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THE BORDERLAND OF CONTRACT

by Richard E. Speidel*

1. Background

In this essay, I plan to visit the "Borderland of Contract." The focus will be upon Contract and Tort and the discussion will be organized around three basic questions: (1) To what extent has Contract—a theory of promissory liability—expanded over the last 50 years; (2) To what extent has Tort—a theory of non-consensual liability—intruded into the bargain-relationship; and (3) What are the consequences of and what explains these developments? As you can see, there is a lot to consider. Because the changes in doctrine to be discussed are still underway, there is considerable risk that conclusions will be premature or that the trees will obscure the forest. But one is kept humble by the late Arthur Leff's reminder that even in the best of circumstances there probably is no coherent, understandable explanation for anything.¹

Let us return to first principles. Important ideas about Contract and Tort can be found in Aristotle’s theory of Commutative Justice. He assumed that every society will adopt some principle of resource distribution consistent with its political regime (Distributive Justice). Commutative Justice sought to preserve each citizen’s allocated share or of entitlement to that distribution. Thus, if Citizen B was allocated Share X and Citizen A took or damaged that share without B’s consent, A should pay B the amount necessary to restore B to his initial position. If A and B agreed to exchange their allocated shares, the voluntary agreement should be performed if the performances were of equal value. Restoration and equality of exchange were variations of the principle that “no

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¹. Leff, Law and, 87 YALE L.J. 989, 1010 (1978). The difficulty of the ultimate questions is highlighted by Professor Kornhauser, who reminds us that the contested issues in tort and contract “lie deeper than the doctrinal changes.” He claims that the focus of the debate “about law has shifted from Doctrine to the nature of law itself, and the relation of law to society” and that the question of “which morality law incorporates, or whether law is related to morality at all, now colors discussion not only of jurisprudence, but also of substantive law.” Kornhauser, Book Review, 82 COLUM. L. REV. 184, 196 (1982).
one should gain by another's loss.” Commutative Justice, therefore: (1) imposed limits upon the redistributive effects of transactions, whether voluntary or not, between A and B; and (2) was unconcerned with whether the overall distribution of shares within the society was just (Distributive Justice) or whether Citizen C, who had no shares, was entitled to some part of the overall distribution to meet minimal needs (Social Justice). It is clear, however, that how and why government establishes the preferred system of entitlements determines the character of the society and the scope and effect of Commutative Justice.³

In retrospect, it is fair to state that Contract and Tort are part of the principle of Commutative Justice and that their development in Anglo-American law was influenced by the changing economic and social order, including the law of property. It is difficult, however, to be sure of the causes and effects. Until the early 17th century, the English forms of action seemed to determine the content of and blur the distinctions between Contract and Tort. Even after Assumpsit emerged as the primary form for Contract and Case was the form for Tort, there were overlaps; actions contractual in nature could be plead in Case and vice versa. As late as 1953, Dean Prosser grudgingly agreed with Maitland that the “forms of action still rule us from the grave,” occasionally appearing as the ghosts of “case and assumpsit” who walk “hand in hand

² See Gordley, Equality in Exchange, 69 CALIF. L. REV. 1587, 1588-90 (1981). For a contemporary restatement of this principle, see R. Unger, Knowledge and Politics 209 (1975): “One is never permitted to take advantage of his legal rights so as to pursue his own ends without regard to the effects he may have on others.”

³ “The political problem of mankind is to combine three things: economic efficiency, social justice, and individual liberty.” J. M. Keynes, Liberalism and Labour (1926). An “entitlement” is a claim to something, e.g., personal integrity, real or personal property, privacy, which the law will protect. According to Calebresi and Melamed, who has a protected claim to or from something must first be determined by government. Whether that decision is based upon considerations of economic efficiency, preferred distributions or other justice factors, the “placement” of entitlements has a “fundamental effect on society’s distribution of wealth.” Calebresi & Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 HARV. L. REV. 1089, 1093-1105 (1972). For more “justice,” see J. R. Lucas, On Justice (1980); J. Rawls, A Theory of Justice (1971); R. Nozick, Anarchy, State and Utopia (1974).

⁴ For a discussion of the different approaches taken by legal historians to discerning and elaborating on the nature of the past and the process of change in law, see Presser, “Legal History” or the History of the Law: A Primer on Bringing the Law’s Past Into the Present, 35 VAND. L. REV. 849, 857-68 (1982). For a case study of the interaction of property, contract and tort, see Browder, The Taming of A Duty—The Tort Liability of Landlords, 81 MICH. L. REV. 99 (1982). See also Calebresi & Melamed, supra note 3 (relationship between tort, property and criminal law).
at midnight."

Although most scholars agree that there were no coherent theories of Contract or Tort before the 19th Century, Professor Morton Horwitz has identified ideas that were consistent with the Aristotelian principle of Commutative Justice. In his *Transformation of American Law*, Horwitz concluded that prior to the 19th century, Tort law imposed liability for intentionally caused "direct" harms (a form of strict liability) and Contract was influenced by the idea of a "just price." The source of these concepts, according to Horwitz, was the 18th century ideals of natural justice and fair exchange. But much of this changed in 19th century America. Important intellectual and economic changes were underway, namely the triumph of the "will" theory, with its emphasis upon private autonomy, and the industrial revolution, with its dramatic increase in industrial accidents and economic opportunities for the entrepreneur. One consequence was significant doctrinal development in Tort and Contract. In Tort, negligence or fault emerged as the primary justification for liability when A's unintended conduct caused B's loss. If A's conduct was neither intentional nor negligent or if A's negligent conduct was not the "proximate" cause of B's loss, there was no tort liability. This new requirement of fault limited the scope of tort liability and, according

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6. For a sampling of the tort scholarship, see R. Rabin, *PERSPECTIVES ON TORT LAW* 33-81 (2d ed. 1983).


8. Under the 19th Century "will" theory of contract, the law of contract simply executed and protected the will of the parties. According to Professor Presser, the values caught up in this idea of freedom of contract were consistent with a recognition that the "national interest would best be served by carving out a large sphere of private initiatives and interests—immune from governmental intervention or regulation—that the free market rather than the state might maximize development." Presser, *supra* note 4, at 856. The result was a "free enterprise ideal of the maximum protection and promotion of private interests and initiatives . . ." Id.

9. According to Holmes, "fault" was not in the morality or immorality of A's conduct but in A acting where there is danger "that harm to another will follow." He concluded that the "defendant must have had at least a fair chance of avoiding the infliction of harm before he becomes answerable for such a consequence of his conduct" and that "a fair chance to avoid bringing harm to pass is not sufficient to throw upon a person the peril of his conduct, unless, judged by average standards, he is also to blame for what he does." O.W. Holmes, *THE COMMON LAW* 128-29 (Howe ed. 1963).
to some, was administered by those in power to subsidize the
growth of industry at the expense of its victims. In Contract, the
"classical" theory of contract, dominated by the doctrine of con-
sideration, was developed under the guidance of Holmes, Langdell
and Williston. The "classical" theory, among other things, limited
contract liability to promises supported by consideration, i.e.,
something bargained for a given exchange, and yielded three ideas
that seemingly compromised the justice inherent in Aristotle's prin-
cipal of equality of exchange: (1) the exchange could be "unequal"
in value if there was consideration, for a court should not inquire
into the "adequacy" of consideration; (2) if A breached the con-
tact, B was entitled to protection of his "expectation" interest
through an award of damages sufficient to put him in the position
he would have occupied from full performance; and (3) A should
not be penalized for his breach, even though intentional or
negligent. He should be required only to compensate B in damages
(not through specific performance) for his losses and punitive
damages should not be exacted. This idea, frequently described
as the doctrine of "efficient" breach, thus allowed A deliberately
to breach and, after full compensation was paid to B, reinvest
any net gains from the transaction in other opportunities. The com-
bination of these three ideas—no inquiry into adequacy, protection
of expectations and "efficient" breach—in theory, at least, sup-
ported an enforceable exchange that in terms of market values
might be unequal and suggested that "classical" contract law was
amoral rather moral.

It is clear that these developments sharpened the distinctions
between Tort and Contract and reduced the force of the Aristotelian

10. The case for the "subsidy" theory is examined and criticised in Schwartz, Tort Law
See also R. Rabin, supra note 6.
11. See Restatement (First) of Contracts § 81 (1932), which provided that, with limited
exceptions, "gain or advantage to the promisor or loss or disadvantage to the promisee,
or the relative values of a promise and the consideration for it, do not affect the sufficiency
of consideration." The general principle is retained in Section 79 of the Restatement (Sec-
ond) of Contracts (1979), but the grounds for attacking the exchange apart from the idea
of consideration have expanded. See Eisenberg, The Bargain Principle and it Limits, 95
12. See Restatement (First) of Contracts § 75 (1932). See also G. Gilmore, The Death
13. See Farnsworth, Legal Remedies for Breach of Contract, 70 Colum. L. Rev. 1145,
14. For a critical discussion, see MacNeil, Efficient Breach of Contract: Circles in the Sky,
principal that "no one should gain by another's loss."

Some scholars have argued that these ideas were orchestrated by those in power to promote a "fluid, entrepeneurial use of capital at the expense of the rentier interest." This might explain the scheme of limited liability and the potential for "unequal exchange that emerged. But there are some skeptics. An alternative explanation, equally deterministic, is that the development in Tort and Contract shows a preference for allocative efficiency—an economic concept that preserves and creates wealth by encouraging the allocation of resources to their highest valuing users. Under this view of the world, the common law decisions in Tort and Contract on liability and remedy were consistent with efficiency and encouraged rather than deterred individual initiative and opportunity. More importantly, the explanation appears to be consistent with the emerging scheme of things: (1) a government which, in the 19th and early 20th century, was perfecting a system of private property and fostering the development of private markets for private exchange, and (2) a legal and intellectual order that resisted governmental taking or redistribution of existing private shares without compen-

15. See G. White, Tort Law in America 19 (1980). White concludes that the emergence of negligence as a basis for tort liability changed tort law by the close of the 19th Century, from a "potpourri of left over civil, non-contractual wrongs" to an "entity distinct from other private-law categories of Contracts or Property: it was the branch of private law that dealt with universally imposed duties." See G. Gilmore, supra note 12, at 15. Gilmore concluded that under the consideration based theory of contract, liability was to be "sharply differentiated from tort liability."


18. According to Professor Presser, the so-called "Wisconsin" school, led by Professor J. Willard Hurst, views "economic needs as the primary determinants of law." Presser, supra note 4, at 858-59.


sation or consent. The role of government was to protect not to redistribute private shares. The emphasis was upon individual liberty and economic efficiency, not social justice.

2. **Doctrinal Differences Between Contract and Tort**

Despite continuing disputes over historical cause and effect, important doctrinal differences between Contract and Tort emerged from the 19th Century and are still imprinted on American law. They can be grouped around three headings: (1) The nature of the conduct causing the loss; (2) the interest protected against loss; and (3) the scope of the available remedy. Consider the following contrasts.  

(A) **Conduct**

In Contract, the actionable conduct is a failure without justification to perform an enforceable promise. A must make and break a promise, but B is not required to prove that the breach was negligent or intentional or otherwise "wrongful." To this extent, Contract is a law of strict rather than fault based liability. The concept of breach also covers a defective promised performance (misfeasance) and a failure to perform as promised (nonfeasance). In Tort, liability is usually imposed for affirmative conduct that causes loss. Unless there are special circumstances, the failure to act is not a tort. In addition, not all conduct which causes loss

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21. See, e.g., Kronman, Contract Law and Distributive Justice, 89 Yale L. J. 472 (1980). For a spirited argument that the redistributive effects of common law rules, whether viewed as promoting economic efficiency or advancing the interest of one class over another, are minimal, see Epstein, The Social Consequences of Common Law Rules, 95 Harv. L. Rev. 1717 (1982).


23. "Cause" here means causation in fact rather than "proximate" cause, a concept used to define the scope of duty.
is actionable. The conduct must be intentional or negligent or, perhaps, that which creates unreasonable danger to others. In short, fault and motive play a greater role in Tort than in Contract. But in both, liability is imposed in a selective process by the courts: not all broken promises are contracts and not all conduct which causes loss is a tort.

(B) Duty and Interest Protected.

In Contract, A's duties extend to persons to whom or for whose benefit the enforceable promise is made. The content of those duties is determined by agreement, occasionally supplemented by the court. Thus, through agreement with A, B can limit both the scope and content of contract duties. Within this framework, B's protected interest is limited by the reasonable expectations created by that enforceable promise, no more or no less. Contract law is concerned about what B invested or what opportunities were foregone in reliance on the promise and the gains prevented if A fails to perform as promised. These are the interests protected by Con-

24. The concept of "interest" is used in the RESTATEMENT (SECOND) of both Torts and Contracts. In Tort, interest means the "object of any human desire" which may or may not be protected against invasion or interference by others. RESTATEMENT (SECOND) OF TORTS § 1 (1965). The question is whether the "realization of the desire is regarded as of sufficient social importance to lead the law to protect the interest by imposing liability on those who thwart its realization." Id., Comment a. If so, then B's interest has "legal protection generally against all the world, so that everyone is under a duty not to invade the interest by interfering with the realization of the desire by certain forms of conduct." Id., Comment d. It is recognized that the range of legally protected interests is gradually increasing. Id., Comment e. In Contract, "interest" refers to the interests protected upon breach of contract and helps to structure the remedies available upon breach. Judicial remedies for breach "serve to protect one or more" of three interests, "expectation," "reliance" and "restitution." RESTATEMENT (SECOND) OF CONTRACTS § 344 (1979). Although these interests define the outer range of protection against breach, it is clear that within this range a court can protect all or one of the interests and has flexibility to grant "such relief as justice requires." Id., Comment a. See Harvey, Discretionary Justice Under the Restatement (Second) of Contracts, 67 CORNELL 666 (1982). In both Restatements, the concept of "interest" involves both the claim of the individual harmed and broader considerations of social policy. Those considerations frequently differ. For example, tort law may protect the broader social interest in the security of the body from harm when it imposes liability on A for a battery on B and contract law may be recognizing the importance of market transactions when it enforces B's expectation interest upon breach of contract by A. See RESTATEMENT (SECOND) OF CONTRACTS, chap. 16, Introductory Note (1979). The terminology and method is reminiscent of the "interest" analysis employed by Dean Pound in his sociological jurisprudence. See White, From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America, 58 VA. L. REV. 999, 1004-12 (1972). Another concept covering the same basic ground is "entitlement." See Calabresi & Melamed, supra note 3.
tract. In Tort, A's duty extends to those persons within a legally defined zone of risk created by his actionable conduct. The content of those duties, i.e., what must A do to avoid harming B, is imposed by operation of law. Within this framework, B's interests which are protected against A's conduct include his person, property and some existing "relationships". In short, Tort protects B's existing state of affairs—his person, property and relationships—from A's wrongful conduct. To this extent, the functions and protected interests in Contract and Tort complement each other. Tort law protects the existing entitlements or interests of the individual from unauthorized intrusion and Contract law permits the owners of those entitlements to shape or reallocate them through bargain and exchange.

(C) Remedies.

In Contract, the primary remedial objective has been to protect B's reasonable expectations by giving him the value of A's promised performance—to put B in the position that he would have been in if A had fully performed. This is normally accomplished by the award of damages rather than specific performance. B's unreimbursed reliance on the promise may also be compensated. Contract remedies usually redress economic losses caused by breach, but these are limited by special policies; e.g., B cannot recover losses caused by the breach that were not reasonably foreseeable at the time of contracting and must make reasonable efforts to avoid the consequences of the breach. Mental anguish caused by a breach is rarely recoverable and punitive damages will not be awarded for breach of contract, even though that action is deliberate. In Tort, the primary remedial objective is to restore B to the position occupied before the tort and, where appropriate,
to enjoin future tortious conduct. Thus, if A causes damage to B's protected interests, justice requires that A restore or correct the loss through compensation. The compensation is usually limited to damage to person and property, although gains prevented may be recovered when A's intentional and wrongful conduct interferes with B's economic opportunities. In contrast with Contract, mental anguish is a frequent element of Tort damages and punitive damages are awarded when A's tortious conduct is particularly outrageous. Finally, if A owes a duty to B and an intentional tort causes some loss, A will be liable for all of the losses caused even though not foreseeable at the time of the tort.

(D) Summary

In summary, Tort protects B's existing set of entitlements—claims to person, property and relationships—from A's wrongful conduct. The remedy is designed to restore B to his pre-Tort position and, in cases where the public interest will be served, punish A for outrageous conduct and "deter him and others like him from similar conduct in the future." This exercise in what some have called "corrective justice" is structured by court imposed duties and exacted remedies which, in turn, are derived from judgments about the minimum standards of conduct that should be required in the various forms of human interaction. These standards vary with the context and change over time.


28. The question in Contract is whether the breacher, at the time the contract was made, had "reason to foresee" that the loss would result "as a probable result of the breach...." RESTATEMENT (SECOND) OF CONTRACTS § 351 (1979). See A. Farnsworth, supra note 13, at § 12.14. Compare UCC 2-715(2). The question in Tort is whether the actor's conduct was the "legal" cause of the unforeseeable harm and the answer turns on the nature of that conduct and the likelihood of the particular loss. See RESTATEMENT (SECOND) OF TORTS § 435 (1965). The debate over this issue is discussed in W. Prosser, supra note 22, at 43. See also Adams, "Hadley v. Baxendale" and the Contract Tort Dichotomy, 8 ANGLO-AMER. L. REV. 147 (1978).


31. Although beyond the scope of this essay, issues on the borderland of Tort include: (1) Should strict liability be preferred over negligence as the primary justification for tort liability, see, e.g., Schwartz, The Vitality of Negligence and the Ethics of Strict Liability, 15 GA. L. REV. 963 (1981); cf. Epstein, supra note 21, at 1723-44 (social consequences of
Contract, in contrast, deals with promised advantages, frequently given as part of a bargained for exchange. Bargains are intended to achieve goals and to implement plans—to change the existing state of affairs for both parties to their mutual benefit. By protecting the expectation interest—putting the aggrieved party "in as good a position as he would have been in had the contract been performed"—Contract is seemingly most sharply differentiated from Tort, with its remedies designed to restore the status quo. But although most contract scholars agree that the expectation interest should be protected, their reasons vary. In this variance, one can see some overlap with conventional justifications for imposing tort liability.

What are these reasons? On the one extreme are economic or "efficiency" reasons. Protecting expectations: (1) rewards risk taking in competitive markets and, therefore, contributes to allocative efficiency; and (2) deters the "inefficient" breach and enables the parties, through ex ante bargaining, to internalize the perceived costs of performance and breach. Put another way, when contract law clearly protects reasonable expectations, both parties can plan...

choice are relatively minor); (2) To what extent should recovery for negligence include economic loss, see, e.g., Rizzo, A Theory of Economic Loss in the Law of Torts, 11 J. LEGAL STUD. 281 (1982); Note, Tort and Contract, 93 L. Q. REV. 422 (1977); and, more generally, (3) How should tort theory accommodate the competing demands of utilitarianism and the achievement of fair results in the particular case, see, e.g., the articles by John Borgo, Richard Posner and Richard Epstein, 8 J. of Legal Stud. 419-504 (1979); R. Rabin, supra note 6, at 152-284. In the midst of this theoretical babbleground, Professor Marshall Shapo has suggested that tort law provides a "unifying methodology" in that it links a "complex set of rationales to facilitate solution of an enormous range of disputes about events perceived as wrongs" and, in its "suppleness in response to new situations," provides "mediation... between socialization and individual justice." Shapo, Unpublished Report, in preparation for the American Bar Association's study of the law of torts.


33. One English commentator has stated that the "real function of contract is to decide when the expectation interest will generally be protected." Adams, supra note 28, at 151. See also Samuel, The Reality of Contract in English Law, 13 TULSA L. J. 508 (1978); Friedman, supra note 22. Professor Friedman concludes:

The risk of a new class of jural relations, stemming from the law of restitution or unjust enrichment, in which the nature of the obligation which exists between the parties partakes somewhat of the character of tort and somewhat of that of contract, ought to lead the courts to realize that there is not, and need not be, such a clear-cut distinction in the law and between tort and contract.

Id. at 448.


35. For an excellent general discussion, see Eisenberg, supra note 11, at 785-98.
more efficiently at the time of contracting and the breacher can better assess at the time of the breach when his gains through breach will exceed the cost of compensating the aggrieved party. Economic reasons are consistent with the presuppositions of classical contract law and, if imposed upon bargainers in the interest of more efficient markets, are utilitarian in effect. Another reason is that awarding damages based upon reasonable expectations protects the reliance interest. This argument, traceable to a seminal article by Professor Lon Fuller, assumes that reliance requested or induced by a promise ought to be compensated but claims that reliance, whether by action or forebearance, is costly to determine and difficult to prove. There is, therefore, a risk of undercompensation. The solution is to award expectation, when provable with reasonable certainty, as a "surrogate" for an accurate reliance measurement. Expectation is an outer limit of recovery for actual but unprovable costs incurred and opportunities foregone in reliance on the promise. Thus, this reason for protecting expectations tends toward fairness in the particular transaction between the parties rather than overall market efficiency.

A final reason has little to do with fostering efficient markets or protecting the reliance interest. Rather, it flows from the moral obligation that A assumes when he makes a promise to B. According to Charles Fried, the promisor imposes an obligation upon himself where none existed before. He "should" perform his promise and the connection between the promise made and B's expectation is "palpable." Morality rather than efficiency or reliance, therefore, demands that "if I fail to keep my promise ... I should be made to hand over the equivalent of the promised performance." But

38. A. Farnsworth, supra note 22, at 18-19 (expectation recovery protects "hidden" reliance). See also Eisenberg, supra note 11, at 787:
   ... (Fairness normally requires that a promisee should at least be compensated for the cost he incurred in reasonably relying on a bargain promise ... (I)n many transaction-types enforcement of an executory contract to its full extent is desirable on the ground that expectation damages are approximately equal to cost, but much easier to measure.
two points must be made here: (1) Although ethical reasons may underlie Contract law, Professor Fried's theory has not been explicitly adopted by courts, restaters and commentators; and (2) Although many scholars contend that Tort law has strong ethical underpinnings, the moral responsibility arises from the fact that A's wrongful conduct has harmed B, not from A's wrongful act alone. For Professor Fried, it is the making (and breaking) of the promise that imposes the obligation, not the fact of injury.

3. Changes at the Borderland of Contract Theory

Contract is a theory of promissory liability. I have suggested that this theory, wrapped in the coat of consideration, entered the 20th Century with three important structuring ideas: Courts should, (1) not inquire into the adequacy of consideration, (2) protect the expectation interest, and (3) permit the so-called "efficient" breach by (a) awarding damages rather than specific performance and (b) refusing to award punitive damages. The question is what, if any, changes are underway in contract doctrine that might affect these ideas? More particularly, if protecting the expectation interest is a key remedial difference between Contract and Tort, have any doctrinal changes from within undercut that protection?

Before focusing upon two important changes, let me clear out some underbrush.

First, the adequacy idea is still alive today, but there is less chance that a court would enforce an "unequal" exchange where

40. See, e.g., Havighurst, Consideration, Ethics and Administration, 42 COLUM. L. REV. 1 (1942). See also, Jones, The Jurisprudence of Contract, 44 U. CIN. L. REV. 43, 44-45 (1975) (moral imperative that promises freely made are to be performed).

41. According to Richard Epstein, A's moral and legal responsibility arises because his intentional conduct causes harm to B. See Epstein, A Theory of Strict Liability, 2 J. LEGAL STUD. 151 (1973); Epstein, Defenses and Subsequent Pleas in a System of Strict Liability, 3 J. LEGAL STUD. 165 (1974); Epstein, Intentional Harms, 4 J. LEGAL STUD. 391 (1975). Epstein's ideas have been attacked. See Borgo, Causal Paradigms in Tort Law, 3 J. LEGAL STUD. 419 (1979); Posner, Epstein's Tort Theory: A Critique, 3 J. LEGAL STUD. 457 (1979); but see Epstein, Causation and Corrective Justice: A Reply to Two Critics, 3 J. LEGAL STUD. 477 (1979).

42. According to Fried, a person "is bound by his promise and not by the harm that the promisee may have suffered in reliance on it. . . ." C. FRIED, supra note 39, at 19. See Kornhauser, The Resurrection of Contract, 82 COLUM. L. REV. 184, 189 (1982) (Fried's approach is called a "promise-based theory" where voluntary exchange is the source of obligation): "Whether the exchange benefits all parties to it or whether it facilitates the realization of efficient outcomes is, under a promise-based theory, irrelevant to the decision to enforce the promise."
there was, at the time of contracting, a serious disruption in information or choice. More flexible applications of fraud and mistake concepts and the emergence of the doctrine of unconscionability have enabled courts to police against bargaining abuses that produce apparent disparity in the exchange. In short, the borderland of contract liability has shrunk in this area. At the same time, a critical distinction between the commercial and the consumer contract has developed. In the former, the adequacy idea has efficacy where the parties have actually bargained for the disparity—i.e., where they have intended that their values and preferences prevail over the market price. In the latter, there is a scheme of state and federal judicial, legislative and administrative protection that has, in effect, removed most consumer contracts from the market and thus, the “general law of contracts,”43 and, in the process, supported the principle of equal exchange.

Second, the pulse of the doctrine of “efficient” breach remains strong in the commercial contract. There has been an interesting scholarly debate over the morality and efficiency of damages versus specific performance.44 But the Uniform Commercial Code and the Restatement, Second, although liberalizing the test, have not installed specific performance as the preferred remedy.45 Similarly, there is no suggestion that a deliberate breach of contract alone justifies an award of punitive damages.46 Thus, a promisor who


45. Under UCC 2-716(1), specific performance may be decreed “where the goods are unique or in other proper circumstances.” Section 345 of the Restatement (Second) of Contracts lists specific performance as one of the remedies available for breach of contract and, in Section 359(1) states that specific performance or an injunction “will not be ordered if damages would be adequate to protect the expectation interest of the injured party.” One can conclude that the Restatement’s textual position is more restrained than that in UCC 2-716(1), which provides a more flexible test. See Greenberg, Specific Performance Under Section 2-716 of the Uniform Commercial Code: “A More Liberal Attitude” in the “Grand Style,” 17 NEW ENG. L. REV. 321, 352-53 (1982) (both UCC 2-716 and the Restatement have “rejected the notion that specific performance should be an equally available alternative to money damages with the choice of remedy for the buyer to make”).

46. See, e.g., UCC 1-106(1) (no “penal” damages may be had except as “specifically provided in this Act or by other rule of law”); Restatement (Second) of Contracts § 355 (1979) (punitive damages not available unless the “conduct constituting the breach is also a tort for which punitive damages are recoverable”). See also Fogge v. Fullerton Lumber Co., 277 N.W.2d 916, 918-20 (Ia. 1979) (knowing and willful breach of contract does not justify punitive damages).
concludes that a deliberate breach is worth it—i.e., that there will be a net gain after the promisee is fully compensated—should still not be unduly deterred by the prospect of a coercive remedy, specific performance, or punitive damages.

Third, there has been a change in methodology with jurisprudential significance, a shift from rules to standards in contract law. There are still rules of course: there must be a promise and that promise must meet specified conditions before it is enforceable. But within these givens, contract doctrine, lead by Article 2 of the Uniform Commercial Code, seems to have shifted from a system of structured rules existing "out there" to be applied with ineluctable logic to particular disputes to a group of overlapping standards that have precise meaning only when they are particularized in each case. In contract formation, for example, the question of liability where some terms are not agreed upon turns on whether the parties intended to conclude a bargain47 rather than upon some rule requiring a minimum quantity of agreement. The intention question may turn upon such context factors as language, conduct, prior course of dealing, trade usage or other relevant circumstances. If the intention is present but there are "gaps" in the agreement, the court is invited to fill the "gap" by supplying a "term which is reasonable in the circumstances"48 and to enforce the bargain according to the terms supplied. Standards also dominate in other areas of contract interpretation and performance. In addition, words like "justice," "good faith" and "unconscionability,"49 all standards of open-ended texture, suggest a countervailing regulation of standards by standards. In this war of openendedness, one thing is reasonably clear: in commercial cases, at least, the standards are designed to facilitate the intention of the parties rather than to undercut the protection of reasonable expectations.50 Less clear

47. The language in UCC 2-204(3) is whether the parties have "intended to make a contract" even though "one or more terms are left open." If they did not, the contract "fails for indefiniteness." Section 33 of the RESTATEMENT (SECOND) OF CONTRACTS influenced by the UCC, states that the "fact that one or more terms of the proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance." In short, the negotiations are not concluded and no contract can arise until they are.


50. The scope of expectation might be limited, however, if there is "no reasonably certain basis for giving an appropriate remedy." UCC 2-204(3). RESTATEMENT (SECOND) OF CONTRACTS § 33(2) (1979).
is whether the difficulties posed in particularization, the delegation of power to the courts and private parties and the preference for values and norms "immanent" in the relevant context will justify over an extended period this jurisprudence of standards. 51

(A) The Expansion of Contract Liability.

The foregoing developments suggest that, in the absence of unconscionability in the bargaining process or indefiniteness in the agreement, modern contract law will still protect the expectation interest upon breach of a contract. We will now consider two developments that expand the scope of contract liability without dictating that the full expectation be protected upon breach. In fact, the courts are given discretion to limit the remedy as "justice" requires or the circumstances dictate.

(1) The Reliance and Restitution Interests.

For breach of a promise supported by consideration, contract law has consistently given the plaintiff a combination of gains prevented and reliance losses incurred. If reliance in part-performance actually benefited the defendant, there was an overlap of what the Restatement calls the "reliance" and "restitution" interests 52 and an even stronger case for recovery of that part performance. But without consideration, the enforceability of the promise was in doubt. Although promises without consideration were sometimes enforced as contracts, there was, until the 1930's at least, no coherent theory of liability. 53

The Restatement, Second, building on developments in the last 50 years, presents an independent basis for enforcing two types of promises made without consideration: reliance and restitution, Section 90 provides that a "promise which the promisor should

51. These and other questions are discussed in Speidel, Restatement Second: Omitted Terms and Contract Method, 67 CORNELL L. REV. 785 (1982).

52. The "reliance" interest is the promisee's "interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made." RESTATEMENT (SECOND) OF CONTRACTS § 344(b) (1979). The "restitution" interest is his "interest in having restored to him any benefit that he has conferred on the other party." Id. § 344(c). For background, see Henderson, Promises Grounded in the Past: The Idea of Unjust Enrichment and The Law of Contracts, 57 VA. L. REV. 1115 (1971); Knapp, Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel, 81 COLUM. L. REV. 52 (1981); Hudis, Restating the "Reliance Interest," 67 CORNELL L. REV. 704 (1982).

reasonably expect to induce action or forbearance on the part of a promisee . . . and which does induce such action or forbearance on the part of a promisee . . . is binding if injustice can be avoided only by enforcement of the promise.” Here the promisee may have reasonable expectations, but it is his reliance that justifies enforcement. Section 86 provides that a “promise made in recognition of a benefit previously received by the promisor is binding to the extent necessary to prevent injustice.” Again, the promisee may have reasonable expectations but it is the past benefit that turns the trick. So this expansion of liability for promises made outside of the bargain contract turns on induced reliance or past benefits rather than consideration.

Consider first induced reliance, a factor the presence of which is also essential to the Tort doctrines of fraud and misrepresentation. Should the expectation interest be protected where there is no bargain and the reason for enforcement is reliance?

Section 90’s answer is “maybe”: the failure to perform is a breach of contract, but the “remedy granted for breach may be limited as justice requires.” When does “justice” require the partial enforcement of the promise? The Restatement’s answer is fuzzy and this has bothered some commentators. From the comments and illustrations, one concludes that the court must mold “justice” to fit the particular transaction in context and that there is a predisposition toward partial enforcement. From a functional perspective, this predisposition is understandable. Reliance is the primary reason for enforcement and the promise has less economic utility

54. See e.g., Restatement (Second) of Contracts § 164(1) (1979) (justified reliance as grounds for avoiding a contract for misrepresentation).

55. See Comment, Once More Into the Breach Promissory Estoppel and Traditional Damage Doctrine, 37 U. Chi. L. Rev. 559 (1970). For a more general indictment, see Harvey, Discretionary Justice Under the Restatement (Second) of Contracts, 67 Cornell L. Rev. 666 (1982) (focuses on Section 351(3)).

56. Comment (d) to Section 90 states that the “same factors which bear on whether any relief should be granted also bear on the character and extent of the remedy.” Those factors include the reasonableness of the promisee’s reliance, on its definite and substantial character in relation to the remedy sought, on the formality with which the promise is made, on the extent to which the evidentiary, cautionary, deterrent and channeling functions of forms are met by the commercial setting or otherwise, and on the extent to which such other policies as the enforcement of bargains and the prevention of unjust enrichment are relevant.

Restatement (Second) of Contracts Comment (b) (1979). Three of the five illustrations of partial enforcement involved negotiations within a bargain relationship that induced reliance but failed to produce a final, enforceable agreement. For discussion of the role of “promissory estoppel” in the bargaining process, see Henderson, Promissory Estoppel and Traditional Contract Doctrine, 78 Yale L. J. 343, 350-76 (1969).
than one made as part of a bargain. In fact, expansion of contract liability here has a clear ring of tort; A is liable for making a promise with reason to know that B would rely and, upon breach, failing to restore B to his pre-promise position.

The issue under Section 86 might come up like this. A has, in the past, been benefited by B under circumstances where no gift was intended, but where B had no legal claim in either Tort or Quasi-Contract for restitution. Let us say that the value of that benefit was $5,000. Motivated by this past benefit, A later promises to pay B $7,500. Even though there is no induced reliance or bargain, the promise may be enforceable. A's own sense of unjust enrichment has motivated the promise, thereby obviating the lack of consent in the prior transaction, and this is deemed a good reason for enforcement. But, shades of Aristotle, the clear tone of Section 86 is to limit enforcement of the promise to the value of the benefit conferred. The promise is not enforceable at all "to the extent that its value is disproportionate to the benefit," and, in any event, it is binding only "to the extent necessary to prevent injustice." The weasel words in this section are infamous but, like Section 90, an interest other than expectation is to be protected.

These new possibilities for contract liability, although dependent upon a promise and, arguably, complementary to the consideration doctrine, do focus upon interests regularly protected in Tort. This development prompted Grant Gilmore to conclude that Contract was in danger of being "reabsorbed into the main stream of Tort" and this theme has dominated recent English Contract scholarship. Suffice it to say for now, the economic reasons supporting expectation are less compelling in the non-bargain transaction and to the extent that courts exercise their discretion in...
favor of partial enforcement, a traditional distinction between Contract and Tort has been eroded.

(B) The Duty of Good Faith in Bargain Contracts.

Influenced by Section 1-203 of the UCC and common law developments,60 Section 205 of the Restatement, Second, provides: “Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.”61 This duty, expressed as a standard rather than a rule, is imposed as a term of the contract and is neither dependent upon nor excluded by agreement of parties.62 Has, then, Tort arrived in Contract under the guise of the good faith duty?

The answer, according to the Restatement at least, is no. The good faith duty is, in Restatement parlance, a term of the contract and bad faith conduct is a breach of contract for which normal contract remedies are available.63 But which contract remedies? According to Comment (a) to Section 205, the “appropriate remedy for a breach of the duty of good faith . . . varies with the circumstances.” As with the discretionary remedies for induced reliance and past benefits conferred, those circumstances are not clearly stated in the Restatement—the remedy might be less but not more than the expectation interest.64

The modern emphasis upon standards and contextualization is apparent in this duty, which is designed more to regulate than to facilitate the bargain. Comment (a) states: (1) the meaning of good faith “varies somewhat with the context”; (2) good faith emphasizes “faithfulness to an agreed common purpose and consistency


62. See UCC 1-102(3); but see RESTATEMENT (SECOND) OF CONTRACTS § 205, comments (1979).

63. The duty of “good faith and fair dealing” is a term supplied by the court rather than stated in the agreement. As such, it is a “term of the contract.” RESTATEMENT (SECOND) OF CONTRACTS § 5(2) (1979). Nonperformance of the duty of good faith, when that duty is due, is treated as a breach of contract. See RESTATEMENT (SECOND) OF CONTRACTS § 235(2), & comment (b) (1979).

