of federal deposit insurance funds requires nationwide uniformity. Bank examiners would be unable to assess the true value of bank assets to qualify a bank for insurance or terminate a bank's insurance if they were subject to borrowers' state law defenses arising out of a scheme or arrangement outside a bank's files.[127] Second, to recognize a borrower's state law defenses would impair the valuation function of examiners and frustrate the federal objective of protecting the insurance program for the banking industry.[128] Third, *D'Oench* does not disrupt commercial relationships predicated on state law. For all states, "it is standard and prudent banking practice to reduce all material conditions of a bank agreement to writing."[129]

In contradistinction, the "federal holder in due course" doctrine fails the three pronged *Kimbell* test.[130] The Eleventh Circuit was the first to apply federal holder in due course status to the F.D.I.C. in *Gunter v. Hutcheson*.[131] The court was overly concerned with enlarging the F.D.I.C.'s protection during a purchase and assumption transaction of a failed bank.[132] True, purchase and assumption transactions are usually the preferred course of action upon bank failure.[133] The public benefits from

124. 440 U.S. 715 (1979).
125. *Id.* at 726-27.
126. Brief for Respondent, *supra* note 39, at 44-46.
127. *Id.*
128. *Id.*
129. *Id.*
130. Hymanson, Note, *supra* note 9, at 302.
131. 674 F.2d 862 (11th Cir.), *cert. denied*, 459 U.S. 826 (1982).
132. *Id.* at 870.
133. The following table shows the number of overall bank failures that were resolved through a purchase and assumption transaction during the years 1987 to 1990.

100% "de facto" insurance on deposits and a continuation of banking service.[134] Additionally, the F.D.I.C. is saved from the heavy administrative cost of a liquidation.[135]

Notwithstanding, the *D'Oench* doctrine and section 1823(e) provide adequate protection to the F.D.I.C. without federal holder in due course status. However, the Eleventh Circuit believed that overnight valuation of a bank's assets was crucial to a purchase and assumption transaction.[136] Therefore, because of the speed required for this type transaction, *all* personal defenses asserted by a borrower against the F.D.I.C. must be barred to encourage bidding and reach a reliable valuation of bank assets.[137] This included barring personal defenses and affirmative claims that were not barred by *D'Oench* or section 1823(e).[138] The Eleventh Circuit held that the F.D.I.C. is a federal holder in due course as long as it lacked knowledge of the borrower's defenses when the asset was acquired.[139]

The Fifth Circuit expanded the federal holder in due course doctrine in *F.D.I.C. v. Wood*.[140] In *Wood*, the court allowed the F.D.I.C. to bar a defense of usury that was evident on the face of the note acquired during a purchase and assumption transaction.[141] The court held that the defense was barred because the F.D.I.C. was a federal holder in due course.[142] The borrower argued that the F.D.I.C. had knowledge since the interest rate was written on the note.

The Fifth Circuit claimed that "the F.D.I.C. is under no duty, in either of its capacities, to examine the assets of a failed bank before it agrees to execute a purchase and assumption transaction."[143] Furthermore, "the F.D.I.C. can't be charged with knowledge of a defense merely because the

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Year	*Purchase and Assumptions*	*Total Bank Failures For the Year*
1987	133	184
1988	164	200
1989	174	206
1990	148	168

See 1990 F.D.I.C., ANNUAL REPORT 84 (1991).

134. *See* sources cited *supra* note 20.
135. 1990 F.D.I.C., ANNUAL REPORT (1991).
136. *Gunter*, 674 F.2d at 870.
137. *Id.* (emphasis added).
138. *See id.* at 869.
139. *See id.* at 873.
140. 758 F.2d 156 (6th Cir.), *cert. denied*, 474 U.S. 944 (1985).
141. *Id.* at 160-61.
142. *Id.* at 161.
143. *Id.* at 162.

information was in the bank's files."[144] Clearly, in *F.D.I.C. v. Wood*, there was no *D'Oench* type secret arrangement or 1823(e) violation; nonetheless, the court protected the F.D.I.C. with federal holder in due course status. At this time, the Fifth, Sixth, Eighth, and Eleventh Circuits have held that the F.D.I.C., the R.T.C., and its assignees are holders in due course.[145]

To recognize the flaw in granting these agencies holder in due course status, one need only apply the *Kimbell* test. True, there must be a nationwide uniformity in protecting the F.D.I.C. But contrary to the contention of the Fifth, Sixth, Eighth, and Eleventh Circuits, added nationwide protection is unnecessary for purchase and assumption transactions.

Today, a large percentage of purchase and assumption transactions are "whole bank" transfers.[146] The purchasing bank places a bid which incorporates a standardized discounting method for bad loans.[147] This is because it is practically impossible for bank examiners to reach a precise value of all assets in one night.[148] The focus for the purchasing bank is on the other bank's market position and branch outlets rather than on the few personal defenses that might arise outside the scope of *D'Oench*.[149] Furthermore, the purchasing bank often negotiates for "asset put-back."[150] Those purchasers that negotiate for this option are rarely concerned about the few personal defenses that escape *D'Oench* when they place their bids.

Furthermore, allowing the few state law defenses against F.D.I.C./-R.T.C. that are not extracted out by *D'Oench* or section 1823(e) would not frustrate the federal objective of protecting the federal insurance funds. Section 1823(e) and *D'Oench* give the F.D.I.C. and R.T.C. enough protection. Why place a further burden on the borrowing community? The objective behind the federal insurance program was to assess premiums to member institutions to finance the fund.[151] A complete cancellation of borrowers' rights against the F.D.I.C. was never contemplated as the means to

144. *Id.*

145. Mayer & Kahn, *supra* note 29, at 9; *see, e.g.*, Campbell Leasing, Inc. v. F.D.I.C., 901 F.2d 1244 (5th Cir. 1990); F.D.I.C. v. Newhart, 892 F.2d 47 (8th Cir. 1989); F.D.I.C. v. Wood, 758 F.2d 156 (6th Cir.), *cert. denied*, 474 U.S. 944 (1985); Gunter v. Hutcheson, 674 F.2d 862 (11th Cir.), *cert. denied*, 459 U.S. 826 (1982).

146. *See* French, *supra* note 3, at 3.

147. *Id.* at 11.

148. *Wood*, 758 F.2d at 161.

149. Zisman, *supra* note 20, at 637.

150. *See* sources cited *supra* note 20.

151. Hymanson, Note, *supra* note 9, at 303.

accomplish this objective.[152]

Moreover, application of the federal holder in due course doctrine to these agencies causes a disruption of commercial relations predicated on state law. State law requires that a holder in due course can not acquire the instrument in a bulk transaction or outside the transferor's ordinary course of business.[153] Typically, when a bank or thrift fails, the F.D.I.C. or R.T.C. acquires the bank's assets in a bulk transaction. It is also arguable that bank receivership is not within the bank's normal course of business.[154]

State law requires that a holder in due course take the instrument "without knowledge of any defense against or claim to it on the part of any person."[155] Certainly, this would disqualify a transferee who acquired a note where a usurious claim or defense against the transfer was evident on the instrument. However, this did not preclude the Sixth Circuit from imputing federal holder in due course status to defeat a borrower's defense against the F.D.I.C. when the borrower's note was usurious on its face.[156] Likewise, the Fifth Circuit has held that "the F.D.I.C. . . . enjoy[s] holder in due course status whether or not they satisfy the technical requirements of state law."[157]

It is clear that creating federal holder in due course status for these agencies disobeys the test that the Court enunciated in *Kimbell*. To ignore the *Kimbell* test and create federal common law that is contrary to unanimous state law completely disregards the concept of federalism and the separation of powers doctrine.[158] If overturning state law is necessary, then let Congress be the one to do it. While the *Kimbell* test allows the federal common law *D'Oench* doctrine to be applied when a scheme to deceive is involved, absent this scheme, state law should not be ignored.

It is a fundamental principle of statutory construction that judicial interpretation of a statute should not void any section of that statute.[159] Courts that have interpreted *Langley* as implying that section 1823 gives the F.D.I.C. holder in due course status, violate this principle.[160] Congress

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152. *Id.* at 297-99, 303.

153. *Id.* at 300 (citing R. ANDERSON, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 3-302(1)(c) (3d ed. 1984)).

154. *See* Zisman & Spears, *supra* note 1, at 371.

155. U.C.C. § 3-302 (1991).

156. *Wood*, 758 F.2d at 156.

157. Campbell Leasing, Inc. v. F.D.I.C., 901 F.2d 1244, 1249 (5th Cir. 1990).

158. Hymanson, Note, *supra* note 9, at 293, 297.

159. *Id.* at 279.

160. *See, e.g.*, F.D.I.C. v. State Bank of Virden, 893 F.2d 139 (7th Cir. 1990); F.D.I.C.

specifically set out the requirements of section 1823(e) when they codified *D'Oench*.[161] No reference was made allowing these agencies holder in due course status.[162] It is a mutant interpretation of section 1823(e) to say that it authorizes holder in due course status, since this status would encompass all protections afforded by section 1823(e) making its specific provisions unnecessary.[163]

Therefore, courts should not allow these agencies to have federal holder in due course status. This overgloss violates the *Kimbell* test, separation of powers doctrine, federalism, and basic tenets of statutory construction. Besides, *D'Oench* and section 1823(e) provide ample protection for these federal insurance agencies without needing more.

D. *Recent Developments*

Under commonly accepted principles of commercial and property law, the transfer of an instrument vests in the transferee all rights as the transferor has therein.[164] Aside from federal holder in due course status which fails as a right under the *Kimbell* test, the protection of the *D'Oench* doctrine should extend to successors in interest of assets sold by the F.D.I.C. or R.T.C. during a purchase and assumption transaction. Public policy favors extending *D'Oench* to purchasers to protect federal insurance funds since it promotes higher bidding during a "purchase and assumption."[165] The majority of courts agree and therefore have held that the protection of the *D'Oench* doctrine extends to F.D.I.C. or R.T.C. successors.[166] This includes "new banks," bridge banks, bridge savings associations,[167] and privately owned banks or thrifts acquiring assets through a "purchase and assumption."[168]

At the other end of the road, courts have extended the F.D.I.C.'s and R.T.C.'s protection under *D'Oench* and section 1823(e) to assets of a wholly

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v. Newhart, 892 F.2d 47 (8th Cir. 1989); F.S.L.I.C. v. Murray, 853 F.2d 1251 (5th Cir. 1988).

161. *See* 12 U.S.C. § 1823 (1991).
162. *Id.*
163. Hymanson, Note, *supra* note 9, at 305.
164. U.C.C. § 3-201(a).
165. Thomas B. Hudson, *No Guaranties; The R.T.C. and F.D.I.C. use the D'Oench Doctrine to Wipe Out Claims by Parties Against Failed Banks and Thrifts*, MAG. BANK MGMT., Mar. 1992, at 64.
166. *See, e.g.*, Porras v. Petroplex Sav. Ass'n, 903 F.2d 379, 381 (5th Cir. 1990).
167. *See* 12 U.S.C. § 1821(n)(4)(I) (1991).
168. *Porras*, 903 F.2d at 381.

owned subsidiary of a failed institution.[169] These subsidiaries or "service corporations" are regulated since their activities have a major effect upon the soundness of the insured parent institution.[170] Public policy demands that their assets be protected from borrowers' claims or defenses arising from outside side agreements. This ensures protection of the federal insurance program.[171]

Today, it is generally accepted that *D'Oench* bars affirmative claims as well as defenses arising from a scheme or arrangement likely to deceive bank examiners.[172] This includes claims or defenses such as fraud in the inducement,[173] failure of consideration,[174] accord and satisfaction,[175] negligence,[176] breach of fiduciary duty,[177] estoppel and waiver,[178] anti-tying provisions,[179] and securities law fraud.[180] When the borrower's claim or defense does not arise from an outside agreement or scheme, neither section 1823(e) nor *D'Oench* bars these contentions from receiving a trial on their merits.[181]

The protection of *D'Oench* or section 1823(e) can now be raised for the first time on appeal when the F.D.I.C. or R.T.C. is substituted as a party for the bank subsequent to a trial court's verdict favoring the borrower.[182]

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169. *See, e.g.*, Victor Hotel Corp. v. F.C.A. Mortg. Corp., 928 F.2d 1077 (11th Cir. 1991).

170. 12 C.F.R. § 545.74 (1990).

171. *Victor Hotel Corp.*, 928 F.2d at 1083.

172. *See* Chatham Ventures, Inc. v. F.D.I.C., 651 F.2d 355 (5th Cir. 1981), *cert. denied*, 456 U.S. 972 (1982).

173. *See Victor Hotel Corp.*, 928 F.2d at 1077; F.D.I.C. v. Galloway, 856 F.2d 112 (10th Cir. 1988); F.S.L.I.C. v. Lafayette Inv. Prop., 855 F.2d 196 (5th Cir. 1988).

174. *See* F.D.I.C. v. Cardinal Oil Well Serv. Co., 837 F.2d 1369, 1371 (5th Cir. 1988); Taylor Trust v. Security Trust Fed. Sav. & Loan Ass'n, 844 F.2d 337 (6th Cir. 1988).

175. *See* F.D.I.C. v. Manatt 922 F.2d 486 (8th Cir.), *cert. denied*, 111 S. Ct. 2889 (1991); Pub. Loan Co. v. F.D.I.C., 803 F.2d 82 (3d Cir. 1986).

176. *See, e.g.*, R.S.R. Prop., Inc. v. F.D.I.C., 706 F. Supp. 524 (W.D. Tex. 1989).

177. *See, e.g.*, Beighley v. F.D.I.C., 868 F.2d 776 (5th Cir. 1989).

178. *See, e.g.*, Bowen v. F.D.I.C., 915 F.2d 1013 (5th Cir. 1990).

179. *See, e.g.*, Newton v. Uniwest Fin. Corp., No. 91-15329, 1992 WL 137695 (9th Cir. 1992).

180. *See, e.g.*, Kilpatrick v. Riddle, 907 F.2d 1523 (5th Cir. 1990) (*D'Oench* bars claim of securities fraud against the F.D.I.C., notwithstanding federal statute stating securities fraud renders an instrument void), *cert. denied sub nom.* Rogers v. F.D.I.C., 111 S. Ct. 954 (1991).

181. *See, e.g.*, Garrett v. Commw. Mortg. Corp., 938 F.2d 591 (5th Cir. 1991) (mortgagor's claims of breach of contractual and fiduciary duties not barred by *D'Oench* or § 1823(e) when failed bank had negligently underinsured plaintiff's home which burned down).

182. *See* 12 U.S.C. § 1821(d)(13) (1991).

This appellate privilege is proper for two reasons. First, the F.D.I.C./R.T.C. never had the opportunity at trial to assert *D'Oench* or section 1823(e). Second, the harm to the F.D.I.C./R.T.C. occurred during the first bank examination that they were misled, and the F.D.I.C.'s or R.T.C.'s knowledge of the lawsuit when they acquired the asset does little to alleviate this prior harm.[183] Should the trial court determine that the bank has void title in the asset, then this appellate privilege is negated.[184]

The overwhelming majority of jurisdictions do not allow a solvent institution, as original lender, to assert the *D'Oench* doctrine to bar a borrower's claims or defenses.[185] Unlike the F.D.I.C. or R.T.C., the lender allegedly is a participant in creating an outside agreement with a borrower. Thus, under the doctrine of "in pari delicto" the solvent bank or thrift may be considered equally at fault.[186] It is only fair that borrowers' claims or defenses against solvent institutions receive a trial on their merits rather than face the procedural bar of *D'Oench*.

For the first time, a state, New Hampshire, has enacted law extending the federal statutory and common law protections of *D'Oench* to state chartered institutions that have never been closed but are under an open-bank assistance program.[187] This promotes open-bank assistance as a viable alternative to closing the bank and proceeding with a "purchase and assumption" since private investors in such a program will now be protected by *D'Oench*.[188]

V. *SUNCHASE APARTMENTS V. SUNBELT SERVICE CORP.*

A. *Facts*

Prior to August 19, 1988, Sunbelt Service Corporation was a wholly-owned subsidiary of Sunbelt Savings Association of Texas, a state chartered savings and loan insured by the F.S.L.I.C.[189] D.R.W. Property Co. went

183. *See* F.S.L.I.C. v. T.F. Stone Liberty Land Assoc., 787 S.W.2d 475 (Tex. Ct. App. 1990).

184. *See* Thurman v. F.D.I.C., 889 F.2d 1441, 1447 (5th Cir. 1989).

185. *See, e.g.*, First Interstate Bank, N.A. v. First Nat'l Bank, 928 F.2d 153, 155 (5th Cir. 1991) (solvent bank could not use *D'Oench* to bar contention of breach of contract).

186. Hymanson, Note, *supra* note 9, at 268.

187. John Funk, *N.H.'s Law a Trailblazer for Rescues*, AM. BANKER, July 24, 1991, at 4.

188. *Id.*

189. Sunchase Apartments v. Sunbelt Serv. Corp., 596 So. 2d 119 (Fla. 1st Dist. Ct.

to Sunbelt Service Corp., a lender, and executed a note and mortgage to purchase an apartment complex from another entity. D.R.W. Property Co. defaulted on the note to Sunbelt Service Corp. D.R.W. Property Co. entered into a contract to sell the subject property to Sunchase Apartments, a general partnership. This contract was conditioned on Sunchase Apartment's success in obtaining the lender's consent to a reduction in principal, or interest, or both on the outstanding debt so that the property could realize a positive cash flow.[190]

Evidently, the apartment complex was in a deteriorated state and had a high vacancy rate. The property needed $500,000 worth of capital improvements because of depreciation and tenant abuse. As it existed, the income from the property could not carry the debt service. Sunchase Apartments, G.P., and Sunbelt Service Corp. orally agreed that if Sunchase Apartments, G.P.: 1) completed the purchase from D.R.W. Property Co.; 2) made the necessary capital investments; and 3) kept the loan current for a period of four months, then Sunbelt Service Corp. would modify the principal, or interest rate, or both so that the subject property would at least break even.[191] Sunbelt Service Corp. cited administrative reasons for not being able to document any reduction in debt until after the closing occurred.

Shortly thereafter, Sunchase Apartments, G.P. purchased the property from D.R.W. Property Co. Simultaneously, Sunchase Apartments, G.P. executed a replacement note and mortgage modification agreement with Sunbelt Service Corp. The mortgage documents contained a "merger clause." The merger clause provided that all modifications to this agreement must be in writing and signed by Sunbelt Service Corp.[192]

After the closing, Sunchase Apartments, G.P. made the necessary capital improvements and kept the loan current for the four month period. Then, Sunchase Apartments, G.P. requested that Sunbelt Service Corp. enter into good-faith negotiations to reduce the debt structure as orally agreed. Sunbelt Service Corp. delayed negotiations.[193] As a result, Sunchase Apartments, G.P. stopped all payments on the note and failed to pay property taxes.

App. 1992).

190. *Id.* at 124.

191. *Id.* at 125.

192. *Id.* at 122.

193. Initial Brief for Appellant at 23, Sunchase Apartments v. Sunbelt Serv. Corp., 596 So. 2d 119 (Fla. 1st Dist. Ct. App. 1992) (No. 91-00598).

On August 19, 1988, Sunbelt Savings Association of Texas was declared insolvent and placed under F.S.L.I.C. receivership. On the same day, the Federal Home Loan Bank Board chartered a "new bank," Sunbelt Savings, F.S.B. The "new bank" entered into a purchase and assumption transaction with the F.S.L.I.C. receiver transferring all the stock of the "old" Sunbelt Savings Association to the new bank. Thus, Sunbelt Service Corp. became a wholly-owned subsidiary of the new Sunbelt Savings, F.S.B. The new bank remained under the supervision of the F.S.L.I.C. until F.I.R.R.E.A. abolished the F.S.L.I.C. Pursuant to this Act, supervision of the new bank succeeded to the F.D.I.C.[194]

In June, 1989, Sunbelt Service Corp., now under federal regulation, filed a foreclosure action against Sunchase Apartments, G.P. Sunchase Apartments, G.P. filed their response asserting several affirmative defenses and a counterclaim. The affirmative defenses included estoppel, waiver, fraudulent misrepresentation, and failure of consideration. All were based on the oral misrepresentations of Sunbelt Service Corp. The counterclaim sought in the alternative damages for fraudulent misrepresentation; or rescission, reformation, or cancellation based upon the same misrepresentations.[195]

Sunbelt Service Corp. responded to the counterclaim by asserting two affirmative defenses. One, the presence of a "merger clause" in the mortgage documents prevents any oral side agreement from having effect. Two, Sunbelt Service Corp., a wholly-owned subsidiary of a federal savings bank under F.D.I.C. supervision, is entitled to use the *D'Oench* doctrine to bar any agreement outside the bank's files that was likely to have misled banking authorities.[196] Sunbelt Service Corp. filed for partial summary judgment on the foreclosure action. The trial court granted summary judgment in favor of Sunbelt Service Corp. on both the foreclosure action and the counterclaim. The trial court based their decision on the "merger clause" which served to prevent oral side agreements from having effect.[197] A rehearing was denied. Subsequently, Sunchase Apartments, G.P., appellants and defendants below, filed an appeal to the First District Court of Appeal of Florida.[198]

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194. *See supra* text accompanying notes 93-98.
195. *Sunchase Apartments*, 596 So. 2d at 121.
196. Supplemental Response Brief for Appellee at 5, Sunchase Apartments v. Sunbelt Serv. Corp., 596 So. 2d 119 (Fla. 1st Dist. Ct. App. 1992) (No. 91-00598).
197. *Sunchase Apartments*, 596 So. 2d at 122.
198. *Id.* at 119.