64. RESTATEMENT (SECOND) OF CONTRACTS § 205, comment (a) (1979).
with justified expectations”; and (3) “bad faith” is conduct which violates community standards of decency, fairness or reasonableness.” There is a continuing debate over the scope and wisdom of this imposed duty. But however defined, it imposes a minimum floor of proper conduct in the performance and enforcement of a bargain—a floor from which the parties cannot escape by agreement. The duty, however, responds to the needs of the bargain and, by so doing, provides additional protection to the reasonable expectations of the parties. Thus, the fact that the remedy for bad faith might be less than the full expectation does not necessarily further erode the remedial distinction between Contract and Tort.

In summary, these changes in Contract doctrine have four characteristics: (1) they expand liability both within and without the bargain; (2) the expansion may depend upon the reasonableness or ethical content of the defendant’s conduct; (3) the expectation interest is presumptively protected, but the courts have discretion to grant partial enforcement as “justice” requires; and (4) no punitive damages are awarded for breach of contract alone: the contract must “also” be a “tort for which punitive damages are recoverable.” Thus, all are tied to the making and breaking of promises and none is inconsistent with protection of the expectation interest. But the supposed clean line between Contract and Tort has been blurred, the importance of consent has been diluted by imposed duties and judicial “gap” filling, something less than expectation may be protected through partial enforcement and the “duty of good faith” has an ethical tone more suitable for discourse in Tort rather than the utilitarianism frequently associated with classical contract law. More significantly, the scope of Tort doctrine, heretofore kept at bay, stands at the border and threatens to overrun the province of Contract.

4. Tort Intrusions into the Bargain Relationship

The developments just discussed are “contract” law because they involve (a) the making and breaking of promises and (b) duties

65. For example, if a “requirements” buyer ordered more than his actual requirements in bad faith, the seller’s remedy might be limited to refusing the excess. If, on the other hand, the buyer ceased to have any requirements in bad faith, the seller’s remedy would be for breach of the entire contract.


68. Restatement (Second) of Contracts § 355 (1979).
imposed or remedies fashioned to protect reasonable expectations created or reliance induced by those promises. There are other doctrinal trends where Tort has intruded into the bargain relationship. These intrusions, of judicial creation, protect public and private interests other than the expectations created by the promise. The general questions are (1) when will a court call the conduct of one party to the bargain tortious; (2) what interests are served by the imposition of a tort duty; and (3) what difference does it make in such matters as pleading and proof, application of the statute of limitations, or the appropriateness of agreements allocating risk or remedy?

I will explore three areas where tort has intruded or could intrude into a bargain relationship: (1) Defective performance where, but for the tort, there would be no contract liability; (2) the failure to perform an enforceable promise where, but for the tort, damages would be limited by the expectation interest; and (3) the failure within the bargain to take affirmative action to aid the other—action that was not promised and where both Contract and Tort have been unsympathetic to liability.

(A) Defective Performances and the "Tort" Interest.

It has long been recognized that if A undertakes a specific task for B, such as the storage or carriage of B's goods, and negligently damages the goods, A is liable to B in Tort for that damage. Similarly, if A in a bargain has promised a particular result and through negligent performance leaves B worse off than before, A

69. By "bargain relationship" I mean both the negotiations preceding a proposed bargain that fail, for one reason or another, to conclude a contract and the course of performance and enforcement that follows contract formation. Although this definition appears to focus upon a particular bargained for exchange, a broad definition of agreement, see, e.g., UCC 1-201(3), makes trade usage, prior courses of dealing and other surrounding circumstances relevant to the transaction.

70. See generally, Ursin, Judicial Creativity and Tort Law, 49 GEO. WASH. L. REV. 229 (1981).

71. The question whether a particular agreement allocating risk or limiting remedies should, as a matter of public policy, be enforced should be distinguished from the case where the parties, for one reason or another, have failed in advance of a loss to consent or to reach an agreed risk allocation. For a discussion of the former, see Kennedy, supra note 22, at 590-614 (creation of a new tort duty in a contractual situation). For a discussion of the latter, see Calebresi & Melamed, supra note 3, at 1105-15 (where entitlement is protected by a "liability" rule and is taken or destroyed without consent, holder is compensated by the value that he would have sold it for measured by objective standards). See also Wade, Restitution for Benefits Conferred Without Request, 19 VAND. L. REV. 1183 (1966).
may be liable to B in both Contract and Tort. Thus, in a construction contract, A’s negligent and defective performance may both damage B’s property and delay the promised completion date. In this case, B should have a remedy for both the damage to his existing property (Tort) and the delay (Contract). One court put it this way: wrongful conduct which causes "physical harm . . . usually represents an invasion of a right existing apart from any contract—a tort interest" but if the promisor "simply fails to live up to its promise, if it does not accomplish what it was supposed to, that is only an invasion of a contract-like interest: the user has lost the benefit of his bargain." This catches the essence of an important distinction: If A's negligent, defective performance both damages B's existing entitlements and disappoints expectations, B has a claim in both Tort and Contract.

There are some transactions where A’s performance disappoints B’s expectations but there is no claim in either Tort or Contract. The best example is a contract for professional services. Here the doctor or lawyer does not promise a particular result and performs the service with reasonable professional care. In these cases, the client, despite the presence of confidential or fiduciary relationships, assumes a certain amount of risk. The courts refuse to im-

72. These developments, grouped under the heading of "misfeasance," are discussed in W. PROSSER, supra note 5, at 405-22. See also Siegel v. Spear & Co., 234 N.Y. 479, 138 N.E. 414 (1923) (misfeasance in performance of gratuitous promise to insure goods bailed to promisor).

73. Many courts have held that a negligent, defective performance that causes only economic loss, i.e., loss of the value of the bargain, is not actionable in tort. To recover in "negligence there must be a showing of harm above and beyond disappointed expectations." Redarowica v. Ohlendorf, 441 N.E.2d 324, 327 (Ill. 1982). See also Edens v. Kole Constr. Co., 188 Conn. 489, 450 A.2d 1161 (1982) (defective home construction tried on contract theory); compare Velotta v. Leo Petronzio Landscaping, Inc., 69 Ohio St.2d 376, 433 N.E.2d 147 (1982) (alleged negligent and fraudulent construction subject to statute of limitations for tort).


75. For that rare example where a doctor promised a particular result in the performance of cosmetic surgery, see Sullivan v. O’Connor, 363 Mass. 579, 296 N.E. 183 (1973). The complaint charged both breach of contract and malpractice. The jury found for the doctor on the negligence claim. On appeal, the contract claim was upheld but, on the particular facts, the plaintiff's damages were limited to her out-of-pocket expenditures (her reliance interest) and for the "pain and suffering and mental distress" involved in unnecessary surgery. The court did suggest, however, that the plaintiff, upon proper proof, might have recovered damages for both her worsened condition and lost expectations, measured by the difference in value between the result promised to her and her actual condition after three unsuccessful operations.
pose any warranties (Contract) and, unless there is malpractice (Tort), there is no remedy for B’s disappointed expectations. But, in this relationship of dependence and confidence, the courts do keep a wary eye on effort by the professional to exculpate himself from negligence.

None of this is new. It illustrates a bargain relationship where liability depends upon the negligent performance of the professional’s undertaking. Despite flexibility in administering the standard of care, it is Tort rather than Contract that dominates the measure of recovery. All of this leads to the most dramatic common law development in the past 20 years, strict products liability. In 1960, the law was reasonably clear. If A sold defective and dangerous goods to B and they caused damage to B’s person and property, as well as to his expectations, B could recover all of his loss under a warranty theory. Put another way, if there was privity of contract and the “intricacies” of the law of sales were satisfied, B could recover damages to his tort and contract interest under a “warranty” theory. If there was no “privity,” however, the plaintiff had to establish negligence to state a claim, whether he was a remote buyer in the chain of distribution or someone affected by the goods. Today, the doctrine of strict products liability has swept the land. Neither privity nor negligence are required to im-

76. As one court put it:

Architects, doctors, engineers, attorneys, and others deal in somewhat inexact sciences and are continually called upon to exercise their skilled judgment in order to anticipate and provide for random factors which are incapable of precise measurement. The indeterminate nature of these factors makes it impossible for professional service people to gauge them with complete accuracy in every instance. . . . Because of the inescapable possibility of error which inheres in these services, the law had traditionally required, not perfect results, but rather the exercise of that skill and judgment which can be reasonably expected from similarly situated professionals. Klein v. Catalano, 386 Mass. 701, 713, 437 N.E.2d 514, 525 (1982) (citing City of Mounds View v. Walijarvi, 263 N.W.2d 420, 424 (Minn. 1978)). Unless the trier of fact can find negligence as a matter of common knowledge, the plaintiff, through expert testimony, must establish the standard of care commensurate with the attributes of the profession. See O’Neil v. Bergan, 452 A.2d 337 (D.C. App. 1982). See Note, Contorts: Patrolling the Borderland in Contract and Tort in Legal Malpractices Actions, 22 B.C.L. REV. 545 (1981).

77. See, e.g., Tunkl v. Regents of Univ. of Calif., 60 Cal.2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963) (hospital exculpation from negligence against public policy).

pose liability upon a manufacturer or seller of a dangerously defective product that causes damage to the person or property of any buyer, user or other person who might reasonably be expected to be affected. In this situation, warranty theory (Contract) is irrelevant, negligence is unnecessary and strict tort liability reigns supreme. At the same time, agreements attempting to disclaim the tort duty or to exclude liability for consequential loss have been ruled to be against public policy. Except for confusion where the product causes damage to the expectation interest, strict liability has marched steadily toward its inevitable clash with legislation designed to slow or divert the march.\textsuperscript{79}

Three overlapping reasons have been offered to justify strict products liability. The first is accident avoidance. Strict liability provides an incentive to be careful in the manufacturing process and, thus, to reduce the number of dangerous defects. Second, strict liability is thought to promote efficient risk allocation. The manufacturer is in a better position than the ultimate user to identify the risk of loss and to distribute it through insurance, pricing or otherwise. Third, it is “wrong” for the manufacturer to profit from the distribution system yet avoid direct responsibility for losses caused by defective, dangerous products.\textsuperscript{80} These reasons, however, seem to be most persuasive when the “tort” interest is involved—i.e., the product has damaged person or property. What happens when a dangerously defective product damages only the “contract” interest, i.e., the reasonable expectation that the product will meet a certain standard of quality?

The question, which has perplexed courts and commentators, arises when the plaintiff is either a buyer from the defendant or a remote buyer in the distributive chain. Most courts have struggled to the following conclusions: (1) if the buyer is in “privity,” warranty (Contract) theory applies, which means that Article 2 of the

\textsuperscript{79} See, e.g., Schwartz, The Uniform Products Liability Act—A Brief Overview, 33 Vand. L. Rev. 579 (1980). For a comprehensive summary, see W. Prosser, supra note 78, ch. 17. For an evaluation of the role of the courts in the development of strict products liability, see Ursin, supra note 70, at 287-304.

\textsuperscript{80} These and other justifications for strict products liability are discussed in Ursin, supra note 70, at 287-304; Henderson, The Boundary Problems of Enterprise Liability, 41 Md. L. Rev. 659, 659-62 (1982); Shapo, Tort Law, Products Liability and Substantive Justice: Past and Prologue, (an unpublished paper given at a colloquium, Rethinking Tort Law, Tulane Law School, November 5-6, 1982). For an elaborate suggestion that the entire theory might be explained on the basis of reliance induced by advertising, see Shapo, A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment, 60 Va. L. Rev. 1109 (1974).
UCC with its scheme of notice, disclaimers, agreed remedies and limitations must be dealt with;\(^1\) and (2) if there is no "privity," there is no liability to the remote buyer unless the seller's warranty is extended under the relevant version of UCC 2-318.\(^2\) Thus, if UCC 2-318 does not extend warranty liability and the court refuses to adopt strict liability in tort for economic loss, there is a gap in protection if, for any reason, the remote buyer is unable to recover from his seller.\(^3\)

Why this outcome in the economic loss cases? Why have most courts decided that Contract rather than Tort is more appropriate for resolution of the issues of liability and remedy? One possibility is that the defective product has damaged the expectation interest (Contract) rather existing entitlements (Tort) in a commercial transaction. Put another way, the buyer in commerce has lost the value of his bargain, frequently in the form of consequential damages. Here the parties should be expected to bargain over such losses and allocate them by agreement. A judicially imposed risk allocation in the form of strict liability appears to be unreliable. How, for example, does a manufacturer or seller efficiently insure against consequential economic loss where disclaimers or agreed remedies are against public policy?

This reasoning has been sufficient for most courts,\(^4\) but it is

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\(1\) See, e.g., S.M. Wilson & Co. v. Smith Intern., Inc., 587 F.2d 1363 (9th Cir. 1978) (California law). The court noted that under California law economic losses were not recoverable for negligence and this rule served to limit actions of this sort to the Uniform Commercial Code, a "body of law specifically designed to deal with commercial disputes between sellers and buyers of goods." Id. at 1376; compare Posttape Associates v. Eastman Kodak Co., 537 F.2d 751, 753 (3d Cir. 1976) (where defective product causes economic loss, UCC provides "appropriate guidelines for proving an agreement . . . to limit damages resulting from negligence"). If, however, a dangerously defective product causes damage to person or property of a buyer in privity with the seller, many courts have held that strict tort liability rather than the UCC governs the controversy. See, e.g., Phipps v. General Motors Corp., 278 Md. 337, 363 A.2d 955 (1976); compare Cline v. Prowler Indus. of Maryland, Inc., 418 A.2d 968 (Del. 1980).


\(3\) This potential "gap" is found in Kentucky law, where the court has adopted strict products liability, as defined in Section 402A of the Restatement of Torts. See Nichols v. Union Underwear Co., Inc., 602 S.W.2d 429 (Ky. 1980). However, the legislature has enacted the most restrictive version of UCC 2-318. See Brickey, Products Liability in Kentucky: The Doctrinal Dilemma, 65 Ky. L. J. 593 (1976-77).

\(4\) Noting that the claim will be asserted by the owner of the product, whether in privity with the seller or not, one court noted:

(B)ecause persons other than the owner of the product will not incur economic losses
incomplete when the full plate of reasons for strict liability are considered. If, for example, the product is dangerously defective but only causes economic loss, will there be enough incentive for safety if the manufacturer is not liable for economic loss? Perhaps, if one concludes that the pressure for safety from cases were damage to person and property did occur is enough. Similarly, will the ethical policy against unjust enrichment be satisfied? Maybe, if the manufacturer is held accountable to intermediate suppliers and retailers when they are required to compensate buyers for damaged expectations. Finally, suppose the buyer is a consumer who has paid a fair value for a seriously defective product. Even if this is a loss of bargain, should that loss be left on the consumer when, for example, his immediate seller is insolvent or out of business?

Enough has been said to suggest that this perplexing problem on the borderland cannot be resolved simply by distinguishing between the Tort and the Contract interest. The social policies involved where the risk of damage to person or property is great suggest, perhaps, that all buyers within the distribution chain should receive full protection for both interests, regardless whether there is privity of contract. At this point, however, only one thing is clear: the intractability of the economic loss problem begs for and has received a compromise solution. When in doubt, the courts have chosen a flexible (Contract) rather than a rigid (Tort) solution.

resulting from the product's poor performance, the costs associated with economic loss will likely be reflected in the price of the product. There accordingly would seem to be no need to internalize these costs through a non-price mechanism such as strict liability.


85. See Morrow v. New Moon Homes, Inc., 548 P.2d 279 (Alaska 1976), where the court refused to apply strict tort liability to a consumer-buyer's claim against the manufacturer of a defective mobile home but extended the protection of warranty without the blessing of UCC 2-318. The court appeared to limit is extension to cases where consumer-buyers asserted claims to "direct" economic loss, i.e., the difference in value between the goods as warranted and the goods as received. See also UCC 2-714(2).

86. But not without misgivings. See Moorman Mfg. Co. v. National Tank Co., 91 Ill.2d 69, 435 N.E.2d 443, 455 (1982) (Simon, J. concurring) (after arguing that the difference between economic loss and its opposite is "the difference between contract and tort," he states that this does not mean that economic loss "should not be recoverable unless there is privity.... The proper approach is to develop a system of warranties out of privity to protect warranty-like, that is contract-like, interests, while using a tort theory to protect tort interests." Id. at 456-57). It is submitted that the basis for such a "system" can be found in the representational theory developed by Professor Shapo. See Shapo supra note 80.
(B) **Bad Faith Refusal to Perform**

Suppose, in a contract for the sale of goods, that B has paid S the price ($10 per unit) in advance and now awaits the delivery of the promised goods on August 1. On July 20, the market price is twice as high as the contract price, and S sells the goods intended for B to a third party. He also invests the contract price in a profitable futures contract. On August 1, S deliberately breaches the contract. B promptly buys substitute goods in the open market for $15 per unit and sues S for compensatory damages under the UCC. In addition, B claims: (1) damages for emotional distress caused by the breach; (2) punitive damages for the deliberate breach; and (3) restitution of the gains S made trading in the goods intended for B and the price paid under the contract. What are B's chances for the claims in addition to the economic losses associated with disappointed expectations?

The answer, in a commercial case such as this, is virtually none. Some courts simply refuse recovery for emotional distress in commercial cases and all courts require that the risk of such loss be in the contemplation of the parties at the time of contracting. Punitive damages are not awarded for deliberate breaches in commercial cases—S's conduct simply does not qualify as that independent, aggravated tort necessary to justify punishment. Finally,

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87. Compare Roberson v. Dale, 464 F. Supp. 680, 683-84 (M.D.N.C. 1979) (even if foreseeable, mental distress not recoverable for breach of a commercial contract) and Martin v. Donald Park Acres at Hasting, Inc., 54 A.D.2d 975, 389 N.Y.S.2d 31 (A.D. 1976) (mental anguish not compensable, "especially where the breaching party is engaged in private enterprise and there is no allegation of an accompanying physical injury) with Chung v. Kaonohi Center Co., 62 Hawaii 594, 600, 618 P.2d 283, 288-89 (1980) (even in commercial contract, foreseeable mental distress caused by a "wanton or reckless" breach is compensable). See also UCC 1-106(1) (no special or punitive damages recoverable unless "specifically provided in this Act or by other rule of law"); RESTATEMENT (SECOND) OF CONTRACTS § 353 (1979) (even without bodily harm, damage for emotional disturbance recoverable if the "contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result"). For a classic case where damage for emotional distress is allowed see Allen v. Jones, 104 C.A.3d 207, 163 Cal. Rptr. 445 (1980) (negligent performance of cremation contract).

88. A common statement of the "rule" is that no punitive damages will be awarded "solely" on the breach itself. The breach must constitute an "independent and wilful tort accompanied by fraud, malice, wantoness or oppression." McIntosh v. MAGNA Systems, Inc., 539 F. Supp. 1185, 1190 (N.D. Ill. 1982). Cases with different verbal formulations which refuse punitive damages in commercial disputes include: Argo Welded Products, Inc. v. J.T. Ryerson Steel & Sons, 528 F. Supp. 583 (E.D. Pa. 1981) (negligent delivery of nonconforming goods); Pogge v. Fullerton Lumber Co., 277 N.W.2d 916 (Iowa 1979) ("knowing and wilful" deviations from specifications in construction of residence); J.G.S., Inc. v. Lifetime Cutlery Corp., 87 A.D.2d 810, 448 N.Y.S.2d 780 (1982) (fraudulent promise to deliver goods after buyer had paid full price). In New York, the court must find public fraud in a private
if B sues for compensatory damages, restitution is limited to the price paid. It does not include the gains S made speculating with the subject matter of the exchange. This rigid result is explained in various ways by the courts. To the economist, however, it is justified in the allocative efficiency thought to result when S is permitted to deal freely with any net gains left after B's expectation interest is fully compensated.

There are some exceptions, however, and in them one can see the nose of the punitive damage camel under the contract tent. Consider this simple illustration. Support that A is hired by Corporation B as a manager. No duration for the employment is stated. Five years later, a new president, C, persuades the board of directors of Corporation B to terminate A's employment. No notice and no reasons are given. At common law, the contract "rule" was that the relationship was terminable at will by either party at any time for any reason. Compensation must be paid for work done, but there was no basis for protecting the expectation of continuing employment. A Tort exception, however, has recently emerged: If the discharge was in retaliation for conduct by A that furthered some important, established public policy, it is a tort and the employer may be liable for punitive damages. Thus, when A was discharged because he actively cooperated in a police investigation of fellow workers, the Illinois Supreme Court concluded that A stated a cause of action in tort for retaliatory discharge: "The transaction. "Allegations of breach of a private agreement, even a breach committed willfully and without justification do not establish ... willful fraud or other morally culpable behavior." 448 N.Y.S.2d at 781. See Sullivan, Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change, 61 MINN. L. REV. 207 (1977).

89. Under the RESTATEMENT (SECOND) OF CONTRACTS, the "restitution" interest means the plaintiff's "interest in having restored to him any benefit that he has conferred on the other party." Section 344(c). Although the plaintiff may seek restitution as a remedy for breach of contract, he is "entitled to restitution ... only to the extent that he has conferred a benefit on the other party by way of part performance or reliance." Section 370. Cf. Section 371, where the measure of the "restitution" interest may be "the extent to which the other party's property has been increased in value of his other interests advanced." Comment (a) suggests that the flexibility in the measurement is designed more to protect lost opportunities of the plaintiff rather than to disgorge speculative gains made by the defendant. See Farnsworth, Legal Remedies for Breach of Contract, 70 COLUM. L. REV. 1145, 1147-49 (1970). But see Schiro, Prospecting for Lost Profits in the Uniform Commercial Code: The Buyer's Dilemmas, 52 S. CAL. L. REV. 1727, 1749-50 (1979).


91. For a concise discussion, see Note, Defining Public Policy Torts in At-Will Dismissals 34 STAN. L. REV. 153 (1981).
foundation of the tort of retaliatory discharge lies in the protection of public policy, and there is a clear public policy favoring investigation and prosecution of criminal offenses." 92

Note that this Tort duty is imposed upon the employment relationship to protect interests broader than the employee's contract expectations. In effect, the employer is punished for using the employee to oppose what might be called society's expectations of preferred conduct. Without this retaliation, however, or a fixed duration in the contract, the "at will" rule remains intact, unless the power to terminate is regulated by a collective bargaining agreement or legislation. 93

Although limited by its context, there is a germ of an idea here. To what extent should a court examine the motives or reasons for the conduct of the breaching party, with the view to expanding the scope of punitive damages in breach of contract actions? Put another way, should a deliberate breach of contract coupled with improper motives or "bad faith" justify the imposition of punitive damages?

In insurance contracts, a limited "yes" can be given to this question. Stated simply, if an insurance company unreasonably fails to settle a claim within the policy limits under circumstances where there is a "great risk" that the injured party will recover a judgment against the insured in excess of the policy limits, California and the courts of other states have held that there is a tortious breach of the implied covenant of good faith and fair dealing. 94 This failure to settle "sounds in tort and contract" and the insured may,

92. Palameter v. International Harvester Co., 85 Ill.2d 124, 421 N.E.2d 876, 880 (1981). For other examples of the "tort" of retaliatory discharge, see Tamenev v. Atlantic Richfield Co., 27 Cal.3d 167, 610 P.2d 1330 (1980) (discharged for refusal to commit the criminal act of price fixing); Nees v. Hocks, 272 Or. 210, 536 P.2d 512 (1975) (discharged for serving on a jury); Harless v. First National Bank in Fairmont, 246 S.E.2d 270 (W.Va. 1978) (discharged for attempt to persuade employer to comply with consumer protection laws). Kentucky recognizes the tort, but has held that a discharge because the employee decided to attend night law school did not impair a clear public policy. See Scrogan v. Kraftco Corp., 551 S.W.2d 811 (Ky. 1977) (employee's attendance in law school was a private rather than a public concern).


in proper circumstances, recover: (1) the payment due plus interest; (2) the excess liability caused by the failure to settle; (3) damages for emotional distress; and (4) punitive damages. The factors involved in justifying this recovery in excess of expectation include:

1. insurance companies have quasi-public responsibilities;
2. the dominant purpose of the transaction was not commercial;
3. emotional distress was foreseeable at the time of contracting;
4. the insured was dependent upon the insurer's skill and judgment in a continuing relationship where trust and confidence were important;
5. the insurer took advantage of the insured's weakness by deliberately refusing to pay a valid claim under circumstances where the insured needed the money and was left with litigation as the only recourse.

However these factors are arrayed, this deliberate refusal to settle breaches the contract, impairs the integrity of a quasi-fiduciary relationship and damages public interests and the interest of the insured beyond the expectation of a prompt, fair settlement. This "bad faith" breach, therefore, is called a Tort and remedies redressing both private and public interests have been fashioned.

The important question is this: to what extent should the doctrine of "bad faith" breach be extended beyond the insurance setting? Although there is some debate in the law reviews, the judicial answer to date has been "never." As one court recently explained it: "Care must be taken to prevent the transmutation of every breach of contract into an independent tort action through the bootstrapping of the general contract principle of good faith and fair dealing."

But why should such care be taken? One answer may be that

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97. See Note, supra note 91; Diamond, supra note 94; Louderback & Jurika, supra note 96.
98. Well, hardly ever. See F.D. Burkholder Co. v. Sandock, 413 N.E.2d 567 (Ind. 1980) (punitive damages awarded for intentional, wrongful and defective construction of a cinderblock addition to a business).
99. Martin v. Federal Life Insurance Co., 440 N.E.2d 998 (Ill. App. 1982). The court stated that in employment contracts where the plaintiff has "expressly bargained for permanent employment," there is a right of action based upon the contract and tort principles are not needed. Id. at 1004.
the courts are influenced, although subliminally, by the doctrine of "efficient" breach.100 Even if A's breach is deliberate and motivated by self-interest, if there are no important public interests impaired by the conduct and B's expectation interest is adequately protected by normal contract remedies, why should A be punished for his breach? In fact, the argument is that the public interest will be served if A is permitted to reinvest his "net gain" from the breach in other economic opportunities. This reasoning, of course, downplays the "wrongfulness" of A's conduct, emphasizes the economic reasons for protecting the expectation interest and assumes that B can recover full compensation from A in a relatively costless litigation. It accords with the classical exchange transaction between parties of relatively equal bargaining power arising in a functioning market where it is assumed that there is a dollar price for everything and, given their head, the parties will reach an efficient agreement either before or after the breach.

Somewhere between this "model" commercial transaction and the insurance contract, transaction types exist that will sorely tempt a court to classify a bad faith breach as a tort. Undoubtedly, it will contain a mix of commercial and non-commercial and private and public interests. The temptation to impose punitive damages will be found in: (1) the unethical or outrageous character of the breacher's conduct; (2) the fact that the loss to B may equal or exceed the gain to A from breach; (3) the probability that other private interests of B or strong "public" interests will be impaired by the breach; and (4) the probability that B will not be able to obtain full compensation through a quick, relatively costly proceeding.101 These factors tend to neutralize the force of the efficient

100. See Pogge v. Fullerton Lumber Co., 277 N.W.2d 916, 918-20 (Ia. 1979), where the court, in rejecting punitive damages for the knowing and wilful breach of a contract to construct a residence, stated that contract damages adequately compensated for the loss and an award of punitive damages would create uncertainty and confusion in commercial transactions. See also General Motors Corp. v. Piskor, 381 A.2d 16, 20-23 (Md. 1977), where the court concluded that damages in contract were sufficient "without the necessity of assuaging his feelings or allaying community outrage" and that the award of punitive damages for a "pure" breach of contract would "seriously jeopardize the stability and predictability of commercial transactions, so vital to the smooth and efficient operation of the modern American economy."

101. The test for punitive damages in Indiana offers a less complicated avenue to expanded redress in tort. The plaintiff must establish either that D's conduct in breach independently establishes the elements of a common law tort or that the elements of fraud, malice, gross negligence or oppression "mingle" in the controversy (i.e., the wrong does not fit the confines of a predetermined tort) and that the public interest will be served by the deterrent effect of punitive damages. In the Burkholder case, the court found that
breach idea, especially where the breacher captures an immediate gain under circumstances where the prospect of full compensation to the aggrieved party is low. Also, the relational features of these transactions emphasize the need for extra protection for persons with lesser economic power who are requested to rely upon the skill, judgment and honesty of others. When these cases arise and are well argued by counsel, I predict that the head and shoulders of the punitive damage camel will soon be ever farther inside the contract tent.

(C) The Failure to Act Where There is No Promise to Act.

So far, we have considered when a defective performance (misfeasance) or the unjustified failure to perform a promised performance (nonfeasance) may amount to a tort. In both situations, the range of potential tort liability within and around the bargain relationship has increased. This is attributable, in part, to the presence of public and private interests which, in addition to expectation, need protection. The ultimate question in this "borderland" inquiry, is this: To what extent in a bargain do the parties have a duty in either Contract or Tort to take affirmative

in defectively constructing a cinderblock addition to a business, the defendant practiced "intentional wrongful acts," e.g., fraud, deceit and misrepresentation. F.D. Burkholder Co. v. Sandock, 413 N.E.2d 567 (Ind. 1980). The public interest would be served by deterring contractors from intentional deviations from contract specifications and building codes in residential construction. "(A) building contractor occupies a position of trust with members of the public for whom he agrees to do the desired construction." Id. at 571.

102. Louderback and Jurika conclude that the tort of bad faith breach should be applied to commercial contracts if "four of the features characteristic of insurance bad faith actions are present." Louderback & Jurika, supra note 96, at 227. The features are:

(1) one of the parties to the contract enjoys a superior bargaining position to the extent that it is able to dictate the terms of the contract; (2) the purpose of the weaker party in entering into the contract is not primarily to profit but rather to secure an essential service or produced, financial security or peace of mind; (3) the relationship of the parties is such that the weaker party places trust and confidence in the larger entity; and (4) there is conduct on the part of the defendant indicating an intent to frustrate the weaker party's enjoyment of the contract rights.

Id.

A recent California decision stated the proposition in the negative:

Where the dominant purpose of such a contract is merely the obtaining of a commercial advantage and there attends to it no particular aspect of protection against mental distress, no special relationship giving rise to public policy or public interest considerations and no lack of balance in the contractual relationship as is characteristic in contracts of adhesion, tort recovery including punitive damages is not available. Seaman's Direct Buying Serv. v. Standard Oil, 181 Cal. Rptr. 126, 134-35, 129 C.A.3d 416 (Cal. App. 1982).
action to cooperate with or to "rescue" the other when such action has not been promised? Is there such a duty? If so, when should it be satisfied and what are the consequences of failure? To date, the nose of the "good samaritan" camel has not appeared in the contract tent, although its hot breath can be felt on the side. 103

There is a strong historical correlation between the outcome in Contract and Tort: neither imposes exacting duties upon one party to be a good samaritan, commercial or otherwise. In Contract, an "implied duty of cooperation" is imposed upon the bargain relationship and has occasionally been breached where A's failure to cooperate with B is necessary for the occurrence of a condition or to effectuate the exchange. 104 In Tort, A may have a duty to act or to "rescue" where his conduct has created the risk to B or he occupies a special relationship with B. 105 In both Contract and Tort, a relationship may create a dependence by B upon A's assistance and the circumstances may give A power to render that assistance at very little cost. But if A has not promised to assist and there are no special relational features, such as a fiduciary duty, or the assistance would be risky or costly to A, the failure to act is neither a breach of contract nor a tort. 106

This result should surprise no one. A has not promised to act,

103. For example, the "duty" of a landlord to take action to protect tenants within common areas and their apartments from violent crime by third parties. See Browder, supra note 4, at 144-55.

104. See, e.g., Seaman's Direct Buying Serv. v. Standard Oil, 181 Cal. Rptr. 126, 129 C.A.2d 416 (Cal. App. 1982), where the court held that one party to a long-term supply contract breached the implied duty to cooperate by refusing to make a stipulation that was essential for the other to secure a lease upon which the contract depended. Accord, see Weber Meadow-View Corp. v. Wilde, 575 P.2d 1053, 1055 (Utah 1980); Fernandez v. Vazquez, 397 So.2d 1171, 1173-74 (Fla. App. 1981). See also, Restatement (Second) of Contracts § 205 (1979); E. Farnsworth, supra note 22, at 528-29 (cooperation is part of duty of good faith); Muris, Opportunistic Behavior and the Law of Contracts, 65 Minn. L. Rev. 521, 552-56 (1981) (failure to act, although not required by agreement, is in bad faith if contrary to other's understanding and leads to a wealth transfer from A to B); Patterson, Constructive Conditions in Contracts, 42 Colum. L. Rev. 903, 928-42 (1942) (duty arises from necessities of exchange to avoid unjust enrichment).


106. The "special" relationship exists in insurance, where an agent or broker who with a view to compensation for his services, undertakes to procure insurance for another, and through his fault or neglect fails to do so, will be held liable for damages in tort. See Rae v. Air-Speed, Inc., 435 N.E.2d 628 (Mass. 1982); but see Burks v. Madyun, 435 N.E.2d 185 (Ill. App. 1982), where the court held that the contractual relationship with a baby sitter imposed no duty on the parent to warn or protect against the criminal acts of third parties.
so no reasonable expectations are created. B's dilemma was not caused by A's conduct. A's decision not to act, although motivated by self interest rather than altruism, has moral justification, especially if B can be said to have assumed the risk of the accident. Thus, imposing the duty to act on A is tantamount to a forced exchange exacted by government. Although this exchange might be justified by some broader conception of the social contract, it is inconsistent with both Tort and Contract doctrine, not to mention Aristotle's theory of Commutative Justice. Nevertheless, there is some argument for a more expansive concept of the duty to act, either as the duty to effect an "easy" rescue in the law of Torts or as the duty to negotiate in good faith toward the adjustment of a contract where, beyond the bounds of clear risk allocation, a commercial "accident" has occurred. Good arguments notwithstanding, however, there is no evidence that Tort and Contract have joined forces to increase the legal duty to rescue within the bargain relationship.

5. Conclusion.

It is now time to assess the findings on our brief tour of the borderland of contract. Without question, there have been some changes in the contract doctrine that emerged from the 19th Century and in its relationship to the law of Torts. Thus, the "adequacy of consideration" principle no longer insulates an apparently unequal exchange from judicial scrutiny; courts are empowered, through partial enforcement of the promise, to protect less than the expectation interest and the limitations upon compensation implicit in the idea of "efficient" breach have been under heavy attack by plaintiffs who increasingly seek punitive damages. At the same time, strict products liability has helped further to erode the doctrinal distinctions between Contract and Tort and the duty of

107. The arguments for and against the "forced exchange" are collected in R. POSNER, TORT LAW: CASES AND ECONOMIC ANALYSIS 403-23 (1982).
109. See Speidel, The New Spirit of Contract, 2 J. L. & COM. 193, 202-08 (1982), where the case for a "duty to modify" a contract is made to depend upon four conditions: (1) the occurrence of an unanticipated even that justifies some relief to the promisor; (2) a proposed modification which, if accepted by the promisee, would be enforceable; (3) a refusal to modify by the promisee that results in large, windfall gains; and (4) other factors that support continuation and performance of an adjusted relationship.
good faith, imposed regardless of consent, provides the potential
for greater integration of the two theories of civil liability within
the bargain relationship.

Nevertheless, except for strict products liability, there may be
less here than meets the eye. Although the seeds for these doc-
trinal developments were planted more than 50 years ago, there
is little evidence of widespread judicial acceptance today. Rather,
assimilation has been uneven and identified with particular trans-
action types. Thus, the claim of unconscionability has been most
successful in consumer transactions, partial enforcement may
work best for the promises on the periphery of the market and
punitive damages for a "bad faith" breach have been limited to
special situations, e.g., insurance contracts. More importantly, it
would seem that the underpinnings of the classical doctrine, if not
its form of expression, are still very much in place in the commer-
cial transaction, particularly the contract for the sale of goods under
Article 2 of the Uniform Commercial Code. Under Article 2, com-
mercial parties have great latitude to fix the value of their ex-
change, expectation is the primary interest to be protected and
the doctrine of "efficient" breach still stands guard against tort
intrusions in the form of punitive damages. In fact, the post-real list
shift from rules to standards has delegated even more power to
the parties to define the scope and content of the bargain.

On top of this, there are many who doubt the importance of judge-
made private law as a technique to facilitate or regulate bargains.
The nature of the doubts turn on the perspective of the doubters.
Thus, some argue that judge-made doctrine has relatively little
impact on the behavior of parties to the transaction, others claim
that because of the dominance of the legislative and administrative
processes, the choice and implementation of new doctrine will have
very little impact upon the distribution of resources in the society.