B. *Analysis of the Court's Decision*

The First District Court of Appeal of Florida affirmed the trial court's decision but not on the same theory. The appellate court recognized that a "merger clause" does not bar oral evidence offered to prove that the "merger clause" was procured through fraud.[199] Nevertheless, the appellate court affirmed absent a genuine issue of material fact regarding appellee's assertion of *D'Oench*.[200]

The court's opinion outlined the scope of *D'Oench's* application. The court correctly acknowledged that *D'Oench* extends to wholly-owned subsidiaries of federally insured institutions[201] as well as purchasers or transferees of a purchase and assumption transaction.[202] The appellate court recognized that *D'Oench* applied to the F.D.I.C., F.S.L.I.C., and the R.T.C.[203]

Citing *D'Oench, Duhme & Co. v. F.D.I.C.*, the court reiterated that neither fraudulent intent to deceive regulators, nor the fact that regulators were not deceived was a prerequisite to use the *D'Oench* doctrine.[204] "The rule emerging from *D'Oench, Duhme* is that no agreement between a borrower and a bank which does not plainly appear on the face of an obligation or in the bank's official records is enforceable against the F.D.I.C."[205] This comports with the original language used in *D'Oench, Duhme & Co.* that "it would be sufficient . . . that the maker lent himself to a scheme or arrangement whereby the banking authority . . . *was or was likely to be misled*."[206] Since appellants failed to memorialize all of the material terms in their replacement note and mortgage modification agreement with appellee, appellants lent themselves to an arrangement likely to mislead bank examiners. Thus, the court correctly concluded that *D'Oench* bars appellants from asserting claims or defenses based on oral

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199. *Id.* at 122 (citing Nobles v. Citizens Mortg. Corp., 479 So. 2d 822 (Fla. 2d Dist. Ct. App. 1985).

200. *Id.* at 126.

201. *Id.* at 124 (citing Victor Hotel Corp. v. F.C.A. Mortg. Corp., 928 F.2d 1077 (11th Cir. 1992)).

202. *Sunchase Apartments*, 596 So. 2d at 124 (citing F.S.L.I.C. v. Griffin, 935 F.2d 691 (5th Cir. 1991)).

203. *Id.* (citing Bauman v. Savers Fed. Sav. & Loan Ass'n, 934 F.2d 1506, 1510 (11th Cir.), *cert. denied*, 112 S. Ct. 1936 (1992)).

204. *Id.* at 123 (citing 315 U.S. 447, 459 (1942)).

205. *Id.* (quoting Adams v. Madison Realty & Dev., Inc., 937 F.2d 845, 852 (3d Cir. 1991)).

206. *D'Oench, Duhme & Co.*, 315 U.S. at 460 (emphasis added).

representations that tend to defeat or diminish any interest of the F.D.I.C. or its transferee.

The only flaw in the court's analysis was by omission. The court acknowledged that section 1823(e) was the codification of *D'Oench* but not a preemption.[207] Citing *Hall V. F.D.I.C.*, the court stated that *D'Oench* has broader application than section 1823(e),[208] but failed to define how section 1823(e) was limited. The court failed to explain why section 1823(e) was not a basis for their decision.

The court cited *Victor Hotel Corp. v. F.C.A. Mortgage Corp.* as having material facts substantively indistinguishable from the instant case.[209] The court compared the two cases and decided that *D'Oench* bars appellant's claims and defenses based on oral representations. In *Victor Hotel Corp.*, the court found that both *D'Oench* and section 1823(e) protect the wholly-owned subsidiary of a "new bank" transferee of a purchase and assumption transaction.[210] Yet, in the instant case, the First District Court of Appeal of Florida never explained why section 1823(e) was not a basis for their decision.

The overwhelming majority of jurisdictions protect the F.D.I.C./R.T.C. through both section 1823(e) and *D'Oench*.[211] But transferees/purchasers of a purchase and assumption transaction are typically protected solely by *D'Oench*.[212]

In *Victor Hotel Corp.*, a "new bank" transferee, pursuant to an acquisition agreement, entered into a purchase and assumption with the F.S.L.I.C. to acquire a failed bank.[213] A provision in this acquisition agreement required the F.S.L.I.C. to reimburse the "new bank" for any net loss on bad loans that were purchased (i.e., asset "put back").[214] It's likely the court acknowledged, perhaps improperly, that section 1823(e) protection

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207. *See supra* text accompanying notes 31-32.

208. The court, in dicta, stated that unlike § 1823(e), the *D'Oench* doctrine can be applied absent an interest or title in an asset by the F.D.I.C. 920 F.2d 334, 339 (6th Cir.), *cert. denied*, 111 S. Ct. 2852 (1991). However, this dicta is contrary to the commonly accepted principle in *D'Oench* ("a federal policy to protect respondent and the public funds . . . against misrepresentations as to the *securities or other assets* in the portfolios of the banks which respondent insures" *D'Oench, Duhme & Co.*, 315 U.S. at 457 (emphasis added)).

209. *Sunchase Apartments*, 596 So. 2d at 126.

210. *See Victor Hotel Corp.*, 928 F.2d at 1083.

211. *See, e.g.*, R.T.C. v. McCrory, 951 F.2d 68 (5th Cir. 1992).

212. *See, e.g.*, Porras v. Petroplex Sav. Ass'n, 903 F.2d 379 (5th Cir. 1990).

213. *Victor Hotel Corp.*, 928 F.2d at 1080-81.

214. *Id.*

was available to the "new bank" transferee on account of the F.S.L.I.C.'s ongoing liability. But this reimbursement is statutorily granted to all "new banks" under 12 U.S.C. § 1821(m).[215]

Since 12 U.S.C. § 1821(n)(4)(I) expressly extends the protection of section 1823(e) to bridge banks,[216] Congress' failure to include a similar provision extending section 1823(e) protection to "new banks" shows the Congress never intended section 1823(e) protection to extend to "new banks." Unlike the court in *Victor Hotel Corp.*, the First District Court of Appeal of Florida was correct in basing their final decision solely on *D'Oench*. But steps in their decision making analysis were omitted.[217]

VI. Recommendations to Alleviate Borrowers' Woes and Curb Further Expansion of *D'Oench*

Recently, the United States Fifth Circuit Court of Appeals held that section 1823(e) barred a borrower's defense of a written release from liability.[218] In *R.T.C. v. McCrory*, bank officers testified that they had executed the written release. The release was kept in the files of the bank's outside attorney in the same building and on the same floor as the bank. Notwithstanding two documents in the bank's official files that referred to this release, the court held that the R.T.C., as conservator, could bar the written release because of section 1823(e). This stunned the borrower as he became liable for an additional four million dollars. Because the written release was not in the official bank files, the borrower failed to meet the requirements of section 1823(e) and was barred from asserting his defense. Although the attorney was an agent for the bank, the court opted to apply section 1823(e) in its strictest sense.[219]

This result is one example of the seemingly inequitable and unconstitutional burden that section 1823(e) and *D'Oench* place on borrowers' rights. But courts have consistently upheld the constitutionality of section 1823(e) and *D'Oench* against alleged violations of the Fifth and Fourteenth Amendments.[220] In equity, courts automatically tend to impute "clean

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215. 12 U.S.C. § 1821(m)(13) (1991).

216. *See supra* note 108.

217. Perhaps the court's omission of a § 1823(e) analysis was due to the absence of any mention of § 1823(e) in the appellee's brief.

218. R.T.C. v. McCrory, 951 F.2d 68 (5th Cir. 1992).

219. *Id.*

220. Allegations that the procedural bar of § 1823(e) and *D'Oench* constitute a "taking" of property without just compensation have been consistently refuted. Lake, Note, *supra* note

hands" status upon the F.D.I.C./R.T.C.[221] unlike borrowers who's "clean hand" status depends on requirements beyond their control.[222] A true equitable analysis has been compromised to satisfy Congress' and the judiciary's thirst for policy which alleviates the drain on federal insurance funds.

Recommendations to reduce the burden on borrowers' rights fit into two categories. The first category involves precautionary measures that a borrower can take to prevent the scorn of *D'Oench* or section 1823(e). The second category suggests different ways that Congress could restore health to the federal deposit insurance system. This would ease the burden on borrowers' rights since courts would be less likely to jump onto the "public policy" bandwagon.

Under the first category, proper documentation can level the "playing field between the borrower and the F.D.I.C./R.T.C."[223] Banks and thrifts should help inform borrowers that oral agreements are unenforceable against the F.D.I.C./R.T.C. if the institution becomes insolvent. A standard clause revealing this risk should be included in the loan agreement. Often times, borrowers can prevent a bad situation from developing if they have adequate representation advising them on the intricacies of banking law.

Since it is not the bank attorney's responsibility whether a borrower complies with the requirements of section 1823(e),[224] the borrower must

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69, at 329 (citing Prune Yard Shopping Ctr. v. Robins, 447 U.S. 74, 83 (1980)). Although a borrower's defense or claim may constitute a property right under a Fifth Amendment "takings clause" analysis, the borrower lacks reasonable investment-backed expectations in this property right. This is because the borrower has been on notice of *D'Oench* since 1942 and § 1823(e) since 1950. *Id.*

Since borrowers have had a "reasonable opportunity both to familiarize themselves with [the] general requirements and to comply with these requirements" of § 1823(e) and *D'Oench*, these procedural bars do not constitute a violation of due process. Campbell Leasing, Inc. v. F.D.I.C., 901 F.2d 1244, 1248 (5th Cir. 1990) (quoting United States v. Locke, 471 U.S. 84, 107 (1985)). *D'Oench* and § 1823(e) are not procedural due process violations since they both pass constitutional muster of the Mathews test. Lake, Note, *supra* note 70, at 333 (citing Mathews v. Eldridge, 424 U.S. 319 (1976)). *D'Oench* and § 1823(e) are not "contract clause" violations since state law is not implicated. *See* F.S.L.I.C. v. Griffin, 935 F.2d 691, 698 (5th Cir. 1991), *cert. denied sub nom.* Griffin v. First Gibraltar Bank, F.S.B., 112 S. Ct. 1163 (1992).

221. However, this is not true if the F.D.I.C./R.T.C. exhibited, ratified, or acquiesced in conduct that was the basis for the borrower's claim or defense. F.D.I.C. v. M.M. & S. Partners, 626 F. Supp. 681, 685 n.1 (N.D. Ill. 1985).

222. Whether a loan document is continuously kept in the official bank files is beyond the borrower's control.

223. Hudson, *supra* note 165, at 64.

224. The Supreme Court left standing a Fifth Circuit decision affirming a lower court decision which partially held that a thrift attorney was not liable for malpractice or

make efforts to ensure that the entire written agreement is continuously kept in the bank's official files. Congress left it up to the courts to decide what constitutes the official files of a bank.[225] Most likely, official records include corporate minutes and loan committee minutes.[226] But accessible loan files that are subject to collusive restructuring of loan terms by loan officers may not constitute official bank files.[227]

Until the definition of "official bank files" is clarified, borrowers should take the following steps: obtain approval for the loan agreement by the board of directors or the loan committee as reflected in their minutes; obtain an opinion by counsel if the loan approval was received from the loan committee that the loan committee was empowered to act; have the loan agreement state that it is an official record of the bank; have the minutes mention that the loan agreement is an attachment to the minutes; and request initial and periodic certificates from an officer of the bank that the loan agreement is being maintained as an official record.[228] Borrowers must beware that for over forty years they have had "a reasonable opportunity both to familiarize themselves with [the] general requirements [of section 1823(e) and] to comply with these requirements."[229]

In the second category of recommendations, there are numerous ways to deflate public policy concerns through restoration of federal insurance funds. However, an equilibrium must be achieved between bank regulation replenishing the funds and the adverse side effect of a "credit crunch" on the economy.

Countries such as France and Italy have successfully implemented a risk based deposit insurance system.[230] Each bank's insurance premium is adjusted according to the risk level of its asset portfolio.[231] Unlike our flat-rate system, this promotes prudent consideration of all loan transac-

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negligence for failing to prepare a written release. The obligor was barred from asserting his oral release of debt. Federal Sav. & Loan Ins. Corp. v. Swords, 1990 U.S. Dist. LEXIS 1564 (E.D. La. 1990), *aff'd sub nom.* FDIC v. Swords, 951 F.2d 345 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 2302 (1992); *see The Moniter*, BANKING POL'Y REP., June 15, 1992, at 19.

225. *See* 12 U.S.C. § 1823(e) (1991).

226. Hudson, *supra* note 165, at 64.

227. *Id.*

228. *Id.*

229. *Campbell Leasing, Inc.*, 901 F.2d at 1248 (quoting United States v. Locke, 471 U.S. 84, 107 (1985)).

230. Christine Blair & Gary Fissel, *A Framework for Analyzing Deposit Insurance Pricing*, F.D.I.C. BANKING REV., 1991, at 25.

231. *See id.*

tions.[232] Consequently, the number of insolvent institutions and the drain on federal insurance funds is reduced.[233] One implementation that Congress did make was to remove the annual cap on premium rate increases and allow the F.D.I.C. to make midyear adjustments. This will help replenish federal insurance funds.[234]

Currently, bank dividends are based on equity capital.[235] Equity capital is overstated because bank balance sheets need not recognize the banking industry's liability to the shortfall to the fund. To prevent excessive dividends from being paid, bank balance sheets should reflect a portion of the overall liability owed to the fund. This would improve banking capitalization and reduce the number of bank failures.[236]

The Federal Deposit Insurance Improvement Act of 1991 heightened the standards for external auditing and examinations of institutions.[237] Although this will contribute towards a reduction in bank failures, other provisions of this act have been labeled "regulatory overkill."[238] On imposing a limit to asset base expansion and interest rate risk that institutions can incur, Congress slowed down any chance for a strong economic recovery.[239]

Another concern involves bank mergers. As banks merge, they often become "too big to fall."[240] If the megabank fails, few purchasers will be in the marketplace to acquire such a large bank through a purchase and assumption transaction.[241] On the other hand, the bank is too large to liquidate as it has become essential for maintaining adequate banking services to the community. The result is a tremendous drain on federal insurance funds at the expense of the public and small and midsized banks.[242] Congress should strongly consider enacting legislation to limit bank mergers to prevent this situation from becoming worse.

Eventually, the banking crisis will be resolved. When it does end, courts will become more hesitant to apply *D'Oench* and section 1823(e) as a strict eradication of borrowers' rights. Until then, borrowers can still opt

232. *See id.*
233. *See id.*
234. *See* 1990 F.D.I.C., ANNUAL REPORT 44 (1991).
235. David Horne, *Bank Dividend Patterns*, F.D.I.C. BANKING REV., 1991, at 13.
236. *See id.*
237. Novack, *supra* note 2, at 102.
238. *Id.*
239. *Id.*
240. *See* 1990 F.D.I.C. ANNUAL REPORT 3 (1991).
241. *Id.*
242. *Id.*

to bring suit against the insolvent institution and, upon a verdict in their favor, receive a pro rata share of the remaining estate along with the other general creditors.[243]

VII. CONCLUSION

The *D'Oench* doctrine arose out of equitable principles to bar defenses against the F.D.I.C. where the borrower's conduct resulted in a scheme likely to mislead banking authorities.[244] A borrower's failure to memorialize the material terms of an agreement with a bank constitutes a scheme likely to mislead authorities.[245] Whether the borrower had fraudulent intent is irrelevant to an application of *D'Oench*.[246]

Through its expansion, *D'Oench* was extended to protect the F.S.L.I.C., the R.T.C., wholly owned subsidiaries of insolvent institutions, and purchasers/transferees/assignees involved in a "purchase and assumption."[247] The protection afforded by *D'Oench* is available to federal regulators acting as receiver, conservator, or in a corporate capacity.[248] Courts have extended *D'Oench* to bar claims as well as defenses.[249] As an example, the First District Court of Appeal of Florida in *Sunchase Apartments v. Sunbelt Service Corp.* correctly applied *D'Oench* to bar petitioner's claims and defenses that arose from a scheme likely to mislead authorities.[250]

Congress partially codified *D'Oench* in section 1823(e).[251] Section 1823(e) protection is now available to the F.D.I.C., the F.S.L.I.C. (now abolished), the R.T.C., and bridge banks in their different capacities.[252] This protection bars any claim or defense arising out of an agreement which fails to meet the four requirements of section 1823(e) regardless of whether the borrower lent himself to a scheme likely to mislead authorities.[253]

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243. *Campbell Leasing, Inc.*, 901 F.2d at 1249.
244. D'Oench, Duhme & Co. v. F.D.I.C., 315 U.S. 447, 457-59 (1942).
245. *Id.* at 461.
246. *Id.*
247. *See supra* text accompanying notes 164-66.
248. *See supra* text accompanying notes 104-07.
249. *See* Chatham Ventures, Inc. v. F.D.I.C., 651 F.2d 355 (5th Cir. 1981), *cert. denied*, 456 U.S. 972 (1982).
250. *See supra* text accompanying notes 199-209.
251. *See supra* text accompanying notes 31-32.
252. *See supra* text accompanying notes 104-07.
253. Mayer & Kahn, *supra* note 29, at 9.

Judicial Use Immunity and the Privilege Against Self-Incrimination in Court Mandated Therapy Programs

TABLE OF CONTENTS

I. INTRODUCTION: *MONTANA V. IMLAY* 1441
II. THE HISTORY AND PURPOSE OF THE RIGHT AGAINST SELF-INCRIMINATION 1444
III. THE UTILITY OF COURT-MANDATED THERAPY PROGRAMS 1448
IV. THE FIFTH AMENDMENT AND COURT-MANDATED THERAPY PROGRAMS 1453
A. *Guidance from the Supreme Court* 1456
1. *Estelle v. United States* and the Requirement for *Miranda* Warnings 1457
2. *Minnesota v. Murphy* 1461
B. *The "Penalty" Cases* 1463
C. *Application in the Lower Courts* 1471
1. Fifth Amendment Not Violated 1472
2. Fifth Amendment Violated 1478
3. A Dubious Compromise 1482
V. THE BEST OF BOTH WORLDS: JUDICIAL USE IMMUNITY 1485
A. *Why Opposition to Judicial Use Immunity is Unwarranted in Court-Mandated Therapy* .. 1487
B. *Judicial Use Immunity is a Reasonable Accommodation* 1491
VI. CONCLUSION 1493

I. INTRODUCTION: *MONTANA V. IMLAY*

HIGHLIGHT: This note examines cases in which a criminal defendant is ordered to admit his or her guilt during therapy as a condition to probation. It suggests investing the probationers with immunity so that they may be compelled to accept responsibility for their crimes without courts running afoul of the Fifth Amendment privilege against self-incrimination.