110. Even here, the impetus has shifted from the courts, operating under the standards
of UCC 2-302, to administrative officials, operating under more detailed definitions appear-
ing in consumer protection codes. See, e.g., UCC § 5.108, 6.111.
111. See, e.g., UCC § 1-106(1).
112. See Speidel, Restatement Second: Omitted Terms and Contract Method, 67 CORNELL
113. For a recent example, see White, Contract Law in Modern Commercial Transactions:
114. For one version of this claim, see Epstein, The Social Consequences of Common Law
and, finally, others assert that at best private law can only treat the symptoms of an allegedly unfair system of resource allocation. Until structural and other changes occur, they argue that the achievement of social justice cannot be secured through changes in either Contract or Tort doctrine.  

This is, of course, the nature of commutative justice. It responds to rather than determines the systems of distributive and social justice in place in the surrounding society. Yet Contract and Tort have also responded to changes in those systems, changes that have taken us in less than 150 years from a modified lassiez faire economy to a complex welfare state. Some of these changes are (1) increased governmental regulation of the institution of private property and the markets where it is exchanged; (2) greater dependence by more individuals on governmental assistance to obtain the basic necessities of life; and (3) the development of a complex, continuing exchange relationships between private corporations and individuals through which the individual obtains health care, insurance, education, investment management, retirement security or other important services. These transactions are symptoms of what Professor Robert Clark has called the "fourth stage of capitalism" and reflect the provision through contract by private enterprise of some services that the state might provide in a socialist society. In addition, these transactions, like the insurance contract, highlight the Tort and Contract interests of individuals dependent upon professional managers and the general public interest in having them managed in an honest and efficient manner. Thus, as government works to preserve the market system as the primary pattern for resource distribution and the claims by in-

115. See Kennedy, supra note 16, at 620-24, who argues that contract doctrine designed to remedy unequal bargaining power is of little use to a person seriously committed to achieving distributive objectives through law. The analysis is insufficient to address the general problems of equality "let alone the problem of the quality of life under our form of capitalism." For a broader brush, see Unger, The Critical Legal Studies Movement, 96 Harv. L. Rev. 561, 616-48 (1983).


117. Clark, The Four Stages of Capitalism: Reflections on Investment Management Treatises, 94 Harv. L. Rev. 561, 562-69 (1981), discussing the growing role of the "savings planner" in financial management. He describes the fourth stage as "intent upon splitting capital supplying into the possession of beneficial claims and the decision to save, and professionalizing the savings-decision function." The result is that individual decisions are made by a group of professional savings planners within a large corporate structure.
individuals for social justice increase, these complex private relationships have quietly emerged as the 20th Century version of the 14th Century “common callings.”

In conclusion, I predict that courts, in responding to disputes arising under these complex employment, financial and service transactions, will develop a creative synthesis of Contract and Tort ideas under the general duty to perform and enforce contracts in good faith. These transactions feature exchange within a continuing relationship, the presence, in varying degrees, of confidential and fiduciary duties, and an individual who is dependent upon the exercise of skill, judgment and discretion by private managers in meeting important needs. These special features, along with the broader public interests likely to be involved, undercut the appropriateness of the market model and heighten the desirability of a flexible duty of good faith as the transaction unfolds. Even if the transaction may be regulated in part by other law-making bodies and recourse to the courts in cases of disputes may be sporadic, the need to secure realistic protection of the individual against abuses of power by the managers exists. In short, the full range of the individual’s contract and tort interests and emerging public interests can be achieved by a skillful judicial blending of contract and tort ideas and the use of punitive damages as a regulatory device. For it is at this “borderland of contract” in the advanced welfare state that the ageless principle that “no one should gain by another’s loss” must be implemented in the complex transactions of a changing society.

118. See W. Prosser, supra note 5, at 382-84, where the duties imposed upon those who held themselves out to serve the public generally are discussed.
LEGAL REFORM AND THE CRIMINAL COURT:
THE CASE OF DOMESTIC VIOLENCE

by

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I. INTRODUCTION

Although the focus of many interest groups is in changing state and federal laws to facilitate meeting their particular ends, there has been little research done on whether this is in fact a useful or appropriate method of achieving system or social change. In recent years, there has been some important work done on the evaluation of the effect of U.S. Supreme Court decisions,1 on the long range effect of public policy initiatives,2 and on the importance of trial courts.3 By contrast, few studies exist which attempt to evaluate the effect of enacted legislation on the legal system’s decision-makers, especially in criminal justice decisions.4 This study examines the impact of a single legislative change, a recent statutory move in Ohio, which created a new crime of domestic violence.5 In recent years, one of the most active areas


We wish to thank Lee Ellington for her assistance in collecting the data analyzed in this paper.


5. OHIO REV. CODE ANN. § 2919.25 (Baldwin 1982).
of legal change affecting women nationally has been the proliferation of state legal changes and legislation attempting to deal with the social problem of woman abuse. Most state legislatures have in recent years adopted some form of legislation to deal with this problem, including such remedies as temporary or permanent protection orders, the creation of a new criminal offense of domestic violence, the provision for state-funded or state-assisted shelter houses for victims, state-mandated data collection efforts, and increased powers for police to make arrests in misdemeanor assaults. While the Ohio statute encompassed several of these reforms, the area of concern here is whether the creation of a new criminal offense has had an impact on prosecutorial charging decisions, on the behavior of judges, or on the traditional court outcomes in domestic violence cases.

Law Reform in Criminal Courts

A sizable literature on law reform exists in spite of a lack of agreement about what law reform is. When the question is narrowed to the effect of enacted legislation on the criminal courts,


While it is true that women can be and are battered by relatives other than husband or lovers, and that husbands may be battering victims, it is widely assumed and a premise here that most domestic violence victims are women and that most if not all reformist legal effort in this area stems from this premise.


however, one finds little information of substance. Levin suggests that one of the reasons why so little is known about the effects of change on the criminal courts is that the criminal courts have not experienced any major change. "The problem lies in the paucity of actual experience with innovations in the criminal courts."\(^{13}\) This lack of information may be due in part to the difficulty in studying law reform. A common method of studying decision-making in courts is through experimental mock juries.\(^{14}\) As Lempert has argued, however, study of law reform is possible only through non-experimental designs with actual reforms carried out in real-life situations.\(^{15}\)

The few scholars who have addressed themselves to legal change in domestic violence have not been optimistic about the effects of changes in the criminal courts.\(^{16}\) Nimmer, for example, argues that peace bonds have often been assumed effective because of anecdotal stories of success, but that these anecdotes remain viable only because all cases where further violence occurs are ignored.\(^{17}\) The identified problems seem to be of two types. Where the call is for some sort of decriminalization or diversion of battering cases away from formal court processes into informal hearings, "lack of time in which to consider the case and lack of expertise in dealing with complex interpersonal problems combine to prevent effective action."\(^{18}\) Where the call is for the use of the traditional criminal sanctions, the general agreement among students of the court processes is that usual court practices do little to prevent future spouse abuse.\(^{19}\) The percentage of dropped cases is extremely high, and prosecutors and judges often do not take such cases seriously.\(^{20}\) Very few defendants actually go to jail, "and the great majority

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are handled summarily and off-the-cuff. What little innovation is utilized by our courts is frequently and disturbingly extralegal."

In order to evaluate any new law, a number of problems must be resolved. One of the most difficult is the one which appears to be the simplest: to identify the goal which the law purports to address, and then measure or study behavior to see if this goal is being met. While the second of these steps—the measurement of behavior—has its own set of thorny problems, often the identification of goals is the more difficult step. Legislative reform may involve a coalition of interest groups with differing goals, as filtered through legislators themselves, who may have very different goals in mind for the same legislation.

In the case of the Ohio legislation, it is possible to make some basic presumptions about goals. One is that the bill drafters believed the new law would reduce the incidence of domestic violence. Unfortunately, since valid estimates of the actual incidence of domestic violence either before or after the new law do not exist, the impact of the law here cannot be addressed.

Another reasonable presumption is that the new law was intended to provide victims of domestic violence with a remedy. By providing for a new misdemeanor crime of domestic violence, and by providing that this crime should be dealt with by the traditional processes of the criminal courts, rather than through diversion or alternative processes, this law was designed to make "prosecution a viable alternative for a mate suffering physical abuse within the home." But does it? This paper will examine how the increased emphasis on the use of traditional legal processes affected certain legal outcomes: the number of cases filed, the number of cases dropped, the number of batterers found guilty, and the types of criminal justice sanctions imposed.

Symbolic Value of Law Reform

Another factor which must be considered in the evaluation of law reform is the symbolic impact of legislation. To what extent

23. OHIO ATTORNEY GENERAL'S OFFICE, THE REPORT FROM THE ATTORNEY GENERAL'S TASK FORCE ON DOMESTIC VIOLENCE (n.d.) at 17 [hereinafter cited as TASK FORCE REPORT].
DOMESTIC VIOLENCE

are legal changes concerning cosmetic violence useful for symbolic reasons even if there is no instrumental change on the part of legal decision-makers?

Edelman, for example, suggests that a new law which does not have an important effect on behavior might still prove to be a part of an important process which identifies a particular field as a public problem and begins a process of recognition of that area as such. A continuation of this process might eventually lead to more substantial impact. In many ways, the entire concept of deterrence to criminal law is built on such a presumption. Zimring and Hawkins argue that most people refrain from committing crimes because they believe that such behavior is "wrong," but that moral concepts of right and wrong have many roots, one of which is the criminal law itself. The public is generally more likely to view a particular act as wrong if it is also criminal.

In this model, members of a particular interest group might wish to see legislation passed in order to begin a long, slow process of consciousness-raising, which could eventually result in a major change in internalized norms. Many commentators, however, have argued that there is a lack of empirical evidence to support the existence of this process, and have therefore discounted it entirely. Others have argued that, since legal reform is a complex process, often occurring over several years, it is difficult to sort out causal factors.

In fact, one could argue that the most important symbolic effect of legislative change such as domestic violence laws is the symbolic value such laws have to a criminal justice system with no intention of changing. Such laws may change the nature of public assurances that the problem is being dealt with, without changing the basic allocation of power and decisions. Domestic violence laws might also allow officials under some pressure to deal with the problem to claim they are taking positive steps, even though there

28. HANDLER, supra note 2, at 37.
29. Id.
will be no results from these steps. Worst of all, one could argue that such legal activity is merely "cosmetic window dressing," designed more to placate reformers and activists concerned about spousal abuse than to ameliorate the social problem.

II. FINDINGS

On March 27, 1979, new legislation (Ohio House Bill 835) went into effect which established the crime of domestic violence and provided a range of procedures and remedies for victims of assault caused by family or other household members. Prior to this new legislation, although misdemeanor assault charges could be filed in cases involving domestic violence, in practice police agencies usually handled these cases informally and diverted them away from the formal criminal justice system, often to a private complaints program. The new legislation directs police officers to handle domestic violence cases as a criminal matter.

This study examined all cases recorded in the Municipal (misdemeanor) Court docket of Hamilton County, Ohio, with an approximate population of 873,000. Data were collected on all cases recorded either as domestic violence cases under the new law, or misdemeanor assault cases in which the complainant and the defendant had the same last name and/or address. Most of the information was obtained from the court docket, but when the docket information was incomplete, case records were examined.

Was the New Domestic Violence Charge Utilized?

Information was gathered on both the new domestic violence charge and on assault charges so that the frequency of use of the respective charges could be examined. The new domestic violence law requires police officers to use the domestic violence charge when it is appropriate, since this charge gives the victim access to civil and protective remedies, such as temporary protection orders. On the other hand, where the relationship between the victim and the offender might be doubtful or difficult to prove,

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32. OHIO REV. CODE ANN. § 2919.25 (Baldwin 1982).
33. OHIO REV. CODE ANN. § 2903.13 (Baldwin 1982).
34. Cincinnati Police Training Bulletin No. 123 (March 26, 1979), at 1.
35. Id.
police officers were encouraged to use of the charge of assault, since failure to substantiate the family or household member relationship could jeopardize the prosecution of a domestic violence case. Of the 1458 charges filed, 95 percent were for domestic violence and only 5 percent were for assault. The relative frequency of the two charges is consistent with the interpretation that the domestic violence charge was used in almost all cases except where the family or household relationship was doubtful or would have been difficult to prove.

The data collected in the study do not allow us to ascertain whether charges were filed in all cases in which they were warranted. However, the large number of cases filed does indicate that the new charge of domestic violence is being utilized frequently.

Sex of Victims and Offenders

Both the assault and the domestic violence statutes are written in a sex-neutral language: the victim and the assailant can be either the same sex or opposite sexes. Although the language of these laws is sex-neutral, the charges filed are not. In 90 percent of the cases, the victim was female and the defendant was male; in 5 percent the victim was male and the defendant was female; and in 5 percent of the cases the defendant and victim were the same sex.

Dismissed Charges

Nationally, one of the most serious impediments to prosecution has been a combination of dismissed charges, refusal to appear as a witness, or other unwillingness to follow through by the complaining witness. In studies of courts operating under regular assault statutes, investigators have typically found that approximately 80 percent or more of all cases of domestic violence were dismissed by the court either at the victim's request or because the victim failed to appear in court.

Under the new domestic violence law the frequency of dismissed cases is also high. Excluding those cases where there is an open warrant, one finds that of the 1408 cases filed, 1142 or 81 percent of all cases before the court were dismissed. Of these, 1062 or 93 percent of all dropped cases were dismissed either at the request of the victim or because the victim did not show up in court.

36. Id. at 3.
37. Lerman, Criminal Prosecution of Wife Beaters, 4 RESPONSE 1, 2 (1981).
Sentences

Although many women dropped domestic violence charges (or failed to bring them in the first place), 250, or 17 percent, persisted until a verdict was reached. Many of these victims persisted in spite of the numerous delays and inconveniences of the trial, in spite of psychological and financial dependency on the batterer, and in spite of fear about their own safety and the safety of their children both before and after the trial.

Of the 250 cases in which a verdict was reached, 66 percent or 166 persons were found guilty either by plea or trial. However, the sentences received by those found guilty were very light. In a county which has a strong reputation for harsh sentences, only 36 percent of the guilty defendants served any time at all in jail, including those sentenced to time already served while awaiting trial. Of those serving jail sentences, about one-third actually served between one and 15 days in jail, about one-third served between 16 and 30 days, and about one-third served between 31 and 188 days.

One possible explanation of the small percentage of guilty defendants that are sentenced to jail is that, instead of jail sentences, judges are using alternative sentences such as volunteer service or mandatory participation in drug therapy, alcohol counseling or other counseling. However, our study found that less than 10 percent of all those convicted were given alternative sentences. Moreover, alternative sentences are just as likely, in fact slightly more likely, to be given to those who serve time in jail as to those who do not serve time in jail. Clearly, alternative sentences are not being widely used as a substitute for jail.

Likewise, fines do not seem to be used as a substitute for jail. The majority of guilty defendants (51%) were not fined, and those that were generally were not fined large sums. Only 12 percent were fined more than $100. Such low fines are unlikely to be deterrents to future abuse, although fines large enough to be a deterrent may be counterproductive. Since most victims are economically dependent on their abusers, larger fines would penalize the victim and victim's children as much or more than the abuser.

The most common sentence given to the convicted is probation; 67 percent of the convicted were sentenced to three months or more on probation. Ideally, probation would protect the victim against further abuse. Since continued abuse would be a violation of probation, if the abuse did not stop, the victim could have the
abuser's probation revoked by reporting the incident. But does probation work?

In the study county, no special effort is made to encourage victims of convicted abusers to report further abuse to the abuser's probation officer. Generally, victims are not informed that further abuse is a violation of probation. In most cases, even if the victim did report continued abuse, the convicted abuser's probation would not be revoked unless he was found guilty of another charge of domestic violence or some other crime. Unfortunately, it is likely that having tried once to use the court to escape the battering situation, many women do not file charges a second time because they feel betrayed by the court and afraid to use the legal system again.

Summary of Findings

This study examines all 1980 charges under Ohio's new domestic violence law in a large misdemeanor court of one Ohio county. Our examination of measurable court outcomes indicates that the creation of this new offense category has not provided most victims with a remedy they are willing to use. For example, excluding cases in which there is an open warrant, 81 percent of all cases before the court are dismissed before a verdict is reached. This figure is extremely high, especially when it is combined with the large number of victims who never even file charges. Moreover, even when victims persevere and the batterer is found guilty, very little happens to him. For example, 64 percent of those convicted do not spend even one day in jail, less than 10 percent were sentenced to alternative programs, and 27 percent served no days either in jail or on probation. The most common sentence is probation, but no special precautions are taken to ensure the victims' safety when batterers are sentenced to probation.

The new Ohio domestic violence law was designed to make "prosecution a viable alternative for a mate suffering physical abuse within the home." However, even after the passage of this new law two serious problems remain. First, the number of cases

38. In about one-third of the cases in which a verdict was reached, the defendant was found not guilty, and an unknown (but probably small) number of cases were dropped in spite of the victim's willingness to pursue the case.

39. TASK FORCE REPORT, supra note 23, at 1.
dismissed is very high. Second, even when found guilty, most batterers are neither punished nor offered help. In less than 2 percent of the cases filed is the accused sent to jail for more than 30 days. Currently, little is being done by the court to insure the safety of the remaining victims who file charges but whose abusers are not sent to jail or the victims who never file charges. Clearly, even under the new law, the needs of many victims of domestic violence remain unmet.

III. THE IMPORTANT SYSTEM ACTORS

Given the important problem we have identified—the high incidence of dropped charges—it seems that the three most important actors in the decision-making process are the victim, the batterer and the prosecutor. Each of these three will be dealt with in turn before returning to deal with implications and recommendations for dealing with this problem.

The Victim

As has already been established, one of the most difficult problems in prosecution of domestic violence cases is that many women do not file criminal charges, and if they do file, fail to follow through in the prosecution of their batterers. In one study, for example, out of 881 discovered incidents of battering, the victims only reported the episode to the police in 76 cases. Even then, immediate arrest was made in only 41 percent of these cases. If the majority of these cases are then dropped, one can see that those cases which reach the courts are but a small percentage of the estimated two million people who each year are beaten up by their spouses.

There is an argument to be made that the problem of dropped cases feeds into a cycle, where the reactions to the problem tend to exacerbate the original condition. Domestic violence cases which eventually get dropped are seen as a major waste of time by prosecutors, who eventually blame the women for causing this situation.

In anticipation of such problems, prosecutors may take steps to

discourage women from following up on criminal complaints, which then swells the percentage of dropped cases.\textsuperscript{43}

Perhaps more important, however, are problems which relate directly to the particular situation and mental state of the victim. When combined with some of the prevalent myths about the battering victim, these problems can work to prevent a majority of criminal cases from reaching the courts. Loving has suggested that some of the prevalent myths held by people in the criminal justice system are that battered women are generally masochists, that many find the use of violence as a sexual turn-on, that men who use violence against women are generally driven to do so by the women's obnoxious or nagging behavior, that alcohol abuse is the main cause of spouse abuse, and that if battered women won't do anything to change their marriages, then things couldn't be all that bad.\textsuperscript{44} Walker has suggested that the prevalence of such myths might be related to the ability of the system to help; that people who have no ability to help battered women tend to believe that these women like their beatings.\textsuperscript{45}

Certainly, the root of some of these myths is a misunderstanding of the situation of the battered woman. Researchers have found that such women often suffer from feelings of unworthiness, self-doubt, fear, isolation, helplessness and dependency.\textsuperscript{46} Martin has suggested that at the time a woman is asked to make decisions about the prosecution of a case against her husband, she may be additionally suffering from trauma as a result of the attack, and fearful of reprisals by her husband if she pressed charges.\textsuperscript{47} A woman who feels helpless and dependent may have fear for her own safety or the safety of her children, or a belief that she cannot survive economically and/or emotionally without the batterer.\textsuperscript{48} Walker has argued that because of learned helplessness, these women often do not believe they can ever get away from their batterers.\textsuperscript{49}

\begin{thebibliography}{50}
\bibitem{43} J. B. Fleming, Stopping Wife Abuse 198-201 (1979).
\bibitem{46} See, e.g., Roy, Some Thoughts Regarding the Criminal Justice System and Wife Beating, in Battered Women (M. Roy ed. 1977); Hilberman & Munson, Sixty Battered Women, 2 Victimology 460-70 (1977-78); Walker, Battered Women and Learned Helplessness, 2 Victimology 525-34 (1977-78).
\bibitem{47} Martin, \textit{supra} note 41, at 210.
\bibitem{48} R. J. Gelles, The Violent Home (1974).
\bibitem{49} Walker, \textit{supra} note 46, at 530.
\end{thebibliography}
Perhaps one of the more useful distinctions in understanding the battered woman has been made by Steinmetz, who suggests that there is a group of women who do in fact exhibit some of the behavior ascribed to battered women by many in the justice system.50 This type—Steinmetz terms her the “Saturday Night Brawler”—may indeed use the police and courts as a way to get the “last word” in an argument that either partner may have begun or escalated. This woman typically is neither fearful nor powerless, and may provoke the violence:

If I were to aggravate him or bring up something, then he would get violent when he was drinking. But if he would come home and I would just leave him alone—no violence. But I just can’t stand him half-asleep in that chair, with no one for me to talk to—you want adult conversation.51

Steinmetz characterizes these Saturday Night Brawls as “reciprocal, escalating, violent interactions—with either spouse likely to be the victim in a given fight.”52 In these cases, one can see the woman who is so often complained about in courtroom corridors, police locker rooms, and even at battered women’s shelter houses. The victim is an active participant in the violence, is neither fearful nor without resources, and is willing to use the criminal justice system to make the final statement in an argument. She virtually always, of course, later drops the charge, claiming “reconciliation” with her spouse.

The problem is that these Saturday Night Brawl cases provide the occasional verification of myths about women who don’t mind being battered because it is “so much fun to make up afterwards.” This combination of myths and occasional verification allows an individual to either ignore, or ascribe similar reactions to the vast majority of battered women, who Steinmetz typifies as being caught in the Chronic Battered Syndrome.53 These women not only do not provoke the attacks, but remain passive in order to protect themselves from injury or escalating violence.54 The typical pattern of fear, isolation, emotional dependency, guilt and lack of support these

51. Gelles, supra note 48.
52. Steinmetz, supra note 50, at 323.
53. Id.
women go through is remarkably similar to the processes of brain-washing, with the similar reactions of helplessness, doubts of self-worth, and self-blame. Yet, it is not uncommon for these women to be similarly blamed by criminal justice system and treatment system professionals for starting the trouble, provoking the situation, or failing to take effective action to end the problem. It is, perhaps, the unkindest cut of all to blame a person caught in the midst of a psychologically traumatizing Chronic Battering Syndrome, that produces learned helplessness, for not taking difficult steps to help themselves. Steinmetz cites the following case as an example of the dynamics of powerlessness in the Chronic Battered Syndrome:

The woman, six months pregnant, is repeatedly punched in the abdomen. Her husband keeps screaming: "Bitch, you are going to lose that baby," and then beats her in the stomach again. After the assault in the bathroom, accused told victim to cook dinner. Victim stated that the accused picked up a butcher knife and put it to the victim's throat and told victim, "I am going to kill you and you know I can do it, too, don't you?" Victim answered "Yes," and accused laid the butcher knife on the table and turned around and hit victim in the face with his fist and knocked victim to the floor. Then the accused sat down on the victim's stomach and put his knees on the victim's arms so victim could not block any kicks from accused. The accused started beating victim in the head, face, and stomach.

Under these circumstances, it is not unreasonable to find that women often find little incentive to go forward with the criminal justice system process, and much incentive to back off. Such women may have received intense pressure or threats of violence from spouses, discouragement from the police or court officials for continuing through the case, lengthy delays in a complex process in urban misdemeanor courts that under the best of circumstances are alienating and confusing, and perhaps most important, a lack

55. Steinmetz, supra note 50, at 328-32.
56. Actually, at least one commentator has suggested that some dropped cases by battered women may be the result of a positive experience: she may have used the time her husband was in custody to pack up and move out. Fields, supra note 42, at 256.
57. Steinmetz, supra note 50, at 325. Actually, it is common for women to report that physical abuse becomes much more serious during pregnancy, although theorists are uncertain whether this is resentment due to lack of attention, or perhaps prenatal child abuse. Gelles, Violence and Pregnancy: A Note on the Extent of the Problem and Needed Services, THE FAM. COORDINATOR 81-86 (1975); L. Walker, The Battered Woman 105-06 (1979).
of support. Pagelow has argued that "if a woman lacks necessary resources, receives negative institutional response and is strongly traditional in her beliefs, she is highly unlikely to take an action which will significantly alter her situation in a positive direction."  

Both the chronically battered women and the Saturday Night Brawlers drop charges. The fact that a woman has dropped the charges may mean a reconciliation between two Saturday Night Brawlers or it may mean that a chronically battered woman has been intimidated. Any solution to the problem of domestic violence victims must recognize that, although a few women are Saturday Night Brawlers, many more are caught in the Chronic Battered Syndrome, and consequently they are afraid, dependent and easily discouraged from filing charges or following through once they are filed.

IV. THE BATTERER

A prerequisite to developing a strategy for relieving domestic violence, either through the criminal justice system or other methods, is an understanding of the abuser as well as the victim.

One common misconception about batterers is that they are mentally ill. However, it is estimated that only 2 or 3 percent of all battering can be attributed to men who are psychotic or who suffer from brain damage which interferes with their being able to control aggression.  

Some psychological studies based on small samples of special populations, such as batterers who are in jails or in treatment, have found high rates of mental illness among the men in their samples, but since most batterers are not sentenced to jail or treatment, those that are are likely to be atypical. Therefore, findings based on jail or other institutionalized samples cannot be generalized to other batterers. The best available evidence suggests that batterers are no more likely to be mentally ill than are other members of the population.

Although most batterers are not mentally ill, they do seem to share several personality traits and cultural values and beliefs. Men who batter tend to be emotionally constricted and very de-

63. Strauss, supra note 61.
pendent on women for nurturance and emotional support, but at the same time they hold anti-woman attitudes. David Adams and Isidore Penn, two counselors who work with men who batter, have described how normative sex role socialization encourages these characteristics in men.  

Little boys are taught that to be a man is to not be a "sissy." Thus, rather than desired behavior being defined positively as something the child should do or be, undesirable behavior is indicated negatively as something the child should not do or be—particularly anything that is regarded as "sissy." Several consequences result from this type of socialization. First, little boys are taught to suppress characteristics attributed to females, especially the expression of emotions. The frequently heard adage, "Be a man; don’t cry," epitomizes this message. One way to avoid expressing emotion is to actually curtail feeling emotions or at least one's awareness of one's emotions. Counselors of battering men report that batterers often fail to realize that their anger is a secondary reaction to hurt or fear and many batterers even lack words to express their emotions.

Another consequence of this type of socialization is that men are especially wary of expressing their emotions to other men, and consequently become very dependent on women (often just one woman) for emotional support. Battering often erupts when a man is experiencing an emotional crisis that the woman who is his sole source of emotional support cannot solve. As Andrew McCormick explains:

Most men do not feel comfortable with stoic emotional independence. It creates lonely and isolated people. After the "good times" of the corner gangs or the army are gone, men are left with few relationships that even hint at intimacy. When the women they love is someone they feel they need to dominate, they are lonely indeed. This detached emotional life of men belies an internal festering that gives rise to rage, which often appears to be the dominant feeling in men. The rage is not only the result of mistreatment or hurt, it is also a deeper rage that is a response to the unmet need to share feelings that he has. It is this rage that most people see as the cause of abuse.


We must be clear that the rage is not a result of the woman's not meeting the man's needs. On the contrary, most men do not know how to ask for what they need. 66

A third consequence of socialization which requires boys to be hostile toward femininity is that it is difficult to be hostile toward femininity without being hostile toward females. According to Ruth Hartly:

Indeed a great many boys do give evidence of anxiety centered in the whole area of sex-connected role behaviors, an anxiety which frequently expresses itself in overstraining to be masculine, in virtual panic at being caught doing anything traditionally defined as feminine, and in hostility toward anything even hinting at "femininity," including females themselves. 67

This disdain for women is compounded by the fact that at the same time boys are taught to disdain everything that is "sissy," they are forced into a close relationship with the epitome of sissy-like things, women (mothers and teachers). 68 Moreover, they are also subordinates in this relationship in contradiction to the culturally prescribed relationship between the sexes. This situation breeds hostility toward women.

The batterer is hostile and violent toward women, but very dependent on the object of his hostility. Therefore, the beating is not an attempt to drive the victim away. On the contrary, the batterer is extremely possessive and may threaten the victim with further violence if she attempts to flee. 69 The batterer uses intimidation to prevent the victim from both escaping and pressing charges.

This type of sex role socialization which encourages emotional constriction, heavy dependence on women (usually one woman) for emotional support, and hostility towards women is experienced to a greater or lesser extent by most men in our society, but most do not become batterers. Battering usually does not occur unless three other conditions are met:

1) a man must believe he has a right to beat a woman;
2) a man must believe that violence is a legitimate way of solving problems;

67. Hartley, supra note 65, at 8.
68. Id. at 9.
3) a man must believe that he needs to maintain his dominant position vis-à-vis women.\textsuperscript{70}

The introduction to this paper emphasized that legislation can have symbolic as well as instrumental effects. Most batterers believe that a man has a right to beat his wife. Our culture teaches that violence is an acceptable way of solving problems, especially violence against women. Murray Strauss has even suggested that batterers view their marriage license as a "hitting license."\textsuperscript{71} The very existence of a law specifically directed at domestic violence could be one of the mechanisms used to change such attitudes. However, the potential symbolic effect of the new Ohio legislation is likely to be undermined by the light sentences currently being meted out in Hamilton County. If the goal is deterrence, then the light sentences being given in domestic violence cases are supporting the view that the marriage license is a hitting license.

A second goal of the new Ohio legislation was to provide a remedy for mates suffering from domestic violence. The courts could provide this remedy either by incarcerating the batterer or rehabilitating him. We have no evidence that incarceration facilitates the rehabilitation of the batterer, although in many cases it could protect the victim from further abuse by allowing her to get away from the batterer and helping her to break her dependence on the batterer. Rehabilitation of the batterer would protect not only the current victim from further abuse but also other women who might come in contact with the batterer in the future.

If rehabilitation is the goal, then counseling programs designed especially for batterers offer the greatest hope for success.\textsuperscript{72} Admission to such programs could be voluntary or a condition of probation or pre-trial release.\textsuperscript{73} Whatever the type of admission, group counseling programs, especially for batterers, have a higher likelihood of success than individual or couple counseling for a variety of reasons.\textsuperscript{74} Couple counseling is difficult with batterers, because couple counseling requires openness and honesty, and many vic-

\textsuperscript{70} McCormick, \textit{supra} note 66.


\textsuperscript{72} \textit{Emerge, Organizing and Implementing Services for Men Who Batter} 47-52 (1981).

\textsuperscript{73} The advantages and disadvantages of court-mandated counseling will be discussed in the section on recommendations. \textit{See infra} text section V, Recommendations.

\textsuperscript{74} \textit{Emerge, supra} note 72.
tims are afraid that honest revelations about the extent of the battering will provoke more violence. Moreover, since counseling tends to focus on the couple's interaction, attention is often drawn away from the battering and focused on the victim's behavior prior to the battering.

Individual counseling is difficult with batterers because they tend to deny and minimize the abuse and project blame onto the victim, arguing that the violence was provoked. Batterers hesitate to reveal themselves to counselors. In the group counseling situation, batterers are more willing to discuss their behavior with other batterers, and it is more difficult for a batterer to get away with denying and minimizing the abuse with another batterer. One of the problems of most batterers is that they are extremely dependent on their female victims for emotional support. The group setting helps these men develop peer relationships and overcome their social isolation.

IV. PROSECUTION

There have been numerous attempts to explain prosecutorial behavior in the dropping of criminal charges in domestic violence and assault cases. Dow, for example, has recently argued that "[t]he customs, traditions, mores and folkways of a given community are often considered, even when these traditions are contrary to the written legal code." Unfortunately, Dow does not make it clear whether these folkways are those of the prosecutor or those of the community involved in the dispute. For example, he approvingly cites the case of dismissal of charges of assault and battery, even when the bodily harm is grievous, when the defendant and victim are black. His assumption that the inflicting of grievous bodily harm is acceptable behavior in the black community does not make it clear whether the behavior is acceptable to the victim, or whether the behavior is seen as not serious by the prosecutor for racist reasons.

Greenberg and Ruback have argued that a major part of the

75. Id. at 49-50.
76. Id. at 50.
77. Id. at 48-49.
78. Id. at 49.
79. Id. at 50.
81. Id. at 101.
charging decision by prosecutors is a prediction of the likelihood of conviction. Given the knowledge that up to 80 percent of all domestic violence cases result in dropped charges, a self-fulfilling prophecy might encourage speedy resolution of these cases. Stanko has further argued that prosecutors are at least more likely to reduce charges (if not drop them) if the victim is a woman, and if she had a prior relationship with the offender, because of an implicit assumption that the woman could always be seen as at least partially to blame for her own victimization.

A more sophisticated model is offered by other commentators, such as Nimmer, who argues that patterns of legal behavior, such as a prosecutorial decision, develop into routinized decision-making paths. These predictable patterns, which often reflect various accommodations of intragroup interests over the years, allow the prediction of future responses, so that a prosecutor need only decide what category a particular case fits into best, and an immediate decision can be made as to what the appropriate action step should be. Changes, then, disrupt these predictable responses, and introduce uncertainty into the system. The group tendency, as Nimmer argues, is to resist uncertainty, and to strive to retain the stability of the pre-existing system. Therefore, prosecutors are likely to undermine attempts at legal changes since they introduce uncertainty into the routinized decision-making paths.

Part of the problem of evaluating a legal reform is to decide just what the goals of the particular legal reform are. If the goal is an instrumental one of changing prosecutorial behavior, then the reformers may be naive to assume that legal change alone will affect such behavior. Given the nature of prosecutorial discretion, most decision-makers could have changed their behavior easily without the reform legislation: why would they feel the need to disrupt carefully worked out patterns of decision-making after reform legislation? Such a lack of change need not involve open defiance of the law. It is more likely to involve adaptations and

85. Id. at 49.
86. Id. at 176.
changes which superficially change the nature of the decision-making process, but which do little to change the ultimate allocation of power decisions. This tendency to counter formalistic remedies may be embodied in various system-maintaining adaptations. Malcolm Feeley, for example, has argued that lower courts particularly are able to deflect attempts to change the pattern of decisions:

The lower court is a complex, flexible institution that is able to absorb efforts to change it and adapt to new circumstances without abandoning old ways. Whatever new programs or directions are added to the court will be reflected, adapted, and absorbed in a variety of unpredictable ways.

Of course, one could suggest that there are some areas of law where change is easier to implement than others. Dror, for example, has suggested that legal changes which are straightforward, instrumental, and in emotionally neutral areas, might be implemented easily. However, “[b]asic institutions rooted in traditions and values, such as the family, seem to be extremely resistant to changes imposed by law.” Following this line of thought, then, it would seem that to the extent prosecutorial decision-making in domestic violence cases is rooted in paternalistic notions of marriage, then change might be particularly difficult. Such notions might include a presumption that some violence within marriage is normative and acceptable, that domestic violence cases are commonly the fault of the woman who brought the violence upon herself by her behavior, or that any reluctance on the part of the victim to testify is a sign of a “patched-up quarrel.”

V. RECOMMENDATIONS

This study has identified two problems which are cause for concern. First, few cases of domestic violence reach the end of the court process; the few cases which are in fact filed most often end up dismissed. Second, even when prosecution is pursued and a guilty verdict obtained, little punishment is meted out to offenders; most convicted abusers do not spend a single day in jail. The most

88. M. Feeley, supra note 3, at 292.
common sentence is probation, but because reports of continued abuse do not result in revocation, probation does not protect the victim against further abuse.\footnote{Certainly the solution here is obvious. A system of informing the victim of how to report continued abuse, and a policy of revocation after continued abuse can be easily instituted in any court.}

As discussed earlier, perhaps the most difficult problem is to come to some firm decision as to what the goal of the criminal justice system should be in relation to domestic violence. Certainly, a law criminalizing domestic violence with no provisions for alternative sentencing presumes a goal of prosecution and criminal justice system sanctions for offenders. While there are alternatives, commentators have generally been wary of the actual operation of such alternate procedures.\footnote{See, e.g., R. T. Nimmer, supra note 17; H. I. Subin, supra note 18.} Fields, for example, has suggested that if judges and prosecutors are given the alternative of diversion of offenders from the courts to alternative processes, there may be a tendency for overloaded courts to divert all cases, thereby relieving themselves of the need to deal with difficult cases. “Diversion can become an end in itself instead of a rationally applied alternative.”\footnote{Fields, supra note 42, at 252.} Such a move can also serve to reinforce traditional notions that domestic violence need not be taken seriously, since few within the criminal justice system see diversion as serious a step as criminal prosecution.