In 1989, Donald Glenn Imlay was accused of sexually molesting a

nine-year-old girl in his Great Falls, Montana grocery store. In his fifty-six years, Imlay had never been accused of a crime and stood adamantly on his proclamation of innocence. Despite his protestations, Imlay was convicted by a jury of sexual assault on a minor. The judge sentenced him to a five-year suspended sentence conditioned upon gainful employment and successfully completing a sexual therapy program. After sentencing, Imlay moved in with his mother because he no longer had a business to go back to nor any income. Due to his degenerative joint disease and high blood pressure, he was denied employment but did begin vocational training in leather work which provided a small income to support his mother and himself. In addition, he also sought out the treatment mandated by the court's sentencing order, but was greeted with difficulties of a constitutional dimension.[1]

After attending six sessions of treatment, he was terminated from the program because of his refusal to incriminate himself. Imlay was distraught. He immediately contacted another program but was denied admission for the same reason. No program in the State of Montana would accept him if he continued to deny his guilt. In September of 1990, almost one year after his original sentence and despite his apparent good-faith efforts, the county court revoked the suspended sentence for Imlay's failure to successfully complete a sexual therapy program. Mr. Imlay was remanded to the custody of the Montana State Prison to serve out a sentence of five years.[2]

Mr. Imlay's guilt is irrelevant at this point. What is relevant is whether Mr. Imlay was punished for refusing to incriminate himself in derogation of the Fifth Amendment to the United States Constitution.[3] Imlay was stranded between Scylla and Charybdis. He was forced to either waive his privilege against self-incrimination, thereby remaining free and amenable to treatment, or he could stand his constitutional ground but be sent to jail. The Montana Supreme Court found the dilemma to be unconstitutional.[4] The court held that the Fifth Amendment "prohibits augmenting a defendant's sentence because he refuses to confess to a crime or invokes his privilege against self-incrimination."[5] The United States Supreme Court,

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1. Montana v. Imlay, 813 P.2d 979, 980-81 (Mont. 1991), *cert. granted*, 112 S. Ct. 1260, *and cert. dismissed as improvidently granted*, 113 S. Ct. 444 (1992).

2. *Imlay*, 813 P.2d at 980-81; Miller.

3. The Fifth Amendment to the United States Constitution provides, in pertinent part, that "no person . . . shall be compelled in a criminal case to be a witness against himself . . ." U.S. CONST. amend. V.

4. *Imlay*, 813 P.2d at 985.

5. *Id.*

having never confronted the issue, granted review,[6] but then dismissed the grant of certiorari as improvidently granted.[7] In dissent, Justice White stated:

> We granted certiorari to consider whether the Fifth Amendment bars a State from conditioning probation upon the probationer's successful completion of a therapy program in which he would be required to admit responsibility for his criminal acts. . . . The constitutional question is an important one and the decision below places the Montana Supreme Court in conflict with other courts. I believe we should decide the question and resolve the conflict.[8]

Although the opinion of the United States Supreme Court would have been concededly more authoritative, this note shall address the issue framed by Justice White.[9] In so doing, it will be necessary to trace the history and purpose of the Fifth Amendment privilege against self-incrimination in order to determine its applicability to court-ordered therapy programs.[10] Next, the note presents a brief examination for the rationale and utility of court-mandated treatment. Indeed, it is this consideration that courts often weigh against the Fifth Amendment.[11] Third, the note discusses the often

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6. Montana v. Imlay, 112 S. Ct. 1260 (1992).
7. Montana v. Imlay, 113 S. Ct. 444 (1992).
8. *Id.* at 445 (citations omitted).
9. This note is limited to the Fifth Amendment concerns inherent in court-ordered therapy programs which require an admission of guilt. It leaves to others the question of a psychotherapist-patient privilege which may also protect against using such statements in court. *See, e.g.*, Alaska v. R.H., 683 P.2d 269 (Alaska Ct. App. 1984) (psychotherapist privilege prevents testimony from treating psychologist in child abuse case); Eduardo A. v. Juan A., 261 Cal. Rptr. 68 (Cal. 1989) (psychotherapist privilege excepted in court-ordered psychological examinations but not in therapy); Thomas R. Malia, Annotation, *Validity, Construction, and Application of Statutes Limiting Physician-Patient Privilege in Judicial Proceedings Relating to Child Abuse or Neglect*, 44 A.L.R.4th 649 (1986). A number of states have enacted a "psychotherapist privilege" but have specifically abrogated that privilege when child abuse is suspected. *E.g.*, FLA. STAT. § 90.503(2) (Supp. 1992) (creating a psychotherapist privilege); FLA. STAT. § 415.512 (1991) (denying the privilege in child abuse investigations); E.H. v. Department of Health & Rehabilitative Serv., 443 So. 2d 1083 (Fla. 3d Dist. Ct. App. 1984); Missouri v. Ward, 745 S.W.2d 666 (Mo. 1988).
10. In construing the effect of the Fifth Amendment to a particular set of facts, it is imperative to examine the history of that Amendment. Asherman v. Meachum, 957 F.2d 978, 989 (2d Cir. 1991). Here, it is particularly true that "a page of history is worth a volume of logic." New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921) (Holmes, J.).
11. *See* discussion *supra* part IV.C.

divergent opinions of the state and federal courts which have touched upon the issue. Although the law surrounding the privilege against self-incrimination cannot be summed up in a discrete set of elements, there are, nonetheless, constant principles which can be distilled from the case law. This note then takes the position that a reasonable remedy exists which prevents court-mandated therapy programs from running afoul of the Fifth Amendment—the grant of immunity. Courts can grant use immunity to defendants who are ordered to undergo treatment. In this manner, the rehabilitative interests of the State are served while not impinging on the defendant's constitutional rights. The note concludes with the sober realization that if courts do not avail themselves to the reasonable accommodation of immunity, they must find a violation of the Fifth Amendment when one is ordered to confess during treatment.

II. The History and Purpose of the Right Against Self-Incrimination

No matter how noble and revered the constitutional aspiration, some find it especially difficult to afford such protections to the child abuser or the sex offender.[12] These crimes are viewed as particularly heinous and worthy of swift and severe punishment.[13] Even those who should be better advised are led by moral impulse to deny such defendants their full panoply of constitutional rights.[14] To be sure, it is all too easy to view the privilege against self-incrimination as a "shelter to the guilty"[15] rather than a protection for the innocent. Yet such a view shows little deference for the history and rationale of the privilege.

While there are earlier references,[16] the privilege against self-incrimination is most often traced to the English Court of Star Chamber.[17] In that

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12. *See, e.g.*, Douglas J. Besharov, Defending Child Abuse and Neglect Cases: Representing Parents in Civil Proceedings 207-08 (1987).

13. *Id.*

14. *See* discussion *supra* part IV.C.

15. Quinn v. United States, 349 U.S. 155, 162 (1955) (quoting Twining v. New Jersey, 211 U.S. 78, 91 (1908)).

16. By the early sixteenth century, the courts and Church of England had devised a latin phrase, "*Nemo tenetur prodere se ipsum*," or, in English, No one should be required to accuse himself. The maxim, however, seemed little more than an idea. Erwin N. Griswold, The Fifth Amendment Today 7 (1955). Christ himself, in response to his accusers said, "Why ask me? Go to them that heard me." *John* 18:21-22.

17. For a more complete history of the privilege against self incrimination, see

court, individuals, who stood accused of crimes were given the choice of taking their legal oath or of being whipped and pilloried.[18] In 1637, "Freeborn John" Lilburne was haled before the Star Chamber on a charge of sedition.[19] When charged by the Council, he refused to take the oath officio and was condemned to torture.[20] But Lilburne was a stubborn man and petitioned the newly convened Long Parliament for relief.[21] In 1641, the House of Commons freed Lilburne and abolished the Council and Court of Star Chamber.[22]

Thirty-six years after the House of Common's decree, the Virginia House of Burgess declared that "noe law can compell a man to sweare against himselfe in any matter wherein he is lyable to corporall punishment."[23] Yet as the Salem witch trials of 1692 so sadly proclaimed, the privilege was far from ingrained in the colonial fabric.[24] Mindful of the Star Chamber and of the incidents at Salem, by 1776, eight colonies had adopted the right to remain silent within their own constitutions.[25] And when the Bill of Rights was ratified in 1791, it included James Madison's draft that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself . . . ."[26] In 1964, the privilege was incorporated to the states by way of the Fourteenth Amendment.[27]

The constitutionalization of the privilege has been hailed as "one of the great landmarks in man's struggle to make himself civilized"[28] and has been expanded well beyond its meager words.[29] Indeed, the scope of the

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GRISWOLD, *supra* note 16.

18. MARK BERGER, TAKING THE FIFTH 17 (1980).

19. Dean Griswold termed Lilburne, "a cantankerous person, the sort to whom we owe much for many of our basic rights." GRISWOLD, *supra* note 16, at 3.

20. BERGER, *supra* note 18, at 17-18.

21. *Id.*

22. *Id.* at 18.

23. JOHN ROGGE, THE FIRST AND THE FIFTH 180 (1960).

24. BERGER, *supra* note 18, at 21-22.

25. *Id.*

26. U.S. CONST. amend. V.

27. Malloy v. Hogan, 378 U.S. 1 (1964).

28. GRISWOLD, *supra* note 16, at 7.

29. For example, even though, on its face, the Amendment limits itself to criminal cases, courts have consistently applied the privilege to civil cases that harbour criminal qualities. *See, e.g.*, Boyd v. United States, 116 U.S. 616, 633-34 (1886) ("proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal").

privilege is "as broad as the mischief against which it seeks to guard."[30]

And this "mischief" is not confined to the Star Chamber or to the witch's stake. The privilege addresses "many of our fundamental values and noble aspirations."[31] The enactment of the right reflects "our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt . . . ."[32] As illustration, had Donald Imlay, in order to remain free, waived his Fifth Amendment right and confessed his guilt during treatment, he would be subjecting himself to perjury and/or contempt charges for maintaining his innocence at trial.[33]

The existence of the privilege is also required to maintain "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and requiring the government in its contest with the individual to shoulder the entire load."[34] This rationale seems based on the large arsenal of information that the government has at its disposal and the fundamental unfairness that would result from the accused being added to that arsenal.[35] It is true that, especially in sexual crimes or crimes of abuse, the defendant's testimony may be one of the only means of soliciting information.[36] Yet this is no justification to disregard the Fifth Amendment. The argument failed when propounded by the Council of the Star Chamber[37] and it should fail today. On the one hand is the government's need for information. On the other is the danger inherent in compelling adverse testimony from the lips of the accused. It is truly a balancing test, in which history has dictated the result.

That government may compel one to incriminate oneself not only offends the balance between the individual and the State, it also offends "our respect for the inviolability of the human personality and of the right of each

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30. Counselman v. Hitchcock, 142 U.S. 547, 562 (1892), *overruled by* Kastigar v. United States, 406 U.S. 441 (1972); *see also* Hoffman v. United States, 341 U.S. 479, 486 (1951) (privilege against self-incrimination granted liberal application).

31. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

32. *Id.*

33. *See* Supplemental Brief for Respondent, Montana v. Imlay, 113 S. Ct. 444 (1992).

34. *Waterfront Comm'n*, 378 U.S. at 55 (quoting 8 WIGMORE, EVIDENCE 317 (McNaughton rev., 1961)).

35. *Cf.* Culombe v. Connecticut, 367 U.S. 568, 581-82 (1961) (privilege is based on "the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips").

36. *See, e.g.*, United States v. Byers, 740 F.2d 1104 (D.C. Cir. 1984).

37. *See* GRISWOLD, *supra* note 16, at 3.

individual 'to a private enclave where he may lead a private life.'"[38] For example, the privilege protects an alleged communist sympathizer from being forced to testify about his beliefs and activities where those statements may later be used against him in a criminal prosecution.[39] In this way the Fifth Amendment operates to restrain government from the abuse of its own power - from having unfettered access to the minds of its subjects. To this end, the United States Supreme Court has found there to be an "intimate relationship" between the Fourth and Fifth Amendments in that they encompass "all invasions on the part of the government [directed towards] the sanctity of a man's home and the privacies of life."[40]

Justice Goldberg also provided as rationale for the privilege, "our distrust of self-deprecatory statements."[41] This is best illustrated by way of example. In *United States v. Wong*,[42] the criminal defendant was given a Fifth Amendment warning but claimed, due to a language barrier, that she understood the instruction to mean that she had to answer all questions.[43] Under this assumption, she proceeded to give perjurious testimony.[44] *Wong* clearly illustrates the fact that when forced to play a role in their own conviction, defendants are likely to be less than honest.[45] Without the privilege, those who provide self-incriminating testimony will be hastening their own conviction. The incentive to lie is great since a perjury conviction will be likely less severe than conviction for the crime charged, assuming at all that one is found out.[46] The distrust of self-deprecatory statements stems, then, "from an awareness that individuals are unlikely to incur freely the sanction of a criminal conviction."[47]

In the context of incriminating statements made during the course of

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38. *Waterfront Comm'n*, 378 U.S. at 55 (quoting United States v. Grunewald, 233 F.2d 556, 581-82 (2d Cir. 1956), *rev'd*, 353 U.S. 391 (1957)).

39. Ullman v. United States, 350 U.S. 422 (1956).

40. Boyd v. United States, 116 U.S. 616, 630 (1886). Despite longstanding precedent to the contrary, the present bench of the Court seems to be moving away from the privacy rationale for the Fifth Amendment as it seeks to limit the right to privacy in general. *See* BERGER, *supra* note 18, at 41-44. As the preceding discussion has shown, privacy is but one reason for respecting the privilege. Therefore, even if the Court divorces privacy from the privilege, the privilege must stand in its entirety.

41. *Waterfront Comm'n*, 378 U.S. at 55.

42. 431 U.S. 174 (1977).

43. *Id.* at 176.

44. *Id.*

45. *See Byers*, 740 F.2d at 1154 (Robinson, J., dissenting).

46. *See* BERGER, *supra* note 18, at 28.

47. *Byers*, 740 F.2d at 1154 (Robinson, J., dissenting).

therapy, there is also a sense that the "confessor" is merely cleansing her or his mind, and that the statements may or may not have a basis in reality.[48] Discussions with one's therapist are of a highly private nature and personal thoughts may easily be taken out of a context known only to the "confessor."[49] The Fifth Amendment provides blanket protection against the unreliability of self-deprecatory statements.

To encapsulate, the privilege against self-incrimination protects us from a recurrence of Star Chamber inquisition; from subjecting ourselves to a Hobson's choice of perjury, contempt, or self incrimination; from the excess of State power; from invasions upon our solitude and right to be let alone;[50] and from an inherent distrust for self-deprecatory statements.[51] Yet, again, in the words of Justice Blatchford, the privilege is "as broad as the mischief against which it seeks to guard."[52]

The question remains then, as to whether the privilege extends to bar a state from conditioning probation upon the probationers' successful completion of a therapy program in which defendants would be required to admit responsibility for their criminal acts. Whether this is a "mischief" contemplated by the Fifth Amendment turns upon a number of factors. To understand the nuances of the issues involved, one must understand the methodology of modern treatment programs.

III. THE UTILITY OF COURT-MANDATED THERAPY PROGRAMS

One of the reasons that sex offenders are more frequently the subject of court-mandated therapy programs[53] is the prevalence of the disorder.[54]

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48. *Cf. id.* at 1154.

49. *Cf. id.*

50. *See* Tehan v. United States *ex rel.* Shott, 382 U.S. 406, 416 (1966) (the privilege "reflects the concern of our society for the right of each individual to be let alone").

51. *See Waterfront Comm'n*, 378 U.S. at 55; United States v. Grunewald, 233 F.2d 556, 591 (2d Cir. 1956) ("to put an individual . . . in a position where his natural instincts and personal interests dictate that he should lie . . . and then punish him for lying is . . . intolerable").

52. *Counselman*, 142 U.S. at 562.

53. It is beyond the scope of this note to compare the relative benefits of the rehabilitative theory of punishment with those of the utilitarian and retributivist schools. Suffice it to say that the rehabilitative model implicated by the treatment programs is not without its supporters nor its critics. *Compare* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 53 (1968) (rehabilitation serves the goal of retooling the offender to comport with the dictates of law and "what we do to the offender in the name of reform

Research indicates "that as many as 10% to 15% of boys and 20% to 25% of girls experience at least one instance of sexual misuse prior to the age of 18 . . . ."[55] Moreover, most prosecuted sex offenders have multiple victims.[56]

While not limited to sexual abuse,[57] the long-term consequences of child abuse can be devastating.[58] Some studies indicate that the percentage of psychiatric inpatients who were abused as children may be as high as eighty percent.[59] Due to their sexual misuse, adult survivors are much more likely to develop depression, various anxiety disorders, substance abuse disorders, and sexual dysfunction.[60] Given the impact of the malady, it is clear that society must be protected from those who sexually abuse children.

To this end, sexual abuse of children is a serious crime in all jurisdictions,[61] and legislatures and courts often find that treatment is the best sentencing alternative.[62] The constitutional issues underlying treatment become all the more significant as psychological counseling becomes the

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is being done for *our* sake, not for his") *with* CHARLES W. THOMAS & DONNA M. BISHOP, CRIMINAL LAW 85 (1987) (rehabilitation "is roughly as useful as is our inclination to place a free turkey on the table of an impoverished family on Thanksgiving or Christmas and to walk away from our well-motivated degradation of that family with the pious conviction that we just struck a major blow in the fight against poverty"). None of the courts which have concerned themselves with the privilege as it relates to treatment programs have ever questioned the utility of those programs. *See* discussion *supra* part IV.C.

54. *See* BARRY M. MALETZKY & KEVIN B. MCGOVERN, TREATING THE SEXUAL OFFENDER 12-34.

55. William N. Friedrich et al., *Normative Sexual Behavior in Children*, 88 PEDIATRICS 456, 462 (1991).

56. BENJAMIN SCHLESINGER, SEXUAL ABUSE OF CHILDREN 12-29 (1982).

57. Barbara E. Smith et al., *The Probation Response to Child Sexual Abuse Offenders: How is it Working?* 1990 A.B.A. CRIM. JUST. SEC. 1-14.

58. *See generally* David Finkelhor & Angela Browne, *The Traumatic Impact of Child Sexual Abuse: A Conceptualization*, 55 AM. J. ORTHOPSYCHIATRY 530 (1985); Elizabeth F. Pribor & Stephen H. Dinwiddie, *Psychiatric Correlates of Incest in Childhood*, 149 AM. J. PSYCHIATRY 52 (1992).

59. *See, e.g.*, Andrea Jacobson & Charaine Herald, *The Relevance of Childhood Sexual Abuse to Adult Psychiatric Inpatient Care*, 41 HOSP. & COMMUNITY PSYCHIATRY 154 (1990).

60. James A. Chu & Diana L. Dill, *Dissociative Symptoms in Relation to Childhood Physical & Sexual Abuse*, 147 AM. J. PSYCHIATRY 887 (1990).

61. *See* Lynne Kocen & Josephine Bulkley, *Analysis of Criminal Child Sex Offense Statutes*, *in* CHILD SEXUAL ABUSE AND THE LAW 1-51 (5th ed. 1985).

62. SMITH, *supra* note 57, at 1.

most often ordered offense-specific condition for child sexual abuse probationers.[63] Fortunately, the treatment alternative seems to be working. One study found a four-year recidivism rate of twenty-five percent for treated offenders compared with sixty percent for non-treated offenders.[64] Others have found recidivism rates below ten percent for properly treated individuals.[65] What makes these programs so effective is the time-tested behavioral modification techniques developed by program therapists and researchers.[66] And therein lies the rub.

One element which all successful programs share is the requirement that the patient admit that the abuse occurred.[67] Cognitive behavioral principles require the patient to admit responsibility for his or her actions as a condition precedent to practical corrective therapy.[68] In fact, failure to confess responsibility greatly reduces the chances for positive results.[69] Research indicates that offenders who wholly deny allegations of sexual abuse are three times more likely to fail in treatment than those who admit even partial complicity.[70] The United States Department of Justice has therefore indicated that the offender must openly acknowledge guilt as a "basic requirement for meaningful participation."[71] In another study, the Criminal Justice Section of the American Bar Association found that "[w]ith few exceptions, the therapists interviewed said they would not accept anyone in their program who absolutely denied sexual conduct with children. Most firmly believed that individuals who denied the abuse were not amenable to treatment."[72]

Unfortunately, denial is a common phenomenon in sexual offender treatment.[73] Although modern treatment programs utilize methods to

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63. *Id.* at 3.

64. W.L. Marshall & H.E. Barbaree, *The Long Term Evaluation of a Behavioral Treatment Program for Child Molesters*, 26 BEHAV. RES. & THERAPY 499 (1988).

65. Kenneth G. Gray & Johann W. Mohr, *Follow-Up of Male Sexual Offenders in* SEXUAL BEHAVIOR & THE LAW 745 (Ralph Slovenko, ed. 1965).

66. *See* Smith et al., *supra* note 57.

67. *See* MALETZKY & MCGOVERN, *supra* note 54, at 253-55.