Nevertheless, there remains a serious need for consideration of diversion processes. It should be obvious from this study that if the primary goal of new domestic violence legislation is the conviction and jailing of large numbers of offenders, then the simple addition of a new section to the penal code is not the way to achieve this goal. Legislation which does not deal with the problems and causes of dropped cases and refusals to prosecute will not produce a major improvement on the most common current system of simply using assault statutes to prosecute batterers.

While those commentators who have studied alternative processes have generally been questioning as to the advantages of such services as mediation and counseling, these concerns have generally centered on practical matters, such as whether counseling or mediation would cut costs, processing time, or resolve problem situations more easily.\footnote{See, e.g., Parnas, supra note 16; Maidment, supra note 16; Truninger, supra note 16.} There are, however, other concerns.
An emphasis in many areas on forms of dispute resolution intervention makes the presumption that there is in fact a dispute to resolve. As discussed earlier in the section on the victim, women caught in the Chronic Battered Syndrome rarely have disputes to settle. Counseling similarly presumes all too often that conflict is caused by both parties, and therefore centers on the woman's provocative behavior which "caused" the violence. This can have the effect of exacerbating the problem, and contributing to the woman's feeling of self-blame and lack of self-esteem.

While the authors here have great sympathy for the position which argues for extensive criminalization of batterers, to achieve aims of punishment, deterrence and protection of the victim, it must be recognized that, as seen in this study, such criminalization rarely leads to conviction and the convicted batterer is usually not sent to jail. Certainly the decision to prosecute a spouse is an extremely difficult one under any circumstances, and, in a situation where the victim feels dependent and helpless, it can be paralyzingly difficult. It may even be a useful research hypothesis for future study to argue that battered women rarely press charges against their husbands unless they are convinced that the marriage is already at an end. Few people can look forward to a successful marriage after jailing their spouses for months. Thus, a complete reliance on the criminal justice system to deal with domestic violence may be counterproductive: "Exclusive criminal jurisdiction may render the threat of prosecution meaningless; it puts the battered woman in an all-or-nothing position the first time she seeks help from the legal system."

One promising alternative which deserves future study is court-mandated counseling for batterers, both as a sentence and as part of a diversion program. The field of counseling for batterers is new, and most current programs have dealt primarily with voluntary clients rather than with court-ordered treatment. Of course, court-ordered counseling has been criticized because in other situations it has been found that generally people benefit less from

95. J. B. FLEMING, supra note 43, at 205.
96. Steinmetz, supra note 50.
99. Voluntary here means that clients were not sentenced to treatment. Many batterers in these programs were coerced because their wives had left them and would not return unless their husbands entered the batterers' counseling program. __ EMERGE, supra note 72, at 19-20.
counseling which is non-voluntary. Because of their tendency to deny, minimize, externalize, and act impulsively, however, many batterers will either not enter or fail to complete voluntary treatment programs. Although further experience with both voluntary and court-mandated programs is necessary, several of the newer programs designed especially for batterers are reporting success rates which are high enough to be encouraging.

The use of court-mandated counseling as a diversion technique also promises to deal with the problem of dismissed cases. Rather than the outright dismissal common in most jurisdictions, cases can be referred to a specific program to deal with battering. Lerman has described such a program:

A defendant accepted by a diversion program makes a contract with the program to comply with certain requirements, such as attending counseling sessions and refraining from violence. If the defendant fulfills the requirements of the contract for the period agreed upon, charges are dropped, and the defendant’s arrest record may be expunged. If the defendant fails to comply with the terms of his contract, prosecution is resumed.

Cities which have set up such diversion programs have reported that they hold some promise in dealing with domestic violence. First, counseling can begin immediately after the battering incident, at a time when therapists feel it can be most effective. The batterer still feels guilty, and is less able to deny or minimize the assault. He may still be worried that his wife will leave him if he does not get help. Second, since the batterer chooses the diversion program over court processes, some of the elements of a voluntary choice are present, particularly if the batterer sees the program as helping him to avoid the criminal courts. Finally, the immediacy of diversion minimizes the likelihood that the batterer will use delay to threaten or cajole the victim into dropping the charges. While there has been little work in the evaluation of

100. A. Ganley, supra note 69, at 1.
102. Emerge, supra note 72; A. Ganley, supra note 69.
104. The cities are Miami, Fla., Santa Barbara, Cal., and Portland, Or. L. Lerman, supra note 103.
105. Id. at 94-95.
106. Id. at 111 (includes detailed discussions of specific issues involved in pre-trial diversion for batterers).
domestic violence treatment programs, there is some evidence from the field of incest treatment that a move by the courts from a punishment emphasis to one of promoting treatment can have the effect of increasing the number of cases which come to official attention, as families reluctant to expose an offender to punishment seem to be less reluctant to seek aid. 107

There are, of course, other options for change. One that has been attempted in several jurisdictions is to force the victim to appear in court and proceed with the criminal process. This can be done through several means, all of which have been attempted with some success in at least one court: having the prosecutor sign the complaint, so that the victim is no longer the complaining witness; a court policy of refusing victim requests for dismissal of charges; a prosecution policy of subpopenaing victims into court as a witness, no matter what her wishes, or simply prosecuting without the victim's cooperation or consent. 108 Such policies take the burden of prosecution from the shoulders of the victim. This can have an effect on both types of victims identified earlier. The chronically battered woman is protected from intimidation and threats from the batterer to get her to drop charges, while the Saturday Night Brawler would be discouraged from making charges by the knowledge that she could not later drop them. While this study showed in Hamilton County a dismissal rate of 81 percent, prosecutors who have adopted at least one of the above alternative measures have reported dismissal rates in domestic violence cases of between 10 and 34 percent. 109 Several programs have additionally reported conviction rates as high as 80 percent. 110

Such changes may involve some choices by the prosecutor to adopt an alternate policy of prosecution. While there have been many studies of prosecutorial decision-making, perhaps one of the most sophisticated has been developed by Jacoby, who presents a typology of at least ideal generalized classifications of prosecution policy. 111 These models can be useful in explaining some of the findings we have made, and some of the directions we have suggested.

In her model of "legal sufficiency," a prosecutor will accept all

109. Id. at 34.
110. Id. at 35.
cases at least initially where the elements of a case as spelled out in the statute are present. This, one might presume, is a model which might be adopted by a reformer who wishes to see the legal system deal with domestic violence, and argues for the creation of a special statute to criminalize such behavior. However, Jacoby argues, prosecutors who follow this model tend to be characterized by a high rate of referral of cases to other criminal justice agencies, very high rates of dismissal of charges, high rates of charge reduction, and actually a low number of persons who are actually found guilty of the offense.\textsuperscript{112} Our data showing high rates of dismissed charges are consistent with this model of prosecutorial behavior. Jacoby, of course, suggests that there are other possible models of prosecutorial behavior. If one arbitrarily presumes that the goal of legislation designed to deal with domestic violence might be a maximum number of cases where the problems involved are dealt with in some meaningful manner, then it might be useful to see what type of prosecutorial policy one would wish to encourage. As we have seen, a policy which encourages criminal charges in all cases possible tends to lead to high dismissal rates. The model Jacoby terms “trial sufficiency,” where only cases which the prosecutor feels are certain to result in conviction are accepted, similarly would not seem to maximize a societal response to the problem of spouse abuse. A third model, “system efficiency,” results from a desire by a prosecutor to obtain a speedy resolution of cases by any means possible, and similarly does not seem suited to a victim orientation. Jacoby’s final model is termed “defendant rehabilitation.”\textsuperscript{113} While this title may not sound quite like the goal that reformers might have in mind, it may indeed provide outcomes which are more directly related to a useful disposition of domestic violence cases. Here, prosecutors are also interested in early and speedy resolution of cases, but engage in a large scale diversion of offenders to alternative programs. Few cases are actually dismissed. The remaining cases, distinguished by the seriousness of the behavior, or the prior record of the offender, are seriously and heavily prosecuted with a resulting high rate of conviction of those cases which proceed through the criminal justice system.

Within domestic violence, high rates of dismissal by definition

\textsuperscript{112} Id.
\textsuperscript{113} Id.
do little to deal with underlying social problems; a dismissal most often puts the defendant and victim back where they started. If the factors which lead to these high rates of dismissal cannot be directly dealt with, perhaps a better course would be to encourage a prosecutorial policy which maximizes diversion for most offenders and enthusiastic prosecution for the more serious offender.

The type of diversion we are recommending is different from many diversion programs of the past. Old-style diversion programs usually diverted cases away from the court system to mediation, counseling, or civil proceedings either before charges were filed or as a condition of dropping charges. Critics have argued that such diversions suggested that the courts did not take these cases seriously. The type of diversion that we are recommending is less likely to have this effect since the diversion is after charges have been filed rather than before. Therefore, domestic violence cases are not diverted out of the court system but rather diversion is an alternative within the system. If the defendant fails to fulfill the requirements of the diversion program, the case is automatically returned to the court system and prosecution resumes. Since charges are not dropped when a referral to an alternative is made, the existence of the diversion program is less likely to undermine the symbolic effect of the new law. In fact, Fleming has suggested, "It is quite possible that the practice of judges' imposing mandatory counseling as a condition of release would carry a lot of weight in combating the unwritten societal acceptance of wife abuse and in giving legitimacy to the seriousness of the problem." 114

Another problem of the old style diversion is that the counseling and mediation were not effective because they were not designed specifically for batterers. The new counseling programs designed especially for batterers promise to be more effective than previous diversion programs.

Although court-mandated counseling both as a sentence and as part of a pre-trial diversion program is appropriate for most cases, it is not appropriate for all cases. Court-mandated counseling is probably most appropriate for those cases now being dismissed or those cases in which the convicted abuser is currently sentenced to probation. It may not be appropriate for many of the abusers who are currently being given jail sentences. Although many victims are unwilling to assist in a trial which could send their abusive

husbands to jail, those that are willing need the full protection of the law. Women need to know that they can bring charges against a batterer and that he will be sent to jail. Otherwise we are condemning them to a hopeless situation of brutality. Potential batterers need to know that the court considers domestic violence an offense serious enough to be punished by jail. Zeal for counseling programs should not overshadow our attention to victims' safety.

A two-pronged solution to the problem of domestic violence is necessary. First, a woman should be able to bring criminal charges against her husband or lover or whoever is beating her, and the court should send the batterer to jail, especially when the victim is still in danger from the batterer. Second, the court should provide alternatives to women not currently willing to follow through with charges. The existence of court-mandated counseling would probably encourage more women to file charges and reduce the number of dismissed cases. Furthermore, procedures which do not burden the victim with being potentially responsible for sending her husband to jail (prosecutors signing the complaint, denying requests for dismissal, subpoenaing the victim as a witness, and even prosecuting the batterer without the victim's cooperation) should be implemented, at least on an experimental basis.
THE STRANGE CASE OF THE RECKLESS
PROMISE: REFLECTIONS ON Brown v. Hartlage
by Paul J. Weber and Delta Felts*

"'Excellent!' [Watson] cried."
"'Elementary,' said he [Holmes]."

THE MEMOIRS OF SHERLOCK HOLMES¹

I

The case began innocently enough with a campaign promise by
two obscure political aspirants for even more obscure part-time
political offices—Jefferson County, Kentucky, commissioners. The
aspirants, Carl Brown, a lawyer, and Bill Creech, a dentist, called
a press conference on August 15, 1979, to level charges of fiscal
skullduggery against the commissioners in general, and Mr. Brown's
opponent Earl J. Hartlage, in particular:

There are ... three part-time county commissioners. With state law
limiting their authority and responsibility to legislation . . . , it is
clear that their jobs are simply not worth $20,000 a year each. It
is ludicrous that the part-time commissioners nevertheless see fit
to pay themselves the same amount as that paid the full-time county
judge. The mere fact that state law allows such outrageous levels
of renumeration does not in itself justify those payments . . . . At
a fiscal court meeting in 1976, Hartlage led a surprise move to . . .
more than double the salaries of the county commissioners! His ac-
tions demonstrated his unmistakable disrespect for the office of the
chief executive of this county and his utter disdain for the spirit
of the laws that govern our county system . . . . [U]sing the gray
fringes of the law for his own personal gain, Hartlage led the move
to funnel county tax dollars into commissioners' pockets.²

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in 1984.

in THE COMPLETE ADVENTURES AND MEMOIRS OF SHERLOCK HOLMES, 289 (1972)).
2. Press Conference, Carl Brown and William Creech (August 15, 1979), (published in
No. 80-1285, Joint Appendix, at 1-3).
This speech was vintage campaign rhetoric until Dr. Creech made the following promise:

We abhor the commissioners' outrageous salaries, and to prove the strength of our convictions, one of our first official acts as county commissioners will be to lower our salary to a more realistic level. We will lower our salaries, saving the taxpayers $36,000 during our first term of office, by $3,000 each year.³

Brown supported his running mate by adding:

These two proposals—cutting our own salaries and reorganizing the commissioner's office staff, will save the taxpayers over $172,000 during our term of office. We make these statements fully aware that the office we intend to occupy should set the tone for the type of public officials we intend to be. Under our guidance, extravagance of public expense will be a thing of the past, and responsibility and integrity will be our watchwords.⁴

Unfortunately, soon after the press conference the candidates were informed that the promise to lower their salaries may have violated the Kentucky Corrupt Practices Act. As a result, on August 19, 1979, they issued a joint retraction and alternative pledge:

We are men enough to admit when we've made a mistake. We have discovered that there are Kentucky court decisions and Attorney General opinions which indicate that our pledge to reduce our salaries if elected may be illegal.

... [W]e do hereby formally rescind our pledge to reduce the County Commissioners' salary if elected and instead pledge to seek corrective legislation in the next session of the General Assembly to correct this silly provision of State Law.⁵

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3. Id.
4. Id. It may be noted that "right after taking office in 1980, Brown voted along with the rest of the court for a raise from $20,462 a year to $23,184." Courier-Journal, Jan. 21, 1982, at A-7. At a later date Brown did decline a further $3,000 cost-of-living increase that the other commissioners received. The Louisville Times, April 5, 1982, at A-12.
5. C. Brown & W. Creech, Press Release (August 19, 1979) (unpublished). That the retraction may have been somewhat less than whole-hearted is indicated by the words left out in the above quotation.

This has to be one of the most ridiculous lines of court decisions we have ever seen. Why should it be illegal for us to promise that if elected we will cease being the only one of Kentucky's 120 counties which pays its part-time county commissioners the same amount of money as its full-time County Judge/Executive? Why should we not be able to reduce government waste wherever we find it? Why shouldn't we be able to cut our own salaries. This appears to us to be a sweetheart deal with one group of politicians protecting other politicians. A classic 'you scratch my back, I'll scratch yours.'

No more was made of the matter until after the November elections. While Dr. Creech was defeated, Mr. Brown received 53% of the vote to oust the incumbent. Mr. Hartlage immediately filed suit in the Jefferson County Circuit Court alleging that Mr. Brown had violated the Corrupt Practices Act. He sought relief in the form of having the election declared void and the office vacated. Hartlage based his claim on KY. REV. STAT. § 125.055 which declares that

Candidates prohibited from making expenditure, loan, promise, agreement, or contract as to action when elected, in consideration for vote—

No candidate for nomination or election to any state, county, city or district office shall expend, pay, promise, loan or become pecuniarily liable in any way for money or other thing of value, either directly or indirectly, to any person in consideration of the vote or financial or moral support of that person. No such candidate shall promise, agree or make a contract with any person to vote for or support any particular individual, thing or measure, in consideration for the vote or the financial or moral support of that person in any election, primary or nominating convention, and no person shall require that any candidate make such a promise, agreement or contract.

Based on previous Kentucky court decisions, Hartlage's claim was not without merit. Twenty years earlier in Sparks v. Boggs the Kentucky Court of Appeals had held that where salaries had been fixed by law, a promise to serve at $1 a year and to distribute the remainder to certain charitable organizations did violate the Corrupt Practices Act. The Jefferson Circuit Court, resting its decision squarely on the Sparks precedent held that Brown's promise did violate the Corrupt Practices Act. However, it denied Hartlage the relief he sought, concluding that in light of Brown's almost immediate retraction, the defeat of his running mate who had also joined in the promise, the prospect of disenfranchising thousands of votes, and

6. Hartlage sought to have the election voided under KY. REV. STAT. § 120.015 which states that if a violation occurs the election shall be declared void.
9. Hartlage v. Brown, Case No. 79-100, Jefferson County, Ky. Circuit Ct. (Nov. 1, 1979). The court held that KY. REV. STAT. § 120.165(4), which states "If it appears from an inspection of the whole record that there has been such . . . , bribery . . . in the conduct of the election that neither contestant nor contestee can be judged to have been fairly elected, the circuit court . . . , may adjudge that there has been no election," [emphasis added] overcomes the mandatory application of KY. REV. STAT. § 120.015 in as much as the campaign promise could not reasonably be construed as bribery.
the presumption that the will of the people had been revealed in
the election, Brown had been fairly elected. The only penalty
Brown was to suffer was having to bear the costs of the litigation. Although Brown had raised the freedom of speech issue in his
defense, the court did not reach the issue because it did not declare
the election void.

Mr. Hartlage appealed to the Court of Appeals where a three
judge panel unanimously reversed the lower court ruling. The court
held that Brown had violated the Corrupt Practices Act; that while
a retraction may indicate good faith, there's no provision in Ken-
tucky statute or case law which allows retraction as a defense;
and that since the action was brought and tried under KY. REV.
STAT. § 120.015, KY. REV. STAT. § 120.165(4), dealing with bribery,
was not applicable. The Court of Appeals also ruled that the trial
court had erred in believing it had the discretionary authority to
find a violation of the Corrupt Practices Act, as applied through
Sparks, yet declined to order a new election.

To its credit, the Court of Appeals proceeded to give Brown's
first amendment claim its first consideration, although not a very
favorable one. The court's basic contention was a "floodgates"
argument:

10. Id.
11. Id.
that even if KY. REV. STAT. § 120.165(4) were applicable, KY. REV. STAT. § 120.015, the
more specific statute, would still control. Id. See also City of Bowling Green v. Bd. of Educ.
13. Hartlage v. Brown, 618 S.W.2d 603 (1980). The court quoted the following principle
from Sparks as the specific rationale for its holding:
The general rule on the question before us is thus stated in 43 Am. Jur., Public
Officers, sec. 374, p. 159:
"An agreement by a candidate for office that if chosen he will discharge the duties
of the office without compensation or for a lesser compensation than that provided
by law, or will pay part of his salary into the public treasure, is illegal, whether
made in good faith or not. The underlying principle . . . is that when a candidate
offers to discharge the duties of an elective office for less than the salary fixed by
law, a salary which must be paid by taxation, he offers to reduce pro tanto the amount
of taxes each individual taxpayer must pay, and thus makes an offer to the voter
of pecuniary gain."

It appears to us there can be no escape from conclusion that a promise to take
a reduction in the salary set by law for an elective public office, or an agreement
to discharge the duties of the office gratis, advanced by one to induce votes for
his candidacy, is so vicious in its tendency as to constitute a violation of the Corrupt
Practices Act.

Sparks v. Boggs, 339 S.W.2d 482 (Ky. 1960).
To hold that promises to serve at reduced compensation in violation of the Corrupt Practices Act are immune from regulation in view of the Provisions of the United States Constitution is to open the door to arguments that other statements in violation of the Corrupt Practices Act are protected because they involve speech and self-expression.\textsuperscript{14}

The court next quoted without comment from 16A Am. Jr. 2d \textit{Constitutional Law}: "Constitutional rights of liberty, of speech and of the press are subject to such reasonable regulations as are necessary to promote and preserve public welfare,"\textsuperscript{15} and from a later maxim that "[i]t is well settled that the rights of free speech and press are subject to legislative restriction, within proper limits."\textsuperscript{16} It then ordered that the appellee's election be voided.\textsuperscript{17}

Faced with Brown's petition for a rehearing, the Court of Appeals wrote a second opinion which more carefully focused upon the first amendment question.\textsuperscript{18} While the petition was denied, the opinion clarified the legal conflict in such a manner that further appeal was all but inevitable.\textsuperscript{19} "Without question," Judge Gudgel wrote, "a state may not censor what a candidate for public office may say to the electorate. There is a compelling state interest, however, in the fairness and integrity of elections, and a state may require that elections be conducted free of corruption and bribery."\textsuperscript{20}

The critical question, of course, was not whether corruption and bribery could be prohibited, but whether Brown's promise could be so classified. The \textit{Sparks} decision dictated that such a promise was corrupt and tantamount to bribery.\textsuperscript{21} When confronted with Brown's claim that \textit{Sparks} was unconstitutionally broad because "if carried to its logical extreme . . . any promise by a candidate to increase the efficiency and thus lower the cost of government might likewise be considered as an attempt to buy votes," the court admitted the cogency of the argument.\textsuperscript{22} But in a classic example of an invitation to appeal its ruling, it held that since Brown's argu-

\begin{enumerate}
\item 14. Hartlage v. Brown, 618 S.W.2d 603 (Ky. 1980).
\item 15. 16A Am. Jur. 2d \textit{Constitutional Law} § 409, at 148.
\item 16. \textit{Id.} § 507, at 346.
\item 17. Hartlage v. Brown, 618 S.W.2d 603 (Ky. 1980).
\item 18. Hartlage v. Brown, 609 S.W.2d 368 (Ky. 1980).
\item 19. \textit{Id.}
\item 20. \textit{Id.}
\item 21. 339 S.W.2d 480 (Ky. 1960).
\item 22. Hartlage v. Brown, 609 S.W.2d 368 (Ky. 1980).
\end{enumerate}
ment "... strikes at the heart of Sparks v. Boggs ... it must be addressed to a court which has the power to overturn or modify that decision."\textsuperscript{23}

Inexplicably the Supreme Court of Kentucky, with all the Justices concurring, declined to review the decision of the lower court.\textsuperscript{24} Brown's last recourse was to appeal to the United States Supreme Court, which granted the petition for a writ of certiorari on March 30, 1981.\textsuperscript{25}

II

At the point of appeal to the U.S. Supreme Court, the case took a somewhat curious twist. While Brown's appeal quickly resulted in the issuance of a writ of certiorari,\textsuperscript{26} Hartlage refused to proceed, and missed a deadline for filing his written arguments. "I just wasn't going to keep throwing money into it" he was quoted as saying.\textsuperscript{27} Upon inquiry from the clerk of the Court, Hartlage's attorney confirmed that his client was unwilling to proceed. Rather than award the decision to the plaintiff, the Court appointed Mr. Stanley Chauvin, an amicus curiae, to argue the case.\textsuperscript{28} The appointment aroused considerable interest in the case, as well as speculation that the Justices may have thought they had hit upon a fact situation appropriate for a major first amendment ruling.\textsuperscript{29}

\textsuperscript{23} Id. at 40.
\textsuperscript{24} Unpublished.
\textsuperscript{25} Brown v. Hartlage, 618 S.W.2d 603 (Ky. 1980), reh'g denied 609 S.W.2d 368 (Ky. 1980), cert. granted, 49 U.S.L.W. 3725 (U.S. Mar. 30, 1981).
\textsuperscript{26} Id. It may be worth noting that in the 1981-82 term 5,311 appeals were filed and only 200 writs were issued. 93 U.S. NEWS & WORLD REP., Nov. 1, 1982, at 57. Brown's appeal was among the less than 4% accepted.
\textsuperscript{28} This most unusual procedure is not precisely covered in the rules of the Court. Sup. Cr. R. 13, 14, 31, and 41 treat primarily the filing responsibilities of appellants, not appellees. The basic principle operating at the current time is that once a writ of certiorari is granted. The case has a life and significance independent of the appellee. If the Justices find the fact situation sufficiently enticing they may use the Court's inherent authority to appoint an amicus curiae to argue for the defendant. Appointment of amicus curiae is relatively common for in forma pauperis criminal cases, but rare in civil cases. A conversation with a deputy clerk of the Supreme Court confirmed that the Court may choose to appoint an amicus to argue a case when (1) the federal government changes sides and refuses to support a case and/or (2) the appellee is either unwilling or unable to continue, even though the Justices believe there remains an important controversy around an unsettled point of law.
\textsuperscript{29} See, e.g., Note, Freedom of Speech: The Case of the "Corrupt" Campaign Promise, 70 KY. L.J. 203 (1982).
Speculation aside, when the Supreme Court did decide Brown v. Hartlage, its opinion was a model of simplicity. After reviewing the facts, Justice Brennan immediately stated the issue as one involving a confrontation between a legitimate state interest and first amendment rights: "We begin . . . by acknowledging that the States have a legitimate interest in preserving the integrity of their electoral processes . . . . But when a State seeks to uphold that interest by restricting speech, the limitations on state authority imposed by the First Amendment are manifestly implicated.

The first amendment side of the issue was disposed of in a single page with Justice Brennan making three points. First, he used Mills v. Alabama to establish that political discussion is a primary first amendment purpose:

Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.

Justice Brennan then relied on Monitor Patriot Co. v. Roy to argue that "... the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office." Finally he applied the first amendment protections to candidates in such elections through Buckley v. Valeo:

The candidate, no less than any other person, has a First Amendment right to engage in the discussion of public issues and tirelessly to advocate his own election and the election of other candidates. Indeed, it is of particular importance that candidates have the unfettered opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day. Mr. Justice Brandeis' observation that in our country 'public discussion is a political duty,' Whitney v.

31. Id. at 52.
34. 461 U.S. 265 (1971) (alleged defamation of a political candidate held unconstitutional).
35. 456 U.S. at 52 (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)).
California, 274 U.S. 357, 375 (1927) (concurring opinion), applies with special force to candidates for public office.37

Having summarily established the importance of the first amendment side of the confrontation by citing precedents showing that the first amendment clearly covers political speech, campaigns and candidates, Justice Brennan examined the other side, legitimate state interests, in applying KY. REV. STAT. § 121.055 as interpreted by Sparks, to Brown's campaign promise:

We discern three bases upon which the application of the statute to Brown's promise might conceivably be justified: first, as a prohibition on buying votes; second, as facilitating the candidacy of persons lacking independent wealth; and third, as an application of the State's interests and prerogatives with respect to factual misstatements.38

The latter two arguments seem something of an afterthought and may be discussed with some brevity. The Court admits that states have some interest in ensuring that elections are not decided on the basis of who can serve without compensation rather than more appropriate qualifications.39 But limitation upon speech about salaries is not an appropriate means to that end.40 A fear that citizens might not choose wisely on the basis of such a promise is not a sufficiently compelling state interest. It is simply not the function of government to "'select which issues are worth discussing or debating' . . . in the course of a political campaign."41

Factual misstatements during the course of a campaign may likewise be protected, although within limits. While deliberate falsehoods may be actionable under the rule established in Gertz v. Robert Welch, Inc.,42 "erroneous statement is inevitable in free

38. 456 U.S. at 54.
39. Id.
40. Indeed, in a footnote the Court suggests that one constitutional means to further this interest is to prohibit "the reduction of a public official's salary during his term of office . . ." Id. at 60, n.9.
41. Id. at 61 (quoting Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96 (1972), which held as unconstitutional an ordinance prohibiting picketing near a school which, by allowing an exception for labor union pickets, was discriminatory. The Court here may have cut too broadly, particularly if judicial campaigns are included in the term "political." Canon 7 of the American Bar Association Code of Judicial Conduct in Sec. B (1)(c) prohibits a judicial candidate from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office." In addition candidates are banned from announcing their "views on disputed legal or political issues . . ." Id.
42. 418 U.S. 323, 340 (1974) (a private individual's right to sue for defamation was upheld even though the false statements about him were political in nature).
debate and ... it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need ... to survive.'" 43 The Court found that Kentucky's statute, mandating that an election victory be forfeited if a candidate promises to serve at a reduced salary, did not allow sufficient breathing space. 44 Such a strict requirement, wrote Justice Brennan, would have a chilling effect incompatible "with the atmosphere of free discussion contemplated by the First Amendment in the context of political campaigns." 45 While the Court recognized that a state's interest in protecting the political process from inaccurate and untrue speech was somewhat different from its interest in protecting individuals from defamation, it held that as a general rule, the preferred remedy for each was reliance upon rebuttal statements by the erring candidate's political opponents. 46 In this particular case, where the error had been made in good faith without reckless disregard for its falsity and a retraction had been made promptly upon discovery of the error, "... nullifying petitioner's election victory was inconsistent with the atmosphere of robust political debate protected by the First Amendment." 47

It was this line of argument that triggered Justice Rehnquist's concurrence. 48 He agreed that Kentucky's Corrupt Practices Act unduly limited speech, but he disagreed with the analogy between corrupting speech and defamation. 49 He based his own decision on Mills v. Alabama 50 and saw "no need to rely on other precedents which do not involve state efforts to regulate the electoral process." 51 In analyzing whether Kentucky's interest was compelling, Justice Brennan considered as the first possible basis for justification "a prohibition on buying votes," 52 but his primary focus, in the end, was upon the campaign promise. Before turning directly to his argument, some background may be appropriate.

44. 456 U.S. 45 at 61.
45. Id.
46. Id. at 62.
47. Id.
48. Id. Chief Justice Burger concurred in the judgement but joined neither the majority's nor Justice Rehnquist's opinion. One can only speculate about the reasons behind such a move.
49. Id.
52. 456 U.S. at 54.
III

The basic problem has been well stated by a noted constitutional scholar:

Democracy envisions rule by successive temporary majorities. The capacity to displace incumbents in favor of the representatives of a recently coalesced majority is, therefore, an essential attribute of the election system in a democratic republic. Consequently, both citizens and courts should be chary of efforts by government officials to control the very electoral system which is the primary check on their power.

But in the political marketplace . . . laissez faire is not always a satisfactory alternative. Without at least some government regulation of elections, election day . . . would yield only the cacophony of an atomized body politic, not the orchestrated voice of an electorate.

. . . And so the government comes to regulate certain aspects of the electoral process . . . .

Congress and the states have both developed extensive regulation of major aspects of the electoral process, and the Supreme Court has reviewed many of them. Regulation has covered four major areas: equal access to participation in the electoral process, the powers and responsibilities of political parties, campaign financing, and candidate’s eligibility and conduct.

A. Equal Access to Participation.

1. Voting

The Court in *Wesberry v. Sanders* spelled out the basic nature of the right to vote as well as any court has: “No right is more precious in a free country than that of having a choice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” The Court has not always been so sympathetic to the preciousness of individual votes. In its first major precedent, *Colegrove v. Green*, Justice Frankfurter declined to plunge the Court into what he called “the political thicket” of

54. 376 U.S. 1 (1964) struck down a scheme in which Atlanta’s 20% of the population elected only 10% of this state’s congressional delegations.
55. Id. at 17.
56. 328 U.S. 549 (1946).
state election laws.\textsuperscript{57} When the Court began to explore this thicket it at first stayed close to the edges. \textit{Baker v. Carr}\textsuperscript{58} provided the first point of access (over Justice Frankfurter's vigorous dissent). There the Court opened to judicial review a 1901 Tennessee statute which apportioned seats in The General Assembly.\textsuperscript{59} Despite a half century of growth which resulted in gross malapportionment, subsequent assemblies had refused to change or adjust electoral boundaries. The Supreme Court declared the statute's constitutionality a justiciable issue on equal protection grounds.\textsuperscript{60} In \textit{Gray v. Sanders},\textsuperscript{61} it outlawed Georgia's county-unit method of tabulating votes in party primary elections for state officials. It moved to congressional apportionment in \textit{Wesberry v. Sanders},\textsuperscript{62} and applied the full "one man, one vote" concept in \textit{Reynolds v. Sims}\textsuperscript{63} and related cases decided the same year.\textsuperscript{64} After \textit{Reynolds}, the Court became all but bogged down in a cleaning up operation that ironically seemed to vindicate Justice Frankfurter's political thicket allusion. Particularly troubling was the issue of local and special purpose districts. \textit{Sailors v. Board of Education},\textsuperscript{65} \textit{Dusch v. Davis},\textsuperscript{66} and \textit{Dallas County v. Reese}\textsuperscript{67} upheld a school board election and two city council elections although they were not based on the one-person, one-vote concept. The Court deviated from its course in \textit{Avery v. Midland County},\textsuperscript{68} holding that one-person one-vote applied to the election of a County Commissioner since the Commission had "general governmental powers over an entire geographic

\textsuperscript{57} Id. at 556.
\textsuperscript{58} 369 U.S. 186 (1962).
\textsuperscript{59} Id. at 237.
\textsuperscript{60} Id.
\textsuperscript{61} 372 U.S. 368 (1963).
\textsuperscript{62} 376 U.S. 1 (1964).
\textsuperscript{63} 377 U.S. 533 (1964).
\textsuperscript{64} See Lucas v. Colorado General Assembly, 377 U.S. 713 (1964); Roman v. Simcock, 377 U.S. 695 (1964); Davis v. Mann, 377 U.S. 678 (1964); Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656 (1964); WMCA v. Lomenzo, 377 U.S. 633 (1964). It is interesting to note that the original phrases in Gray v. Sanders were "one person, one vote" and "one voter, one vote." 372 U.S. 368, 381-82. After the lapse into sexist language in Reynolds and the campanion cases, the Court returned to its original formulation. See Mahan v. Howell, 410 U.S. 315, 319 (1973).
\textsuperscript{65} 387 U.S. 105 (1967) (the Court held that the Board was more appointive than elective and had administrative, not legislative responsibilities).
\textsuperscript{66} 387 U.S. 112 (1967) (although council members were required to live in separate boroughs, the Court reasoned that each represented all the city's population).
\textsuperscript{67} 421 U.S. 477 (1975) (per curiam opinion based on the Dusch precedent).
\textsuperscript{68} 390 U.S. 474 (1968).
area"; 69 and Hadley v. Junior College District, 70 abandoning the special purpose district principle of Sailors and the general powers principle of Avery in order to uphold the application of Reynolds; and in Salyer Land Co. v. Tulare Lake Basin Water Storage District, 71 in which election of members of a water board were held not covered by the equal protection mandate.

Local elections were not the only political thickets encountered by the Court. Only slightly less dense was the degree of equality required. While Reynolds eschewed an exact mathematical equality, requiring instead that "...a State make an honest and good faith effort to construct districts ... as nearly of equal population as is practicable," 72 that vague standard triggered considerable controversy. Swann v. Adams 73 invalidated a Florida reapportionment plan because deviations from mathematical equality were neither de minimis nor satisfactorily justified by a compelling state interest. 74 In Kirkpatrick v. Preisler, 75 decided two years later, the Court moved closer to the mathematical equality ideal for Congressional Districts unless a deviation could be rationally justified. In Mahon v. Howell, 76 the Court relented somewhat where state legislative districts were involved and the deviations were not in themselves invidious, although it did draw some lines in Chapman v. Meier 77 when it invalidated a reapportionment plan with a twenty percent deviation. The Court was more willing to allow flexibility in local elections when the rationale was to respect the boundaries of established townships within a county. 78

One final problem bedeviled the Court's attempt to provide equal access to voting: apportionment schemes which diluted the voting power of identifiable groups either through multi-member districting or gerrymandering. In the first major multi-member district case, Fortson v. Dorsey, 79 the Court upheld a Georgia plan since

69. Id. at 485-86.
73. 385 U.S. 440 (1967).
74. Id. at 444.
77. 420 U.S. 1 (1975).
the identifiable group argument was never raised. In *Whitcomb v. Chavis*, the issue was raised, but the plaintiffs were unable to prove an intent to discriminate against the cognizable group. That deficiency was remedied in *White v. Regester*, and the Court held that in such circumstances multi-member districts were unconstitutional. In a somewhat curious case, the Court utilized its supervisory role to reject a multi-member district established by a federal district court on the basis of prudence rather than constitutionality.