68. *Id.*

69. *Id.*

70. *Id.*

71. U.S. DEPARTMENT OF JUSTICE, A PRACTITIONER'S GUIDE TO TREATING THE INCARCERATED MALE SEX OFFENDER: BREAKING THE CYCLE OF SEXUAL ABUSE 73 (1988).

72. Smith et al., *supra* note 57, at 8.

73. MALETZKY & MCGOVERN, *supra* note 54, at 27; *see* Illinois v. Prusak, 558 N.E.2d 696, 697 (Ill. App. Ct. 1990) (testimony of program administrator that denial is "almost universal" amongst persons accused of sexual offenses).

overcome that denial,[74] those who deny involvement altogether are summarily deemed unamenable for treatment.[75] Some professionals argue that they are bound by their code of ethics to terminate treatment if the offender is unable or unwilling to confess his guilt.[76] To be sure, if outpatient therapy is not being effective, then society is at much greater risk of the patient reoffending.[77]

It appears then, that the nature of the treatment and the nature of the malady conflict. Effective treatment requires an admission of guilt, but sex offenders are especially prone to denial.[78] Understandably, therapeutic professionals must take this opposition into consideration when designing a program of treatment.

The sexual offender treatment program of Ft. Lauderdale's Family Service Agency provides an excellent example of how professionals deal with denial in structuring a therapy program.[79] In January of 1993, the program was treating twenty-five sex offenders which had been ordered into the program by the Broward County courts. Some of the offenders denied the abuse when they first entered the program. Others were immediately amenable to treatment. No matter their disposition at the outset, each offender has a ten-week probationary period in which they are encouraged to admit full responsibility for their crime. During this first ten weeks, treatment centers on overcoming denial by explaining to the probationers the way in which the mind might mask acceptance of responsibility. During the next stage, treatment centers on modifying behavior so as to prevent a recurrence of criminal conduct. If, however, the offender does not accept responsibility during the first ten-weeks, he or she is deemed unamenable to treatment. The counselor is then required to report such non-compliance

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74. MALETZKY & MCGOVERN, *supra* note 54, at 27.

75. *Id.*

76. *See, e.g.*, AMERICAN PSYCHOLOGICAL ASSOCIATION, ETHICAL PRINCIPLES OF PSYCHOLOGISTS 6(e) (1990) ("Psychologists terminate a clinical or consulting relationship when it is reasonably clear that the consumer is not benefitting from it. They offer to help the consumer locate alternative sources of assistance").

77. *See supra* text accompanying notes 64-65.

78. *See* MALETZKY & MCGOVERN, *supra* note 54.

79. Telephone interview with Dr. John Morin, Psychological Resident of the Family Service Agency located in Ft. Lauderdale, Florida (Jan. 6, 1993). During the discussion and as an "aside," Dr. Morin expressed his concern about the actual guilt of some of his patients. During treatment, a number of the probationers had expressed a feeling of coercion to plea bargain. They felt that their public defender was unable or unwilling to afford them a full defense. Indeed, Dr. Morin indicated that only one of his twenty-five patients had gone to trial. That innocence might be one reason for a failure to confess guilt cannot be lightly dismissed. *Id.*

to the offender's probation officer.

The case of *Vermont v. Gleason*,[80] provides an example of how such programs affect the individual offender. Myron Gleason pleaded nolo contendere to a misdemeanor lewdness charge and was placed on probation with the requirement that he successfully complete a sex offender program.[81] Gleason had difficulties accepting responsibility for his behavior and was dismissed from the treatment program.[82] At his probation revocation hearing, the treating psychologist testified that Gleason had "not addressed the issue in any way with me in a meaningful way and this pattern of massive denial concerns me for his safe[ty] and for the community."[83] The court accepted Gleason's representations that, if given a second chance, he would cooperate fully with the treatment program.[84] Five months later, however, Gleason's probation officer again petitioned the court for a revocation of probation.[85] At the violation hearing, the psychologist explained that Gleason was a pleasant subject who had faithfully kept his appointments.[86] However, "when the agenda focused on any sexual matters or issues, there was a definite change in attitude and cooperation in terms of discussing that particular issue."[87] Gleason had made improvements, however. He opened up about his childhood history, his sexual awareness, and his adolescent sexual experiences.[88] Still, he refused to enter into any "meaningful dialogue" regarding his sexual offenses.[89] The psychologist testified that because of this "wall of denial," he discontinued Gleason's therapy sessions in the belief that "additional counseling would not prove helpful."[90]

While *Gleason* typifies the difficulties denial brings to the treatment process, it also exemplifies the point of departure where treatment ends and the law begins. When Gleason's psychologist recognized the futility of future treatment, he was compelled to report such findings to Gleason's probation officer. In turn, Gleason was no longer at the mercy of therapy. His concerns could now only be addressed by the law.

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80. 576 A.2d 1246 (Vt. 1990).
81. *Id.* at 1248.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Gleason*, 576 A.2d at 1248.
86. *Id.* at 1249.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Gleason*, 576 A.2d at 1249.

IV. The Fifth Amendment and Court-Mandated Therapy Programs

The *Gleason* and *Imlay*[91] cases are factually similar,[92] but the courts which decided them reached very different results with regard to the constitutional rights of the defendants. Both Gleason and Imlay were convicted of sex crimes. Both were ordered to undergo sexual treatment as a condition to their probation.[93] Both men were also required to admit responsibility for their respective crimes during the course of that treatment. On appeal, both Gleason and Imlay contended that they were therefore being coerced to waive their Fifth Amendment privilege against self-incrimination.

The Vermont Supreme Court held that the Fifth Amendment did not prohibit the trial court from conditioning Gleason's probation upon his admission of guilt during court-ordered therapy.[94] The court noted that the condition of probation required Gleason only to admit to crimes for which he had already been convicted.[95] Since Gleason cannot be twice placed in jeopardy for the same offense,[96] the court reasoned, any statements he makes pursuant to the court order cannot be used against him.[97] Moreover, since the Fifth Amendment only bars the compelling of incriminating statements, Gleason's rights are not abridged.[98] If, on the other hand, the condition of probation had required the admission of acts unrelated to Gleason's convictions, then Gleason's Fifth Amendment rights would have been violated.[99] Here, however, effective treatment mandated disclosure only of previously convicted crimes.[100] Furthermore, the court found that the trial judge had merely acted to advance the rehabilitative interests of the

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91. *See* discussion *supra* pp. 1442-43.

92. The only variance which may be deemed material is that Imlay pleaded innocent and was convicted after trial while Gleason pleaded nolo contendere. The *Gleason* court rendered the difference moot by holding that "[w]hen the court accepts a plea of nolo contendere, it has the same effect in that case as a plea of guilty and 'authorizes the court for the purposes of the case to treat defendant as though he were guilty.'" 576 A.2d at 1249 (citations omitted).

93. Many jurisdictions invest their courts with the authority to order parents into psychological counseling by statute. *See, e.g.*, FLA. STAT. § 39.442(1)(a) (1991).

94. *Gleason*, 576 A.2d at 1250-51.

95. *Id.* at 1251.

96. *See* U.S. CONST. amend. V.

97. *Gleason*, 576 A.2d at 1250.

98. *Id.* at 1250-52.

99. *Id.* at 1251 (dicta).

100. *Id.*

State.[101] The trial court "did not take that extra, impermissible step of compelling defendant to choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent. . . . [It merely found that] the public would be best protected if defendant could learn to control his sexual behavior."[102] In sum, the Vermont court found the condition to comport with the Fifth Amendment.[103]

And then there is *Imlay*,[104] in which the Montana Supreme Court found nearly identical facts to violate the privilege.[105] The court considered how Imlay had done nearly everything in his power to comply with the conditions of his probation.[106] When denied gainful employment elsewhere, Imlay had applied and been accepted for state-funded training.[107] When denied treatment from one therapy program, he looked elsewhere.[108] Like Gleason, the only thing, Imlay had failed to do was to admit that he committed the crime of which he had been convicted.[109] The court found it clear

> that in this case the defendant is being subjected to a penalty that he would not otherwise be subjected to if he would simply admit his guilt. That penalty is that he serve time in the Montana State Prison. Even though the defendant has already been convicted of the crime that he denies, our system still provides . . . for opportunities to challenge that conviction. . . . These are important rights guaranteed to every defendant under our criminal justice system, but would be rendered meaningless if the defendant could be compelled to admit guilt as a condition to his continued freedom. . . . In addition, by admitting guilt in this case, the defendant would have to abandon his right guaranteed by the Fifth Amendment, not only to the crime for which he has been convicted, but also to the crime of perjury. . . . Under these circumstances . . . we believe that the better reasoned decisions are those decisions which protect the defendant's constitutional right against self-incrimination, and which prohibit augmenting a defendant's sentence because he refuses to confess to a crime or invokes his privilege against

101. *Id.* at 1248-52.
102. *Gleason*, 576 A.2d at 1251-52.
103. *Id.*
104. 813 P.2d at 979.
105. *Id.* at 985.
106. *Id.* at 983.
107. *Id.* at 981.
108. *Id.* at 983.
109. *Imlay*, 813 P.2d at 985.

self-incrimination.[110]

In so holding, the Montana Supreme Court raised several issues of import. As in *Gleason*, the *Imlay* court found the privilege to apply only to incriminating statements.[111] Unlike *Gleason*, however, the court appears to have found the privilege abridged on at least three levels; the threat of imprisonment being the first level of Fifth Amendment violation, the threat of future convictions being the second; and the hinderance of the appellate process, being the third.[112]

Mr. Imlay was forced to choose between waiving his privilege against self-incrimination, thereby retaining his freedom, or of asserting his constitutional right and being sent to prison for five years.[113] In short, Imlay received a harsher punishment due to his failure to confess guilt. That choice, as far as the Montana Supreme Court is concerned, is one the Fifth Amendment will not condone.[114]

Furthermore, by requiring Imlay to speak, the probation condition threatened him with future convictions as well.[115] Imlay testified in his own defense during trial.[116] If, during therapy, he were to admit guilt of his crime, he might well be subject to a charge of perjury.[117] In this regard, Imlay's court-ordered confession would not only impair his freedom on the present charge, but it would subject him to criminal liability for another.[118]

What is more, found the court, is that the probation condition would deny Imlay his fair chance of challenging his conviction.[119] For example, the girl whom Imlay was convicted of assaulting may later recant her testimony. If Imlay is compelled to admit guilt to retain his freedom, such an admission would make the prospects of a new trial extremely unlikely.[120] Again, in the view of the *Imlay* court, this penalty should not be

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110. *Id.* at 985.
111. *Compare Gleason*, 576 A.2d at 1250-52 *with Imlay*, 813 P. 2d at 985.
112. *Imlay*, 813 P.2d at 985.
113. *Id.* at 980-81.
114. *Id.* at 985.
115. *Id.*
116. *Id.* at 980-81.
117. *Imlay*, 813 P.2d at 985; Brief for Respondent at 9-10, Montana v. Imlay, 112 S. Ct. 1260 (1992) (No. 91-687).
118. *Imlay*, 813 P.2d at 985.
119. *Id.*
120. *See id.*

exacted from a choice contrary to the Fifth Amendment.[121]

The *Imlay* and *Gleason* decisions differ then, in this one respect - the *Imlay* court goes farther. It recognizes the purpose of the privilege and cites three ways in which it is violated.[122] One should not assume that this represents a mere oversight on behalf of the Vermont Supreme Court. On the contrary, the different opinions represent different conceptions about the breadth and potency of the Fifth Amendment and epitomize the conflict which has been brewing in the lower courts for years.[123]

It is important to consider both views in reaching the right decision. And there is a "right decision." Indeed, though it may often appear otherwise, the law can only tolerate one of two conflicting principles at a time. The United States Supreme Court has never been directly faced with the issue of whether court-ordered therapy programs that require an admission of guilt violative the privilege against self-incrimination. Nevertheless, the Court has not shied away from the Fifth Amendment.[124] This note will examine the pertinent Fifth Amendment holdings of the Supreme Court and will then move to the application of those holdings in the lower courts.

A. *Guidance from the Supreme Court*

Although the United States Supreme Court has never decided whether the Fifth Amendment prevents a state from conditioning parole upon successful completion of court-mandated therapy programs that require an admission of guilt, the Courts holdings on related Fifth Amendment issues are instructive. First of all, the Court has made clear that the privilege survives conviction and may therefore apply to prisoners and probationers.[125] Second, the Court has found the privilege to apply only to those

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121. *Id.*

122. *Id.*

123. The United States Supreme Court declined to resolve this manifest conflict when it dismissed its original grant of certiorari in the *Imlay* case. *See* 113 S. Ct. 444, 445 (1992) (White, J., dissenting). Elizabeth Griffing, counsel of record for the State of Montana, speculates (not without foundation) that Justices Stevens and Blackmun were responsible for the pretext of not hearing the case on procedural grounds. She believes that they feared a reversal of the Montana Supreme Court decision and interposed the remedy of dismissing the writ as improvidently granted. Telephone Interview with Elizabeth L. Griffing, Montana Assistant Attorney General (Dec. 30, 1992).

124. *See supra* part IV.A.

125. *See* Minnesota v. Murphy, 465 U.S. 420, 426 (1984); Estelle v. Smith, 451 U.S. 454, 462-63 (1981).

statements that are testimonial in nature.[126] For example, the privilege will not reach voice exemplars,[127] handwriting exemplars,[128] police line-ups,[129] or the taking of blood samples.[130] For the Fifth Amendment to respond, the evidence given by the defendant must be related to some communicative act or used for the testimonial content of what was said.[131] Third, the Court has not limited the scope of the privilege to a defendant who testifies at his or her own criminal trial.[132] Rather, the privilege reaches to "any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings."[133] Fourth, in the landmark case of *Miranda v. Arizona*, the Court held, that when a defendant is "faced with a phase of the adversary system" and "not in the presence of a person acting solely in his interest" that defendant must be explicitly warned of his or her right to remain silent.[134]

Despite these constant principles, Fifth Amendment law is not formulaic. Fortunately, the Court has fleshed out these rather expansive rules of law in application to a number of cases which roughly speak to the issue at hand.[135]

1. *Estelle v. United States* and the Requirement for *Miranda* Warnings

In *Estelle v. Smith*,[136] the trial court judge, *sua sponte*, ordered a pre-trial psychiatric evaluation of the accused as was his standard practice in all death penalty cases.[137] After Smith's conviction for murder and at the penalty phase of the proceedings, the State called the examining psychiatrist to testify about Smith's future dangerousness.[138] His testimony was based

126. *See* United States v. Dionisio, 410 U.S. 1, 5-6 (1973).
127. *Id.*
128. *See* Gilbert v. California, 388 U.S. 263, 266 (1967).
129. *See* United States v. Wade, 388 U.S. 218, 221 (1967).
130. *See* Schmerber v. California, 384 U.S. 757, 765 (1966).
131. *Id.* at 761 & n.5.
132. *See* Lefkowitz v. Turley, 414 U.S. 70, 77 (1973).
133. *Id.* The Fifth Amendment protects only those statements that might subject the giver to criminal liability. Garner v. United States, 424 U.S. 648, 655 (1976).
134. 384 U.S. 436, 469 (1966); *see also Estelle*, 451 U.S. at 454 (subjects of pre-trial psychiatric examinations must be warned of right to remain silent for statements to be used against them).
135. See supra part II.B.
136. 451 U.S. 454 (1981).
137. *Id.* at 456-57.
138. *Id.* at 457-58. Pursuant to Texas law, the jury must decide three critical issues

on the pre-trial evaluation and stated in substance that Smith would be a future danger to society.[139] After deliberation, the jury sentenced Smith to death.[140]

The Court ruled that admission of the doctor's testimony violated Smith's privilege against self-incrimination.[141] Barring a scenario where the defendant places his or her own sanity in issue,[142] statements made during court-ordered competency interviews cannot be used, absent an express waiver of the privilege against self-incrimination.[143] The Court found that if the State wanted to use statements Smith made during the examination, it would have had to instruct Smith prior to the interview that anything he said to the psychiatrist could be used against him.[144] The Court held that to allow otherwise would compel Smith to incriminate himself in violation of the Fifth Amendment.[145]

It must be noted that to reach the issue at all, the Court had to first decide that the Fifth Amendment applies to both the guilt and penalty phases of the trial.[146] In so holding, the Court reaffirmed the language from *In re Gault*,[147] that "the availability of the privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites."[148] In *Estelle*, the exposure invited by Smith's statements was an aggravation of his sentence, specifically from life imprisonment to death by electrocution.[149] In an oft cited passage, Chief Justice Burger wrote, that "[j]ust as the Fifth Amendment prevents a criminal defendant from being made 'the

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to determine whether a sentence of death is appropriate, among them the "probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." TEX. CRIM. PROC. CODE ANN. § 37.071(b)(2) (West 1989).

139. *Estelle*, 451 U.S. at 459-60.

140. *Id.* at 460.

141. *Id.* at 461-69.

142. *See* Buchanan v. Kentucky, 483 U.S. 402, 423 (1987) (testimony elicited from psychiatric evaluation may be used solely to rebut mental status defense); Pope v. United States, 372 F.2d 710, 736 (8th Cir. 1967) (in raising issue of sanity, defendant cannot complain of government gathering and introducing relevant evidence).

143. *Estelle*, 451 U.S. at 468.

144. *Id.*

145. *Id.*

146. *Id.* at 462.

147. 387 U.S. 1 (1967), *overruled on other grounds*, Allen v. Illinois, 478 U.S. 364 (1986).

148. *Estelle*, 451 U.S. at 462 (quoting *Gault*, 387 U.S. at 49).

149. *Id.* at 457-59.

deluded instrument of his own conviction,' it protects him as well from being made the 'deluded instrument' of his own execution."[150]

Although a pre-trial psychiatric examination is not the same as court-ordered therapy, there are fair implications to be drawn. First, *Estelle* restates the Court's position that Fifth Amendment applicability is not determined on the type of proceeding, but upon the exposure invited by elicited statements.[151] Where Smith's statements were used against him to increase the penalty for his crime, so too are statements taken from court-ordered therapy programs which are used to revoke probation.[152] In both cases, the defendants become the "deluded instruments" of their own heightened penalties.[153] Thus both scenarios violate the Fifth Amendment absent the use of procedural safeguards.

The Court's decision in *Miranda* set forth those procedural safeguards as requiring a warning that the defendant has a "right to remain silent" and that "anything said can and will be used against the individual in court."[154] The *Miranda* Court required such warnings when a defendant or suspect is in an especially coercive atmosphere, such as that arising out of a custodial interrogation in a police station.[155] The concept of custodial interrogation is not limited, however, to the station house,[156] nor does questioning at a police station necessarily constitute a custodial interrogation.[157] The test for custody is whether a defendant's "freedom of action is curtailed in any significant way . . . ."[158]

In *Estelle*, the psychiatric interview took place in jail,[159] arguably a more coercive environment that an out-patient treatment facility.[160] Still,

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150. *Id.* at 462 (quoting 2 HAWKINS, PLEAS OF THE CROWN 595 (8th ed. 1824)) (citations omitted).

151. *Estelle*, 451 U.S. at 454; *see In re Gault*, 387 U.S. at 49.

152. *Compare Estelle*, 451 U.S. at 462 *with* cases discussed *supra* part IV.C.

153. *Id.*

154. 384 U.S. at 466-69; *see Estelle*, 451 U.S. at 466-69.

155. *Estelle*, 384 U.S. at 444.

156. *See* Orozco v. United States, 394 U.S. 324 (1969).

157. Oregon v. Mathiason, 429 U.S. 492 (1977).

158. *Miranda*, 384 U.S. at 467; *see Estelle*, 451 U.S. at 466.

159. *Estelle*, 451 U.S. at 467.

160. The fact that the interview happened to occur while the defendant was in jail seems of little consequence. The *Estelle* Court was much more concerned that the non-adversarial nature of the court-ordered competency examination would lead a reasonable person to assume that he or she was free to speak without fear of criminal reprisals. 451 U.S. at 467. Lower courts have expressed a similar concern regardless of whether the court-ordered psychiatric examination took place in a custodial setting. *See, e.g.*, Gibson v. Zahradnick, 581 F.2d 75, 79 (4th Cir.), *cert. denied*, 439 U.S. 996 (1978); United

the patient undergoing therapy does have his freedom of action curtailed in a very significant way. A therapy patient is not free to leave the treatment facility on penalty of probation revocation.[161] Moreover, the very nature of psychological treatment may, in itself, be "coercive."

The treating physicians are armed not with weapons and badges, but with the tools of their trade—the means of eliciting information from those not otherwise willing to open up their thoughts.[162] If therapists, rather than limiting their function to the rehabilitation of offenders, disclose statements made during the course of therapy, the patients are, to borrow a phrase from *Miranda* and *Estelle*, "faced with a phase of the adversary system" and are "not in the presence of [a person] acting solely in [their] interest."[163] Accordingly, if statements are to be used from a treatment program, the defendant should have the opportunity to make a knowing and intelligent waiver of his or her right against self-incrimination.[164]

Following this reasoning, the *Estelle* Court found the Fifth Amendment to be implicated when statements are elicited from a proceeding intended for a different purpose.[165] The pre-trial interview was intended to gauge Smith's competency for trial, not to elicit incriminating statements.[166] When Smith was ordered to undergo the examination, he did not know that his statements would be used for anything other than determining his competence to stand trial.[167] The state crossed the boundaries of the Fifth Amendment, however, when it used Smith's statements to increase the penalty for his crime.[168] In fact, if the testimony of the psychiatrist had been confined to his function as evaluator, no Fifth Amendment issue would have arisen.[169] Since Smith was reasonably under the impression that the examination was being used only to determine his competence, the State, in

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States v. Reifsteck, 535 F.2d 1030, 1034 n.1 (8th Cir. 1976); United States v. Alvarez, 519 F.2d 1036, 1041-42 (3d Cir. 1975); United States v. Julian, 469 F.2d 371, 376 (10th Cir. 1972); United States v. Bennett, 460 F.2d 872 (D.C. Cir. 1972); United States v. Bohle, 445 F.2d 54, 66-67 (7th Cir. 1971).

161. *See* cases discussed *supra* part IV.C.

162. *Cf.* United States v. Byers, 740 F.2d 1104, 1151-54 (D.C. Cir. 1984) (Robinson, J., dissenting).

163. *Estelle*, 451 U.S. at 467 (quoting *Miranda*, 384 U.S. at 469) (first alteration in original).

164. *Id.* at 467 (purpose of warnings are to afford the subject an intelligent decision).

165. *Id.*

166. *Id.*

167. *Id.* at 465.

168. *Estelle*, 451 U.S. at 465.

169. *Id.* at 465.

order to use his communications for more, needed to give Smith due warning that any thing he said could be used against him.[170]

Accordingly, when offenders subject themselves to court-ordered therapy, there is also no expectation that statements made during the course of that therapy can be used against them.[171] To the contrary. It seems reasonable to assume that statements are being made in confidence with one's therapist.[172] Since effective treatment can only be had with candor,[173] it is not reasonable to expect that the courts would violate that candor by exacting penalties for one's admissions. For this reason, probationers like Imlay and Gleason should arguably be warned of such a practice just as Smith must be warned.

2. *Minnesota v. Murphy*

In *Minnesota v. Murphy*, the Court decided that a statement made by a probationer to his probation officer, without prior warnings, is admissible in a subsequent criminal proceeding.[174] In 1974, Murphy was a suspect in the rape and murder of a teenage girl. No charges were then brought. Six years later, Murphy was charged with criminal sexual conduct in an unrelated incident. He pleaded guilty to a reduced charge of false imprisonment and was sentenced to probation. Among other things, Murphy was required to participate in a sexual treatment program and to be truthful with his probation officer "in all matters."[175] Murphy was told that if he failed to comply with any of the conditions of his probation, he may be subject to imprisonment. In September of 1981, the probation officer was informed by Murphy's therapist that during the course of his therapy Murphy had admitted to the 1974 rape and murder. Although the probation officer did not immediately call the police, she did contact Murphy to set up a meeting at which she planned to elicit incriminating statements. At the meeting, Murphy admitted to the probation officer that he had committed the 1974 crimes. This confession was used in Murphy's subsequent trial in which he

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170. *Id.* at 466-67 (construing *Miranda*, 384 U.S. at 436). These are not, however, comprehensive "Miranda" warnings. Although the *Estelle* Court requires notice to defendants that statements made during the examinations may be used against them, the Court did not require instruction as to the right to have counsel present. *Id.* at 466-67.

171. *Cf. id.* at 465.

172. *See* Smith et al., *supra* note 57, at 8.

173. *See supra* part II.

174. 465 U.S. 420, 424 (1984).

175. *Id.* at 422.

was convicted of rape and murder.[176]

The Court held that Murphy's admissions to his probation officer were properly admitted against him in his subsequent trial for rape and murder.[177] However, the Court considered the case in the context of statements made to a probation officer, practically ignoring the issue that the statements were first discovered during the course of therapy.[178] The Court held that the Fifth Amendment permitted Murphy to refuse any discussion of the crimes with his probation officer.[179] However, Murphy failed to assert his privilege against self-incrimination in a timely manner,[180] opting instead to reveal incriminating information to his probation officer.[181] This incriminating information, the Court held, was therefore properly admitted against Murphy in his subsequent rape and murder trial.[182] The Court reasoned that all Murphy had to do was decline to answer the probation officer's questions.[183]

Murphy contended that it was not so easy.[184] Murphy feared that had he done so—had he asserted his privilege against self incrimination—his probation would have been revoked in response.[185] To the Court, this fear was "unreasonable" in light of its previous decisions that held it unconstitutional for a state to penalize a defendant for asserting his right to remain silent.[186]

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176. *Id.* at 425.

177. *Id.* at 440.

178. *See id.* at 424 ("The Court explained that it granted certiorari to resolve a conflict among state and federal courts concerning whether a statement made by a probationer to his probation officer without prior warnings is admissible in a subsequent criminal proceeding."). It is not entirely clear from the opinion, briefs, or joint appendix, but it appears that the treatment facility in which Murphy was enrolled was covered by a federal statute requiring the confidentiality of statements made to a therapist. *See* 21 U.S.C. § 1175 (1988); 42 U.S.C. § 290dd-3 (1988); *Murphy*, 465 U.S. at 423 n.1. In this way, the counselor may not have been able to provide the information directly to the police. *Murphy*, 465 U.S. at 423 n.1.

179. *Id.* at 426-34.

180. As soon as the probation officer told Murphy of her discovery, Murphy did say that he "felt like calling a lawyer." *Id.* at 424. However, the Court did not trifle with the issue of Murphy having requested counsel at the meeting, thus invoking his Fifth Amendment privilege. *Id.* at 424 n.3; *see* Fare v. Michael C., 442 U.S. 707, 709 (1979) (request for lawyer is an automatic invocation of the privilege).

181. *Murphy*, 465 U.S. at 440.

182. *Id.*

183. *Id.* at 437.

184. *Id.* at 434-35.

185. *Id.*

186. *Murphy*, 465 U.S. at 438; *see* discussion *infra* part IV.B.

Unfortunately, Murphy was not a lawyer and was not schooled in Supreme Court opinions. He was guided only by what the Judge had told him in the conditions of his probation; namely, that he was to "report to his probation officer periodically as directed, and be truthful with the officer 'in all matters.'"[187] From this, the dissent submitted, Murphy could well have believed he was under compulsion to answer.[188]

The dissent's rationale follows the general rule that one need not claim the privilege where the assertion of the Fifth Amendment right is itself penalized.[189] A government may simply not impose penalties "capable of forcing the self-incrimination which the Amendment forbids."[190] In this way, the Amendment privileges not only the right to remain silent, but also the freedom from influence that would have one waive that right.[191]

B. *The "Penalty" Cases*

The "penalty" cases reflect the understanding that "the blood of the accused is not the only hallmark of an unconstitutional inquisition."[192] An early illustration is the case of *Boyd v. United States*,[193] involving a civil forfeiture action against property. A statute offered the owner an election between producing a self-incriminating document or forfeiting the goods.[194] The Court held the statute to be violative of the Fifth Amendment in that it constituted a penalty for the exercise of the privilege.[195]

It was therefore clear, early in the Court's Fifth Amendment jurisprudence, that the government could not exact a penalty for asserting one's privilege against self-incrimination. It was not until much later, however, that the Court fleshed out the parameters of this "penalty" rule.[196]

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187. *Murphy*, 465 U.S. at 420.
188. *Id.* at 445-46.
189. *See id.*; *see, e.g.*, Garrity v. New Jersey, 385 U.S. 493, 500 (1967) (privilege against self-incrimination is among those inviolable rights "whose exercise a State may not condition by the exaction of a price").
190. Lefkowitz v. Cunningham, 431 U.S. 801, 806 (1977); *Murphy*, 465 U.S. at 434-39.
191. *See Murphy*, 465 U.S. at 434-39; *Cunningham*, 431 U.S. at 805-06; Lefkowitz v. Turley, 414 U.S. 70, 79-84 (1973); Uniformed Sanitation Men Ass'n v. Commissioner of Sanitation, 392 U.S. 280, 283-84 (1968); Gardner v. Broderick, 392 U.S. 273, 278-79 (1968).
192. Blackburn v. Alabama, 361 U.S. 199, 206 (1960).
193. 116 U.S. 616 (1886).
194. *Id.* at 617.
195. *Id.* at 633-35.
196. *See Turley*, 414 U.S. at 70 (state may not revoke contracts with and disqualify

First in *Garrity v. New Jersey*[197] and then in *Gardner v. Broderick*,[198] the Court found that self-incriminating testimony may not be elicited from police officers by the threat of employment termination.[199] The cases were very similar. Both dealt with criminal investigations of police officers, and in both cases the police were threatened with termination if they refused to testify.[200] The only distinction is that in *Garrity*, the police officers succumbed to the threat and testified.[201] In *Gardner*, the officers stood their constitutional ground but lost their jobs in the process.[202] The Court found a violation of the Fifth Amendment in both instances.[203] Accordingly, self-incriminating testimony must be suppressed if it was elicited by threatening job loss.[204] Similarly, those who assert the privilege and suffer the loss of their jobs in response, must be reinstated to their previous positions.[205] In this manner, the Fifth Amendment draws no distinction between those who cave into the threats and those who suffer because they did not.

These "penalty" rules have broad impact on cases involving court-ordered therapy. In all such cases, a government has threatened to revoke probation or a suspended sentence if the defendant takes the Fifth.[206] Unfortunately, while the Supreme Court has often held employment termination to be an impermissible penalty,[207] it has yet to tip its hand on

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from future contracts, architects who asserted privilege); *Uniformed Sanitation Men Ass'n*, 392 U.S. at 283-85 (discharge of city employees who fail to sign a waiver of Fifth Amendment rights is per se unconstitutional); Spevack v. Klein, 385 U.S. 511 (1967) (lawyer cannot be disbarred because he refused to testify against himself at disciplinary proceeding); Slochower v. Board of Higher Educ., 350 U.S. 551 (1956) (teacher may not be discharged due to invocation of privilege when questioned by congressional committee).

197. 385 U.S. 493 (1967).
198. 392 U.S. 273 (1968).
199. *Compare Garrity*, 385 U.S. at 496-500 *with Gardner*, 392 U.S. at 276-79.
200. *Compare Garrity*, 385 U.S. at 496-500 *with Gardner*, 392 U.S. at 267-79.
201. *Garrity*, 385 U.S. at 495.
202. *Gardner*, 392 U.S. at 274-75.
203. *Compare Garrity*, 385 U.S. at 496-500 *with Gardner*, 392 U.S. at 276-79.
204. *Garrity*, 385 U.S. at 495.
205. *Gardner*, 392 U.S. at 274-75.
206. See, e.g., Mace v. Amestoy, 765 F. Supp. 847 (D. Vt. 1991); Archer v. Florida, 604 So. 2d 561 (Fla. 1st Dist. Ct. App. 1992); Young v. Florida, 566 So. 2d 69 (Fla. 2d Dist. Ct. App. 1990); Henderson v. Florida, 543 So. 2d 344 (Fla. 1st Dist. Ct. App. 1989); Illinois v. Prusak, 558 N.E.2d 696 (Ill. Ct. App. 1990); Gilfillen v. Indiana, 582 N.E.2d 821 (Ind. 1991); *Imlay*, 813 P.2d at 979; Vermont v. Gleason, 576 A.2d 1246 (Vt. 1990); *see also* discussion *infra* part IV.C.
207. *See Cunningham*, 431 U.S. at 801 (termination and bar from political office);

whether the imposition of a stiffer sentence may violate the Fifth Amendment. However, the Circuit Courts of Appeals have taken up the issue, and have, for the most part, decided the issue in the affirmative.

In *Colman v. Lahouse*,[208] the defendant desired transfer to another prison. The defendant had a favorable record and the prison Superintendent lent his approval to the transfer. Nevertheless, because Colman refused to admit to the crime of which he was convicted, the review board denied his transfer. The First Circuit Court of Appeals held:

> Though not unqualified, it is generally recognized that even after conviction, a defendant who shows a "real and appreciable risk" of subsequent incrimination may be entitled to assert the privilege against self-incrimination with regard to the crime. . . . And requiring a prisoner to choose between his Fifth Amendment privilege and favorable post-conviction treatment may create a "classic penalty situation" in which the prisoner's answers would be deemed compelled and inadmissable in the criminal prosecution.[209]

Accordingly, the court found Colman's Fifth Amendment privilege to be abridged in not allowing his transfer.

The First Circuit holding has obvious implications in the area of court-ordered therapy. The court found that Colman had shown a "real and appreciable risk" of subsequent incrimination in that any statements he made could be used against him in a subsequent appeal.[210] Defendants who are placed in therapy programs may likewise have their statements used against them while they appeal their case or seek habeas corpus relief.[211] Moreover, the *Colman* case clearly holds that a defendant is placed in an unconstitutional penalty situation when the defendant is denied favorable post-conviction treatment for asserting his or her Fifth Amendment privilege.[212] In court-mandated therapy cases, the defendants are often

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Turley, 414 U.S. at 70 (losing state contracts); *Gardner*, 392 U.S. at 273 (discharge of city employees); *Uniformed Sanitation Men Ass'n*, 392 U.S. at 280 (same); *Spevack*, 385 U.S. at 511 (disbarment of lawyer); *Slochower*, 350 U.S. at 551 (discharge of public school teacher).

208. 976 F.2d 724 (1st Cir. 1992) (per curiam) (table case), reported in full 1992 U.S. App. LEXIS 23235.

209. *Colman*, 1992 U.S. App. LEXIS at *6-*7.

210. *Id.* at *7.

211. The threat of perjury charges may be another "real and appreciable risk." *See Imlay*, 813 P.2d at 985.

212. *Colman*, 1992 U.S. App. LEXIS 23235, at *7-*10.

Nova Law Review, Vol. 17, Iss. 4 [1993], Art. 1

taken off probation and placed in jail for asserting their privilege during treatment.[213] If it is unconstitutional to deny a defendant's prison transfer based on that prisoner's assertion of his Fifth Amendment rights, then it could be argued that going from conditional freedom to jail is at least as egregious.[214]

Prior to *Colman*, a number of appellate courts had considered the analogous issue of whether judges may increase defendants' sentences for their failure to accept responsibility for the crime of which they were convicted.[215] The *Imlay*[216] decision of the Montana Supreme Court relied heavily upon the case of *Thomas v. United States*.[217] In the sentencing phase of Thomas' trial, the following exchange took place:

> MR. WILSON [U.S. Attorney]: If the court please, the defendant was convicted in this Court on June 14 for bank robbery and he is here for sentence.
>
> . . . .
>
> THE COURT: Do you want to say anything on behalf of yourself?
>
> THE DEFENDANT: I will repeat again that I am innocent. That's all.
>
> THE COURT: I am going to tell you something and I want you to think carefully before you answer. You have been proven guilty beyond a reasonable doubt by overwhelming evidence . . . . If you will come clean and make a clean breast of this thing for once and for all, the Court will take that into account in the length of the sentence to be imposed. If you persist, however, in your denial, as you did a moment ago, that you participated in this robbery, the Court also must take that into account. Now which will it be?
>
> . . . .

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213. *See, e.g., Imlay*, 813 P. 2d at 980.

214. The *Colman* case was decided on September 24, 1992 and therefore has not appeared in any court-mandated therapy cases.

215. *See* United States v. Heubel, 864 F.2d 1104 (2d Cir. 1989); United States v. Garcia, 544 F.2d 681 (3d Cir. 1976); United States v. Wright, 533 F.2d 214 (5th Cir. 1976); Poteet v. Fauver, 517 F.2d 393 (3d Cir. 1975); United States v. Laca, 499 F.2d 922 (5th Cir. 1974); Scott v. United States, 419 F.2d 520 (D.C. Cir. 1969); Thomas v. United States, 368 F.2d 941 (5th Cir. 1966). *But see* Gollaher v. United States, 419 F.2d 520, 530-31 (9th Cir.), *cert. denied*, 396 U.S. 960 (1969) (Fifth Amendment not violated when defendant faces harsher sentence for failing to confess).

216. 813 P.2d at 979; *see* discussion *supra* pp. 1442-43.

217. 368 F.2d 941 (1966).

THE COURT: I am asking you to speak for yourself.

THE DEFENDANT: I am speaking for myself that I am innocent.

THE COURT: You persist in that?

THE DEFENDANT: Yes, sir.

THE COURT: The sentence of the Court is that you be sentenced to the maximum term permitted by law, twenty-five years.[218]

That sentence was vacated by the Fifth Circuit Court of Appeals which found that the alternatives presented to the defendant violated his Fifth Amendment privilege against self-incrimination.[219]

> The two "ifs" which the district court presented to Thomas placed him in a terrible dilemma. If he chose the first "if," he would elect to forego all . . . post-conviction remedies and to confess to the crime of perjury, however remote his prosecution for perjury might seem. Moreover, he would abandon the right guaranteed by the Fifth Amendment. . . . His choice of the second "if" was made after the warning that the sentence to be imposed would be for a longer term than would be imposed if he confessed. . . . [A]n ultimatum of a type which we cannot ignore or approve confronted Thomas. Truly, the district court put Thomas "between the devil and the deep blue sea."[220]

Just as Thomas was faced with a constitutionally impermissible dilemma, so too was Imlay when he was told to confess during treatment or to serve out his sentence in jail.[221] The applicability of the *Thomas* rule

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218. *Thomas*, 368 F.2d at 943-44. Such dialogue is not unique. More startling than *Thomas* is the following question from a federal district court judge to a man who had just been convicted of bank robbery:

> THE COURT: I'm asking you. Not interested in indictments. I'm less interested in the Fifth Amendment. I'm interested in you were guilty of this crime (sic). Your buddy; he says he wasn't. What do you say? I'm the man to impose the sentence. Not your buddy. You tell me. Were you there?

Poteet, 517 F.2d at 394; *see also Heubel*, 864 F.2d at 1109-10.

219. *Thomas*, 368 F.2d at 945-46; *accord* United States v. Wright, 533 F.2d 214 (5th Cir. 1976) (maximum sentence need not be imposed to run afoul of Fifth Amendment).

220. *Thomas*, 368 F.2d at 945; *see also Imlay*, 813 P.2d at 983.

221. *Imlay*, 813 P.2d at 985.

to court-mandated therapy programs has great utility in light of its uniform acceptance.[222] It appears that only one court has rejected *Thomas'* holding.[223]

In *Gollaher v. United States*,[224] a criminal defendant was penalized with a stiffer sentence because of his refusal to admit guilt of the crime for which he was convicted.[225] The Ninth Circuit recognized the wisdom of the *Thomas* decision but chose not to follow it, opting instead to place great weight on the state's interest in rehabilitating offenders.[226] The court found it "axiomatic" that in order to affect proper rehabilitation, the defendant must admit his or her guilt.[227] In essence, the court balanced the state's interest in rehabilitation against the defendant's continued right to deny his guilt.[228] Rehabilitation won out.[229]

Similarly, courts which have addressed the Federal Sentencing Guidelines and its provision for a two-point downward departure for acceptance of responsibility[230] have upheld that provision.[231] Essentially, section 3E1.1 of the Guidelines permits a judge to be more lenient if the defendant admits responsibility for his or her criminal acts.[232] On its face, section 3E1.1 seems to run contrary to the other penalty cases[233] and

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222. *See Heubel*, 864 F.2d at 1104; *Wright*, 533 F.2d at 214; *Scott*, 419 F.2d at 264. *But see Gollaher*, 419 F.2d at 520.

223. *See Gollaher*, 419 F.2d at 520.

224. *Id.*

225. *Id.* at 521.

226. *Id.* at 530.

227. *Id.*; *see* discussion *supra* part III.