Gerrymandering, one of the most ancient and creative ways to dilute the voting strength of cognizable groups, has long been held constitutional. While the Court has yet to construct a full theory of what is allowable, several cases sketch the minimum guidelines. *Gomillion v. Lightfoot* established very early that, in Justice Frankfurter's words, "When a legislature ... singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment." On the other hand, if gerrymandering occurs to protect proportionate representation of racial minorities, the Court has held, in *United Jewish Organizations of Williamsburgh Inc. v. Carey*, that gerrymandering passes constitutional muster. The Court waffled a bit when the case involved a disproportionate number of minorities being drawn into one district, so that they would surely have one representative but have a lessened chance of electing more than one. In *Wright v. Rockefeller*, the Court seemed to indicate that such a gerrymander would be unconstitutional, but found no such intent in the instant case. Finally, in *Gaffney v. Cummings*, it upheld a Connecticut plan to devise districts in which Democratic and Republican voting strengths would be roughly equal. Political motivation by itself is apparently constitutional, but racially-motivated gerrymandering appears to be constitutional only if its intent is protection of the minority.

81. 412 U.S. 755 (1973). The case involved two Texas counties which utilized multimember districts very effectively to exclude Mexican-Americans and blacks from office.
84. *Id.* at 346.
86. 376 U.S. 52 (1964).
2. The Franchise

A slightly different problem is posed by restrictions based upon the qualifications of individual voters. Every state and the federal government has certain restrictions. The rationale for such restrictions is well stated by Professor Tribe:

Although free and open participation in the electoral process lies at the core of democratic institutions, the need to confer the franchise on all who aspire to it is tempered by the recognition that completely unlimited voting could subvert the ideal of popular rule which democracy so ardently embraces. Moreover, in deciding who may and who may not vote in its elections, a community takes a crucial step in defining its identity. If nothing else, even though anyone in the world might have some interest in any given election's outcome, a community should be empowered to exclude from its elections persons with no real nexus to the community as such.88

As a general principle, the Constitution itself provides the broad outlines for the franchise. Article I, Section 2 requires that "The House of Representatives shall be composed of Members chosen every second year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."89 Originally, the Senate was to be elected by members of each state's legislature, but this was changed by the seventeenth amendment.90

Article I, Section 4 adds that "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."91

In addition, several amendments regulate restrictions based upon race,92 gender,93 ability to pay a tax (in federal elections),94 and age.95

88. L. Tribe, supra note 53, at 761.
89. U.S. Const., art. 1, § 2.
90. The Seventeenth Amendment provides that "The Senate of the United States shall be... elected by the people [of each State]... The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures." U.S. Const., amend. XVII.
91. U.S. Const. art. 1, §4. The Court has upheld this Congressional power in Wiley v. Sinkler, 179 U.S. 58 (1900), and United States v. Classic, 313 U.S. 299 (1941).
93. U.S. Const. amend. XIX.
94. U.S. Const. amend. XXIV, sec. 1.
95. U.S. Const. amend. XXVI, sec. 1.
The major sticking point in determining franchise restrictions has been the reach of the fourteenth amendment equal protection doctrine. In Oregon v. Mitchell, the Court limited Congress' use of the fourteenth and fifteenth amendments to require extension of the franchise to 18-year olds, but upheld its power to prohibit literacy tests. A variety of cases decided in the late 1960's and early 1970's has begun to etch guidelines around the concept of "interested voters." The initial case, Kramer v. Union Free School District, involved a New York statute which limited voters in school district elections to owners and lessees of taxable property and the parents or guardians of school children. The Court did not explicitly reject the "primary interest" concept, but it did find the statute in question too vague. In a companion case from Louisiana, Cipriano v. City of Houma, the Court used the same tactic to strike down a law limiting voting on public utility revenue bonds to property tax payers.

Finally, in Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., the Court faced the issue squarely and ruled that, for limited purposes, and when the impact of a vote fell primarily and disproportionately on the affected class, "interested voter" statutes are constitutional. Subsequent to Salyer, the Court has been determined to keep this restriction on the franchise a very limited and highly suspect classification. The Court has been somewhat more willing to allow the "interested voter" restrictions for direct referendum, one-time-only elections. In a city-county reorganization case, Lockport v. Citizens for Community Action, the Court allowed a voting scheme whereby an organization had to be approved by a majority in each of the several political communities involved, even though they varied widely in population.

96. 400 U.S. 112 (1970). The case was a challenge to the Voting Rights Act amendments of 1970. Technically the Court has not prohibited literacy tests under all circumstances. Lassiter v. Northampton Election Board, 360 U.S. 45 (1959), upholding a North Carolina literacy test provision, has never been explicitly overturned, but the Court has also upheld Congress' power to suspend such test where evidence of discriminatory intent exists. See South Carolina v. Katzenbach, 383 U.S. 301 (1966); Katzenbach v. Morgan, 384 U.S. 641 (1966).
98. Id.
Residency requirements for obtaining the voting franchise, on the other hand, have received rather strong backing in the Courts. In *Dunn v. Blumstein*, the Court affirmed the constitutionality of the basic residence requirement, but found Tennessee’s full year requirement too long. The Court rejected Tennessee’s argument that the time was necessary for voters to become acquainted with the issues. In the following year, however, it upheld 50-day residency requirements as appropriate to protect the state’s “important interest in [maintaining] accurate, voting lists.” While the Court has been very clear in requiring that residency requirements not be used to “zone out” persons of distinct race or political persuasion, it has been much less clear when the issue was the type of residency, i.e., exclusionary zoning to maintain property values.

Finally, in dealing with military personnel and convicted felons, the Court issued opinions further limiting, but certainly not striking down state’s rights to limit the franchise to those who may be considered bona fide residents. In *Carrington v. Rash*, it struck down a provision of the Texas constitution which denied the right to vote to members of the military who moved to Texas while on active duty. While the state had a right to restrict voting by transients, occupational status was not an adequately precise measure of transiency. In *Richardson v. Ramirez*, on the other hand, the Court upheld restrictions on putatively long term residents: convicts. The Court’s reasoning was simply that the fourteenth amendment did condone the disenfranchisement of those convicted.

3. Commercial Participation.

Commercial speech, i.e., speech for the purpose of selling goods, has long been held subject to far more stringent state regulation

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103. 405 U.S. 330 (1972). Tennessee had required residency within the state for a full year and in a single county for three months.


110. Sec. 2 of the 14th amendment reads, in part, “... when the right to vote at any election ... is denied to any of the male inhabitants of such state ... or in any way abridged,
than political speech under the two-level theory of the first amendment. Valentine v. Chrestensen established the basic principle, but the Court quickly began to modify its position when other first amendment issues appeared to overlap the commercial speech doctrine. Murdock v. Pennsylvania protected the right to sell religious literature on the streets without paying a sales tax, and Joseph Burstyn, Inc. v. Wilson held that film distributors do not lose their first amendment protection merely because they operated in order to make a profit. New York Times v. Sullivan became a landmark case in this, as in so many areas, when it protected a profit-making newspaper's right to publish a paid political advertisement.

In several recent cases, the Court has broadened the protection of commercial enterprises engaging in the political process. In 1978, a sharply divided court (5-4) decided in First National Bank of Boston v. Bellotti that corporations had the right to expend funds "for the purposes of influencing or affecting the vote on any question submitted to the voters other than one materially affecting any of the property, business or assets of the corporation." The Court again protected the right of commercial enterprises to engage in political speech in the 1980 case, Consolidated Edison Co. v. Public Service Commission, by allowing a company to promote nuclear power development though leaflets enclosed with utility bills. One cannot conclude from Belloti and Consolidated Edison, however, that the commercial/non-commercial distinction is entirely moribund. Although the Court struck down a regulatory commission order prohibiting advertisement which promoted the increased use of electricity in Central Hudson Gas and Electric Corp. v. Public

except for participation in rebellion, or other crime, the basis of representation therein shall be reduced . . . ." U.S. Const., amend. XIV, sec. 2 (emphasis added).

112. 316 U.S. 52 (1942) (where the Court held constitutional an ordinance prohibiting commercial advertising in the streets).
113. 319 U.S. 105 (1943).
114. 343 U.S. 495 (1962).
117. Id. at 768. The majority conceded that a state could limit such corporate speech only if it could demonstrate that "corporate advocacy threatened imminently to undermine democratic processes." Id. at 789.
Service Commission, it did maintain the basic distinction, and disposed of the case on a much more limited "overbreadth" argument.

B. Political Parties.

Parties are as critical to political participation as any institution in America. Ironically, they are the one major component not anticipated by the Founders, and their existence is nowhere acknowledged in the Constitution. Since no provision was made for them, and yet they are absolutely essential for the democratic process, both state and federal governments have felt compelled to regulate the parties. At one level the problem is deceptively simple: parties are private associations, and the Bill of Rights regulates only governmental activity. But parties are so integral to the functioning of government at all levels that no responsible government or court could leave them entirely unregulated. Professor Tribe has described the dilemma in the following manner: "Political parties exhibit many of the attributes of ordinary voluntary associations and yet seem imbued with a quasi-governmental character. This hybrid aspect of political parties has left uncertain the extent to which constitutional strictures bind their conduct."

The problems addressed by the courts in sorting out the role of parties in the political process can be divided into four general areas: autonomy vs. regulation, minimum support requirements for ballot access, affiliation, and equal representation.

1. Autonomy vs. regulation.

The earliest cases, which settled the question whether parties were completely autonomous, were the "white primary" cases. Texas proved particularly intransigent in its efforts to exclude blacks and Hispanics from the electoral process. While the fifteenth amendment foreclosed any direct state efforts to deny the franchise, Texas' tradition of being a one-party (democrats) state provided a temptation prejudiced politicians couldn't resist. They simply passed a statute denying minorities from voting in party primaries. In Nixon v. Herndon, however, the Supreme Court struck

120. L. Tribe, supra note 56, at 787.
down the law as violative of the fourteenth amendment. Texas then substituted a law which simply allowed the party executive committee to establish eligibility for voting in primaries. The Court rejected this also, in *Nixon v. Condon*, on the grounds that because the party was allowed to set voter qualifications it was acting as an agent of the state and therefore subject to constitutional restrictions. When Texas next tried to vest the power to determine who could vote in the primary in the Democratic Party's state convention, the Court's negative reaction came as no surprise. The state made one more desperate attempt by allowing the Jaybird Democratic Association to hold a pre-primary election of its own candidates. The fact that the Association excluded minorities from voting in the pre-primary election, coupled with the strange coincidence that election by the association all but assured winning the primary, which in turn tantamount to winning the general election, did not sit well with the Court. An eight member majority found the arrangement unconstitutional in *Terry v. Adams*.

While the white primary cases settled the point that some actions of political parties were subject to state regulations, they did not delineate which actions these might be. More recently, the Court has found itself examining disputes far less clear than racial exclusion. In *O'Brien v. Brown*, the Court was called into a credentials battle between factions of the Democratic Party attempting to seat delegates at the 1972 National Convention. In refusing to settle the problem, the Court, in a per curiam opinion, stated there wasn't enough time remaining before the convention to fully deliberate the question, and that there were serious questions whether the Court even had jurisdiction.

The same national convention gave rise to another question: what is the interest of an individual state when party rules contravene

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124. 286 U.S. 73 (1932).
127. Adams v. Terry, 193 F.2d 600 (5th Cir. 1952).
130. 409 U.S. 1 (1972) (per curiam).
131. *Id.* at 4.
its laws for the selection of convention delegates? In *Cousins v. Wigoda* the Court held that a state's interest in national convention delegates is not sufficiently compelling to allow it to determine their credentials. More recently, *Democratic Party v. Wisconsin ex rel LaFollette* established that no state could dictate how national parties must choose delegates. This decision, however, did not overturn a 1979 ruling in *Marchioro v. Chaney* which upheld a state statute which required that major parties have a state committee consisting of two persons from each county.

At the present time, the issue of party autonomy and state regulation remains, in many aspects, an unsettled area of law. The only certainty is that while parties will continue to be considered private associations, they exercise enough public functions that they are subject to some regulation.

2. *Minimal Support.*

Elections are run under the aegis of various government bodies. In that capacity, governments control access by political parties to the ballot. Access is, of course, critical for success, and not surprisingly has led to some litigation. The state's interest in limiting access is three-fold: to maintain political stability, to discourage frivolous candidates, and to provide manageable ballots. Candidates' interests support reasonably free access. The meeting point of the two interests remains somewhat ill-defined. In *Williams v. Rhodes*, George Wallace's American Independent Party challenged Ohio's rather stringent ballot access rules. Basically, Ohio required that if a party had failed to attract ten percent of the votes cast in the last gubernatorial election, it had to file a petition for access to the ballot. The petition had to be signed by registered voters equal to fifteen percent of votes cast in the gubernatorial contest and had to be filed at least nine months before the presidential election for which access was sought. Parties also were required to hold primary elections and national nominating conventions. The Court agreed with the petitioners that the requirements were so

135. Candidate access presents a somewhat different problem from party access and is discussed *infra* at note 141.
136. 393 U.S. 23 (1968).
stringent that they denied equal protection to minor parties and declared the statutes unconstitutional.\textsuperscript{137}

Three years later, however, the Court upheld Georgia's ballot access requirements. In \textit{Jenness v. Fortson},\textsuperscript{138} a majority upheld as not overly restrictive a regulation which required a petition for access be signed by at least five percent of the voters registered in the previous election. Two later cases clarified the standards somewhat. In \textit{American Party of Texas v. White},\textsuperscript{139} the Court upheld a Texas statute which required that a party either have received two percent of the vote in the previous general election, or have filed a petition signed by the number of registered voters equal to one percent of the number of votes cast in that election. A California case handled at the same time presented a somewhat different fact situation. California required five percent of eligible voters to sign a petition for ballot access, but restricted the eligibility of those who signed to people who had not participated in another party's primary. In \textit{Storer v. Brown},\textsuperscript{140} the Court declared the record inadequate to determine whether the restrictions were too severe and remanded the case for a lower court determination as to whether a reasonably diligent candidate could fulfill the requirements. What is clear at this point is that states have a compelling interest in maintaining minimal support standards of up to five percent of eligible voters before parties have a right of access to the ballot.

3. \textit{Affiliation.}

Since both states and parties have long term interests in the integrity of the whole electoral process, courts have consistently upheld reasonable state regulations requiring voters and candidates to be bona fide members of a party before being permitted to vote or run in party primaries. The basic concern, of course, is to prevent "raiding" by members of another party who might switch over for a primary to vote for a weak candidate whom they could more easily defeat in the general election. The point of contention is the amount of time one must be a registered party member

\textsuperscript{137} \textit{Id.} at 30-34.
\textsuperscript{138} 403 U.S. 431 (1971).
\textsuperscript{139} 415 U.S. 767 (1974).
\textsuperscript{140} 415 U.S. 724 (1974).
before being allowed to vote or run for office on that party’s ticket. The state of New York’s eight month membership for a presidential election and eleven month membership for a state or local primary was upheld in *Rosario v. Rockefeller.* On the other hand, an Illinois statute denying voting rights in a primary to anyone who had voted in the primary of another party within the previous twenty-three months was struck down in *Kusper v. Pontikes* as being an unreasonably long time for the protection of the state’s compelling interest. Again, while the Court left intact the basic principle that affiliation agreements are constitutional, it added that they must be reasonable to pass muster under the Equal Protection Clause.

4. *Equal Representation in Candidate Selection.*

The basis for representation within political parties is a far more enigmatic problem than either minimum support or affiliation. The Supreme Court has not yet dealt directly with equal protection in this context, although a number of lower courts have issued relevant opinions. The basic problem deals with the extent to which nominating processes, whether through primaries or conventions, must conform to the one-person/one-vote concept. On the one hand, selection of candidates whose names will be placed on an official ballot has a large state action component, and therefore must be bound by a strict constitutional standard. On the other hand, selection of candidates by a political party is quite a different enterprise from election of public officials. There are ideological and electability considerations in party selection that have no parallel in regular elections. The Supreme Court hinted in *Gray v. Sanders* that some considerations other than the one-person one-vote standard might be applicable should the issue come before the Court. To date, however, this remains an unsettled area of law.

C. *Campaign Financing.*

With the possible exception of access, no area of political participation discussed above has been as controversial in recent years

as campaign financing. Before 1971, The Corrupt Practices Act of 1925\(^{145}\) contained most provisions relating to such financing. By the late 1960’s, campaigning had changed so drastically and circumventions became so commonplace that Congress felt compelled to develop a completely new set of guidelines. The Federal Election Campaign Act of 1971\(^{146}\) was the first step in this development. Before the provisions of the Act could be fully implemented (and primarily as a result of the election abuses associated with Watergate), Congress amended the Act in 1974 with what one commentator has called “probably . . . the most sweeping set of campaign finance law changes ever adopted in the United States, if not in the world.”\(^{147}\)

The 1974 amended law did the following things:

. . . limited the amount individuals could contribute to federal candidates to $1,000 per election (primary, general election, or runoff), and a cumulative total of $25,000 per year[,] retained the 1971 limit on contributions by candidates to their own campaigns[,] limited to $1,000 the amount an individual could spend independently to influence an election (such spending is termed an “independent expenditure”)[,] limited what candidates could spend to get elected[,] amended a 1940 Hatch Act provision prohibiting contributions from federal contractors to make it clear that contractors could form PACs[,] limited PAC contributions to $5,000 per candidate per election, with no cumulative limit[,] limited expenditures by political parties on behalf of a candidate (over and above contributions) to $10,000 per candidate for the House in general elections, $20,000 or two cents per eligible voter, whichever was greater, in general elections for the Senate, and two cents per voter in the presidential general election[,] established formulas for disbursing public funds to match contributions of up to $250 for presidential candidates in prenomination contests[,] used flat grants to cover the full expense of the conventions of the two major parties and the major presidential general election campaigns, with proportional formulas for postelection grants to qualified candidates of minor parties[,] required candidates of major parties who choose to accept flat grants for general elections to forego private financing and limit their expenditures

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to the amount of the grant[,] created an independent, six-member Federal Election Commission (FEC)[;] [and finally,] strengthened disclosure and closed previous legal loopholes by requiring any federal candidate to establish a single central campaign committee through which all contributions and expenditures would have to be reported.148

Given the scope and complexity of the reforms, it is not surprising that the amendment faced an immediate challenge in the courts. In 1976, the Court decided Buckley v. Valeo,149 and established the basic legal guidelines for campaign financing. Those requirements fall roughly into four areas which we may analyze briefly: limits on campaign contributions, limits on expenditures, disclosure, and subsidies to candidates.150

1. Limits on Campaign Contributions.

In Buckley, the Court upheld the provisions which prohibited contributions by individuals, groups and duly authorized political committees in excess of $1,000 to any one candidate for elective federal office, independent Political Action Committees (PACs) contributions in excess of $5,000 to any such candidate, and individual contributions in a single calendar year in excess of $25,000 to all candidates.151 One argument made by the petitioners was that such limitations violated their first amendment freedoms of speech and association."152 Concerning speech, the Court ruled that "[a] limitation upon the amount that any one person or group may contribute to a candidate or political committee entails only a marginal restriction upon the contributor’s ability to engage in free communication."153 Concerning the corollary freedom of association argument, (made in relation to the $25,000 total limitation) the Court observed:

149. 424 U.S. 1 (1976). Although this was a per curiam opinion, it was accompanied by five additional opinions, each of which concurred in part and dissented in part.
152. Id. at 20.
This quite modest restraint upon protected political activity serves to prevent evasion of the $1,000 contribution limitation by a person who might otherwise contribute massive amounts of money to a particular candidate through the use of unearmarked contributions to political committees likely to contribute to that candidate, or huge contributions to the candidate’s political party. The limited, additional restriction on associational freedom imposed by the overall ceiling is thus no more than a corollary of the basic individual contribution limitations that we have found to be constitutionally valid.  

It is clear that while legislation may change the amounts that may be contributed in response to inflation and other factors, the basic principle that Congress may constitutionally limit such contributions is now a firmly established legal principle.  

2. **Limits on Campaign Expenditures.**

The Campaign Finance Act did not fare as well before the Court in its attempt to limit expenditures as it did with campaign contributions. The Act attempted the following things: “[to] limit independent expenditures by an individual or group advocating the election or defeat of a clearly identified candidate for federal office to $1,000 per year; . . . [to] set limits, depending on the office involved, on expenditures by a candidate for federal office during any calendar year; . . . and [to establish] limits . . . on overall campaign expenditures by candidates.” The Court rejected the expenditure limitations on first amendment grounds. While it recognized that the $1,000 limitation was designed to discourage political corruption, it judged that the means were “ill-equipped” to achieve that end because they would “impose direct and substantial restraints on the quantity of political speech.”

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153. *Id.* at 38.

154. The 1976 amendment did in fact make several changes in contribution limits and distribution. Specifically, it limited individual contributions to political parties to $20,000 per year and to other political committees to $5,000 per year, limited contributions to political parties by PACs to $15,000 per year, increased the amount that the Democratic and Republican Senate campaign committees could contribute to Senate candidates from $5,000 per election to $17,500 per year, limited to $50,000 the amount of their own money that presidential candidates who were publicly financed could spend to support their own campaign. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 487, § 320(a)(1)(c), (a)(2)(B); 90 Stat. 490 § 320(h).

155. 18 U.S.C.A. § 608(a)(1), (b)(1), (c).


157. *Id.* at 38 (1976).
Equally important from a constitutional perspective, the Court declared unconstitutional any attempt at

equalizing the relative ability of individuals and groups to influence the outcome of elections . . . . But the concept that the government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure the widest possible dissemination of information for diverse and antagonistic sources," and "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." 158

For the same reason, the Court overturned the provision which limited the amount a candidate could spend from his or her own funds to $25,000, and the limitation upon aggregate campaign expenditures. 159 Although it acknowledged the problem of spiraling costs, it was not willing to start down the road of establishing economic restrictions in the name of political equality. 160 Concerning the use of a candidate's own funds, the Court concluded that "[t]he First Amendment simply cannot tolerate . . . restriction upon the freedom of a candidate to speak without legislative limit on behalf on his own candidacy." 161

3. Disclosure.

The Campaign Finance Act required candidates to report the source of all contributions of ten dollars or more, and disclosure by all contributors of more than a hundred dollars in a calendar year of their gifts. 162 The Court, recognizing the danger of disclosure particularly for minority parties and unpopular candidates, 163 wrote that "[c]ompelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment." 164 Nevertheless, the Court upheld the disclosure requirements on the basis of several compelling state interests: disclosure allowed voters to know who supported each

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159. 424 U.S. 1, 54 (1976).
162. 2 U.S.C.A. § 431 et. seq.
164. 424 U.S. at 64 (1976).
candidate, and thereby helped them evaluate the choices; disclosure publicized major contributions and expenditures, thereby discouraging corrupt practices and even the appearance of corruption; and finally, disclosure made the state's monitoring of campaign violations much easier.\textsuperscript{185}

4. \textit{Subsidies to Candidates.}

Federal subsidies for elections have long been sought by reformers as a means of modifying the impact of large corporations and wealthy contributors. With the advent of television and the resulting quantum leap in the cost of waging successful campaigns, the need became even more urgent. The Campaign Finance Act made a fundamental distinction between major and minor parties and provided proportionate subsidies to each. Parties which had received over twenty-five percent of the vote in the immediately preceding presidential election could be reimbursed for expenses up to two million dollars incurred in the nominating process and receive subsidies of up to twenty million dollars for their candidate's presidential campaign \textit{provided} the candidates did not accept additional contributions from private sources. Parties which had received between five and twenty-five percent of the vote in the immediately preceding presidential election could receive similar reimbursements and subsidies in proportion to their share of the votes in that previous election (with the promise of post-election payments if they increased their percentage of the total vote). Parties receiving less than five percent of the vote in the previous presidential election could receive no reimbursement or subsidies, but they could qualify for post-election repayment if they received more than five percent of the vote in the current election. Minor party candidates, unlike those of major parties, could accept private contributions as long as their over-all expenditures did not exceed twenty million dollars.\textsuperscript{186}

The appellants in \textit{Buckley} attacked the subsidy provisions on two bases: excessive entanglement in the internal affairs of the political parties (making an analogy to the Court's "excessive entanglement" test in religion Establishment Clause cases); and equal protection, claiming that the provisions discriminated against minor parties and the voters who supported them. The Court, however,

\textsuperscript{185} \textit{Id. at} 65-69.
\textsuperscript{186} Internal Revenue Code of 1954, subtitle H, § 9006.
was not persuaded. It rejected the Establishment Clause analogy, and reasoned that while the first amendment prohibits the suppression of speech, it does not prohibit the enhancement of speech which the subsidies provide. The Court rejected the equal protection argument, holding that access to ballots was available to all candidates and voters and that it was not unreasonable to tie financial aid to a threshold requirement of number of voters attracted. Congress had a legitimate interest to not "[f]oster frivolous candidacies, create a system of splintered parties, and encourage unrestrained factionalism."  

*Buckley v. Valeo* was the landmark case controlling campaign financing. Although divided into several different formations for particular points, a majority of the Court upheld the limitations upon individual campaign contributions, the disclosure requirements, and the subsidizing of presidential elections. It held, however, that limitations on expenditures by candidates and third parties on behalf of candidates violated the first amendment. *Buckley* provided an important precedent for *Brown v. Hartlage* because it settled, for all practical purposes, the principle that "compelling" state interests in maintaining the integrity of the electoral process could not infringe upon protected first amendment rights.

D. **Campaign Speech.**

Given the nearly two centuries of campaign rhetoric, both famous and infamous, remarkably few cases spelling out constitutional limitations on state regulation of campaigning have been handed down by the Supreme Court. Perhaps the reason is that most problem areas have been handled on more general first amendment grounds. On the other hand,

> [t]here is little doubt that a state's interest in purging political campaigns of deceptive content far outweighs any marginal interest in disseminating false or misleading information; the assessment becomes more difficult, however, when the possible chilling effect

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168. *Id.* at 101.
169. *Id.*
170. *Id.* at 1.
of such laws on non-deceptive campaign speech is taken into account.173

Before *Brown*, the Court expressed its concern for limitations on campaign speech in only two interrelated areas: defamation and identification. In two cases handed down on the same day, *Monitor Patriot Co. v. Roy*174 and *Ocala Star-Banner Co. v. Damron*,175 the Court rejected claims for compensatory and punitive damages by candidates suing newspapers for defamatory statements. The Court held, based on its earlier *New York Times v. Sullivan*176 standard, that such candidates had to establish that such defamatory statements were made with either knowledge of or reckless disregard for their falsity.177

*Buckley v. Valeo* seems to have settled most dimensions of the identification problem. Earlier, however, in *Talley v. California*,178 the Court overturned a state statute forbidding the distribution of any anonymous circulars. Because there is a compelling state interest in preventing potentially devastating defamation of political candidates, and allowing voters reasonably accurate assessments of candidates, there seems little doubt that the Court will continue to uphold state laws requiring publishers of campaign literature to identify themselves.

IV

A. **Campaign Promises.**

*Brown v. Hartlage* fits comfortably in this general mosaic of the Court’s case law governing participation in the political process. No other area of politics has received as much attention from pundits and cartoonists and so little from the courts as campaign promises. Both the oral argument and Justice Brennan’s opinion for the majority reflect the Justices’ concern for constructing constitutional guidelines.

175. 401 U.S. 295 (1971).
176. 376 U.S. 254 (1964). The Court applies a different standard when the person defamed is a private person, not someone who has thrust him or herself into the public arena, such as a candidate. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).
178. Id.

During oral argument, Justice O'Connor, putatively the one Justice most solicitous of states' rights, asked some of the most difficult questions of the attorneys: "Do you interpret these cases in the Law of Kentucky to provide then, that the state forbids only campaign promises to perform illegal acts?"179 "Do you take the position that what was stated by the candidates in this case was something that was not capable of legal accomplishment?"180 "... do you think that under Kentucky Law a campaign promise to try to cut government expenditures and reduce taxes would be legal or illegal?"181 "... does the state have to show that each such election promise constitutes a clear and present danger to the electoral integrity, or is it enough... that the state simply shows that the promises as a class tend to mislead the electorate?"182

Chief Justice Burger questioned Brown's counsel as to whether a more carefully phrased promise would have passed statutory muster.183 Mr. Goldberg, Brown's counsel, responded that a requirement for such precision would have a chilling effect on speech.184 In questioning Mr. Chauvin, the amicus appointed to represent Hartlage, the Chief Justice returned several times to the question whether promising to refund a salary to the state treasury or just promising to throw a check away would be illegal under the Kentucky statute.185

Justice Rehnquist focused on the group to whom a promise is made, whether it is a select group such as The Little League and whether taxpayers as a whole could be considered a select group.186

Curiously, most of the questions came from the conservative, "states' rights" bloc of the Court. Of the liberal wing, only Justice Marshall joined in the questioning, asking at one point whether President Reagan's promise to balance the budget would be legal in Kentucky,187 and later: "But don't you get in trouble if you try to enforce a rule that every politician must tell nothing but the

180. Id. at 11.
181. Id. at 12.
182. Id. at 13.
183. Id. at 14.
184. Id. at 14.
185. Id. at 23-24.
186. Id. at 14-15.
187. Id. at 24.
truth?" Justice Brennan, who wrote the unanimous opinion, did not ask a single question or make a single observation. What is clear is that the Justices were having a great deal of difficulty defining the limits of the Kentucky statute.\textsuperscript{189}

2. Basic Guidelines.

It was this difficulty in finding the proper limits on campaign promises which proved critical in determining the outcome of the case. Justice Brennan's opinion for the majority spells out some inchoate guidelines. It may be useful to develop them schematically. The first principle stated was that the state has a fundamental right to prohibit a candidate from buying votes. "No body politic worthy of being called a democracy entrusts the selection of leaders to a process of auction or barter."\textsuperscript{190} Justice Brennan moved from the state's compelling interest in prohibiting the act of vote buying to the first amendment issue in prohibiting the act of vote buying in two steps:

\ldots as a State may prohibit the giving of money or other things of value to a voter in exchange for his support, it may also declare unlawful an \textit{agreement} embodying the intention to make such an exchange. \ldots Finally, while a \textit{solicitation} to enter into an agreement arguably crosses the sometimes hazy line distinguishing conduct from pure speech, such a solicitation, even though it may have an impact in the political arena, remains in essence an invitation to engage in an illegal exchange for private profit, and may properly be prohibited.\textsuperscript{191}

It is "plain," Justice Brennan concluded in his second principle, "that some kinds of promises made by a candidate to voters, and some kinds of promises elicited by voters from candidates, may be declared illegal without constitutional difficulty."\textsuperscript{192} Justice Brennan reaffirmed here a basic first amendment tenet that there are two levels of speech: that which is protected from legislative regulation and that which is subject to control. This principle was best stated by Justice Holmes: "[T]he First Amendment while pro-

\textsuperscript{188} Id. at 39.
\textsuperscript{189} Mr. Chauvin tried at several points to indicate that the statute reached only to promises which would be illegal or impossible to fulfill. At one point, however, he was forced to admit that this was only his reading of KY. REV. STAT. § 121.055, a reading which was supported by neither the wording of the statute or Kentucky case law. Id. at 22, 24-26.
\textsuperscript{190} 456 U.S. at 54.
\textsuperscript{191} Id. at 54-55 (emphasis added).
\textsuperscript{192} Id. at 55 (emphasis added).
hibiting legislation against free speech as such cannot have been, and obviously was not, intended to give immunity for every possible use of language."

Given that some promises are legitimate and "indispensable to decision-making in a democracy," Justice Brennan rejected three possible standards that might conceivably serve as a basis to distinguish protected promises from unprotected promises: (1) appeal to the self-interest of some voters, (2) innocent erroneous promise by a candidate to perform something he could not legally do, and (3) disproportionate benefit or perceived benefit to "some class of citizens." Each standard was rejected as incompatible with a democratic form of government: the first because "... our tradition of political pluralism is partly predicated on the expectation that voters will pursue their individual good through the political process, and that the summation of these individual pursuits will further the collective welfare"; the second because error can never be equated with corruption; and the third because "the benefits of most public policy changes accrue not only to the undifferentiated 'public', but more directly to particular individuals or groups."

On the positive side, Justice Brennan established, in his third principle, the criteria which will be used to determine protected from unprotected promises: Promises made openly, "[subject to comment and criticisms of [a] political opponent and to the scrutiny of the voters]" have a strong presumption of constitutional protection. Once again, Justice Brennan cast the issue squarely into one of the classic and elementary doctrines of the first amendment: the "marketplace of ideas" concept expressed by Justice Holmes in his dissent in Abrams v. United States.

When men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the

193. Id. at 55 (quoting Frohwerk v. United States, 249 U.S. 204, 206 (1919)).
195. Id.
196. Id. at 56.
197. Id. at 58.
198. Id.
199. Id. at 57.
power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. 201

The fourth general principle developed by Justice Brennan was that commitments to make payments from the public treasury through the legitimate exercise of the fiscal powers of government are constitutionally protected. 202 The major distinction here, of course, is between public expenditures made through legitimate channels, and payments from one's personal funds. While in this case the issue was limited to a fiscal concern, the same principle would seem applicable to promises to perform other services of value, e.g., build sidewalks, extend sewers, etc.

The fifth principle stated was that if the promised benefits will "extend beyond those voters who cast their ballots . . . [for the candidate] to all taxpayers and citizens," 203 the promise is constitutionally protected. This principle is aimed at excluding from constitutional protection all particularized quid pro quo arrangements. Of all the principles, however, it is the most likely to cause the courts difficulty in future cases, since it seems somewhat inconsistent with the standard which Justice Brennan rejected, i.e., disproportionate benefits for particular classes of people. 204

The sixth and final principle discussed was that a promise is constitutionally protected if it depends entirely upon election by the majority of voters and not in return for the casting of individual votes. 205 Again, the effort here is to exclude quid pro quo private arrangements which might be tantamount to the buying of votes.

B. Conclusions

The authors hope that this schematic development of the majority opinion will draw more clearly the constitutional boundaries which define protected campaign promises. It is clear from the context of the case that the principles would need to be applied collectively. Whether they will be refined in future cases remains to be seen. This was a case of first impression and Justice Brennan was understandably cautious in developing the guidelines. As he stated:

201. Id. at 630-31.
202. 456 U.S. at 58 (emphasis added).
203. Id. at 58 (emphasis added).
204. Id.
205. Id. at 58.
We hesitate before attempting to formulate some test of constitutional legitimacy: the precise nature of the promise, the conditions upon which it is given, the circumstances under which it is made, the size of the audience, the nature and size of the group to be benefited, all might, in some instances and to varying extents, bear upon the constitutional assessment. But acknowledging the difficulty of rendering a concise formulation, or recognizing the possibility of borderline cases, does not disable us from identifying cases far from any troublesome border. 206

Clearly, as the Justices' votes indicate, they considered Brown v. Hartlage not a borderline case. This may not have been clear until the oral argument, which would explain the appointment of an amicus to argue for the reluctant appellee. The fact that this was the first constitutional challenge to a campaign promise law may explain why the Court refused to strike down the Kentucky statute and, indeed, did not even hold the statute overbroad. 207 Instead, it took the cautious and limited step of holding KY. REV. STAT. § 121.055 unconstitutional only as applied in the instant case. 208

The significance of Brown v. Hartlage is not that it developed new standards for protecting first amendment freedoms, but that it extended elementary standards to a new area: the campaign promise. In this sense it must be seen as filling in the mosaic of case law covering participation in politics rather than as stepping out in a new direction. The impact on political campaigning, of course, remains to be seen. The basic guidelines found in Justice Brennan's opinion provide a sound constitutional basis for experimentation and testing by candidates, and will most likely result in more robust political debate, if that be possible, and more creativity in the making of campaign promises. If the subsequent local history of the present case is any indication, however, lower paid government officials is not a likely result.

206. Id. at 56.
208. 456 U.S. at 62.
COMMENTS

KENTUCKY APPLICATION FOR ABANDONED MINE RECLAMATION FUNDS PURSUANT TO TITLE IV OF FEDERAL LAW 95-87, SURFACE MINING CONTROL AND RECLAMATION ACT OF 1977

Introduction

Local individuals, associations, corporations, city and county governments can benefit from a fund established pursuant to the Surface Mining Control and Reclamation Act of 1977, Public Law 95-87. Further, the state of Kentucky can benefit through public health improvements in water quality, residential housing, recreation facilities, and aesthetic enhancement to its long abandoned and abused strip mine sites if those same groups and individuals take advantage of Title IV of this statute. It is a wonderful opportunity!