228. *Gollaher*, 419 F.2d at 530-31.

229. *Id.*

230. FEDERAL SENTENCING GUIDELINES MANUAL § 3E1.1 (U.S. Sentencing Comm'n) (1991).

231. *See, e.g.*, United States v. Gonzales, 897 F.2d 1018 (9th Cir. 1990); United States v. Henry, 883 F.2d 1010 (11th Cir. 1989). Section 3E1.1 provides:

> (a) If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for his criminal conduct, reduce the offense level by 2 levels.
>
> (b) A defendant may be given consideration under this section without regard to whether his conviction is based upon a guilty plea or a finding of guilt by the court or jury or the practical certainty of conviction at trial.
>
> (c) A defendant who enters a guilty plea is not entitled to a sentencing reduction under this section as a matter of right.

FEDERAL SENTENCING GUIDELINES MANUAL § 3E1.1 (U.S. Sentencing Comm'n) (1991).

232. *Henry*, 883 F.2d at 1011.

233. *See* discussion *supra* part IV.B.

certainly to the rule set forth in *Thomas*.[234] Yet the courts have ruled the downward departure to be generally consistent with the Fifth Amendment.[235] Sine qua non, a defendant is rewarded for waiving his or her privilege.[236] Interestingly, these decisions draw a distinction between enhancing a sentence and lowering one.[237] The courts do not apply the *Thomas* rule since section 3E1.1 confers a privilege, not a punishment.[238]

Upholding the section seems to fly in the face of the *Colman* decision. In that case, the prison transfer would appear to be the conferral of a privilege just as the courts have held the downward departure to be.[239] It takes some semantic liberty to reconcile the Guidelines decisions with the well-established rules of the penalty cases. Plainly, a defendant who is told that his or her sentence will be lessened is under equal compulsion to waive the privilege as is the defendant who is told that his or her sentence will be increased. The practical result is the same regardless of whether one uses a negative or positive linguistic spin. It appears that the courts which have ruled on the Guidelines have sought to vitiate the rehabilitative interests of the state over the rights of the accused, just as did the minority decision in *Gollaher*.

Rejecting the approach of those courts which would subjugate the Fifth Amendment in favor of other policy considerations, the Third Circuit spoke in words which go to the very core of the therapy/privilege controversy:

> Defendant's claim revolves around the conflict between two principles of American criminal law. The first is the Fifth Amendment. . . . The second is the principle that a court may consider all available information in formulating a sentence and may properly grant lenity to those who . . . show contrition for their crimes and take steps toward rehabilitation and re-establishment as good and responsible members of society. . . . [W]e today reaffirm the principle we set out in *Garcia*: where a defendant invokes his or her Fifth Amendment privilege against self-incrimination in a timely manner, a sentencing court may not use his or her failure to waive that right as negative evidence to penalize

234. *See Thomas*, 368 F.2d at 945.

235. *See, e.g., Gonzales*, 897 F.2d at 1021; *Henry*, 883 F.2d at 1011. *But see* United States v. Watt, 910 F.2d 587, 591 (9th Cir. 1990); United States v. Oliveras, 905 F.2d 623 (2d Cir. 1990) (judge precluded from basing acceptance of responsibility reduction on Fifth Amendment claim).

236. *See id.*

237. *See Gonzales*, 897 F.2d at 1021; *Henry*, 883 F.2d at 1011.

238. *See Gonzales*, 897 F.2d at 1021.

239. *See Colman*, 1992 U.S. App. LEXIS 23235, at *7-*10.

> him or her in deciding upon the appropriate sentence.[240]

The court was not without sympathy for the concerns enunciated in *Gollaher*.

> We also recognize that in many instances in which a [defendant displays a] lack of contrition and willingness to make amends for his or her crime, the sentencing court will not be able to consider it. However, when faced with a conflict between two principles of law, one of which is embodied in statute and tradition, and the other of which is embodied in the Constitution, that which is in the Constitution must hold sway.[241]

The penalty cases may have been overcome by semantics, but nevertheless they are useful in applying to cases involving court-ordered therapy. The rule is still clear. Neither a government, nor a court, may exact a penalty for an assertion of the privilege against self-incrimination.[242] Forbidden penalties run the gambit from loss of jobs to an increase in one's sentence.[243] Moreover, a state may not withhold a benefit (such as a prison transfer) from a defendant who invokes the privilege against self-incrimination.[244]

In extending the "penalty" cases to the realm of court-ordered therapy, many courts have held that the threat of probation revocation infects a free

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240. *Heubel*, 864 F.2d at 1109-11. In *United States v. Garcia*, the court ruled it unconstitutional to impose a harsher sentence upon a drug dealer who refused to tattle on his cohorts. 544 F.2d 681, 685 (3d Cir. 1976). The court there found, that "a price tag was thus placed on appellants' expectation of maximum consideration at the bar of justice; they had to waive the protection afforded them by the Fifth Amendment," and "[t]his price was too high." *Id.*

241. *Heubel*, 864 F.2d at 1111. The United States Supreme Court has historically shown little tolerance for balancing other interests, no matter how compelling, against the Fifth Amendment. *Turley*, 414 U.S. at 78 (state interest in "maintaining the integrity of its civil service and of its transactions with independent contractors" insufficient to defeat privilege); McCarthy v. Arndstein, 266 U.S. 34, 40 (1924) (state interest in executing bankruptcy laws insufficient to override privilege); Hale v. Henkil, 201 U.S. 43, 66 (1906) (state interest in Antitrust regulations insufficient when balanced against Fifth Amendment).

242. *E.g.*, Garrity v. New Jersey, 385 U.S. 493 (1967). This appears to be true so long as that benefit is not mandated by Congress as a Federal Sentencing Guideline. *See Gonzalez*, 897 F.2d at 1018; *Henry*, 883 F.2d at 1010.

243. *See* cases cited *supra* notes 196, 207; *Thomas*, 368 F.2d at 941.

244. *See Colman*, 1992 U.S. App. LEXIS 23235, at *7.

and voluntary waiver of the privilege.[245] Yet, as Justice White pointed out in his dissent to the denial of certiorari in *Imlay*, the courts are far from reaching a consensus on the issue.[246] There are a number of courts which find no constitutional dilemma in allowing a state to condition probation upon the admission of guilt in a therapy program.[247]

C. *Application in the Lower Courts*[248]

When the courts are confronted with the Fifth Amendment implications of court-mandated therapy programs, they weigh all of the factors discussed thus far; the history and purpose of the privilege, the utility and means of therapy, and of course, the law. Although the *Imlay* and *Gleason* cases[249] are representative of the conflict operative in the courts today, the opinions can be divided into three categories. The first category is represented by the *Gleason* case.[250] Those which do not find a Fifth Amendment violation

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245. *See, e.g.*, Mace v. Amestoy, 765 F. Supp. 847 (D. Vt. 1991); Jessica B. v. Ginger B., 254 Cal. Rptr. 883 (Ct. App. 1989); Illinois v. Prusak, 558 N.E.2d 696 (Ill. Ct. App. 1990); Gilfillen v. Indiana, 582 N.E.2d 821 (Ind. 1991); *In re* Welfare of J.W., 415 N.W.2d 879 (Minn. 1987); *Imlay*, 813 P.2d 979 (Mont. 1991); *In re* M.C.P., 571 A.2d 627 (Vt. 1989).

246. 113 S. Ct. at 445.

247. Young v. Florida, 566 So. 2d 69 (Fla. 2d Dist. Ct. App. 1990) (abuse of discretion to revoke probation for failure to admit guilt in therapy where defendant willing to do so if given second chance); Henderson v. Florida, 543 So. 2d 344 (Fla. 1st Dist. Ct. App. 1989); *In re* H.R.K., 433 N.W.2d 46 (Iowa Ct. App. 1989); *In re* Welfare of S.A.V., 392 N.W.2d 260 (Minn. Ct. App. 1986), *overruled by In re* Welfare of J.W., 415 N.W.2d 879 (Minn. 1987); Montana v. Donnelly, 830 P.2d 1284 (Mont. 1990), *overruled by Imlay*, 813 P.2d at 985; Vermont v. Gleason, 576 A.2d 1246 (Vt. 1990).

248. Practitioner's Note: The following cases have found a violation of the Fifth Amendment when courts order probationers to undergo therapy wherein they are required to admit responsibility for their criminal acts: *Mace*, 765 F. Supp. at 847; *Jessica B.*, 254 Cal. Rptr. at 883; *Prusak*, 558 N.E.2d at 696; *Gilfillen*, 582 N.E.2d at 821; *In re Welfare of J.W.*, 415 N.W.2d at 879; *In re* Welfare of J.G.W., 429 N.W.2d 284 (Minn. Ct. App. 1988), *aff'd*, 433 N.W.2d 885 (Minn. 1989); *Imlay*, 813 P.2d at 979.

The following cases have found the Fifth Amendment not to be violated when a court orders probationers to undergo therapy wherein they must admit responsibility for their criminal acts: Russell v. Eaves, 722 F. Supp. 558 (E.D. Mo. 1989); Archer v. Florida, 604 So. 2d 561 (Fla. 1st Dist. Ct. App. 1992) (by inference); *Young*, 566 So. 2d at 69 (by inference); *Henderson*, 543 So. 2d at 344 ; Carson v. Jackson, 466 So. 2d 1188 (Fla. 4th Dist. Ct. App. 1985); *In re H.R.K.*, 433 N.W.2d at 46; Dutchess County Dept. of Social Serv. v. G., 534 N.Y.S.2d 64 (Fam. Ct. 1988), *aff'd sub nom. In re* Travis Lee G., 565 N.Y.S.2d 136 (App. Div. 1991); *Gleason*, 576 A.2d at 1246.

249. *See* discussion *supra* pp. 1442-43, 1453-57.

250. 576 A.2d 1246 (Vt. 1990); *see supra* pp. 1453-55.

ground their reasoning in the rehabilitative interests of the State and a perceived lack of harm to the offender.[251] The second category is represented by the *Imlay* case.[252] These cases, which find a Fifth Amendment violation, largely base their holdings on the "penalty" cases and the uncompromising virility of the Fifth Amendment.[253] A third category involves child custody or visitation disputes in which a parent convicted of a sex crime is ordered to undergo therapy requiring an admission of guilt.[254] In these cases, the defendants' Fifth Amendment rights are said to be violated, but it is also noted that, with or without an admission of guilt, the parent has the burden of persuading the court that he or she has reformed.[255] In this third category, the courts defer to the Fifth Amendment while still honoring the goals and methodology of effective therapy.[256]

1. Fifth Amendment Not Violated

Therapists have put it in rather clear terms. Without an acceptance of responsibility for one's crime, a defendant's chances for rehabilitation are nil.[257] It is not without reason, then, that some courts find it constitutionally permissible to require an admission of guilt during court-ordered therapy.[258]

In *In re H.R.K.*,[259] the court affirmed a termination of parental rights where the parents failed to admit abuse during therapy.[260] The parents argued that it violated due process to require them to balance two constitutionally guaranteed rights; the right to maintain the integrity of the family unit, and the right against self-incrimination.[261] In dismissing the parents' claim, the court held:

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251. *See supra* note 248.
252. 813 P.2d 979 (Mont. 1991); *see supra* pp. 1442-43, 1455-57.
253. *See* cases cited *supra* note 248.
254. *See In re Welfare of J.W.*, 415 N.W.2d at 879; *In re Welfare of J.G.W.*, 429 N.W.2d at 284; *In re* M.C.P., 571 A.2d 627 (Vt. 1989).
255. *See* cases cited *supra* note 248.
256. *Id.*
257. *See, e.g.*, MALETZKY, *supra* note 54, at 253-55; *see supra* part III.
258. *See Gleason*, 576 A.2d at 1251-52; *cf. Gollaher*, 419 F.2d at 531 ("no fault can be found of the judge who takes into consideration the extent of a defendant's rehabilitation at the time of sentence").
259. 433 N.W.2d 46 (Iowa Ct. App. 1989).
260. *Id.* at 50.
261. *Id.*

> Termination [of parental rights] in such a situation is not . . . *a sanction for exercise of a constitutional right, but simply the necessary result of failure to rectify parental deficiencies.* Although the state cannot require [the parents] to waive [their] constitutional right, that does not mean it must relinquish its right and obligation to protect these children.[262]

In so holding, the court honored its role as parens patriae by disallowing family reunification until the parents admitted their guilt.[263] Underlying this point was the recognition that effective therapy cannot be had without an acceptance of responsibility.[264]

However noble the result of the case—the *In re H.R.K.* court was able to keep the children safe—it is clear that the court had to knock the air out of the Fifth Amendment privilege in order to arrive at that result. It is significant, for example, that nowhere in the opinion was there a mention of the "penalty" cases which would, at the very least, have drawn the holding into question.[265] After all, while the court maintained that it could not require the parents to waive their rights, it could keep their children from them if they refused.[266] In this, the Iowa court was not alone.

In *Dutchess County Department of Social Services v. G.*,[267] a New York Family Court terminated Mr. and Mrs. G's rights to their child based upon a finding of permanent neglect.[268] The rights were terminated solely due to the parents' "adamant, long-standing, and repeated refusal to admit" to any wrongdoing during rehabilitative counseling.[269] Without this admission, reasoned the court, effective therapy could not be assured, and

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262. *Id.* at 50 (emphasis added). The emphasized language was first employed in the case of *In re Welfare of S.A.V.* in reaching a similar result. 392 N.W.2d at 260. In *In re Welfare of J.W.* that rationale was specifically rejected. 415 N.W.2d at 882.

263. *In re H.R.K.*, 433 N.W.2d at 50.

264. *Id.*

265. *See* discussion *supra* part IV.B. In terming the parents' claim "novel," the court was apparently also unaware of any other cases which applied Fifth Amendment jurisprudence to the instance of court-ordered therapy. *In re H.R.K.*, 433 N.W.2d at 50. This inability to gain from the experience of other courts is not unique to the Iowa Court of Appeals. *Imlay* did not cite to one other case involving court mandated therapy and the Fifth Amendment privilege. This may be due to the dearth of research on the issue. Prior to this comment, there had been no effort to compile these cases.

266. *Id.* at 50.

267. 534 N.Y.S.2d 64 (Fam. Ct. 1988), *aff'd sub nom. In re* Travis Lee G., 565 N.Y.S.2d 136 (App. Div. 1991).

268. *Id.* at 71.

269. *Id.* at 65.

therefore neither could the safety of their child.[270]

The State of Florida has taken especially potent steps toward protecting children from child abuse and sex offenses.[271] Although recently repealed, the State had even codified the requirement that offenders admit guilt in order to undergo therapy.[272] Florida Administrative rule 33-19.001(3) provided:

> An offender shall be considered amenable for treatment if he or she is an individual with a psycho sexual disorder who is motivated to participate in treatment' for this disorder and has an intellectual capacity for logical reasoning and insight. The offender must be able to feel some remorse for his or her behavior and to eventually accept responsibility for his behavior and for changing it . . . .[273]

Pursuant to the rule, where a special condition of probation requires a defendant to undergo therapy, a proper psychiatric evaluation is a condition precedent to any obligation of the defendant to participate in a program.[274] The examination must establish that the defendant is amenable to treatment within the meaning of rule 33-19.001(3).[275] If the defendant is deemed amenable for treatment, it is not violative of the Fifth Amendment to require the defendant to "eventually accept responsibility for his behavior and for changing it."[276]

In upholding the constitutionality of the rule, Florida's First District Court of Appeal held that the Fifth Amendment was not violated "in that any admission of the commission of the offense occurs after the defendant's conviction, and Fifth Amendment protections apply prior to conviction."[277] This reasoning is plain wrong.[278] The United States Supreme Court has

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270. *Id.* at 71-72.

271. *Cf.* Walter E. Forehand, *Are New Procedures Correction Enough for Florida's Child Abuse Registry Statute*, 18 FLA. ST. U. L. REV. 371 (1991) (suggesting that perhaps Florida has gone too far); FLA. STAT. § 415.504(2)(a) (1991) (establishing toll-free number for anonymous informers); *Id.* § 415.512 (abrogating all but attorney/client privilege when communication pertains to child abuse).

272. FLA. ADMIN. CODE ANN. r. 33-19.001(3) (1980) (repealed 1992).

273. *Id.*

274. Yancey v. Florida, 547 So. 2d 1040, 1041 (Fla. 1st Dist. Ct. App. 1989).

275. *Id.*

276. Henderson v. Florida, 543 So. 2d 344, 346 (Fla. 1st Dist. Ct. App. 1989).

277. *Id.* at 346. This Florida case was among the three cited in Justice White's dissent as being in conflict with the Montana decision. *Imlay*, 113 S. Ct. at 444.

278. The court used only one paragraph in a two-page decision to adjudicate the constitutionality of the Rule. Because the opinion lacked much in the way of reasoned

clearly found the privilege to outlive the conviction.[279] Perhaps aware of the deficiencies in its rationale, the court went on to say that "[e]ven if the requirement of admission of guilt under the rule impinged on Fifth Amendment rights, the inmate is not compelled to incriminate himself because the inmate may choose not to participate in the program."[280] In this way, the court reached a result similar to that reached in *In re H.R.K.* by the Iowa Court of Appeals.[281] Recognizing that it may not be able to compel defendants to enter programs and admit their guilt, it may, nonetheless, disallow therapy and probation in favor of prison time if they do not.[282] Like, *In re H.R.K.*, the *Henderson* opinion neglected any discussion of the "penalty" cases.[283]

In the related decision of *Carson v. Jackson*,[284] Florida's Fourth District Court of Appeal did consider the "penalty" cases and still found no Fifth Amendment violation.[285] Linda Carson was ordered to undergo treatment for abusing a child for whom she babysat.[286] In a subsequent and unrelated civil suit for child abuse, the plaintiffs attempted to discover communications between Carson and her psychologist.[287] While discovery in the civil suit was being conducted, Carson also had a criminal charge pending that arose out of the same conduct.[288] Carson maintained that any communications the psychologist might disclose would constitute compelled self-incrimination that may be used against her at the criminal proceeding.[289] As Carson's counsel put it, "She was initially compelled in a prior judicial proceeding to confer with this court-appointed psychologist or face possible sanctions for non-cooperation. Is it then fair to use such compelled

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discussion, it is fair to suggest that perhaps the court gave no reasoned consideration.

279. *See* Minnesota v. Murphy, 465 U.S. 420, 426 (1984) ("A defendant does not lose this protection by reason of his conviction of a crime."); *see also* Asherman v. Meachum, 932 F.2d 137, 145 (2d Cir. 1991) ("The privilege continues even after a person has been convicted of a crime").

280. *Henderson*, 543 So. 2d at 346.

281. *See In re H.R.K.*, 433 N.W.2d at 50; *supra* pp. 1474-75.

282. *See Henderson*, 543 So. 2d at 345; *see also* Archer v. Florida, 604 So. 2d 561 (Fla. 1st Dist. Ct. App. 1992) (did not reach Fifth Amendment issue due to procedural reasons but allowed revocation of probation, due to failure to successfully complete therapy program, to stand).

283. *See supra* note 278; discussion *supra* part IV.B.

284. 466 So. 2d 1188 (Fla. 4th Dist. Ct. App. 1985).

285. *Id.* at 1191.

286. *Id.* at 1189-90.

287. *Id.* at 1190.

288. *Id.* at 1189.

289. *Carson*, 466 So. 2d at 1191.

testimony or records against her in a subsequent criminal or civil action?"[290]

The court held that it was fair to allow discovery because it did not violate Carson's Fifth Amendment rights.[291] The court first recognized that, in the ordinary case, if a witness desires the protection of the Fifth Amendment privilege, he or she must assert it in a timely fashion.[292] In this case, Carson did not claim the privilege at the time of the disclosure.[293] The court also recognized the exception to this general rule as carved out by the "penalty" cases.[294] Therefore, the question left to the court was whether Carson was forced to incriminate herself upon the threat of judicial sanctions, thus excusing her failure to assert her rights before.[295] The court found the "penalty" cases to be inapplicable to Carson's situation.[296] Carson had agreed to undergo the therapy knowing full well that the trial court would not allow her to babysit again until the psychologist assured the judge that she had been rehabilitated.[297] For this reason, the court found, Carson had advance knowledge that her communications would be conveyed to others.[298] With this forewarning, the court held that Carson could not now complain of an infringement of her Fifth Amendment privilege.[299] In essence, the court holds that one may fairly be placed in an otherwise unconstitutional "penalty" situation, so long as there is advance knowledge.[300]

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290. Petition for Writ of Certiorari at 6, Carson v. Jackson, 466 So. 2d 1188 (Fla. 4th Dist. Ct. App. 1985) (No. 84-2301).