The Surface Mining Control and Reclamation Act of 1977 (hereinafter SMCRA) is the culmination of repeated attempts to force surface miners to perform adequate reclamation on permitted areas. SMCRA is a strong enforcement tool which will dramatically change the approach to surface mining in Kentucky and other affected states. Not only is SMCRA evidence of the public sector’s concern for the future attitude toward its environment, it is also evidence that there is concern for its errant ways of the past.

Title IV of the Act, Abandoned Mine Reclamation, establishes a fund which is to be disbursed for projects intended for

1. reclamation and restoration of land and water resources adversely affected by past coal mining, including but not limited to reclamation and restoration of abandoned surface mine areas, abandoned coal processing areas, and abandoned coal refuse disposal

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2. Id. §§ 401-413, 30 U.S.C. §§ 1231-43 (Abandoned Mine Reclamation).
areas; sealing and filling abandoned deep mine entries and voids; planting of land adversely affected by past coal mining to prevent erosion and sedimentation; prevention, abatement, treatment, and control of water pollution created by coal mine drainage including restoration of stream beds, and construction and operation of water treatment plants; prevention, abatement, and control of burning coal refuse disposal areas and burning coal in situ; and prevention, abatement, and control of coal mine subsidence.  

SMCRA had as one of the enumerated "purposes" the goal to

(h) promote the reclamation of mined areas left without adequate reclamation prior to [the enactment of this Act], and which continue, in their unreclaimed condition, to substantially degrade the quality of the environment, prevent or damage the beneficial use of the land or water resources, or endanger the health and safety of the public;  

The Kentucky proposal which accompanied the state reclamation plan known as "Primacy," entitled Abandoned Mine Reclamation Plan (hereinafter AML Plan), stated, "[t]he major goal of the Abandoned Lands program is to correct the adverse conditions caused by past mining practices."  

The purpose of this paper is not to research the language of the relevant statute and regulations or to trace the legislative

5. 30 U.S.C. § 1231(c) (Supp. IV 1980).  
6. Id. § 1202(h).  
8. Kentucky Abandoned Mine Land Reclamation Plan (1981) prepared by Kentucky Department for Natural Resources pursuant to 30 C.F.R. § 884.13 (1981) [hereinafter cited as AML Plan]. The AML Plan was prepared by the Kentucky Department for Natural Resources and Environmental Protection Bureau of Natural Resources Division of Abandoned Lands. Copies of this plan, which includes the initial priority ratings of specific abandoned lands in Kentucky, are available through the Division of Abandoned Lands, Department for Natural Resources, 618 Teton Trail, Frankfort, Kentucky 40601; AC(502) 564-2141. The cost at time of printing was approximately twenty-five dollars ($25.00).  
In addition to standard governmental document requirements of statements of purposes and goals, the AML Plan identifies priority areas of concern at the time the plan was drafted. These areas may have been superseded since the program has become more active and actual disbursement has begun. The Department encourages inquiry about where priority sites are presently located. Further, the AML Plan enumerates the scope of its responsibilities and discusses the approach the AML Division will take to implement each section of Title IV such as liens on reclaimed land and acquisition of abandoned land. The AML Plan includes, in its appendices, large topographical maps of all regions of Kentucky showing affected streams and actual locations of unreclaimed surface mines. There are socio-economic profiles of each area and eco-system descriptions. It is an extensive evaluation of the Commonwealth.  
9. Id. at (3-3).
history of it, although some is included. The primary purpose of this article is to inform local governments and individuals that approximately $60 million is available to them from the state fund alone, not including other federal sources, for reclamation of *their own* land and other neighboring lands which were unreclaimed prior to the effective date of SMCRA.¹⁰

Money provided by SMCRA in Title IV is derived from a levy on production of coal from surface and underground mines. The Abandoned Mine Reclamation Fund (hereinafter Fund) was created in § 1231(a) of Title IV and was termed a "trust fund" by the act.¹¹ The Fund is not an "interest bearing" account according to the Department of Treasury because no provision was made by Congress to allocate revenue for the purpose.¹² Revenue for this fund is paid by each operator at a rate of

35 cents per ton of coal produced by surface coal mining and 15 cents per ton of coal produced by underground mining or 10 per centum of the value of coal at the mine as determined by the Secretary, whichever is less, except that the reclamation fee for lignite coal shall be at a rate of 2 per centum of the value of the coal at the mine or 10 cents per ton, whichever is less.¹³

The Fund is allocated into four parts: (1) fifty percent (50%) to states and Indian tribes directly;¹⁴ (2) up to twenty percent (20%) to the Federal Office of Surface Mining (hereinafter OSM); (3) up to ten percent (10%) to the Small Operators Assistance Program (hereinafter SOAP) for help in funding application for permits under SMCRA; and, (4) up to twenty percent (20%) to the Rural Abandoned Mines Program administered by the Soil Conservation Service.¹⁵

¹⁰ 30 U.S.C. § 1231(c) (Supp. IV 1980). (SMCRA specifically limits the reclamation under the fund to areas "adversely affected by past coal mining." Theoretically, future abuses will be avoided by the stringent limitations in the act itself.)

¹¹ "There is created on the books of the Treasury of the United States a trust fund to be known as the Abandoned Mine Reclamation Fund. . . ." 30 U.S.C. § 1231(a) (Supp. IV 1980).

¹² 47 Fed. Reg. 28,575 (1982). This page discusses the newly promulgated "Definitions" section of the regulations (specifically, the term "Abandoned Mine Reclamation Fund"). Commentators specifically objected to the use of the term "special fund" in the definition rather than "trust fund" as in SMCRA. The Office of Surface Mining (OSM), however, disagreed. Id.

¹³ 30 U.S.C. § 1232(a) (Supp. IV 1980). The act further provides for records to be sent to the Office of Surface Mining for monitoring. Id. § 1232(c).

¹⁴ Id. § 1232(g)(2).

Because the SOAP objectives are not related to Abandoned Mine Land Reclamation, that portion of the Fund will not be addressed. The share allotted to OSM, as discussed later, has been offered to the states as a policy move to avoid duplication of services. The thrust of this article, therefore, will be directed at the state AML Program and the Rural Abandoned Mines Program (hereinafter RAMP) through the Soil Conservation Service.

The Impact of the AML Program in Kentucky

The Division of Abandoned Lands is "responsible for reclaiming lands and waters which have been mined or affected by mining and continue in their unclaimed state to endanger health, safety and general welfare or to substantially degrade the environment." Money for the program is derived from two sources: The Fund and forfeited reclamation bonds.

Distributions are made differently from each group. The AML Fund is based on an annual allotment to the state resulting from a yearly application process from the state to the federal government. Forfeited reclamation bonds comprise a separate state account resulting from those bonds forfeited when surface reclamation was not performed pursuant to application agreement or was done improperly. The forfeited bonds are supplemented with AML Funds to reclaim qualified sites.

Initially, Kentucky's share of the fund under SMCRA at the date of primacy was approximately $70 million. As of November, 1982, some $60 million remained. The first applications had been received and the reclamation projects are under design. Any individual citizen of Kentucky, any county or city government and even corporations may request a reclamation project be carried out on its own land or on other public or private land.

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Secretary of the Interior at his discretion to allocate the remaining 50%. These amounts are ceilings but may vary in proportion. As the Small Operators Assistance Program is not involved with abandoned mine reclamation, this article will not address its objectives.

16. DIVISION OF ABANDONED LANDS, BUREAU OF NAT. RESOURCES, DEPT FOR NAT. RESOURCES AND ENVTL. PROTECTION.

17. Id.

18. AML Plan, supra note 8, at (3-9)-(3-13) (sites under the Supplementary Abandoned Mine Bond Forfeiture Fund will not meet priority qualifications initially but are reclaimed to avoid greater expenses later. Id. at (3-11)).

19. Interview with Mr. Dave Rosenbaum, Director, Division of Abandoned Mine Lands, Kentucky Department for Natural Resources and Environmental Protection (September 10, 1982).
Title IV sweeps broadly and provides for entry by the appropriate state agency or federal government onto privately owned land which meets the criteria. Further, land can be acquired with the AML Funds by the state or local government for purposes of reclamation. However, the Fund is limited to supplying only 90% of the acquisition price of such land. But, obviously, the opportunity for a local municipality or county government is substantial! The act requires that the land acquired with AML Funds “after reclamation, abatement of the adverse effects...will serve recreation and historic purposes, conservation and reclamation purposes or provide open space benefits; and...permanent facilities will be constructed...” The reclaimed land may be sold to the local government by the Department of the Interior or the state at less than fair market value as long as the United States’ initial outlay is returned. Therefore, hypothetically, a county with an area qualifying under Title IV could apply for reclamation of that area (unlimited in size under § 1237), have it restored with either federal funds or the state allotment, purchase that land with money from the fund and establish a recreation area substantially cost-free to the local county. The language of Title IV is broad enough to permit any reasonable use of the land and includes express encouragement for residential use. The act also expressly lists that the acquired land may be transferred to any person, firm, association, or corporation...to construct or rehabilitate housing for persons disabled as a result of employment in the mines or work incidental thereto, persons displaced by acquisition of land pursuant to this section, or persons dislocated as a result of adverse effects of coal mining practices which constitute an emergency...[or] as the result of natural disasters...from any cause.

Title IV does not preclude individual participation in the state fund. However, it does limit profit taking by any person, firm, association or corporation at the expense of the Fund. The Fund

20. 30 U.S.C. §§ 1237(a), 1237(b), 1242(a) (Supp. IV 1980). See also 30 C.F.R. § 877 (1981); AML Plan, supra note 8, at (8-1)-(8-22).
22. Id. § 1237(e).
23. Id. § 1237(c). See AML Plan, supra note 8, at (6-1).
may not be used for construction costs in any residential project under the act. However, the Rural Abandoned Mines Program (RAMP), discussed later, provides an individual landowner an opportunity to contract with the Soil Conservation Service of the Department of Agriculture for improvement of his own land or land he intends to purchase if usable.

Ranking and Selection Procedures in the Kentucky AML Plan

No accurate inventory of affected acreage within Kentucky's borders has been made but one estimate by the Natural Resources and Environmental Protection Cabinet is 150,000 acres. Maps included in the AML Plan show evidence of extensive abandoned contour mines and area mines not yet reclaimed.

The process of ranking individual sites in Kentucky at the time the AML Plan was drafted could not be finalized because there was no complete inventory. Several criteria are listed, however, which can offer some assistance in determining whether a given area will qualify and in which priority level. Cultural resources are a consideration, along with the physical or biological characteristics in site application. Historical significance, recreation opportunities, aesthetic quality, and benefits to adjacent landowners under the proposed future land use are also important.

Aesthetically unappealing situations are scored higher than unobtrusive landscapes. If a site is frequented by more people, the urgency for reclamation is more critical. A higher score is possible for those sites where the surrounding lands support public facilities. Since development of publicly owned land is encouraged before development of sites that are privately owned, the property ownership parameter can result in a higher score if the project area belongs to a governmental entity. Also, a higher magnitude and importance is placed on those projects where public use of the land is the post reclamation proposal.

Reclamation that incorporates research or demonstration projects is encouraged by the scoring process. Reclamation projects where cooperative economic efforts can be arranged, including landowners willing to share in the cost, may receive a higher parameter score.

28. Id.
29. Id. § 1236.
30. AML Plan, supra note 8, at app. 1.
31. Id. at (4-3)-(4-22).
32. Id. at (4-4).
This will assist in planning a cost-effective project.

Negative weighing factors include Potential Mineral Recovery, Permanent Project Maintenance Cost, and Adverse Environmental or Socio-economic Impacts During Reclamation. If the remining potential is high for an A.M.L. site, reclamation will be considered only if the degradation at the site is causing significant damage. Because unlimited funds are not available, maintenance costs are restrictive and therefore given a negative score. Short-term adverse impacts during reclamation may affect both human and environmental sectors, but are temporary and will be greatly overshadowed by long-term benefits to the area.\footnote{33}

The AML Plan uses (1) existing site parameters and (2) action parameters as scoring factors and all are concerned with the current conditions as they relate to the site.\footnote{34} "Subcategories included are Human life, Health, and Safety; Environmental; Aesthetics; Socio-economic; and Property Ownership."\footnote{35} Each individual factor\footnote{36} (such as water quality) is rated as "None, Minimal, Moderate, Extreme," and given a point value with which the AML Division tallies a score sheet. "Selection for the state grants will be based on qualified sites chosen with highest total scores picked first."\footnote{37} However, factors may vary in importance in relation to the focus of the AML Division.\footnote{38}

The Division's initial plan defined that the first three years of its program would consist of

\begin{itemize}
\item \textbf{Existing Site Parameters}: (1) Human Life, Health, or Safety; (2) Water (quality and quantity); (3) Air; (4) Fish and Wildlife Habitat; (5) Area Affected; (6) Current Erosion; (7) Percent Vegetative Cover; (8) Aesthetics; (9) Historical and Cultural Resources; (10) Recreational Resources; (11) Adjacent Land Uses; (12) Number of People Affected; (13) Property Ownership.
\item \textbf{Action Parameters}: (1) Potential Mineral Recovery; (2) Terrain Condition; (3) Proposed Post-Reclamation Land Use; (4) Demonstration of Enhanced Reclamation Technology; (5) Cost Effectiveness; (6) Bond Forfeiture Money Available; (7) Permanent Project Maintenance Cost; (8) Adverse Environmental or Socio-Economic Impacts During Reclamation; (9) Adverse Environmental Conditions.
\end{itemize}
identify[ing] and correct[ing] abandoned mine land sites classified as priority I. This priority deals with the protection of public health, safety, general welfare, and property from the extreme danger of past coal mining practices. Extreme danger is defined as a condition that could reasonably be expected to cause substantial physical harm to which persons or improvements of real property are currently exposed. The magnitude of any hazardous impact on public health, safety, or general welfare is directly related to the nature of the hazard, the number of people currently exposed to the hazard, and the imminency or probability of the impact to occur.

As priority I sites are scheduled for reclamation, work will begin on priority II sites. The goal of this priority is the protection of public health, safety, and general welfare from adverse effects of past coal mining practices which do not constitute an extreme danger. Many of the same type of situations considered to be priority I will also be involved in priority II sites. The difference in priority ranking is directly related to the proximity of the source to populated areas and the degree of risk of public contact. Priority II sites will be identified through the same sources as priority I site identification.39

The Kentucky Plan lists examples of eligible priority I and II sites as slides, acid mine drainage, unvegetated areas, abandoned highwalls, abandoned water impoundments, open shafts and auger holes, fires, waste banks, abandoned structures and machinery and subsidence.40 The federal regulations do not limit reclamation efforts in tunnels and voids to coal mines, however.41 The AML Division was to accumulate a “Data Base” through department personnel, individual private citizens and concerned state and federal citizens.42 Essentially this means that any individual citizen who has an interest in reclamation or can benefit from reclamation of an abandoned surface mine may propose to the AML Division that it act to secure funds for a specific project.

Each of those problems listed above may [also] occur as priority III problems on any given area. This classification includes those areas which severely degrade the biological environment, or affect threatened or endangered species or habitat. Priority III sites which affect natural areas, such as wetlands or wild and scenic rivers, may

39. Id. at (3-3)-(3-4).
40. Id. at (3-4)-(3-5).
41. 47 Fed. Reg. 28,596 (1982) (to be codified at 30 C.F.R. §§ 875.1-.13). This regulation was promulgated in reference to 30 U.S.C. § 1239(a) which declared abandoned tunnels “from any previous mining operation” to be a “hazard”.
42. See AML Plan, supra note 8, at (3-5)-(3-6).
receive consideration for reclamation work before all priority I and II sites have been reclaimed.

The abandoned lands program will consider early work on priority III sites for the following reasons:
1) reclamation work is planned for a site in the close vicinity;
2) the project area is causing severe environmental damage to surrounding areas and has a high degree of public support;
3) the project area is having adverse effects on threatened or endangered species; or
4) the project area will be used for research and demonstration purposes.

As a final note to ranking procedures, as in any federally funded project, the first source of input should be from the affected local population. Through public meetings and private communications, Kentucky's AML Division uses the perception of the local community as an important source for recommendations of potential projects. The Division discovered early in the program that local citizens were the ones concerned, not the state as a whole.

Application for AML Program Funds in Kentucky

A party who wants an area of abandoned mine land reclaimed must contact the Division of Abandoned Lands (hereinafter Division) in Frankfort, Kentucky. This is the extent of necessary involvement of the individual. Because the Division must identify candidate sites, contacts are made through local citizens, county agents and officials, newspaper ads, radio spots, fiscal court meetings, coal associations, civic clubs, and the Appalachian Research and Defense Fund. Any citizen can recommend a site for attention and the Division will investigate and return a correspondence to that person. Many of the worst sites were catalogued in the AML Plan.

The Division will then determine whether the site qualifies under

43. Id. at (3-15)-(3-16).
44. Interview with Dave Rosenbaum, Director of the Division of Abandoned Lands, Kentucky Department for Natural Resources, in Frankfort, Kentucky (Oct. 5, 1982) [hereinafter cited as Interview].
45. This portion of the text is a derivative of Interview, supra note 44. The procedures noted are a variety of state and federal requirements. Federal requirements are promulgated through 30 C.F.R. § 866 most recently published in 47 Fed. Reg. 28,601-604 (1982).
46. Division of Abandoned Lands, Department for Natural Resources, 618 Teton Trail, Frankfort, Kentucky; AC (606) 564-2141.
47. See AML Plan, supra note 8. The Plan included topographical maps as an index to reference past mine sites. Id. at app. 1.
the regulations. Photographs, if possible, must document the seriousness. If no individual is responsible for reclamation, the site will be prioritized as in the preceding section. The state AML Fund operates on a yearly grant. The state will inventory the projects it anticipates correcting, therefore, and submit a "project specific grant" for a fiscal year, itemizing each site, to the Office of Surface Mining. Following evaluation at the federal level, which normally takes ninety days, approval is sent to the Division as a "grant agreement" and a letter of credit from OSM is issued. No money is sent directly to the state until the actual work is performed. There is generally only one yearly grant. The language of SMCRA unfortunately does not provide an automatic allowance to OSM and the Fund must be appropriated annually by Congress.

The AML Division employs in-house staff engineers in Frankfort to draft the plan but, in the alternative, that service may also be contracted to private engineers. The Kentucky contract agency is the Finance and Administration Cabinet.

Once approved, the normal procedures are followed for letting state sealed bid contracts. The availability must be advertised, including the dates of on-site inspections, to allow contractors to view the area and participate in pre-plan conferences with Division agents. The sealed bids, submitted to the Finance and Administration Cabinet are "unit price" bids with itemized accounts. The bids are opened on a previously announced date and read publicly. A bond equally five percent (5%) of bid must accompany each bid and the bid is awarded to the lowest bidder who, in the eyes of the Commonwealth, is capable of performing the project. There is a pre-construction conference to assure all the details of the project are understood and if approved, the Finance and Administration Cabinet awards the bid. Periodic performance payments are made to the contractor. According to the AML Division the minimum time span from the initial inquiry by a citizen to the actual beginning of the project reclamation would be eighteen (18) months.

Some $14 million has been granted to the Division in the first year encompassing 38 projects. The state AML Fund could potentially provide jobs for local construction firms, protection and public

49. Id. § 886.14.
50. Id. § 886.15.
health for local citizenry, and money for a local economy if the proper approach were taken. The AML Division wants these sites reclaimed and encourages local input as well as applications. This is an excellent opportunity for local regions to obtain public facility land and improve local water resources and environment.

**Federal Responsibilities under Title IV**

Initially, the OSM was to retain at least twenty percent (20%) of the fund for use as a federal program. Application for work to be done under this portion is now, with one exception, being channeled through the state Abandoned Mine Lands programs as a result of policy and by virtue of discretionary right afforded by the Act. The concept is realistic because the state office will have access and means to better administer local programming. The one exception to this policy is the emergency program outlined in § 410.

The federal program for emergency restoration and reclamation procedures is channeled through the recently reorganized state office branch of OSM in Lexington. Its purpose is to offer immediate reclamation of imminently dangerous sites such as slides or impoundments. Title IV states that the emergency funds may be used "to restore, reclaim, abate, control, or prevent the adverse effects of coal mining practices and to do all things necessary or expedient to protect the public health, safety, or general welfare." Further, "[t]he moneys expended for such work . . . shall be chargeable against such land . . ." Application for emergency work to be done is similar to that of the state program.

An individual or local government who is aware of a potentially dangerous situation which, again, meets the basic qualifications of Title IV, i.e., mined prior to the act and no one else responsible, and that it is an immediate threat to life, should call or write to the Lexington field office of OSM. From that call, the office will contact the area office closest to the site, either London or Madison.

52. 30 C.F.R. § 872.11 (1981).
54. *Id.* § 1240.
57. *Id.*
ville, which will investigate or have a satellite office, such as in Pikeville, investigate. This investigation will occur within eight (8) hours of receipt of the citizen's notice. From this inspection immediate entry may be made if absolutely necessary but normal procedure is to refer the claim immediately, if the Lexington office determines a valid emergency, to the newly formed Pittsburg Technical Center of OSM. This Center consists of expert technicians in the field of restoration and includes mining and civil engineers, real estate appraisers, and agronomists.

An on-site inspection is made by an agent of the technical center who then contacts several contractors known to have the capability of performing the reclamation. Bids are taken immediately: no contract advertisement period is required as under normal reclamation procedures. Under typical procedures the reclamation work can begin within a period of two weeks or several months, depending upon the severity of the site emergency. This compares to the eighteen month estimate for a state contract. As is evident, the primary distinctions between the Federal Emergency Program application process are 1) the source of the funds and 2) the emergency condition requirement.

*Impact of the Rural Abandoned Mine Program*

The section of Title IV which has the most potential for individuals and non-profit groups is § 1236 which is entitled Reclamation of Rural Lands. Under this section, a landowner may apply directly to the Soil Conservation Service (hereinafter SCS) for funds to help rebuild his own land, abate drainage problems affecting his own or other land, or can purchase abandoned land at minimal personal expense, then enter into a contract for reclamation under this section, and, after a period of maturation under the plan, hold valuable crop land, woodland, or agricultural resource.

The Federal Regulations provide that the Secretary of Agriculture is to receive an appropriation of up to twenty percent (20%) of the AML Fund. The administration of the Rural Abandoned Mine Program falls to the SCS. The SCS is

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59. Appreciation is extended to Local Field Office OSM at 340 Legion Drive, Suite 28, Lexington, Kentucky, for the above information. Further questions should be directed to it.
60. Applicable regulations for this program are found at 7 C.F.R. § 632 (1982).
63. 7 C.F.R. § 632.3(a) (1982).
authorized to enter into agreements of not more than ten years with
landowners including owners of water rights, residents, and tenants,
and individually or collectively, determined by him to have control
for the period of the agreement of lands in question therein, pro-
viding for land stabilization, erosion, and sediment control, and
reclamation through conservation treatment, including measures for
the conservation and development of soil, water (excluding stream
channelization), woodland, wildlife, and recreation resources, and
agricultural productivity of such lands. 64

"[T]he [SCS] is authorized to furnish financial and other assistance
to such landowner . . . for carrying out the land use and conserva-
tion treatment set forth in the agreement." 65 As in the state AML
Program, applications are assigned a funding priority. 66

As indicated, post reclamation use limitations are basically non-
commercial with the exception of cropland. The regulations,
however, encourage "open space, conservation uses, natural areas,
and recreation sites" in contracts with public entities when for
public use. 67 The "public use" areas are not eligible for the "cost-
share" program 68 which supplements the purchase cost up to eighty
percent (80%) if less than 120 acres, but the land could be obtained
through the regular state AML Fund. 69

In the first three years of the project, 70 the state of Kentucky
benefitted greatly: (1) there were thirty contracted projects;
(2) the state has received $3.3 million; (3) the smallest project was
approximately three acres while the largest was to be 108 acres
in 1982; (4) in 1980 and 1981 alone, RAMP reclaimed a total of 403
acres; and (5) Western Kentucky counties shared eight projects
while Eastern Kentucky had seven. 71

"The program primarily involves direct assistance for the
reclamation of private lands." 72 It is generally executed on a "cost-

67. Id. § 632.15.
68. Id.
69. NATIONAL RURAL ABANDONED MINE PROGRAM MANUAL, § 520.4(a) U.S. DEP'T OF
AGRICULTURE, SOIL CONSERVATION SERV. (1979); see also 30 U.S.C. § 1237 (Supp. IV 1980).
70. Because this program was subject to SMCRA, and did not depend on primacy (ac-
ceptance of the state surface mine regulation program), RAMP has had a successful lead
on the budding state AML Program.
71. Interview with Joseph R. Davis, State Conservation Engineer with the Kentucky
State Office of United States Soil Conservation Service, in Lexington, Kentucky (Nov. 15,
1982).
72. NATIONAL RURAL ABANDONED MINE PROGRAM MANUAL, supra note 69, § 520.4(c)(l).
sharing” plan which enables the landowner to contribute a cash percentage of the reclamation work. Guidelines control the landowner’s share of the reclamation costs and factors must be evaluated.73 Affected lands whose main benefits of reclamation would occur off site, as in mine drainage, could get 100% financing if less than 120 acres and the primary future use would be non-income producing.74 Whereas a similar site whose primary benefits would be on-site, such as grading or terracing, and the post reclamation use would be primarily income producing, the assistance ceiling would be 75%.75 The maximum acreage for which one is allowed assistance is 320 acres.76

Cost-sharing is not available for the sole purpose of increasing production, “such as irrigation of cropland, annual lime and fertilizer applications in excess of that required to establish permanent vegetation, and recreation facilities.”77 Required are cost-sharing plans which (1) protect life and property or reduce safety hazards; (2) restore the environment destroyed by pre-Act mining practices that destroyed wildlife and habitat; and (3) stabilize the mine site so it serves a beneficial use.78 These goals translate into such results as sealing shafts, extinguishing fires, stabilizing subsidence, soil reconstruction, grading and shaping, topsoiling, erosion control through basins and impoundments, lining waterways, seeding to establish and protect vegetation, wildlife habitat improvement, hayland and pasture land planting, and fencing.79 “No . . . cost-sharing is provided for the purchase of land.”80

Qualifying an Application for Grant (Priorities)

“District conservationists are responsible for determining whether each applicant meets all of the participation requirements. . . . Participation requirements include:

(1) Eligible land and water.

73. Id. § 520.44(a), Table 1.
74. Id.
75. Id. (Income production is defined as grassland producing more than 5 animal unit months per acre. Non-income producing is anything less on production, plus woodland, rangeland, fish or wildlife land, natural areas, and recreation uses.)
77. See NATIONAL RURAL ABANDONED MINE PROGRAM Manual, supra note 69, § 520.43(d)(1).
78. Id. § 520.43(a).
79. Id. § 520.43(c)(1)(i)-(iv).
80. Id. § 520.43(c)(2).
(2) Eligibility of land user.

(3) 128 hectare (320 acres) limitation per owner.

(4) Land use objectives.\[^{81}\]

Eligible land is defined as that which has been affected by coal mining prior to August 3, 1977, unless it is subject to a "continuing reclamation responsibility," or is under Federal control or the surface rights may be remined in the future.\[^{82}\]

Eligible land users may be less than fee title holders. Tenants, residents, or their agents may qualify if they will control the property for the duration of the contract and have written consent from the fee holder.\[^{83}\]

Land users may participate by operating as persons, partnerships, associations, corporations, estates, trusts, or non-federal public entities; and by acting individually or jointly with other land users. However, joint participation with other eligible land users is required if the primary purpose of reclamation is enhancement of water quality or quantity.\[^{84}\]

No more than 320 acres of land and water may be under one applicant's contract. Joint ownership of 400 acres will not warrant an increase; however, individuals may join in an application if they individually own plots of 320 acres each. A corporation is limited as a single entity regardless of the number and holdings of shareholders.\[^{85}\]

Eligible land uses were listed previously as cropland, rangeland, woodland, natural areas, non-commercial recreation land, etc. Specifically excluded in the manual is recreational home sites, commercial campgrounds and tennis courts. Ineligible uses are basically those inconsistent with the uses mentioned above.\[^{86}\]

The manual specifically states that users may preserve crop history allotments under their contract for up to 20 years,\[^{87}\] thereby allowing a landowner to assure preservation of his autonomy.

The regulations provide that eligible applications shall be given a funding priority which will set the order for approval. "Applica-

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\[^{81}\] Id. § 521(a).
\[^{82}\] 7 C.F.R. § 632.13 (1982). (If inadequate reclamation bonds remain on those lands subject to continuing responsibilities, they may be ruled eligible.)
\[^{83}\] See National Rural Abandoned Mine Program Manual, supra note 69, § 521.2(a).
\[^{84}\] Id.
\[^{85}\] Id. § 521.3.
\[^{86}\] Id. § 521.4.
\[^{87}\] Id. § 521.5.
tions for individual, joint, or special projects... are to be assigned the highest applicable priority." 88

(1) Priority 1. Protection of public health, safety, general welfare, and property from extreme danger of adverse effects of coal-mining practices. Extreme danger means a condition that could be expected to cause substantial physical harm to persons, property, or the environment and to which persons or improvements on real property are exposed.

(2) Priority 2. Protection of public health, safety, and general welfare from the adverse effects of coal-mining practices that do not constitute an extreme danger.

(3) Priority 3. Restoration of the land and water resources and the environment where previously degraded by the adverse effects of coal-mining practices, including measures for the conservation and development of soil, water (excluding channelization), woodland, fish and wildlife, recreation resources, and agricultural productivity. First consideration in this priority is to be the reduction of offsite damage affecting the public. Second consideration is to be given to restoring to beneficial uses for the main benefit of the land user. 89

These priorities are further divided into subpriorities (a), (b), and (c) which distinguish between individuals who owned the land but had no choice in its being mined, individuals who would actively use the area if improved whether consenting to the mining or purchasing after the effective date of SMCRA, and all others including corporations and absentee landlords, respectively. 90

88. 7 C.F.R. § 632.12(a) (1982).
89. Id. These priorities are essentially the same as those listed in the State AML Program when reviewing the definitions expanded in the SCS Manual. The following examples were included:

Priority I—Subsidence in residential areas; slide prone areas near residential areas; mine fires; open shafts, tunnels; hazardous waste impoundments upstream from populated areas; mine drainage into water supplies; serious flooding; highwalls and water filled pits near populated areas.

Priority II—Loss of water supply; illegal garbage and trash dumps; vermin or insect vectors; highwalls and pits near roads or homes; sediment from adjoining mines which affects water supply; abandoned mine structures; open shafts, tunnels in rural areas; dust; flooding.

Priority III—Destruction or impairment to fish and wildlife habitat; loss of agricultural productivity; impairment of natural visual resources; adverse effects on historic, cultural, or recreational resources; reduction in tax base; impairment of water quantity or quality.

National Rural Abandoned Mine Program Manual, supra note 69, § 521.22.
90. See id. §§ 521.22(d)(1), (2) & (3).
Application Process and Contract Awards Under RAMP

An applicant/land user may choose to perform the work himself, hire a contractor of his own choice, or request the SCS to perform the required treatment. In the early applications granted in Kentucky the projects proved to be too great for the individual land users and the SCS issued contract bids.

"Land users apply for program assistance through the SCS field office or local conservation district [county] office by completing Part I of the prescribed application form...." These applications "are only taken during application periods." The application period is determined by availability of funds, potential number of applicants, public interest, and other factors. Therefore, the RAMP program is not constrained to a yearly grant request as is the state AML Program. In fact, a RAMP grant can be operational as soon as two months after application, as compared with the eighteen months required by state AML projects. "Application periods are to be announced in local media at least [ten] days in advance of the period." They "are to include types of reclamation... eligible, where to apply, opening and closing dates of the application period if applicable," although it may be continuous.

According to the Lexington, Kentucky, office of SCS, a typical application would be processed as follows:

1. Advertising the availability of funds (varying, but usually 3-4 weeks).
2. Applications are received and a period of priority evaluation is done (three weeks).
3. Site visits and assessment during which time the application is made through central SCS office for the funding (3 weeks).
4. Writing a plan for use of funds (usually a month).

91. 7 C.F.R. § 632.16(a) (1982).
92. Id. § 632.15(a).
93. See NATIONAL RURAL ABANDONED MINE PROGRAM MANUAL, supra note 69, § 521.6. See also id. § 524.30-1 (the form is only a one page application).
94. Id. § 521.6.
95. Id. § 520.41(b).
96. Id. § 520.4(a).
97. See 30 U.S.C. § 1231 (Supp. IV 1980). (One unfortunate result of interpreting SMCRA as requiring yearly appropriations from Congress regardless of the language establishing an independent trust fund.)
98. See NATIONAL RURAL ABANDONED MINE PROGRAM MANUAL, supra note 69, § 520.41(c).
99. Id.
(5) Signing the contract to obligate a land user's cooperation with the proposed plan.
(6) Survey, design and engineering (from 3-4 months).
(7) General construction start up (planned for spring). These steps will be performed simultaneously where possible but the above time estimates have proven realistic.\textsuperscript{100}

"Applications within a state are to be funded in a manner that reflects the priority order and is within the available limits of technical and financial resources."\textsuperscript{101} "In order to select the highest priority or most critical applications within the state for funding and further servicing, a final selection for funding must be made at the state level."\textsuperscript{102} Although all applications may not be funded, the state office is to review all past applications each period to determine any change in conditions which may alter priority.\textsuperscript{103}

All land users, defined as one who has control of the land for the contract period,\textsuperscript{104} must sign the contract agreement.\textsuperscript{105} That period "is to be the length of time necessary . . . to carry out the reclamation plan . . . ."\textsuperscript{106} "The contract period may not, however, be less than 5 years . . . nor more than 10 years. A contract is to extend for at least 3 years after the application of the last cost-share . . . treatment . . . ."\textsuperscript{107} Modifications are permitted to the contract both as to duration and applicable land coverage.\textsuperscript{108}

\textit{Conclusion}

Availability of Title IV funds in Kentucky can literally change the face of the state and its rural communities if full advantage is taken by those communities and individual citizens. Each ton of coal taken from this state increases the Fund and the monies subsequently available to the Commonwealth. Abandoned land can be purchased, reclaimed, and made functional again. The funds are available through the Division of Abandoned Lands of the Natural

\textsuperscript{100} 7 C.F.R. § 632.15(a) (1982).
\textsuperscript{102} Id.
\textsuperscript{103} Id. § 521.27(b).
\textsuperscript{104} Id. § 523.1.
\textsuperscript{105} Id. § 523.10(b).
\textsuperscript{106} Id. § 523.10(c).
\textsuperscript{107} Id. § 523.12.
\textsuperscript{108} Id. § 523.30(e).
Resources and Environmental Protection Cabinet, in Frankfort, Kentucky, which should be the first source to approach due to its (the largest) allotment; the Soil Conservation Service county agent of the United States Department of Agriculture, which addresses Rural Abandoned Mine Lands primarily from an agricultural approach; and, in case of emergency, the Federal Office of Surface Mining field office in Lexington, Kentucky.

ROBERT L. MCCLELLAND
THEIR LIFE IS IN THE BLOOD:
JEHOVAH'S WITNESSES, BLOOD TRANSFUSIONS
AND THE COURTS

Introduction

Jehovah’s Witnesses believe that the taking of blood into the body is prohibited by the Bible, quoting Genesis 9:3-6,¹ Leviticus 7:26-27,² Leviticus 17:10-14,³ and Deuteronomy 12:23-25.⁴ They believe that Christians are especially enjoined from the use of blood by the New Testament, particularly Acts 15:28-29.⁵ Jehovah’s Witnesses believe that a human is not to sustain his life with the blood of another creature.⁶

1. Genesis 9:3-6 (King James Version).
   Every moving thing that liveth shall be meat for you; even as the green herb have I given you all things. But flesh with the life thereof, which is the blood thereof, shall ye not eat. And surely your blood of your lives will I require, at the hand of every beast will I require it, and at the hand of man; at the hand of every man’s brother will I require the life of man. Whoso sheddeth man’s blood, by man shall his blood be shed; for in the image of God made he man.

2. Leviticus 7:26-27 (King James Version). “Moreover ye shall eat no manner of blood, whether it be of fowl or of beast, in any of your dwellings. Whatsoever soul it be that eateth any manner of blood, even that soul shall be cut off from his people.”