291. *Carson*, 466 So. 2d at 1192.

292. *Id.*; *see also Murphy*, 465 U.S. at 434.

293. *Carson*, 466 So. 2d at 1192.

294. *Id.*; *see also Murphy*, 465 U.S. at 434; *supra* part IV.B.

295. *Carson*, 466 So. 2d at 1191-92.

296. *Id.* at 1192.

297. *Id.*

298. *Id.*

299. *Id.* In doing so, however, the court was careful to limit its holding only to "these specific circumstances . . . ." *Carson*, 466 So. 2d at 1192.

300. *Id.* Florida's Third District Court of Appeal seems to uphold this practice as well. In one case, the court revoked probation for failure of the defendant to successfully complete a sex offender program and sentenced him to sixty years imprisonment. Brown v. Florida, 400 So. 2d 812 (Fla. 3d Dist. Ct. App. 1981). The court did not reach the Fifth Amendment issue. *Id.* Florida's Second District Court of Appeal has also upheld the practice, albeit less enthusiastically. Young v. Florida, 566 So. 2d 69 (Fla. 2d Dist. Ct. App. 1990). In *Young*, that court held that it was an abuse of discretion to revoke defendant's probation merely because he refused to admit guilt during treatment. *Id.* at 69-70. The court's decision was guided by the fact that the defendant was now willing to

And then there is *Russell v. Eaves*,[301] in which a prisoner challenged the practice of the Missouri Sexual Offender Program (MOSOP) requiring prisoners to "accept responsibility" for their crimes.[302] MOSOP is an in-patient rehabilitative program operated by prison employees in which sex offenders are required to participate in order to qualify for parole.[303] Like the program in Fort Lauderdale,[304] MOSOP has two phases.[305] The first is a preliminary phase in which patients are encouraged to get in touch with their feelings about their crime(s).[306] The second phase involves straight therapy.[307] Patients cannot complete the second phase until they accept responsibility for their crimes.[308]

The court set forth three independent reasons for ruling Russell's Fifth Amendment claim "legally frivolous."[309]

> First, MOSOP is not a criminal proceeding, but a clinical rehabilitative program. Second, plaintiff's "testimony" is not compelled. He can refuse to participate in MOSOP. Finally, plaintiff has already been convicted of the crime for which MOSOP requires he accept responsibility. While it is true that any future prosecution for that same crime could potentially violate the fifth amendment's double jeopardy clause . . . such a scenario is purely speculative at this point and, so, not properly before this Court.[310]

It is not clear why the court looked to the character of the treatment program.[311] It is not particularly relevant that the program itself is not a criminal proceeding.[312] What matters is whether statements made therein

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try again. *Id.* at 70. In this way the court appeared to give its tacit approval to the practice, while not ruling upon the Fifth Amendment issue. *Id.*; *cf.* Davidson v. Florida, 419 So. 2d 728 (Fla. 2d Dist. Ct. App. 1982) (abuse of discretion to revoke probation for failure to complete therapy program where defendant left program at behest of therapist and probation officer).

301. 722 F. Supp. 558 (E.D. Mo. 1989).
302. *Id.* at 559.
303. *Id.*
304. *See* discussion *supra* part III.
305. *Russell*, 722 F. Supp. at 559.
306. *Id.*; *see* discussion *supra* part III.
307. *Russell*, 722 F. Supp. at 559.
308. *Id.*
309. *Id.* at 560-61.
310. *Id.*
311. *See id.*
312. *See* Allen v. Illinois, 478 U.S. 364, 368 (1986) (privilege protects against

can be used *in* a criminal proceeding.[313] Next, in holding that the testimony is not compelled because Russell could elect not to enter the program, the court seems to take a view akin to that of the *In re H.R.K.* and *Henderson* courts.[314] If the defendants waive their privilege, they can get out of jail.[315] If they refuse to incriminate themselves, they must remain incarcerated.[316] As in *re H.R.K.* and *Henderson*, the *Russell* court neglected to mention the "penalty" cases. The court's final contention, that incrimination is "speculative" and thus not "properly before this Court," is highly dubious.[317] The privilege against self-incrimination protects a witness "where the answers *might* incriminate him in future criminal proceedings."[318] The privilege does not require a court to wait until the harm has already been done.[319]

As then Circuit Judge Scalia once stated in a similar context: "All of these theories are easy game, but it is not sporting to hunt them. . . . [These theories] are devices—no more fictional than many others to be found—for weaving a result demanded on policy grounds unobtrusively into the fabric of law."[320] It being highly desirable to protect the citizenry from repeat offenders, the courts therefore combat logic to bring the therapy programs within constitutional bounds. Other courts have been unable to do so.

2. Fifth Amendment Violated

Like Donald Imlay, the defendant in *Gilfillen v. Indiana*,[321] main-

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compelled testimony in any proceeding "where the answers might incriminate [the witness] in future criminal proceedings").

313. *Id.*

314. *See supra* pp. 49-53.

315. *Russell*, 722 F. Supp. at 560.

316. *Id.*

317. *Id.* at 561.

318. *Turley*, 414 U.S. at 77 (emphasis added); *accord Murphy*, 465 U.S. at 426.

319. *See* Gardner v. Broderick, 392 U.S. 273, 279 (1968) (privilege will not abide any attempt, "regardless of its ultimate effectiveness," to coerce waiver); United States v. Edgerton, 734 F.2d 913, 921 (2d Cir. 1984) (witness need not go beyond threshold showing of potential incrimination); United States v. Jones, 703 F.2d 473, 477-78 (10th Cir. 1983); United States v. Miranti, 253 F.2d 135, 139 (2d Cir. 1958) (making Fifth Amendment protection hinge upon likelihood of prosecution "would nullify the privilege"); Mace v. Amestoy, 765 F. Supp. 847, 851 (D. Vt. 1991) ("The proper consideration . . . is the nature of the coerced disclosure, not the likelihood of prosecution").

320. United States v. Byers, 740 F.2d 1104, 1113 (D.C. Cir. 1984) (in the context of waiving one's Fifth Amendment rights in psychiatric examinations by placing sanity in issue at trial).

321. 582 N.E.2d 821 (Ind. 1991).

tained his innocence even after his conviction for child molestation.[322] After serving time, Gilfillen was placed on probation with the condition that he receive corrective therapy, but was terminated from the program because he refused to admit his guilt.[323] Like Imlay, Gilfillen persisted and contacted another program but was denied admission due to the strength of his denial.[324] The trial court, thereafter, revoked Gilfillen's probation.[325]

The Supreme Court of Indiana reversed, holding that a trial court may not insist on an admission of guilt as a condition of probation where the defendant has maintained his innocence from the outset.[326] "Under these circumstances, requiring Gilfillen to admit that he has a problem with child molesting . . . is tantamount to requiring that he admit that he is guilty of the crimes charged. Clearly, this is unacceptable."[327] Gilfillen did not plead guilty and could not now be compelled to do so.[328]

Illinois v. Prusak[329] represents the more typical case where a defendant does plead guilty.[330] Prusak pleaded guilty to "knowingly fondling his daughter's breasts."[331] A condition to his three-year probation was that he undergo sexual therapy.[332] When Prusak maintained his innocence during therapy, the trial court revoked his probation and sent him to jail for five years.[333]

The court did not find it necessary to raise the Fifth Amendment issue, instead holding that the trial court abused its discretion in revoking Prusak's probation based upon his refusal to admit to any wrongdoing.[334] As in *Imlay* and *Gilfillen*, the court considered how Prusak had made a good-faith

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322. *Id.* at 823. Gilfillen was charged with two counts of child molestation and one count of incest. *Id.* at 822.

323. *Id.* at 822-23.

324. *Id.* at 823.

325. *Gilfillen*, 582 N.E.2d at 823.

326. *Id.* at 824.

327. *Id.*

328. *Id.*

329. 558 N.E.2d 696 (Ill. App. Ct. 1990).

330. Sex crime or child abuse defendants often plead guilty to the crime charged or to a lesser crime pursuant to a negotiated plea agreement with the prosecutor. It is speculated that, in this area of the law, more than in any other, the danger is great that an innocent person will be convicted due to the incentives to "plea out." Telephone Interview with Reverend Bill Wendler, New York State President, Victims of Child Abuse Laws (V.O.C.A.L.) (Jan. 16, 1993).

331. *Prusak*, 558 N.E.2d at 697.

332. *Id.*

333. *Id.* at 698.

334. *Id.* at 699.

effort to comply with his probation conditions.[335] Prusak had attended each and every counseling session for the approximately five months until his probation was revoked.[336]

> The only thing that Prusak did not do was accept responsibility for his sexual misconduct. However, Riley [the therapist], stated that denial is "almost universal" amongst sex offenders. It appears that Prusak was simply exhibiting a common behavior of persons convicted of sexual misconduct. It seems paradoxical to classify an individual as a sex offender and sentence him to probation and then revoke his probation because he exhibits behavior commonly displayed by sex offenders.[337]

To be sure, the court's concern is adequately documented by therapy professionals.[338] Sex-offenders are inherently offense-deniers.[339] To punish a sex offender for his denial of guilt is akin to punishing a diabetic for having high blood-sugar. And, although the *Prusak* court found it unnecessary to reach the issue, others continue to find it violative of the Fifth Amendment.

Robert Mace was charged in Vermont state court with sexually assaulting his fourteen year-old stepdaughter.[340] The affidavit in support of the complaint stated that the victim reported having sexual intercourse with Mace since she was eleven years-old.[341] Instead, Mace pleaded guilty to an amended information alleging that he had touched his penis to the victim's leg in order to satisfy his prurient interests.[342] Mace was sentenced to probation with the special condition that he successfully complete a sexual therapy program.[343] The therapist required that Mace admit to having sexual intercourse with the victim but Mace continued to maintain that he never had sex with his stepdaughter, although he did admit to other acts.[344] At a subsequent probation revocation hearing, both Mr. and Mrs. Mace gave testimony inconsistent with a finding that sexual

335. *Id.* at 698.
336. *Prusak*, 558 N.E.2d at 697-98.
337. *Id.* at 698.
338. *See supra* part III.
339. *Id.*
340. *Mace*, 765 F. Supp. at 847.
341. *Id.* at 848.
342. *Id.*
343. *Id.*
344. *Id.*

intercourse had occurred.[345] Mace also submitted evidence from the victim's doctor that stated she was still a virgin.[346] More to the point, the victim herself testified that no sexual intercourse had taken place.[347] In the face of all this evidence, the trial judge chose to rely upon the opinion of the treating therapist that intercourse had in fact occurred.[348] It therefore revoked Mace's probation for not coming forth with that admission himself.[349] Soon after deciding the *Gleason* case, the Vermont Supreme Court affirmed[350] and Mace raised a Fifth Amendment claim in this federal habeas corpus action.[351]

The district court vacated the probation revocation[352] and held that Mace's Fifth Amendment privilege against self-incrimination was violated by requiring him to admit to having sexual intercourse with his stepdaughter.[353] The court first set its seal to the longstanding rule that the Fifth Amendment survives conviction.[354] It then noted that a defendant must usually make an affirmative assertion of the privilege, barring that "well defined exception" where a defendant is deprived of his "'free choice to admit, to deny, or to refuse to answer.'"[355] In such "penalty" cases, the court recognized that the privilege becomes "self-executing."[356]

In Mace's case, the trial court had attempted to exact an admission of sexual intercourse—a crime for which he could be prosecuted.[357] He was threatened with, and later subjected to, revocation of his probation for failing to make such an admission.[358] "He was therefore placed in the 'classic penalty' situation and the privilege became self-executing."[359] The Vermont Supreme Court, reminiscent of *Gleason*,[360] held that this penalty situation was not a real fear since the fact that additional charges could be

345. *Mace*, 765 F. Supp. at 849.
346. *Id.*
347. *Id.*
348. *Id.*
349. *Id.*
350. *Mace*, 765 F. Supp. at 849; *see also Gleason*, 576 A.2d at 1246.
351. *Mace*, 765 F. Supp. at 849.
352. *Id.* at 852.
353. *Id.* at 850.
354. *Id.*
355. *Id.* (quoting Lisenba v. California, 314 U.S. 219, 241 (1941)).
356. *Mace*, 765 F. Supp. at 850 (construing *Murphy*, 465 U.S. at 435).
357. *Id.* at 851.
358. *Id.*
359. *Id.*
360. 576 A.2d at 1246; *see supra* pp. 1453-55.

brought was only "theoretically true" and that the State was unlikely to prosecute.[361] The federal court, with notable patience, explained that the Amendment protects one from the threat of *possible* prosecution, not only that which the trial court finds probable.[362]

The court also took issue with a recurring theme coming from the courts which find no Fifth Amendment violation[363]—that the state's rehabilitative interest outweighs a defendant's constitutional privilege against self-incrimination.[364]

> [W]hat is at issue is the disclosure, not the purpose of the disclosure. Certainly the state has a legitimate rehabilitative purpose in demanding full disclosure, but that does not make the disclosure any less incriminating. "Citizens may not be forced to incriminate themselves merely because it serves a governmental need."[365]

3. A Dubious Compromise

And so again the conflict arises. The main contention between the two alternative views—those finding a Fifth Amendment violation and those which do not—seems to be balancing the goal of rehabilitating the offender against the offender's right to remain silent.[366] The third category of cases finds a Fifth Amendment violation in requiring an offender to admit to his or her acts but limits the result of that holding based upon the rehabilitative interest of the State.[367]

In *In re Welfare of J.W.*,[368] non-custodial parents were ordered into a treatment program which required them to explain the circumstances surrounding their nephews death.[369] Successful completion of the program

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361. *Mace*, 765 F. Supp. at 851.

362. *Id.* ("[t]he proper consideration . . . is the nature of the coerced disclosure, not the likelihood of prosecution"); *accord Edgerton*, 734 F.2d at 921 (witness need not go beyond threshold showing of potential incrimination); United States v. Jones, 703 F.2d 473, 477-78 (10th Cir. 1983); *Miranti*, 253 F.2d at 139 (2d Cir. 1958) (making Fifth Amendment protection hinge upon likelihood of prosecution "would nullify the privilege").

363. *See* discussion *supra* at pp. 1474-80.

364. *Mace*, 765 F. Supp. at 852.

365. *Id.* (quoting United States v. Oliveras, 905 F.2d 623, 628 (2d Cir. 1990)).

366. *See supra* note 248.

367. *See In re Welfare of J.W.*, 415 N.W.2d at 879; *In re Welfare of J.G.W.*, 429 N.W.2d at 284; *In re M.C.P.*, 571 A.2d at 627.

368. 415 N.W.2d at 879.

369. *Id.* at 881.

was mandated as a condition precedent to the parents' regaining custody of their own children.[370] When questioned about the nephew's death in pre-trial depositions, the parents invoked their Fifth Amendment privilege against self-incrimination.[371] They continued to assert the privilege throughout the court-mandated therapy program.[372] The question before the Minnesota Supreme Court was whether it violated the parents' Fifth Amendment rights when the court ordered them to explain the death during therapy.[373]

The court observed that if the parents complied with the court order, they may be incriminating themselves and be liable to criminal prosecution.[374] On the other hand, noted the court, if the parents continued to assert the privilege, they would lose their children.[375] Following the "penalty" cases,[376] the court found that such "potent sanctions" clearly violated the parents' Fifth Amendment rights.[377] But the inquiry did not stop there.[378] "The critical issue," stated the court, "is not whether a privilege exists but how far the mantle of its protection extends."[379]

The court recognized the two conflicting principles of ensuring the safety of the children and protecting the integrity of the Fifth Amendment.[380] The court held that, to the extent the probation condition requires self-incrimination, it is unenforceable.[381] "Assertion of a constitutional right does not make a person a less fit parent, any more than it makes a person a less fit citizen. . . . But this is as far as the privilege extends protection."[382] Courts may attempt to fulfill their parens patriae by continuing to mandate treatment, so long as revocation of probation is never based upon a failure to confess during that treatment.[383]

But, recognized the court, the parents are still confronted with quite a

370. *Id.* at 881-82.
371. *Id.* at 880.
372. *Id.* at 881.
373. *In re Welfare of J.W.*, 415 N.W.2d at 881-82.
374. *Id.*
375. *Id.*
376. *See supra* part IV.B.
377. *In re Welfare of J.W.*, 415 N.W.2d at 882.
378. *Id.* at 882-84.
379. *Id.* at 883.
380. *Id.* at 883-85.
381. *Id.* at 883.
382. *In re Welfare of J.W.*, 415 N.W.2d at 883.
383. *Id.*

dilemma.[384] In order to regain their children, the parents must still prove to the court that a "meaningful change" has occurred.[385] In light of overwhelming evidence that an admission of guilt is necessary for meaningful change to occur,[386] the court realized that this would be a difficult task where one refuses to accept responsibility.[387] Nevertheless, found the court, it is a dilemma which the Fifth Amendment does not address.[388]

The Minnesota Supreme Court's approach is an interesting compromise. It recognizes that a revocation of probation for failure to admit guilt during therapy falls within the "classic penalty situation" forbidden by the Fifth Amendment.[389] However, the court does not cower from its responsibility to the child victims of abusive parenting.[390] The court still places the burden squarely on the shoulders of the offenders to prove they can now be good parents.[391] For example, the parents may attempt to disprove the assumption that meaningful change can occur only with an admission of guilt.[392] In adopting this view in the limited context of child custody cases, the Vermont Supreme Court summarized the issue best:

> "While the court may not specify that the only route to reunification is an abandonment of the self-incrimination right, the parents must expect that the court and [State Rehabilitative Services] will act based on the findings of extreme parental abuse. If the parents can find a way to show that they have become good parents, without admitting to any misconduct, and that a restoration of custody of the juvenile to them is in the best interest of the child and is safe, the court may not foreclose the option.[393]

This category of cases stands for a dual proposition—that concern for the children does not permit a trampling of Fifth Amendment protection, but that Fifth Amendment protections do not extend so far as to prevent a court from demanding proof of reform before returning children to their parents.

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384. *Id.* at 884.
385. *Id.*
386. *See supra* notes 67-74 and accompanying text; *In re Welfare of J.W.*, 415 N.W.2d at 883.
387. *In re Welfare of J.W.*, 415 N.W.2d at 883.
388. *Id.*
389. *See id.* at 882.
390. *See id.* at 883-84.
391. *Id.* at 883.
392. *In re Welfare of J.W.*, 415 N.W.2d at 883.
393. *In re M.C.P.*, 571 A.2d at 641.

This seems to be a more reasonable and socially utilitarian rule of law than do those decisions that find no Fifth Amendment violation or those decisions that do find a violation, but take the added risk of placing the public in harm's way. Unfortunately, this position shows little deference to the numerous therapy professionals which have found acceptance of responsibility not to be a preference, but to be required in order for meaningful change to occur.[394]

It would seem then, that all three conceptions of the Fifth Amendment represent something of a Procrustean fit to the arena of court-mandated therapy programs. To hold, in the first instance, that the Fifth Amendment is violated, does much to uphold the sanctity of the privilege, but does little to protect society from repeat offenders. To hold, in the second category, that the privilege is not violated, may ensure a safer world, but shows little regard for the Amendment. And the third position is merely a practice in judicial diplomacy. Despite prevailing professional theory, these cases hold that the parents may put on proof other than an admission to show effective change. Fortunately, there is another way.

V. The Best of Both Worlds: Judicial Use Immunity

This note has canvassed a broad variety of cases which speak to the Fifth Amendment implications of court ordered therapy.[395] From the three different views that have emerged, one is left with the sober realization that none of the approaches adequately reconciles the conflicting interests.[396] On the one hand is the desire to make rehabilitation an effective option; on the other, is the compelling need to uphold the potency of the Fifth Amendment.[397] At its core, the problem surrounds the desire to compel an individual to accept responsibility for her or his crimes without offending the privilege against self-incrimination.[398] It would be the best of all worlds then, to disallow the use of any incriminating statements made during therapy so that the rehabilitative process can be most effective.[399] After all, the offender has already been convicted and sentenced for the underlying crime and the State has already made a decision to rehabilitate

394. *See supra* notes 67-74 and accompanying text.
395. *See* discussion *supra* part IV.C.
396. *See supra* p. 1486.
397. *Compare supra* part II *with supra* part III.
398. *See* discussion *supra* part IV.C.
399. *See, e.g., In re M.C.P.*, 571 A.2d at 640-41.

rather than incarcerate. Having made this choice, it would be defeatist to disallow the full realization of that goal when a reasonable remedy exists.