3. Leviticus 17:10-14 (King James Version).
   And whatsoever men there be of the house of Israel, or of the strangers that sojourn among you, that eateth any manner of blood; I will even set my face against that soul that eateth blood, and will cut him off from among his people. For the life of the flesh is in the blood; and I have given it to you upon the altar to make an atonement for your souls: for it is the blood that maketh an atonement for the soul. Therefore I said unto the children of Israel, No soul of you shall eat blood, neither shall any stranger that sojourneth among you eat blood. And whatsoever man there be of the children of Israel, or of the strangers that sojourn among you, which hunteth and catcheth any beast or fowl that may be eaten; he shall even pour out the blood thereof, and cover it with dust. For it is the life of all flesh; the blood of it is for the life thereof; therefore I said unto the children of Israel, Ye shall eat the blood of no manner of flesh; for the life of all flesh is the blood thereof; whosoever eateth it shall be cut off.

   Only be sure that thou eat not the blood for the blood is the life; and thou mayest not eat the flesh with the blood. Thou shalt not eat it; thou shalt pour it upon the earth as water. Thou shalt not eat it; that it may go well with thee, and with thy children after thee, when thou shalt do that, which is right in the sight of the Lord.

   For it seemed good to the Holy Ghost, and to us, to lay upon you no greater burden than these necessary things; That ye abstain from meats offered to idols, and from blood, and from things strangled, and from fornication: from which if ye keep yourselves, ye shall do well. Fare ye well.

In arguing against a court-ordered blood transfusion which would save the life of his baby daughter, Darrell Labrenz, a Jehovah's Witness, after quoting from the above-cited Scriptures, testified:

[I]t is my opinion that any use of the blood is prohibited whether it be for food or whether it be for, as modern medical science puts it, for injections into the blood stream and as such I object to it. The life is in the blood and the life belongs to our father, Jehovah, and it is only his to give or take; it isn't ours, and as such I object to the using of the blood in connection with this case.7

Rhoda Labrenz, the baby's mother, also a Jehovah's Witness, testified:

[W]e believe it would be breaking God's commandment to take away blood which he told us to eat of the flesh but should not take of the blood into our systems. The life is in the blood and blood should not be drained out. We feel that we would be breaking God's commandment, also destroying the baby's life for the future, not only this life, in case the baby should die and breaks the commandment, not only destroys our chances but also the baby's chances for future life. We feel it is more important than this life.8

Jehovah's Witnesses do not draw a distinction between eating or drinking blood and intravenous blood transfusions. Blood transfusions were, of course, unknown in Biblical times, but Jehovah's Witnesses believe that they too are prohibited by the order to "abstain from blood" because, whether taken orally or intravenously, a human body would be using the blood of another to sustain itself.

Obviously, a law review article is not the proper place to argue theology or the philosophy of life. The important point of this religious discussion is that this is a Scripturally-mandated tenet of a bona fide religious faith, and those who believe in it are entitled to some constitutional protection. The purpose of this article, therefore, is to examine how courts have handled the issue of a competent adult's refusal to undergo a blood transfusion for religious reasons, and to discuss how courts which have not yet been confronted with this question might handle it in the future.

The question of blood transfusions for minor children of Jehovah's Witnesses has been fairly well settled in the courts.9 The usual

8. Id. at __, 104 N.E.2d at 772.
9. See, e.g., In re Green, 448 Pa. 338, 292 A.2d 287 (1972); People ex rel. Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769 (1952); Jehovah's Witnesses in the State of Washington v. King
scenario is that a hearing takes place before a Juvenile Court judge, the child is judged neglected, a guardian ad litem is appointed, and a transfusion is ordered. Similar procedures are undertaken when an adult is incompetent to give consent. A clear controversy arises only in the case of refusal of treatment by a competent adult. Therefore, this article is limited to cases involving competent adults, specifically competent adult Jehovah's Witnesses, who refuse blood transfusions for religious reasons.

There are only a few cases dealing with adult Jehovah's Witnesses who refused blood transfusions. Since they are not long, but the facts vary from case to case, each case will be discussed separately, then the constitutional aspects of the cases will be analyzed.

Discussion of Cases

As shown above, the Illinois Supreme Court ruled on People v. Labrenz, a case involving a child of Jehovah's Witness parents, in 1952. However, it was not until 1962 that a case involving an adult Jehovah's Witness was reported, having been decided by the New York Supreme Court, Nassau County.

That case was Erikson v. Dilgard. The superintendent of the Nassau County Hospital applied for an order authorizing the giving of a blood transfusion to Jacob Dilgard, Sr. Dilgard, who had been voluntarily admitted to the hospital, had agreed to surgery to stop his upper gastro-intestinal bleeding, but refused to consent to a blood transfusion which the hospital maintained was necessary for the best chance of recovery. The superintendent stated that there was a very great chance that Dilgard would not recover without the blood. Evidence also showed that Dilgard was competent and capable of making decisions on his own behalf, and that he understood the risks of having the operation without the transfusion.

The court noted the lack of precedent for dealing with a decision of a competent adult to refuse a blood transfusion. The court did not enter into any discussion of possible constitutional aspects

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of the case. Yet, the court refused to order a transfusion, stating that "it is the individual who is the subject of a medical decision who has the final say and that this must necessarily be so in a system of government which gives the greatest possible protection to the individual in the furtherance of his own desires." 13

Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson 14 is unique in that it involves a competent adult and her fetus. Mrs. Anderson was over 32 weeks pregnant when she was admitted to the hospital. The hospital brought the action seeking authority to give her blood transfusions if it became necessary to save her life and the life of the unborn child. The evidence established a probability that Mrs. Anderson would hemorrhage severely and that she and the child would die unless a blood transfusion were given.

The New Jersey Supreme Court stated that "the unborn child is entitled to the law's protection" and ordered blood transfusions when necessary to save the child's life. 15 As to the mother, the court stated:

The more difficult question is whether an adult may be compelled to submit to such medical procedures when necessary to save his life. Here we think it unnecessary to decide that question in broad terms because the welfare of the child and the mother are so intertwined and inseparable that it would be impracticable to attempt to distinguish between them with respect to the sundry factual patterns which may develop. The blood transfusions (including transfusions made necessary by the delivery) may be administered if necessary to save her life or the life of her child, as the physician in charge at the time may determine. 16

It is interesting to note that the court took this position even though it had been advised at the hearing that Mrs. Anderson had left the hospital the day before, against the advice of the hospital and her physician. The court nonetheless ordered transfusions as necessary, as noted above, and further ordered that the defendant husband was not to interfere with the blood transfusions. By predetermining its decision on the inseparability of the mother and baby, the court was able to evade the possible constitutional ramifications of this question.

13. Id. at 28, 252 N.Y.S.2d at 706.
15. Id. at 422, 201 A.2d at 538.
16. Id.
Application of the President and Directors of Georgetown College, Inc. was decided by Judge J. Skelly Wright. An en banc rehearing by the District of Columbia Circuit Court was denied. Mrs. Jessie Jones, the patient, had lost approximately two-thirds of her body's blood supply from a ruptured ulcer. She was brought to Georgetown Hospital by her husband. Since she had no personal physician and relied solely upon the hospital staff, she was totally a hospital responsibility. Mrs. Jones was twenty-five years old and the mother of a seven-month-old child. She and her husband were both Jehovah's Witnesses. Both refused to authorize blood transfusions. The hospital sought an injunction in the district court, which was denied. The hospital then appealed to Judge Wright.

Judge Wright went to the hospital and spoke with Mr. Jones and the doctors. Mr. Jones again refused to consent to a blood transfusion. The doctors informed Judge Wright that Mrs. Jones would die without blood, but that there was a better than fifty percent chance of saving her life with blood. Judge Wright then attempted to interview the patient. He stated that:

I tried to communicate with her, advising her again as to what the doctors had said. The only audible reply I could hear was “Against my will.” It was obvious that the woman was not in a mental condition to make a decision. I was reluctant to press her because of the seriousness of her condition and because I felt that to suggest repeatedly the imminence of death without blood might place a strain on her religious convictions. I asked her whether she would oppose the blood transfusion if the court allowed it. She indicated, as best I could make out, that it would not then be her responsibility.

Judge Wright then signed the order allowing the hospital to administer blood transfusions to save Mrs. Jones' life.

In his analysis, Judge Wright noted that, “this case does not involve a person who, for religious reasons, has refused to seek medical attention, . . . a disputed medical judgment or a dangerous or crippling operation . . . [or] the delicate question of saving the newborn in preference to the mother.” Judge Wright further noted the precedents of compulsory medical treatment for children and for adults, at least for contagious diseases. Judge Wright thought

18. 331 F.2d 1010 (D.C. Cir. 1964).
19. Id. at 1007.
20. Id.
21. Id. at 1007-08.
that the "sick child cases" might be analogous to Mrs. Jones' situation because she was "in extremis and hardly comos mentis at the time in question; she was as little able competently to decide for herself as any child would be."\textsuperscript{22}

Judge Wright then examined the state's interest in keeping the mother of a seven-month-old child alive. He stated, "The state, as parens patriae, will not allow a parent to abandon a child, and so it should not allow this most intimate of voluntary abandonments."\textsuperscript{23}

Judge Wright then went on to consider the possibility of refusal of medical treatment as suicide. He found, however, that Mrs. Jones had no intention of committing suicide. She "did not want to die. Her voluntary presence in the hospital as a patient seeking medical help testified to this. Death, to Mrs. Jones, was not a religiously-mandated goal, but an unwanted side effect of a religious scruple."\textsuperscript{24}

Last, Judge Wright considered the position of the doctors and the hospital. The doctors had the unenviable choice of giving Mrs. Jones the proper treatment or letting her die, thus possibly exposing themselves to civil and criminal liability.

In reading his opinion, one must sympathize with the burden on Judge Wright when he had to decide this case at the hospital, surrounded by the medical staff and Mrs. Jones' husband. As he says in his final paragraph, a life hung in the balance:

There was no time for research and reflection. Death would have mooted the cause in a matter of minutes, if action were not taken to preserve the status quo. To refuse to act, only to find later that the law required action, was a risk I was unwilling to accept. I determined to act on the side of life.\textsuperscript{25}

On October 14, 1963, about a month after this incident, Jessie Jones filed a petition for a rehearing en banc. That petition was denied by the court sitting en banc.\textsuperscript{26} Judge Miller filed a dissent, in which he was joined by Judges Burger and Bastian, based not on constitutional or substantive grounds, which he stated were moot, but on procedural grounds.\textsuperscript{27} More importantly, Judge Burger (now Chief Justice of the United States Supreme Court) filed a separate dissent in which he was joined by Judges Miller and

\textsuperscript{22} Id. at 1008.
\textsuperscript{23} Id.
\textsuperscript{24} Id. at 1009.
\textsuperscript{25} Id. at 1009-10.
\textsuperscript{26} Id. at 1010.
\textsuperscript{27} Id. at 1011-15.
Bastian. Judge Burger stated that the court had "an obligation to deal with the basic question whether any judicially cognizable issue is presented when a legally competent adult refuses, on grounds of conscience, to consent to a medical treatment essential to preserve life." Judge Burger decided that no justiciable controversy would have existed because the hospital had no legally protected right which was being injured and thus it had no standing to sue. He stated that "because Mrs. Jones could invoke judicial power to enjoin a blood transfusion does not mean, as a corollary, that the hospital had a comparable right to compel it."

Apparently Judge Burger, if he had been in Judge Wright's position on September 17, 1963, would not have signed the order authorizing the blood transfusion. He stated that the judges should "reconcile [themselves] to the idea that there are myriads of problems and the troubles which judges are powerless to solve; and this is as it should be. Some matters of essentially private concern, and others of enormous public concern, are beyond the reach of judges."

In United States v. George, a Jehovah's Witness, Elishas George, voluntarily admitted himself to a Veterans Administration hospital for treatment of a bleeding ulcer. Two days later, an attorney for the government applied to the federal district court for an order authorizing the hospital to give blood transfusions to Mr. George. The judge went to the hospital and interviewed five doctors, the patient, his wife, his mother, and several Jehovah's Witnesses. The patient and his wife had both signed releases, relieving the hospital and its employees of any civil liability for any injury which might follow from the lack of blood transfusions. Medical testimony showed that George was in immediate need of at least five pints of whole blood. His condition was grave and any further bleeding, without blood transfusion, would most likely lead to shock and probable death.

George told the court that he "would not agree to be transfused, but would in no way resist a court order permitting it because it would be the Court's will and not his own. His 'conscience was

28. Id. at 1015-18.
29. Id. at 1015.
30. Id. at 1015-16.
31. Id. at 1016 n.3. (Emphasis in original).
32. Id. at 1017-18.
clear' and the responsibility for the act was 'upon the Court's conscience.'” He stated he would rather die than agree to a transfusion. The judge advised him that if it had no power to force a transfusion on him, and he was free to resist the transfusion by placing his hand over the injection area. George stated he would “in no way” resist the doctors' actions once the court's order was signed.34

The judge noted the similarities between this case and Application of the President and Directors of Georgetown College, Inc.35 The only major difference he found between the two was that in Georgetown the patient was non compos mentis, and in George the patient was “coherent, rational and rather strong.”36 Judge Zampano found Judge Wright's guidelines in Georgetown helpful in making his decision, and in addition to the factors weighed by Judge Wright, Judge Zampano considered one more:

In the difficult realm of religious liberty it is often assumed only the religious conscience is imperiled. Here, however, the doctor's conscience and professional oath must also be respected. In the present case, the patient voluntarily submitted himself to and insisted upon medical care. Simultaneously he sought to dictate to treating physicians a course of treatment amounting to medical malpractice. To require these doctors to ignore the mandates of their own conscience, even in the name of free religious exercise, cannot be justified under these circumstances. The patient may knowingly decline treatment, but he may not demand mistreatment. Therefore this Court, as Judge Wright, “determined to act on the side of life” in the pending emergency.37

Powell v. Columbian Presbyterian Medical Center38 is another case from the New York Supreme Court, this time from New York County. In this case, Mrs. Willie Mae Powell, a Jehovah's Witness and mother of six children “refused the pleas of the hospital staff and of her husband and other members of her family”39 to submit to blood transfusions to save her life. Mrs. Powell refused to give written authorization to consent to a transfusion and had signed a release of liability holding the hospital harmless from any conse-

34. Id. at 753.
36. 299 F. Supp. at 753.
37. Id. at 754, citing Georgetown, 331 F.2d 1000, 1010 (D.C. Cir. 1964).
39. Id. at 216, 267 N.Y.S.2d at 451.
quences flowing out of the failure to administer blood. The hospital, having been given the release, "took the view that it had fulfilled its obligations to this patient and would not, under these circumstances, administer blood transfusions even if necessary to save the patient's life." Mr. Powell brought this proceeding for injunctive relief to authorize the giving of blood transfusions to his wife.

Justice Markowitz noted that he read Application of the President and Directors of Georgetown College, Inc. and "was convinced of the proper course from a legal standpoint." However, his decision "was rooted in more fundamental precepts."

The crux of the problem lay, not in Mrs. Powell's religious convictions, but in her refusal to sign a prior written authorization for the transfusion of blood. She did not object to the treatment involved—she would not, however, direct its use.

Justice Markowitz stated that "[t]his matter generated a barrage of legal niceties, misinformation and emotional feelings on the part of all concerned—including the Court personnel." Presumably that also included the Justice himself, as his opinion seems to be based more upon his emotional response to Mrs. Powell's plight than upon a regard for her possible constitutional rights. In fact, he never mentioned a possible constitutional problem at all. He also discounted the fact that she had executed a written waiver releasing the hospital from all liability if it did not perform a transfusion:

I knew that no release—no legalistic absolution—would absolve me or the Court from responsibility if I, speaking for the Court, answered "No" to the question "Am I my brother's keeper?" This woman wanted to live. I could not let her die!

In re Brooks' Estate was the first case to discuss the basic constitutional rights involved in the Jehovah's Witnesses blood transfusion cases. Mrs. Brooks, her husband and their two adult children were all Jehovah's Witnesses. She had informed her doctor repeatedly during a two-year period prior to her hospitalization that her religious beliefs precluded her from receiving blood

40. Id. at 217, 267 N.Y.S.2d at 451-52.
41. 331 F.2d 1000 (D.C. Cir. 1964).
42. 49 Misc.2d at 216, 267 N.Y.S. 2d at 451.
43. Id.
44. Id.
45. Id.
46. Id. at 217, 267 N.Y.S.2d at 452.
47. 32 Ill.2d 361, 205 N.E.2d 435 (1965).
transfusions. Mr. and Mrs. Brooks had signed a waiver releasing the doctor and the hospital from all civil liability that might result from the failure to administer blood to Mrs. Brooks, and they were assured that no efforts would be made to persuade her to accept blood. Mrs. Brooks' doctor, several assistant State's attorneys and the attorney for the public guardian of Cook County, however, petitioned the circuit court for appointment of the public guardian as conservator of Mrs. Brooks' person and requested an order authorizing the conservator to consent to the administration of blood to her. No notice of the proceeding was given to Mrs. Brooks or any member of her family. The conservator was appointed, he consented to the blood transfusion and it was administered.

The Supreme Court of Illinois defined the issue as follows:

When approaching death has so weakened the mental and physical faculties of a theretofore competent adult without minor children that she may properly be said to be incompetent, may she be judicially compelled to accept treatment of a nature which will probably preserve her life, but which is forbidden by her religious convictions, and which she has previously steadfastly refused to accept, knowing death would result from such refusal?

The Brooks court analyzed some of the preceding cases — Wallace v. Labrenz, Georgetown, and Raleigh Fitkin and found all three distinguishable for various reasons. The court also analyzed the relationship between first amendment religious freedom on one hand, and the state's interest on the other, relying upon the Supreme Court cases of Cantwell v. Connecticut, Prince v. Massachusetts, West Virginia State Board of Education v. Barnette, and School Dist. of Abington Township v. Schempp.

The Illinois Supreme Court thus held the actions of the circuit court unconstitutional because:

48. Id. at 362, 205 N.E.2d at 436.
49. Id. at 363, 205 N.E.2d at 437.
50. Id.
51. Id. at 364, 205 N.E.2d at 438.
52. 411 Ill. 618, 104 N.E.2d 769 (1952).
53. 331 F.2d 1000 (D.C. Cir. 1964).
55. 32 Ill.2d at 365, 205 N.E.2d at 439.
56. Id. at 365-68, 205 N.E.2d at 439-42.
57. 310 U.S. 296 (1939).
59. 319 U.S. 624 (1943).
It seems to be clearly established that the First Amendment... protects the absolute right of every individual to freedom in his religious belief and the exercise thereof, subject only to the qualification that the exercise thereof may properly be limited by governmental action where such exercise endangers, clearly and presently, the public health, welfare or morals. 61

The court found that since there was no indication of any state interest in this case, and Mrs. Brooks was well aware of the probable result of her actions and had released the hospital and doctor from any civil liability, and no minor children were involved and no clear and present danger was being offered to society, the action of the circuit court was unconstitutional. 62

John F. Kennedy Memorial Hospital v. Heston 63 was a New Jersey Supreme Court case. Delores Heston, an unmarried, twenty-two-year-old Jehovah's Witness, was severely injured in an automobile accident. She was in immediate need of an operation on her ruptured spleen—an operation that would not be successful without a blood transfusion. Although Miss Heston stated that she refused a blood transfusion, the hospital stated that she was in shock upon admittance and then or soon after became disoriented and incoherent. Her mother refused to consent to a transfusion and signed a release of liability for the hospital, Miss Heston did not sign such a release; apparently she could not. 64 The hospital, having given notice to Miss Heston's mother, applied to the Superior Court for the appointment of a guardian. After a hearing, attended by the mother, the court appointed a guardian with authority to consent to blood transfusions "for the preservation of life of Delores Heston." 65

The court noted its own decisions in State v. Perricone, 66 a case involving a blood transfusion for a minor child of Jehovah's Witness parents, and Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson. 67 The court noted that the case at hand presented the question it reserved in Raleigh Fitkin. 68

The court started its opinion with the statement, "It seems cor-

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61. 32 III.2d at 367, 205 N.E.2d at 441.
62. Id. at 368, 205 N.E.2d at 442.
64. Id. at 577, 279 A.2d at 671.
65. Id.
68. 58 N.J. at 578, 279 A.2d at 672.
rect to say that there is no constitutional right to die."\textsuperscript{69} The court went on to discuss suicide and the state's interest in preventing suicide, using as an analogy the state motorcycle helmet laws.\textsuperscript{70}

The court then considered the constitutional right to freedom of religion in the context of freedom to choose death, noting that "Religious beliefs are absolute, but conduct in pursuance of religious beliefs is not wholly immune from governmental restraint."\textsuperscript{71} The court appeared to find the state interest pervasive in that category also, as it said, "The question is whether the state may authorize force to prevent death or may tolerate the use of force by others to that end."\textsuperscript{72} The court called the "conservation of life" "a matter of state interest."\textsuperscript{73}

Analysis of \textit{In re Brooks' Estate}\textsuperscript{74} distinguished \textit{Brooks} on the facts, and the court refused to follow \textit{Brooks}' "clear and present danger" test in favor of its "compelling State interest" test.\textsuperscript{75} The court noted that the \textit{Brooks} court "did not consider whether the State had an interest in sustaining life, a consideration which would not be apparent when the focus is upon a 'clear and present danger.'"\textsuperscript{76}

The court concluded by holding that the state's interest in life, and the interest of the hospital and its staff, "warranted the transfusion of blood under the circumstances of this case."\textsuperscript{77}

\textit{Holmes v. Silver Cross Hospital of Joliet, Illinois}\textsuperscript{78} involved a twenty-year-old married male Jehovah's Witness, Ernest Holmes, who was injured in an automobile accident, and was taken to the hospital. While he was fully conscious and competent, he informed the doctors of his refusal of blood on religious grounds. The doctors attempted to persuade members of his family that a transfusion was necessary, but they also refused on religious grounds. Holmes and his wife both signed a form releasing the doctors and hospital from liability if they performed the surgery without blood trans-

\textsuperscript{69. Id.}
\textsuperscript{70. Id.}
\textsuperscript{71. Id.}
\textsuperscript{72. Id. at 579, 279 A.2d at 673.}
\textsuperscript{73. Id.}
\textsuperscript{74. 32 Ill.2d 361, 205 N.E.2d 435 (1965).}
\textsuperscript{75. 58 N.J. at 580, 279 A.2d at 674.}
\textsuperscript{76. Id.}
\textsuperscript{77. Id.}
\textsuperscript{78. 340 F. Supp. 125 (N.D. Ill. 1972).}
fusions. When Holmes lost consciousness, the defendants got the probate court to declare him incompetent as a minor, and to appoint a conservator. One was appointed, and he authorized a blood transfusion. The doctors operated, but Holmes died.

The court considered the issue whether Holmes’ right to the free exercise of his religion was infringed by the defendants’ forcing him to undergo a blood transfusion which they knew was against his religious principles. The court noted that the Supreme Court had not ruled on this issue. The court therefore examined some of the cases outlined above, especially In re Brooks’ Estate, and noted that these cases had conflicting results. The court stated:

We believe, however, that all these cases plus the leading case outlining the contours of the free exercise clause of the First Amendment, West Virginia State Board of Education v. Barnette, 319 U.S. 624 . . . (1943), agree that before the state may restrict a person’s religious beliefs, it must offer some substantial interest it claims to possess which must be protected even at the cost of restriction of the free exercise of religion by its citizens, i.e., the state must show that it is acting “to prevent grave and immediate danger to interests which the state may lawfully protect.” Barnette, supra, 319 U.S. at 639. . . .

The court went on to say that more than a “rational basis” is needed before a state may restrict the free exercise of religion. “[T]he test for determining whether a state-imposed restriction upon religious freedoms is valid is an ad hoc balancing test which examines the facts of each particular case, focusing upon the interests of the state and its citizens.”

The court held that “a state-appointed conservator’s ordering of medical treatment for a person in violation of his religious beliefs . . . violates the First Amendment’s freedom of exercise clause in the absence of some substantial state interest.”

In re Osborne involved a thirty-four-year-old Jehovah’s Witness,
Charles Osborne, who was admitted to the hospital with injuries and internal bleeding caused when a tree fell on him. Both Osborne and his wife refused for religious reasons to give consent to a transfusion.\textsuperscript{88} The hospital petitioned for appointment of a guardian who could consent to a blood transfusion. The judge held two hearings, one at her home the night of the accident, and one the next day after a request for reconsideration. She then held a third hearing at the patient's bedside. At that hearing, Judge Bacon asked Osborne whether he believed that he would be deprived of the opportunity for everlasting life if the transfusion were ordered by the court. He replied, "Yes. In other words, it is between me and Jehovah, not the courts. . . . I'm willing to take my chances. My faith is that strong. . . . I wish to live, but with no blood transfusions. Now get that straight."\textsuperscript{89} Because of this statement, the court was able to distinguish \textit{United States v. George},\textsuperscript{90} where the patient had indicated that if the court ordered him to submit, his conscience would be clear.

Judge Bacon noted that Osborne had financially provided for his children, so they would not be "abandoned" in a financial sense if he died. This negated one compelling state interest which might have been controlling in another case.\textsuperscript{91}

The court then formulated the two critical questions presented: "(1) Has the patient validly and knowingly chosen this course for his life, and (2) is there compelling state interest which justifies overriding that decision?"\textsuperscript{92} The court, having answered question (1) affirmatively, and (2) negatively, decided that in this case "judicial intervention respecting the wishes and religious beliefs of the patient was [not] warranted under our law."\textsuperscript{93} The court noted that "[i]t would be unnecessary to consider the first question if we were to take the view . . . that the state must have a compelling interest in sustaining life."\textsuperscript{94} That was the rationale for the decision in \textit{Heston},\textsuperscript{95} yet the court refused to apply the \textit{Heston} test, stating: "The notion that the individual exists for the good of the state

\textsuperscript{88} Id. at 373.
\textsuperscript{89} Id. at 374.
\textsuperscript{90} 239 F. Supp. 752 (D. Conn. 1965). See supra text accompanying notes 33-34.
\textsuperscript{91} 294 A.2d at 374.
\textsuperscript{92} Id. at 375.
\textsuperscript{93} Id.
\textsuperscript{94} Id. at 375 n.5.
\textsuperscript{95} 58 N.J. 576, 279 A.2d 670 (1971). See supra notes 63-73 and accompanying text.
is, of course, quite antithetical to our fundamental thesis that the role of the state is to ensure a maximum of individual freedom of choice and conduct."

In *Hamilton v. McAuliffe*, Hubert Hamilton, a thirty-five-year-old Jehovah's Witness, was shot through the chest. Physicians determined he could not survive without immediate surgery and blood transfusions. Hamilton consented to the surgery but refused to authorize a blood transfusion even though he was informed by the physicians that he would die if surgery were undertaken and a blood transfusion was not given during the course of the surgery. Hamilton's refusal to consent to the blood transfusion was based on two grounds: (1) That his religious tenets would not permit him to receive a blood transfusion under any circumstances, and (2) that a blood transfusion would violate his constitutional right of privacy."

Hamilton's wife and two brothers filed a petition seeking authority for the physicians to proceed with the blood transfusion notwithstanding his refusal to consent. That same evening, an emergency hearing was held at the hospital. Judge McAuliffe of the Montgomery County Circuit Court authorized the transfusion after ascertaining that Hamilton fully understood the ramifications of his decision, that he was separated from his wife and had a two-year-old child for whom he was the sole support. The judge concluded that "since death would likely follow unless a transfusion was authorized, I should authorize the hospital and physician to proceed with transfusions as if the patient had given consent and that the substantial interest of the state warranted the exercise of equitable jurisdiction.""

Hamilton was given the transfusion. He appealed Judge McAuliffe's order to the Court of Special Appeals, which held that the question was moot. Hamilton did not appeal that decision. Hamilton then filed a declaratory judgment action against Judge McAuliffe, alleging violation of his state and federal constitutional rights under the first, ninth and fourteenth amendments. He prayed that a declaratory judgment be entered against Judge McAuliffe

96. 294 A.2d at 375 n.5.
98. Id. at 337, 353 A.2d at 635.
99. Id.
100. Id.
101. Id. at 338, 353 A.2d at 636.
declaring his December 12, 1973 order “erroneous,” and sought an order preventing Judge McAuliffe “from presently and in the future ordering a blood transfusion for Mr. Hamilton.” No money damages were claimed. The Montgomery County Circuit Court sustained Judge McAuliffe’s demurrer, citing mootness and lack of a justiciable issue ripe for determination.102

The Maryland Court of Appeals (Maryland’s highest court) heard the appeal and agreed with the lower court that there was no justiciable controversy and that granting a declaratory judgment under the circumstances “would be inconsistent with the purpose of the declaratory judgment remedy and contravene established Maryland procedure.”103 Thus, the court did not dwell upon the blood transfusion issue, except to state that “whether an individual has the right to refuse a blood transfusion necessarily turns upon facts existing at the moment.”104 The court did not attempt any constitutional analysis, nor did it cite any of the above blood transfusion cases, except Heston, which it cited solely on the issue of mootness.105

*Matter of Melideo*106 is another New York Supreme Court case, this time from Suffolk County. Kathleen Melideo was a twenty-three-year-old childless, nonpregnant, married woman. Both she and her husband were Jehovah’s Witnesses, and both had signed documents indicating their refusal to permit a blood transfusion. The hospital admitted that there was no question of Mrs. Melideo’s competence to make the decision to refuse the blood transfusion.107

In its decision, the court noted most of the above cases, but did not enter into any constitutional discussion. Rather, it appeared to base its holding upon the general rule that “[E]very human being of adult years and sound mind has a right to determine what shall be done with his own body and cannot be subjected to medical treatment without his consent.”108 The court, having found Mrs. Melideo competent, not pregnant, and childless, decided that her refusal to have a blood transfusion must be upheld.109

102. *Id.*
103. *Id.* at 340, 353 A.2d at 638.
104. *Id.*
105. *Id.* at 339, 353 A.2d at 637.
108. *Id.* at 975, 390 N.Y.S.2d at 524.
109. *Id.*
Constitutional Analysis

The right of the people to religious freedom is, of course, guaranteed by the first amendment to the United States Constitution, and made applicable to the states by the fourteenth amendment. Most, if not all, state constitutions also have religious freedom clauses similar to that of the first amendment. As the United States Supreme Court has pointed out, however, "Religious freedom embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."

In a long line of cases, the Court has limited individuals' freedom to act in areas where religious and secular laws meet. For example, the Court has outlawed religiously-mandated polygamy, supported compulsory vaccination against religious belief, disallowed the use of minors to sell religious tracts, and, most recently, upheld the right of the Social Security system to collect from Old Order Amish who refused on religious grounds to pay into the system. In United States v. Lee, the Court, citing many previous cases, stated that, "Not all burdens on religion are unconstitutional," and that, "The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." The onus thus is on the government to provide the proof that there is an overriding state interest.

To help them decide whether the state's interest improperly impinges upon the individual's right to religious freedom, the courts have devised three basic tests: the rational basis test, the balancing test, and the clear and present danger test. The rational basis test, which merely requires that there be a rational relationship to some state interest, has fallen out of favor due to the Supreme Court's holdings in West Virginia v. Barnette and Sherbert v. Verner. "The cases make it clear that the test for determining

115. Id. at 132, and cases cited therein.
116. Id. and cases cited therein.
117. 319 U.S. 624 (1943).
whether a state-imposed restriction on religious freedoms is valid is an ad hoc balancing test which examines the facts of each particular case, focusing upon the interests of the state and its citizens."119

The rational basis test was used in John F. Kennedy Memorial Hospital v. Heston,120 as that court had doubts about the propriety of using the clear and present danger test in a case which did not involve a free speech issue. The court held that "the relevant question is whether there is a 'compelling State interest' justifying the State's refusal to permit the patient to refuse vital aid."121

Under the balancing test, in order to win a case in which it seeks to limit religious freedom, the state must show that its interest outweighs that of the individual when they are balanced against each other. In Brooks122 and Holmes,123 the courts used the clear and present danger test as a hurdle to be met before the balancing test could be made, i.e., that there was a clear and present danger posed to society by this act.

**Balancing: Patient's Rights v. State Interest**

_A. Patient's Rights_

Basically two rights of the individual are involved here: freedom of religion as guaranteed by the first and fourteenth amendments, and the right to privacy as guaranteed within the penumbra of several amendments.

The importance of the refusal of blood transfusions to the Jehovah's Witnesses has been called into question.124 That view is refuted by one law review article,125 and two official publications of the Watch Tower Bible and Tract Society, the governing body of the Jehovah's Witnesses.126 Furthermore, the sincerity of belief

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121. Id. at 580, 279 A.2d at 674.
122. 32 Ill.2d 361, 205 N.E.2d 435 (1965).
124. "The doctrine forbidding transfusions does not appear to be a fundamental belief in the Jehovah's Witnesses religion. It is not part of the religious ceremony, and its absence will not prevent continued practice of the religion." Note, Compulsory Medical Treatment and the Free Exercise of Religion, 42 Ind. L. J. 386, 402 (1967).
in a religious doctrine is not a question to be answered by the courts.

The determination of what is a 'religious' belief or practice is more often than not a difficult and delicate task. . . . However, the resolution of that question is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.127

As the Supreme Court recently stated, "Courts are not arbiters of scriptural interpretation."128 Thus, the fact that some Jehovah's Witnesses may not believe in the refusal of blood transfusions, and the fact that it is not part of their religious ceremony or day to day worship to refuse blood transfusions should not affect a court's decision when it is faced by such a religiously-motivated refusal by a competent adult.

The right to privacy also is involved in these cases, for it is from the right to privacy that each person has the right to be let alone and to control his own body.129

The constitutional right to privacy, as we conceive it, is an expression of the sanctity of individual free choice and self-determination as fundamental constituents of life. The value of life as so perceived is lessened not by a decision to refuse treatment but by the failure to allow a competent human being the right of choice.130

The common law too gives rise to a right of privacy or self-determination, as was noted by the Supreme Court almost one hundred years ago: "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference by others, unless by clear and unquestionable authority of law."131 The line of cases supporting the premise that "every human being of adult years and sound mind has a right to determine what shall be done with his own body" started with a case decided by Cardozo, and continues to the present day.132 This right of determination of what shall be done with one's own body has been extended to "expressly prohibit the per-

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128. Id. at 716.
129. See In re Brooks' Estate, 32 Ill.2d 361, 205 N.E.2d 425, 442-43 (1965); Georgetown, 331 F.2d 1010, 1016-17 (D.C. Cir. 1964).
formance of life-saving surgery, or other medical treatment."\textsuperscript{133}

Thus, two very important rights, privacy and religious freedom, are to be balanced against the state’s interest.

\textbf{B. State’s Interest}

A review of the cases puts forth the following state interests that might arise in such a case: preservation of the status quo; anti-suicide policy/preservation of the sanctity of life; doctor’s conscience/malpractice dangers; preservation of society; protection of public morals; and protection of third parties, i.e., the survivors of the patient, including minor children.

In \textit{Application of President and Directors of Georgetown College, Inc.},\textsuperscript{134} Judge Wright ordered the transfusion to preserve the status quo and to “prevent the issue respecting the rights of the parties in the premises from becoming moot before full consideration was possible.”\textsuperscript{135} However, when that case came up for an \textit{en banc} hearing, Judge Miller, in his dissenting opinion said: “[T]he orders...[of Judge Wright] did not preserve the status quo; to the contrary, the orders completely changed the status quo ante by granting fully and finally all of the relief sought, thus disposing of the matter on its merits.”\textsuperscript{136}

The New Jersey Supreme Court based its holding in \textit{Heston} mainly upon the anti-suicide/preservation of life theory. The court held that the state had a compelling interest in sustaining life, bolstering that theory by discussion of New Jersey’s anti-suicide statute and the motorcyclist helmet law. The court noted that “the Constitution does not deny the State an interest in the subject” of preserving life.\textsuperscript{137}

Judge Wright also discussed the suicide theory in \textit{Georgetown}: “If self-homicide is a crime, there is no exception to the law’s command for those who believe the crime to be divinely ordained.”\textsuperscript{138} He was quick to note, however, that “[W]hether attempted suicide is a crime is in doubt in some jurisdictions, including the District of Columbia.”\textsuperscript{139}

\begin{itemize}
  \item \textsuperscript{133} Natanson v. Kline, 186 Kan. 393, 350 P.2d 1093, 1104 (1960).
  \item \textsuperscript{134} 331 F.2d 1000 (D.C. Cir. 1964).
  \item \textsuperscript{135} \textit{Id.} at 1007.
  \item \textsuperscript{136} \textit{Id.} at 1014.
  \item \textsuperscript{137} 58 N.J. at 578, 279 A.2d at 672.
  \item \textsuperscript{138} 331 F.2d at 1009.
  \item \textsuperscript{139} \textit{Id.}
\end{itemize}
The problems of the doctor's conscience and medical malpractice were most forcefully elucidated in *Heston*. That court held: "When the hospital and staff are thus involuntary hosts and their interests are pitted against the belief of the patient, we think it reasonable to resolve the problem by permitting the hospital and its staff to pursue their functions according to their professional standards." Judge Wright's reasoning in *Georgetown* was similar, as was Judge Zampano's in *United States v. George*.