Courts can grant "use" immunity to defendant's who are ordered to undergo therapy.[400] In this way, the defendant's Fifth Amendment rights cannot be abridged by compelling an admission of guilt.[401] Moreover, the State's interest in rehabilitation is served because offenders and therapists would then be unfettered in pursuing effective treatment.[402]

Use immunity is co-extensive with the privilege against self-incrimination.[403] It is employed when the need to compel testimony outweighs the need to prosecute further.[404] Use immunity prevents the prosecution from using any testimony, either directly or derivatively,[405] against the witness in a subsequent prosecution.[406] Significantly, however, a grant of use immunity does not free a witness from prosecution for crimes about which testimony is given.[407] It only provides that in any further proceeding against the witness, the government must come up with its case without benefitting from that testimony.[408] To this end, the government has the burden of proving that any evidence used was not derived from the immunized testimony.[409] Moreover, once under a grant of use immunity, a witness cannot refuse to testify.[410]

Since the Fifth Amendment extends only to statements that may incriminate the witness, if a witness is under immunity, he or she may be compelled to testify without running afoul of the privilege.[411] In fact, use

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400. *Id.*

401. *Id.*

402. *Cf.* discussion *supra* part III.

403. *See* Kastigar v. United States, 406 U.S. 441, 453-62 (1972) (statutory use immunity leaves witness and prosecution in same position as if witness had claimed privilege except testimony comes out); United States v. Harvey, 869 F.2d 1439, 1446 (11th Cir. 1989) (testimony may be compelled where use immunity provides protection equal to Fifth Amendment).

404. *See* Roger C. Spaeder, *The Challenge of Negotiating Immunity*, CRIM. JUST., Summer 1992, at 8.

405. Unless otherwise specified, "use" immunity is presumed to include "derivative use" immunity. United States v. Plummer, 941 F.2d 799, 804 (9th Cir. 1991).

406. *Kastigar*, 406 U.S. at 453-62.

407. Counselman v. Hitchcock, 142 U.S. 547, 585-586 (1892).

408. United States v. Watt, 910 F.2d 587 (9th Cir. 1990). "Transactional" immunity forbids prosecution on any covered testimony, regardless of whether the government can come up with independent evidence. *Kastigar*, 406 U.S. at 443.

409. *Harvey*, 869 F.2d at 1445.

410. *E.g.*, United States v. Lach, 874 F.2d 1543 (11th Cir. 1989).

411. Brown v. Walker, 161 U.S. 591 (1896) (statute granted immunity to witnesses

immunity agreements are likened to a contract between the government and the witness.[412] If the witness refuses to testify, thus not living up to his or her end of the bargain, the witness can be greeted with a criminal contempt charge.[413]

In the context of court-ordered therapy, it would then be constitutionally permissible to order defendants to accept responsibility for their crimes.[414] They may still wish not to admit their guilt, but they can no longer fall back on the Fifth Amendment to protect them.[415] In other words, they are forced to undergo the most effective therapy possible.[416]

A. *Why Opposition to Judicial Use Immunity is Unwarranted in Court-Mandated Therapy*

The solution sounds so attractive, so amenable to the realm of court-ordered therapy, that the question must arise as to why all of the cases previously canvassed could not have required it.[417] The answer is twofold. First, prosecutors are unlikely to extend immunity unless it serves a prosecutorial function.[418] While society has an interest in effective rehabilitation, the prosector is naturally reluctant to extend immunity unless there is a reciprocal prosecutorial pay-off.[419] Second, most courts feel that they lack the inherent authority to override the executive branch and grant immunity sua sponte.[420] These courts view judicial use immunity as an unnecessary encroachment on prosecutorial discretion.[421] They view their

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in Interstate Commerce Commission probes so that they are therefore compelled to testify without any breach of Fifth Amendment); *Lach*, 874 F.2d at 1547 (witness found in criminal contempt for refusing to testify after grant of use immunity).

412. United States v. Fulbright, 804 F.2d 847, 852 (5th Cir. 1986) ("Immunity agreements are in the nature of contracts and are to be construed accordingly").

413. *Lach*, 874 F.2d at 1547.

414. *E.g.*, *In re M.C.P.*, 571 A.2d at 627.

415. *Id.* at 640.

416. *See id.*

417. *See* cases discussed *supra* part IV.C.

418. *Cf.* Spaeder, *supra* note 404, at 8.

419. *Id.*

420. *See, e.g.*, United States v. Pratt, 913 F.2d 982, 991 (1st Cir. 1990) (court has no general power to order immunity for defense witnesses); United States v. Doddington, 822 F.2d 818, 821 & n.1 (8th Cir. 1987) (court lacks authority to grant statutory immunity; only prosecutor has that power); United States v. Sawyer, 799 F.2d 1494, 1506-07 (11th Cir. 1986) (per curiam) (district court lacks inherent authority to grant use immunity to defense witness possessing exculpatory information).

421. *See id.*

province as ruling upon procedural devices, not creating them.[422] In their view, a grant of use immunity would therefore be outside the ambit of a court's ordinary function.[423]

While there is a conflict among the courts, those permitting judicial use immunity are clearly in the minority,[424] and the United States Supreme Court has yet to tip its hand.[425] Still, those courts which advocate the

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422. *Id.*

423. *Id.*

424. *Compare Pratt*, 913 F.2d at 991 (court has no general power to order immunity for defense witnesses); *Doddington*, 822 F.2d at 821 & n.1 (court lacks authority to grant statutory immunity; only prosecutor has that power); *Sawyer*, 799 F.2d at 1506-07 (district court lacks inherent authority to grant use immunity to defense witness possessing exculpatory information); United States v. Pennell, 737 F.2d 521 (6th Cir. 1984), *cert. denied*, 469 U.S. 1158 (1985) (federal courts have no inherent authority to grant immunity); United States v. Hunter, 672 F.2d 815 (10th Cir. 1982) (same); United States v. D'Apice, 664 F.2d 75 (5th Cir. Unit B 1981) (expressly rejecting concept of judicial use immunity); United States v. Karas, 624 F.2d 500, 505 (4th Cir. 1980) (district court has no authority to confer immunity sua sponte); United States v. Gleason, 616 F.2d 2, 27-28 (2d Cir. 1979), *cert. denied*, 444 U.S. 1082 (1980) (same); *In re* Daley, 549 F.2d 469 (7th Cir.), *cert. denied*, 434 U.S. 829 (1977) (same); Harding v. Colorado, 708 P.2d 1354 (Colo. 1985) (court has no power to grant use immunity absent request by prosecutor); Florida v. Montgomery, 467 So. 2d 387 (Fla. 3d Dist. Ct. App. 1985) (same); Illinois v. Burrows, 592 N.E.2d 997, 1008 (Ill. 1992); *In re* Noel N., 465 N.Y.S.2d 1008 (Fam. Ct. 1983) (court of limited jurisdiction cannot grant immunity that will bar proceedings in other courts); Ohio v. Landrum, 559 N.E.2d 710 (Ohio 1990); Pennsylvania v. Johnson, 487 A.2d 1320 (Pa. 1985); Norwood v. Texas, 768 S.W.2d 347, 349 (Tex. Ct. App. 1989) *with* United States v. Heldt, 668 F.2d 1238 (D.C. Cir. 1981) (court has power to grant use immunity but not on these facts); Virgin Islands v. Smith, 615 F.2d 964 (3d Cir. 1980) (court has inherent power to grant use immunity when the interests of justice demand it); Earl v. United States, 361 F.2d 531 (D.C. Cir. 1966) (Burger, J.), *cert. denied*, 388 U.S. 921 (1967); United States v. Ditizio, 530 F. Supp. 175 (E.D. Pa. 1982) (granted judicial use immunity to exculpating defense witness); United States v. DePalma, 476 F. Supp. 775 (S.D.N.Y. 1979) (court has power to grant use immunity); United States v. Zayas, 24 M.J. 132 (C.M.A. 1987) (same); Alaska v. Echols, 793 P.2d 1066 (Alaska 1990) (same); *In re* Jessica B., 254 Cal. Rptr. 883 (Ct. App. 1989) (judicial use immunity must extend to persons undergoing therapy where there statements would otherwise be used against them); Lavette v. Florida, 442 So. 2d 265 (Fla. 1st Dist. Ct. App. 1983) (implicitly recognized judicial use immunity as option but not appropriate on facts of the case); New Jersey v. McGraw, 608 A.2d 1335 (N.J. 1992) (court has inherent power to grant use immunity); New Mexico v. McGee, 621 P.2d 1129, 1133 (N.M. Ct. App. 1980) (same); South Dakota v. Swallow, 405 N.W.2d 29, 41 (S.D. 1987) (same).

425. The Court first confronted the issue in Autry v. McKaskle, 465 U.S. 1085 (1984) and denied certiorari. Six years later, the court denied certiorari to Hunter v. California, 111 S. Ct. 222 (1990), another case which addressed judicial use immunity. Justice Marshall dissented in both instances stating that the conflict should be resolved.

limited use of judicially imposed immunity are not without support. At least one state has statutorily authorized its courts to grant use immunity,[426] and legal academia has generated much debate, nearly all of it urging some adoption of judicial use immunity.[427]

Furthermore, the concerns typically enunciated by the opponents of judicial use immunity are not at all implicated in court-ordered therapy. For example, there are those who argue that use immunity would disallow the prosecution of otherwise addressable crimes.[428] This issue is often raised when an exculpatory defense witness is immunized.[429] The defense feels that the testimony is crucial to its case, but the prosecutor is wary of letting another potential criminal go free.[430] By the time a defendant is ordered into therapy, however, his or her guilt for the underlying crime has already

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Autry, 465 U.S. at 1085; *Hunter*, 111 S. Ct. at 222. Justice Powell's comment that "[n]o court has authority to immunize a witness" was directed exclusively to a court's self-employment of the Federal Immunity Statute, 18 U.S.C. §§ 6002-03 (1988), which specifically vests statutory immunity decisions in the executive branch. Pillsbury Co. v. Conboy, 459 U.S. 248, 261 (1983).

426. N.J. STAT. ANN. § 9:17-50(b) (West 1993) ("If the refusal is upon the ground that the testimony or evidence might tend to incriminate the witness, the court, after notice to the prosecutor, may grant the witness immunity from all criminal liability on account of the testimony or evidence that the witness is required to produce."). But cf. FLA. STAT. § 415.511(b) (1991) ("nothing contained in this section shall be deemed to grant immunity, civil or criminal, to any person suspected of having abused or neglected a child, or committed any illegal act upon or against a child").

427. William W. Patton, *The World Where Parallel Lines Converge: The Privilege Against Self-Incrimination in Concurrent Civil and Criminal Child Abuse Proceedings*, 24 GA. L. REV. 473 (1990); Thomas K. Buck, *Self-Incrimination in Civil Litigation: The Evolution of California's Judicially Created Immunities from Murphy v. Waterfront Commission*, 9 HASTINGS CONST. L.Q. 351 (1982); Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71 (1974); Helen M. McCue, Note, *Separation of Powers and Defense Witness Immunity*, 66 GEO. L.J. 51 (1977); Donald Koblitz, Note, *"The Public Has a Claim to Every Man's Evidence": The Defendant's Constitutional Right to Witness Immunity*, 30 STAN. L. REV. 1211 (1978); Note, *The Sixth Amendment Right to Have Use Immunity Granted to Defense Witnesses*, 91 HARV. L. REV. 1266 (1978); William R. Stein, Note, *Resolving Tensions Between Constitutional Rights: Use Immunity in Concurrent or Related Proceedings*, 76 COLUM. L. REV. 674 (1976); Louis S. Quinn, Note, *Defense Witness Immunity - A "Fresh" Look at the Compulsory Process Clause*, 43 LA. L. REV. 239 (1982); Jana Winograde, Comment, *Jailhouse Informants and the Need for Judicial Use Immunity in Habeas Corpus Proceedings*, 78 CALIF. L. REV. 755 (1990). *But see* Richard L. Stone, Note, *The Case Against a Right to Defense Witness Immunity*, 83 COLUM. L. REV. 139 (1983).

428. *See* Stone, *supra* note 428, at 153 n.96.

429. *See* Winograde, *supra* note 427, at 758.

430. *See* Stone, *supra* note 427, at 152-53.

been adjudicated.[431] Therefore, society's interest in prosecuting crimes is not hindered by a grant of use immunity concurrent to the therapy order.[432] Furthermore, even if the breadth of the immunity were to reach to crimes other than the defendant has already been convicted for but for which he or she confessed during court-ordered therapy, use immunity does not bar the government from prosecuting the defendant for those crimes.[433] The State may still prosecute, so long as it establishes its case independent of the immune disclosures.[434]

Moreover, judicial use immunity, when applied to court-ordered therapy does little to hamper prosecutorial discretion.[435] Ordinarily, this concern is raised in the context of the government not being able to control its own trial strategy.[436] Again, the court-ordered therapy cases are very different from those in which a witness is granted immunity to testify for either side.[437] Here, the defendant him or herself is being granted immunity and only after conviction.[438] Accordingly, a grant of judicial use immunity to a defendant already tried, does little to hamper prosecutorial discretion.[439]

Indeed, it has been properly submitted that the judiciary is sometimes in a better position than the executive branch to decide upon a grant of immunity.[440] The court has the benefit of hearing from both sides—from the prosecution and the defense—as to whether immunity is proper in each case.[441] Whereas the prosecutor has a vested interest in the decision, the court is ideally the neutral arbiter.[442] Moreover, the court is the player ultimately responsible for the integrity of the legal system.[443] When applied to the court-ordered therapy cases, judicial use immunity registers as the only accommodation capable of protecting the parent's privilege against self-incrimination while advancing the compelling state goals of rehabilitating the offender.

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431. *See* discussion *supra* part IV.C.
432. *See* cases discussed *supra* part IV.C.
433. *Counselman*, 142 U.S. at 585-86.
434. *Kastigar*, 406 U.S. at 453.
435. *See* Patton, *supra* note 427, at 502.
436. *See* Stone, *supra* note 427, at 154.
437. *See, e.g.*, *Sawyer*, 799 F.2d at 1506-07; *Karas*, 624 F.2d at 505.
438. *See* cases discussed *supra* part IV.C.
439. *See* discussion *supra* part IV.C.
440. *See* Patton, *supra*, note 427, at 504.
441. *Id.*
442. *Id.*
443. *Id.*

B. *Judicial Use Immunity is a Reasonable Accommodation*

Certainly, the ideal remedy would be for the prosecutor's office itself to grant immunity. This would obviate any discussion on separation of powers and the ability of courts to intercede.[444] Unfortunately, such an accommodation is not in the cards. The forces operative in the prosecutor's office work against granting immunity to defendants who have nothing to offer in the way of future prosecutions.[445] Given their adversarial role, prosecutors "would never grant immunity to a sex offender."[446] In order, then, to safeguard the Fifth Amendment, courts must exercise their own supervisory powers.

In *re Jessica B.*,[447] a daughter was removed from her abusive parents subject to periodic review.[448] The dependency court stated that, when it reviews the custody of Jessica, one of the things it will require is an admission of the father's guilt during his court-ordered therapy.[449] Shortly after the dependency action, the parents had criminal charges brought against them for having had abused Jessica.[450] The father, fearing that anything he said during therapy would be used against him in his criminal trial, refused to accept responsibility for the abuse.[451] Upon dependency review, the parents were therefore denied any modification of the court's previous order.[452]

On appeal, the California Court of Appeals held that the father must be given use immunity for any statements he makes during his court-ordered therapy.[453] Indeed, it would be a fine thing to first order a person to undergo therapy and to admit his or her guilt, and to then punish the person for doing so.[454] The court found that, on these facts, the grant of use "immunity is essential to the constitutional privilege against self-incrimination and facilitates the goal of protecting the best interest of the minor and

444. *See* discussion *supra* part V.A.
445. *See supra* notes 418-19 and accompanying text.
446. Interview with Georgeann Stanley, United States Probation Officer, Southern District of Florida (Jan. 21, 1993).
447. 254 Cal. Rptr. at 883.
448. *Id.* at 884-85.
449. *Id.* at 885-86.
450. *Id.*
451. *Id.* at 893.
452. *In re Jessica B.*, 254 Cal Rptr. at 884-85.
453. *Id.* at 893.
454. *See id.*

achieving the reunification of the family at the earliest possible date."[455]

In *Mace v. Amestoy*,[456] the United States District Court for the District of Vermont had found a Fifth Amendment violation in requiring a defendant to admit guilt during court-ordered therapy.[457] The federal court found that the whole dilemma could have been avoided had the State granted use immunity to the defendant.[458]

> If the state wishes to carry out rehabilitative goals in probation by compelling offenders to disclose their criminal conduct, it must grant them immunity from criminal prosecution.
>
> A State may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminate the threat of incrimination.[459]

As the court noted, if a probationer, having been granted immunity, refused to accept responsibility during treatment, it would then be constitutionally permissible to revoke probation.[460] On the surface, it appears that such defendants are still being penalized for remaining silent. Indeed they are. Yet the Fifth Amendment does not grant an absolute right to keep quiet.[461] The privilege covers only those statements that may tend to incriminate a witness.[462] Since these defendants would have been immunized from further prosecution, they no longer bear a constitutional right to remain silent.[463] "In all such proceedings, 'a witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant.'"[464]

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455. *Id.* at 893-94; *see also* Gonzales v. Superior Court, 178 Cal. Rptr. 358, 364 (Cal. 1980) (judicial use immunity relieves "an alleged wrongdoer of the threat of criminal prosecution in exchange for incriminating information which the legislature has deemed to serve some socially desirable policy").

456. 765 F. Supp. at 847; *see supra* pp. 1482-84.

457. *Mace*, 765 F. Supp. at 852.

458. *Id.* at 851-52.

459. *Id.* at 852-53 (notes omitted).

460. *Id.* (dicta).

461. *Cunningham*, 431 U.S. 801, 805 (1977).

462. *Id.*

463. *See Counselman*, 142 U.S. at 560.

464. *Murphy*, 465 U.S. at 426 (quoting *Turley*, 414 U.S. at 78).

The goal is clear—in order to rehabilitate offenders, society demands their acceptance of responsibility for their criminal actions.[465] One court cut right to the marrow when it stated that "[w]ith or without meaningful therapy, the [defendants] may or may not be successfully rehabilitated, but the results can only be known after whatever treatment is tried."[466] As has been shown, the only way to surely "try" is to grant use immunity to the subjects of court-ordered therapy. It is true that a grant of immunity will do little for the defendant who truly believes in her or his innocence, but it will make all the difference to those who want to change but are thwarted by fear of incrimination.

VI. CONCLUSION

From the courts which have addressed the Fifth Amendment implications of court-ordered therapy, three views have surfaced; first, that the privilege against self-incrimination is not violated when a court requires a confession during court ordered therapy; second, that the privilege is violated in that defendants are faced with a "penalty" for asserting their constitutional rights; and third, that the privilege is violated but that parents in a dependency action must still overcome the assumption that change can only occur with an acceptance of responsibility.

As has been shown, none of these theories pass muster. In order to reach the first result, courts must all but ignore the rule that a defendant cannot be penalized for asserting his or her constitutional rights. To subscribe to the first rule is to neglect the rationale and history of the privilege against self-incrimination. The second approach shows much more respect for the Constitution but may deter sound rehabilitation. Still, in the absence of a reasonable accommodation, the second view must stand. It is the only approach that gives the Fifth Amendment its due. The third line of cases still tramples on the privilege, albeit in a less direct manner. These cases still require defendants to make a choice of borderline constitutionality—either admit to your guilt or prove that you don't need to. This too should not be tolerated if a reasonable accommodation exists.

And it does. By granting use immunity to probationers who must admit their guilt during treatment, courts overcome the constitutional infirmities addressed in the foregoing examples. The author does not suggest that judicial use immunity should be employed whenever it seems

465. *See supra* part III.
466. *In re Welfare of J.W.*, 415 N.W.2d at 884.

fair or just, but here, it is all but necessary to uphold the sanctity of the Fifth Amendment. If society and the courts have decided to rehabilitate offenders, let them then do so. A grant of judicial use immunity would force probationers to accept responsibility for their crimes, thus placing them on the road to meaningful change. In this context, judicial use immunity may be the only friend the Fifth Amendment can rely upon.

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