The protection of the minor children of the patient has been an important state interest in most of the Jehovah's Witness cases. As Judge Wright stated in *Georgetown*:

The patient ... was the mother of a seven-month-old-child. The state, as *parens patriae*, will not allow a parent to abandon a child, and so it should not allow this most ultimate of voluntary abandonments. The patient had a responsibility to the community to care for her child. Thus the people had an interest in preserving the life of this mother.

These, then, are the state interests which must be balanced against the patient's rights of religious freedom and privacy.

C. The Balancing

It is clear that in order to outweigh the patient's right to religious freedom, there must be a "compelling" state interest. Other cases hold that the state interest must be "paramount," "of the highest order," and "overriding."

In the *Osborne* case, the judge changed the balancing test somewhat, making it a two-pronged test: "(1) has the patient validly and knowingly chosen this course for his life, and (2) is there compelling state interest which justifies overruling that decision?"

The District of Columbia Court of Appeals noted in *Osborne* that:

It would be unnecessary to consider the first question if we were to take the view discussed by ... *Heston* ... that the state must

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140. 58 N.J. at 579, 279 A.2d at 673.
141. 331 F.2d at 1099.
142. 239 F.Supp. 752 (D.Conn. 1965).
143. 331 F.2d at 1008.
144. 58 N.J. at 580, 279 A.2d at 674.
148. 294 A.2d at 375.
have a compelling interest in sustaining life. The notion that the individual exists for the good of the state is, of course, quite antithetical to our fundamental thesis that the role of the state is to ensure a maximum of individual freedom of choice and conduct.\[149\]

Under a *Heston* analysis, then, even if a balancing approach is used, the scales are always tipped in the favor of the state's interest. By using the *Osborne* approach, a person can fulfill his part of the balancing test only when he or she is competent and conscious. This avoids situations such as those in *Georgetown* and *Heston* where the patient was not fully conscious, or completely unconscious, and the decision not to transfuse may have been made by another family member. Only after that criterion is satisfied will the court look at the state interest. The state interest would have to be compelling, as indicated above. The degree of "compellingness" will no doubt vary from court to court, and from case to case. In *Osborne*, for example, the patient would have been survived by two minor children. The patient's wife testified, however, that they had enough savings to support the children through their family-owned business. Thus the court found that the state interest in providing for the children was adequately met.\[150\]

In some cases, as in *Heston*, courts will probably continue to hold that the state's interest in preserving life is more important than any constitutional right of the patient, even when weighed in an *ad hoc* balancing test. This will depend upon the philosophy of the individual court, as well as on the facts of the case.

**The Role Of The Courts**

When confronted by a situation where a competent adult refuses a blood transfusion for religious reasons, most hospitals will try to protect themselves from liability by turning over the decision whether or not to transfuse to the courts. This is only to be expected: if the hospital goes against the patient's wishes and transfuses, it may be liable for assault,\[151\] but if it follows the patient's wishes and does not transfuse, it could be liable criminally and/or for damages to the survivors if the patient dies.\[152\] Further-

\[149\] Id.
\[150\] 294 A.2d at 393-94.
\[151\] Mohr v. Williams, 95 Minn. 261, 104 N.W. 12 (1905); Matter of Storar, 420 N.E.2d 64 (N.Y. 1981).
\[152\] This would not be the case in New York, where the high court has held that "[A] doctor cannot be held to have violated his legal or professional responsibilities when he
more, a decision not to perform a life-saving procedure when it can be done is diametrically opposed to the philosophy and ethics of hospitals and health professionals. It is contrary to the most fundamental teachings of medicine to allow a patient to die whose life could be saved. Therefore, rather than make such a difficult decision on its own, a hospital will generally look to the courts for instructions on how to proceed.

A judge in Kentucky or Ohio who is faced with a competent adult who refuses a blood transfusion for religious reasons is faced with a case of first impression: this situation has never been decided by an appellate court in either state. There has been one Common Pleas Court case recorded in Ohio involving a minor child of Jehovah's Witnesses; that court ordered the giving of a blood transfusion to the minor. Also in Ohio, one case allowed an action for assault and battery against a physician rendering unconsented medical treatment to a competent adult. That case had no religious overtones. There is apparently no similar case in Kentucky.

In 1942, the Kentucky Court of Appeals was faced with the question whether the religious freedom of snake handlers was being denied by the state when it attempted to make snake handling during religious worship illegal. The court ruled that there was a compelling state interest in public safety that outweighed the religious freedom involved. "The constitutional guarantee of religious freedom does not permit the practice of religious rites dangerous or detrimental to the lives, safety or health of the participants or the public." The refusal of a blood transfusion is a religious tenet that can be considered to be dangerous or detrimental to the life, safety or health of the participant, and a Kentucky court might so decide.

The Kentucky Constitution's religious freedom clause is very different from that of the United States in that it is more narrowly defined. Yet the last sentence of that section is most important: "No human authority shall, in any case whatever, control or interfere with the rights of conscience." If a Jehovah's Witness can

 honors the right of a competent adult patient to decline medical treatment." Matter of Storar, 420 N.E.2d 64, 71 (N.Y. 1981). But see discussion in Georgetown, 331 F.2d at 1009.
154. Lacey v. Laird, 166 Ohio St. 12, 139 N.E.2d 25 (1956).
155. Lawson v. Commonwealth, 291 Ky. 437, 164 S.W.2d 972 (1942); Mosier v. Barren County Board of Health, 308 Ky. 829, 215 S.W.2d 967, 969 (1948).
156. Ky. Const. § 5.
explain to the court that this is a right of conscience, the court might uphold the refusal based on that ground, absent a compelling state interest.

Because of the lack of guidance from the Supreme Court, and because of the variations in decisions based upon the ad hoc balancing test, it will be a difficult task for a court in either state to decide what to do when faced with the problem of a competent adult who refuses a blood transfusion for religious reasons. This author prefers the test articulated in Osborne: "(1) has the patient validly and knowingly chosen this course for his life, and (2) is there compelling state interest which justifies overriding that decision?" But one must bear in mind that the state interest must be a very strong one to enable it to overcome the patient's right of religious freedom and privacy.

Judge (now Chief Justice) Burger had an interesting answer to the problem when he posited in his dissent in Georgetown that judges should reconcile themselves "to the idea that there are myriads of problems and troubles which judges are powerless to solve; and this is as it should be. Some matters of essentially private concern, and others of enormous public concern, are beyond the reach of judges." (This may be a reason why certiorari has been denied by the Supreme Court in all the Jehovah's Witnesses cases dealing with adults.) The main problem with this approach is that it solves nothing: hospitals still will not know what they should do in such a situation, and the patient's fundamental religious rights will more than likely be infringed. One author has called for a statute to aid the judge in dealing with this type of situation. Perhaps it would be better, though, to have an indication from the Supreme Court on how to proceed.

MAUREEN L. MOORE

157. 294 A.2d at 375.
158. 331 F.2d at 1017-18.
TOWER OF BABEL REVISITED: STATE ACTION
AND THE 1982 SUPREME COURT

And the Lord said, "Behold, they are one people, and they have all one language; and this is only the beginning of what they will do; and nothing that they propose to do will now be impossible for them. Come, let us go down, and there confuse their language, that they may not understand one another's speech." So the Lord scattered them abroad from there over the face of all the earth, [and]... confused the language of all the earth.¹

One of the essential elements of bringing suit for violation of a fourteenth amendment right is proof that the state acted in some manner to cause the alleged violation. State action is a concept that both "limits the power of the federal government to control the behavior of private persons,"² as well as protects private persons from unconstitutional acts by the state. During its 1981-82 term, the United States Supreme Court devoted substantial attention to identifying state action by issuing three separate opinions dealing with the question.³ The decisions of Blum v. Yaretsky,⁴ Rendell-Baker v. Kohn,⁵ and Lugar v. Edmundson Oil Company,⁶ each authored by a different Justice, but all announced June 25,

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¹ Genesis 11: 6-9 (Revised Standard Version).
³ During the 1981-82 term, the United States Supreme Court wrote 141 opinions. N.Y. Times, Feb. 7, 1982, at A1, col. 5; Id. at B6, col. 5. In addition to the three cases discussed infra in notes 4-6, the Court also dealt with state action in the case of Polk Co. v. Dodson, 102 S. Ct. 445 (1981) (a public defender, even though an employee of the state, exercised independent professional judgment, and therefore, was not acting "under color of" state law for 42 U.S.C. § 1983 purposes). The impetus for the quantity of treatment of the state action issue may be correlated to several of the Justices opinions about the frequency of § 1983 actions. See, e.g., Nahmod, The Mounting Attack on Section 1983 and the Fourteenth Amendment, 67 A.B.A. J. 1586 (1981).
⁴ 102 S. Ct. 2777 (1982). Justice Rehnquist delivered the Blum opinion, with Justices Burger, Blackmun, Powell, Stevens, and O'Connor joining. Justice White concurred. Seven of the nine justices agreed that there was no state action.
⁵ 102 S. Ct. 2764 (1982). Chief Justice Burger delivered the opinion in Rendell-Baker, with Justices Blackmun, Powell, Rehnquist, Stevens, and O'Connor joining. Justice White concurred. These same seven justices also agreed that there was no state action.
1982, constitute the 1981-82 Supreme Court's treatment of this essential issue.

This comment will analyse the state action precedents leading up to the 1982 term, as well as the state action language announced by the United States Supreme Court in the 1981-82 term. Through this discussion, the writer intends to show that the Supreme Court has so altered formerly developed approaches to state action that the building blocks to the foundation of state action have been shattered and dispersed, resulting in confusion as to what principles and approaches are left to attempt building any future state action case. Before reaching this portion of the article, however, two preliminary steps are necessary. First, an understanding of the origin, purpose, and development of the past approaches to state action must be reviewed. Then, an explication of the three United States Supreme Court opinions announced in 1982 will provide the script of characters as well as the Court's stated analysis of the facts of each case prior to searching for an understanding of what the Court apparently has achieved. Finally, the promised analysis will be delivered.

I. HISTORY AND DEVELOPMENT OF STATE ACTION
DOCTRINE PRIOR TO 1982

The fourteenth amendment was a Reconstruction-era attempt to prevent states from violating specified rights of certain persons.7 Section One of the amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."8 In addition, since private citizens did not at that time have a private cause of action for violations of their constitutional rights,9 Congress enacted the Civil Rights Act of 187110 to vindicate deprivations of civil rights.11 Precisely stated, Section 1983 of the Civil Rights Act provides:

9. It was not until 1971, in Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), that the Court held that a private cause of action could arise directly under the Constitution. Thus, in absence of Section 1983, presumably only the federal government could have enforced the fourteenth amendment.
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.\textsuperscript{12}

While the fourteenth amendment and its enforcement provision, Section 1983, were enacted to combat the disparate treatment of the freed black population,\textsuperscript{13} both the amendment and Section 1983 have evolved into all-purpose remedies for violations of every sort of constitutional right.\textsuperscript{14} From the beginning, however, the Court has emphasized that the fourteenth amendment only applied to action by the state, and thus only protected certain civil liberties or rights from interference by the states.\textsuperscript{15} If the conflict of challenged action merely involved two purely private persons, no constitutional protection was invoked. The Court recognized that there was an "essential dichotomy set forth in that Amendment between deprivation by the State, [which is] subject to scrutiny under its provisions, and private conduct, 'however discriminatory and wrongful,' against which the Fourteenth Amendment offers no shield."\textsuperscript{16}

The result of limiting fourteenth amendment protection to conduct attributable to the state, thus excluding private conduct, is that federal courts must undergo a screening process through which they select to hear only those claims for constitutional violations

\textsuperscript{12} 17 Stat. 13 (1871) (current version at 42 U.S.C. § 1983 (Supp. III 1979)).
\textsuperscript{13} See The Reconstruction Amendments: Debates (1967), published by the Virginia Commission on Constitutional Government. The original act was entitled "An Act to Enforce the Provisions of the Fourteenth Amendment . . .," but was referred to as the Ku Klux Klan Act. Ch. 22, 17 Stat. 13 (1871). Note, Developments in the Law—Section 1983 and Federalism, 90 Harv. L. Rev. 1133, 1152 (1977). See also supra note 7.
\textsuperscript{15} Civil Rights Cases, 109 U.S. 3 (1883). "[I]t is state action of a particular character that is prohibited [by the fourteenth amendment]. Individual invasion of individual rights is not the subject-matter of the amendment." Id. at 11.
allegedly attributable to the state. Thus, unless there is a clear case of state action, the issue whether there is a "significant connection between official and unofficial action is severable from the ultimate question of whether the plaintiff's constitutional rights have been violated."

Professor Tribe finds that two purposes are served by the state action concept. First, because purely private conduct is exempted from constitutional protection, the Constitution cannot be used to preempt individual liberties such as the freedom of persons to choose with whom they will associate. Second, the requirement of state action reinforces the government structure of federalism and separation of powers by leaving a "zone of action ... reserved to the states unencumbered by the constraints of federal supremacy." Justice Harlan noted these principles in Peterson v. City of Greenville:

Freedom of the individual to choose his associates or his neighbors, to use and dispose of his property as he sees fit, to be irrational, arbitrary, capricious, even unjust in his personal relations are things all entitled to a large measure of protection from governmental interference. This liberty would be overridden, in the name of equality, if the strictures of the Amendment were applied to governmental and private action without distinction. Also inherent in the concept of state action are values of federalism, a recognition that there are areas of private rights upon which federal power should not lay a heavy hand and which should properly be left to the more precise instruments of local authority.

Having identified the purpose of the state action concept, the

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17. Clear cases of state action occur when a state official solely performs the challenged action, or the state enacts legislation or regulations that require the particular conduct that is being challenged. Also, in cases involving garnishments and prejudgment attachments, state action has been consistently found to exist when public officials are involved in the process. See North Georgia Finishing, Inc. v. DiChem, Inc., 419 U.S. 601 (1975); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969). 18. Leedes, supra note 2, at 750.

19. L. Tribe, American Constitutional Law 1147-61 (1978). Professor Tribe actually adopts a unitary approach to state action issues which holds that the "substantive constitutional right at issue ... determines the parameters [of the state action inquiry]." Id. at 1158. Under his view, the determination of state action is decided simultaneously with whether there in is fact a constitutional violation rather than being treated as a separate and distinct issue because "[c]onstitutional rights define the characteristics of unconstitutional state action." Id. at 1159. See also infra notes 26-27; but see supra note 18.

20. L. Tribe, supra note 19, at 1149.

21. Id. at 1149-50.

22. 373 U.S. 244 (1963) (Harlan, J., concurring).

23. Id. at 250.
Court's approaches to identifying state action may be synthesized. Although state versus private action may seem deceptively simple, as late as the 1960's the state action concept was described as a "conceptual disaster area." The Court itself admitted that it had "never attempted the 'impossible task' of formulating an infallible test for determining whether the state 'in any of its manifestations' has become significantly involved in private discriminations. 'Only by sifting facts and weighing circumstances' on a case-by-case basis can a 'nonobvious involvement of the State in private conduct be attributed its true significance.'" Because of this difficulty, several commentators have persuasively called for the abandonment of state action analysis, arguing that there is always state action in some sense in any court case. Instead, they argue, the Court should proceed directly to determine whether the "challenged governmental action or policy is constitutionally permissible."

Nevertheless, the Court has clearly rejected this approach—at least in nonordinary or "nonobvious" cases—in spite of its dif-

28. Both the Court—although the Court has never expressly stated such—and the commentators seem to believe that there are two standards in state action cases. This analysis is most strongly expounded by Professor Rowe, supra note 27. He writes that:
   
   ... the approach may be described as follows. It presumes a rough division between "ordinary" state action situations, in which state action usually presents no difficulty, and all others. In most of the ordinary cases, the state is unambiguously the sole initiator of the particular challenged action, as when it is running a segregated public school or prosecuting a speaker for subversive advocacy. ... In the remaining "nonordinary" cases, there appears to be a presumption of no state action.

   Rowe, supra note 27, at 747. Also, in Flagg Brothers v. Brooks, 436 U.S. 149, 163 (1978), the Court cautioned that its holding did not impair the precedential value of state action decisions arising in the context of racial discrimination: "By differentiating these cases, the Court implicitly endorsed the premise that standards of state action may vary according to the right allegedly abridged." Note, Flagg Brothers and State Action: Foreclosing the Fourteenth Amendment, 10 LOY. U. CHI. L.J. 811, 829 (1979).
iculty in defining state action. In these “nonordinary” cases, the Court has dealt with the state action question as a threshold issue.\textsuperscript{30} In effect, the Court seems to presume that there is no state action and then to allow rebuttal by criteria already announced in other “nonordinary” cases. Though the Court and commentators vary in their characterization,\textsuperscript{31} these approaches are most often categorized as (1) whether the private actor performs a public function;\textsuperscript{32} (2) whether there is a sufficiently close nexus or joint participation or a symbiotic relationship between the state and the private actor;\textsuperscript{33} and (3) whether the state has authorized or significantly encouraged or ordered/compelled the private action.\textsuperscript{34} The Court’s development of each of these approaches to state action is treated below. Through each category, the Court is ultimately seeking to determine if the action can be fairly attributable to the State, or, in other words, whether the State is responsible for the action of the private actor.\textsuperscript{35}

A. PUBLIC FUNCTION APPROACH TO STATE ACTION

In \textit{Marsh v. Alabama},\textsuperscript{36} and the \textit{White Primary Cases},\textsuperscript{37} the Court articulated a “traditional public function” formulation. These cases “held that the actions of seemingly private actors may be inherently governmental, and thus subject to constitutional limitation notwithstanding the absence of overt state responsibility for the actions challenged.”\textsuperscript{38} Therefore, a private party could perform a

\begin{footnotesize}
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  \item \textsuperscript{31} Leedes, supra note 2, divides the categories into public function and state authorization; Rowe, supra note 27, defines two main categories, public function and authorization, with a secondary category that includes joint participation. J. NOWAK, R. ROTUNDA, & J. YOUNG, supra note 14, at 456-75 utilize the categories of public function, state command or encouragement, symbiotic relationship, and a balancing approach.
  \item \textsuperscript{32} See infra notes 36-59.
  \item \textsuperscript{33} See infra notes 60-79.
  \item \textsuperscript{34} See infra notes 80-99.
  \item \textsuperscript{35} Rendell-Baker v. Kohn, 102 S. Ct. 2764, 2770 (1982).
  \item \textsuperscript{36} 326 U.S. 501 (1946) (corporation which owned and operated a town held to performed government functions and thus could not prohibit distribution of religious material off the streets of the company town).
  \item \textsuperscript{37} See, e.g., Terry v. Adams, 345 U.S. 461 (1953) (“preprimary” elections of white Democratic club that produced normally unopposed candidates in official Democratic primary violated fifteenth amendment by excluding black voters); Smith v. Allwright, 321 U.S. 649 (1944) (official party primary excluded black voters; party primary was held to be delegated state function).
  \item \textsuperscript{38} L. Tribe, supra note 19, at 1163 (footnote omitted).
\end{itemize}
\end{footnotesize}
governmental function either by default or delegation from the
government, and, for state action purposes, be viewed as an exten-
sion of the sovereign and subject to the same constitutional
constraints. Under this approach, the Court found requisite state
action in operating a company-owned town, conducting primary
elections, managing a park, and operating large shopping
centers. But in 1974, the Court narrowed the application of this
open-ended concept by interjecting an "exclusivity" element into
the public function approach. Currently, the function exercised by
a private party must be one "traditionally exclusively reserved
to the State." 4

In Jackson v. Metropolitan Edison Co., a consumer's electric ser-
vice was turned off by a private utility monopoly without a hearing.
The customer asserted that the state's creation and regulation of
the public utility monopoly was state action because it permitted
a private company to perform a public function. The Court found,
however, that the state's creation of a monopoly was insufficient
by itself unless there was some relationship between the decision
of the private party and its monopoly status. In Jackson, the Court
described its past public function decisions as cases actually in-
volving exclusive functions and not just traditional functions.
The Court also used an historical analysis of the state's role in the
establishment of private utility companies to determine whether
state action was present. Citing two Pennsylvania Supreme Court
decisions, the Court stated that "[t]he Pennsylvania courts have

43. Food Employees Local 590 v. Logan Valley Plaza, Inc. 391 U.S. 308 (1968), but see
44. "This malleable formulation of the public function concept lacks adequate specificity
since socialists and libertarians, for example, have different conceptions of inherently govern-
mental power." Leedes, supra note 2, at 753. Probably the concept was never intended
to apply to all instances of state delegation of authority, but rather was meant to focus
upon the tradition of the activity involved. Note, Flagg Brothers, Inc. v. Brooks: The Public
Function Doctrine in Retreat, 12 J. MAR. J. PRAC. & PROC. 637, 649 (1979) (footnotes
omitted).
46. Id. at 345.
47. Id. at 352.
48. Id.
49. Id.
City of Philadelphia, 88 Pa. 393 (1879).
rejected the contention that the furnishing of utility services is either a state function or a municipal duty."51 Therefore, the Jackson Court ruled that there was no state action and dismissed the plaintiff's claim.

The most recent pronouncement of the state action public function theory occurred in Flagg Brothers, Inc. v. Brooks.52 Brooks had been evicted from her apartment and her belongings were placed in storage at Flagg Brothers' storage company. New York's Uniform Commercial Code §7-210 permitted a warehouse person to sell stored goods to obtain any storage fee owed.53 When Flagg Brothers threatened to sell her goods, Brooks, under 42 U.S.C. § 1983, sought damages, an injunction, and a declaration that the sale violated due process and equal protection under the fourteenth amendment.54 Through Justice Rehnquist's answer to Brook's appeal, the Court again sought to determine whether "Flagg Brothers' action might fairly be attributed to the State of New York."55 The Court concluded that there was no state action for two reasons: (1) the self-help remedy was not a traditionally exclusive function; and (2) the State did not "compel" the warehouseman to use the state statute. The Court rejected respondent's contention that resolution of private disputes was a traditional function of civil government which the state had delegated by statute to private parties. The Court's denial was based upon the newly incorporated "exclusivity" requirement. While many functions may be performed by government, only very limited actions are "exclusively reserved to the state."56 In Flagg Brothers, the respondent might have had access to actions such as replevin, damages, or waiver.57 The Court stated that the statute's "system of rights and remedies, recognizing the traditional place of private arrangements in ordering relationships

51. 419 U.S. at 353.
53. Id. at 151. N.Y. U.C.C. § 7-210 (McKinney 1964) reads in part:
§ 7-210. Enforcement of Warehouseman's Lien. "(1) Except as provided in subsection (2), a warehouseman's lien may be enforced by public or private sale of the goods in bloc or in parcels, at any time or place and on any terms are commercially reasonable, after notifying all persons known to claim an interest in the goods.
54. 436 U.S. at 153.
55. Id. at 157.
56. Id. at 158. Eminent domain was an example of an exclusive public function cited in Jackson v. Metropolitan Edison, 419 U.S. at 353. Elections were identified as an exclusive public function in Flagg Brothers, Inc. v. Brooks, 436 U.S. at 158.
57. 436 U.S. at 160.
in the commercial world, can hardly be said to have delegated to Flagg Brothers an exclusive prerogative of the sovereign."

In *Flagg Brothers*, the Court further restricted the "exclusive" criterion by holding that the possible existence of alternative remedies precluded a public function result. Situations without alternatives are not likely, even though the alternatives may be impractical. Furthermore, the Court implied that the state must in fact bar alternate relief before a public function is alleged.

**B. CLOSE NEXUS—JOINT PARTICIPATION—SYMBOLIC RELATIONSHIP**

A second approach used by the Court was to determine whether the state government is so involved in the private action as to create a "joint participation" or a "sufficiently close nexus." In a much criticized opinion, *Burton v. Wilmington Parking Authority*, the Court found state action when Burton, a black man, was denied service solely because of his race at a coffee shop located on space leased from a parking garage operated by a state agency. Rather than declare the restaurant's action unconstitutional because of its reliance upon a Delaware statute permitting restaurant owners to refuse service to persons who "would be offensive to the major part of his customers," the Court instead circuitously engaged in a process of "sifting facts and weighing circumstances." The Court relied upon a combination of factors: public ownership and private use of the land and garage; public financing of the building; mutual financial benefits between the restaurant and garage; and the State's failure to affirmatively prevent discrimination through its lease agreement. The Court failed, however, to designate the significance of each factor in isolation or in different combinations.

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58. Id. (footnotes omitted).
59. Id.
61. 365 U.S. at 716.
62. DEL. CODE ANN. tit. 24 § 1501 (1974). The statute provides in part: "No keeper of an inn ... or restaurant ... shall be obliged, by law, to furnish ... refreshment to persons [who] ... would be offensive to the major part of his customers and would injure his business." See 365 U.S. at 717 n.1.
63. 365 U.S. at 722.
64. Id. at 723-25.
65. Rowe, supra note 27.
The Court merely concluded that through all these circumstances, the "state ha[d] so far insinuated itself into a position of interdependence with [the shop] that it must be recognized as a joint participant in the challenged activity." In practical terms, however, the Court limited Burton to its facts: "Because readily applicable formulae may not be fashioned, the conclusions drawn from the facts and circumstances of this record are by no means declared as universal truths on the basis of which every state leasing agreement is to be tested. . . ."  

Subsequent to Burton, the Court has shown ambivalence and reluctance in employing Burton to support a finding of state action. Nevertheless, in the 1970 case of Adickes v. S. H. Kress & Co., the Court again used the "joint activity" language. Sandra Adickes, a white female teacher, was refused service at a restaurant because she had six black students with her. She was subsequently arrested by a city police officer for vagrancy and taken into custody. The plaintiff alleged that Kress and the police conspired to deprive her of equal treatment in a public place and to arrest her. Justice Harlan easily concluded that the relationship of the police and the defendant created the requisite state action element. Even though the defendant was a private party, "[p]rivate persons, jointly engaged with state officials in the prohibited action, are acting 'under color' of law for purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents."

In the 1974 case of Jackson v. Metropolitan Edison Co., the Court continued to imply that at least a fragment of the joint participant approach remained by referring to an "absence [in Jackson] of the 'symbiotic relationship' present in Burton." Although the utility was extensively regulated, the Court announced that "the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that

66. 365 U.S. at 725.
67. Id. at 726.
68. Rowe, supra note 27, at 762.
70. Id. at 146.
71. Id. at 148.
72. Id. at 152 (quoting U.S. v. Price, 383 U.S. 787, 794 (1966)).
73. 419 U.S. at 357. That the "joint participation" language of Burton has been relabeled as "symbiotic relationship" is evident in the U.S. Court of Appeals for the Sixth Circuit opinion of Griffeth v. Bell-Whitley, 614 F.2d 1102, 1107 (6th Cir. 1980).
the action of the latter [might] fairly be treated as that of the State itself."
4 Even though the state knew and approved of the policy and procedure, the state had not "put its own weight on the side of the proposed practice by ordering it. . . ."75 The utility had, on its own initiative, made a choice allowed by state law.76 While the Court again failed to delineate standards helpful in recognizing a "sufficiently close nexus," it did indicate that "mere government approval of or permission for a private activity without a showing of government inducement or close participation did not constitute state action."77 Thus, the part of the Burton holding that implied that state inaction could amount to state action appeared to have been rejected. The Court suggested, however, that a certain degree of government involvement with private activity might overcome a presumption of no state action.78 The lower courts have continued to struggle with discerning the degree of involvement required to create state action.79

C. AUTHORIZATION & ENCOURAGEMENT—ORDERING & COMPELLING

The third approach in determining whether there has been sufficient action by the state to make it responsible for private action, and one which began as the "authorization or encouragement" strand, evolved into a requirement that private action be "ordered or compelled" by state government. The process began in Reitman v. Mulkey,80 where the Court held that a California constitutional amendment that merely permitted racial discrimination by repealing the state's fair housing laws81 was affirmative legislation "which authorized private discrimination 'and made the State at least a partner in the instant act of discrimination. . . .'"82
Reitman went to the brink without actually finding that mere authorization created state action. In subsequent cases, the Court has receded from that edge, and mere authorization and encouragement has been deemed insufficient. In the 1972 case of Moose Lodge No. 107 v. Irvis, a private club with a state liquor license refused to sell liquor to the black guest of a club member. The district court concluded that liquor licenses were subject to "pervasive" state regulation, even though no mention was made about discrimination policies in selling liquor to persons. The Supreme Court stated, however, that mere licensing and comprehensive regulation did not "foster or encourage racial discrimination," or "make the State in any realistic sense a partner or even a joint venturer in the club's enterprise." Justice Rehnquist, author of the Moose opinion, determined that the state had no significant involvement with the discrimination, and that there was "nothing approaching the symbiotic relationship" in Burton. Again, in the 1974 case of Jackson, evidence of authorization, regulation and approval was insufficient to support a finding of state action. Instead, the state would have been required to have "ordered" the decision of the private entity in order for state action to be found.

Continuing along this same line of reasoning in Flagg Brothers, the Court rejected the argument that "Flagg Brothers' proposed action is properly attributable to the State because the State has authorized and encouraged it in enacting § 7-210." Although the legislation was arguably an "affirmative act intended to encourage the warehouseman to conduct himself as he did," the Court stated that "[o]ur cases state 'that a State is responsible for the . . . act of a private party when the State, by its law, has compelled the act.'" In Flagg Brothers, the state did not compel the act of selling the goods. The Court specifically stated that more than mere ac-

84. Id. at 176.
85. Id. at 176-77.
86. Id. at 177.
87. Id. at 173.
88. Id. at 175.
89. 419 U.S. at 357. See also supra note 75.
91. Id. at 164.
92. See Rowe, supra note 27, at 773.
93. 436 U.S. at 164.
quiescence in a private action is necessary to convert that action into state action.\textsuperscript{95} Even though the statute embodied the state's decision not to act, the state of New York was not responsible for Flagg Brothers' choice to sell the goods.\textsuperscript{96} The Court concluded by asserting that "[i]ndeed, the crux of respondent's complaint is not that the State has acted, but that it has refused to act."\textsuperscript{97}

As one writer has commented, however, the flaw in this approach is that the State cannot remain "truly 'neutral' in the face of allegedly objectionable conduct;" it must "act," either by legislative fiat or judicial decision.\textsuperscript{98} In Flagg Brothers, the state statute which allowed the warehouseman's conduct was held insufficient to find state action because the statute did not order the conduct. As another commentator wrote, "the Court is insisting that the complaintant show, at least, that but for the state's active and purposeful pressure fostering the alleged invasion of individual rights, the wrong would never have occurred."\textsuperscript{99}

In sum, the three flexible lines of reasoning initially used by the Court to define state action have become increasingly more inflexible and restrictive in recent cases. Public functions must now be exclusive; the symbiotic relationship or close nexus between the state and private party must result in the state, itself, committing the act; and state authorization and encouragement must have taken the form of state compulsion or command.

II. UNITED STATES SUPREME COURT TREATMENT OF STATE ACTION IN ITS 1982 TERM

As indicated in the preceding section, the Court has increasingly restricted the three separate approaches to state action, thereby rendering the burden of proving state action more onerous, and resulting in less frequent availability of constitutional protection. While Section III indicates that the 1981-82 state action opinions continue to increase the burden of proving state action thus reducing the availability of fourteenth amendment protection, the recent Court opinions achieved this result through ambiguous language. Each of these three decisions voiced arguably incongruous and,
at least, varied approaches in analyzing the state action question. As Section III will describe, the language of the Court in Blum indicates that the three formerly separate approaches to state action may no longer be independent; Rendell-Baker further creates ambiguity by relegating the three approaches to mere "factors"; and Lugar announced a new two-part state policy-state actor approach. Through these opinions, the burden of proving state action is not enhanced by the announcement of heightened elements for past approaches but rather through ambiguous and inconsistent language. An understanding of the facts and language of the three opinions, however, is necessary before reaching the analysis of the different approaches used by the Court.

A. Blum v. Yaretsky

In Blum v. Yaretsky, the original plaintiffs were Medicaid patients being cared for in private nursing homes in the state of New York. The State reimbursed nursing homes for the reasonable cost of health care received by these patients according to each patient's required level of care. As a prerequisite to reimbursement, nursing homes had to establish a utilization review committee (URC) of doctors who periodically determined whether a patient should be transferred to a different level of care or discharged. Either assessment of discharge or transfer was reported to the state's Medicaid agency. The agency subsequently either reduced or terminated the patient's benefits.

In Blum, a URC determined and reported that certain patients were to be transferred to a lower level of care; their benefits were reduced accordingly. When these patients refused to be transferred, the state social service officials held administrative hearings and then decided to terminate benefits unless the patients accepted a transfer. Subsequently, the patients brought a class action suit against two state agencies for an alleged deprivation of adequate notice and a proper hearing in violation of the Due Process Clause of the fourteenth amendment. The district court granted a consent judgment, which recognized substantive and procedural rights applicable to transfers to lower levels of care. In addition, the district court found state action although the court did not provide an ex-
planation for its basis. The Court of Appeals for the Second Circuit affirmed and held that implicit in the State's "response" of reducing or eliminating Medicaid benefits was a "sufficiently close nexus" between the State and nursing home or review committee to equal state action. The Supreme Court granted certiorari to address the state action issue and reversed.

The Court analyzed this case in light of three relationships between the state and private entity. The Court outlined these possible relationships as:

1. whether there was a "sufficiently close nexus' between the state and the regulated entity such that the entity's action can be fairly treated as that of the state itself;" and
2. whether the State "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice [of the private entity] must in law be deemed that of the state;" and
3. whether the private entity exercised powers "traditionally the exclusive prerogative of the State."

Through the application of these approaches to state action, the Court reversed the finding of state action by the lower courts. First, although the state had admittedly responded to the committee decision by either reducing or eliminating benefits, the response did "not render it responsible for those actions." Furthermore, not only was the action insufficient to form a "close nexus," it was also inadequate under the "joint participant" theory of Burton v. Wilmington Parking Authority. The Court disagreed with the premise that subsidization and regulation of privately owned enterprises created "joint participant" status. The Court concluded that programs undertaken by the State result[ing] in substantial funding of the activities of a private entity is no more persuasive than the fact of regulation of such an entity in demonstrating that the State is responsible for decisions made by the entity in the course of its business.

103. 629 F.2d 817 (2nd Cir. 1980).
104. 102 S. Ct. at 2783.
105. 102 S. Ct. at 2786 (citations omitted).
106. Id. (citations omitted).
107. Id. (citations omitted).
108. Id. (emphasis in original).
110. 102 S. Ct. at 2789.
111. Id.
Turning next to the second element—coercive power or significant encouragement—the Court rejected the plaintiff's contention that the State "affirmatively command[ed]" the discharge or transfer. After a rather lengthy textual and footnote explanation of the form the nursing homes were required to complete by the state, the Court concluded that completing state-mandated forms did not make the state responsible for the physician's decision to either transfer or discharge. Rather, the Court analogized the role of the doctors on the URC to that of the public defender in Polk Co. v. Dodson. The public defender, even though an employee of the State, exercised independent professional judgment in "'no way dependent on State authority.'" In Blum, the physician exercised medical judgment based upon standards established by the medical profession, not the state. Furthermore the presence of penalties and fines applicable to nursing homes that furnished services "substantially in excess" or "inappropriate" to the patient's need did not constitute any "affirmative command." The Court concluded that "those regulations [imposing penalties] themselves do not dictate the decision to discharge or transfer in a particular case. Consequently, penalties imposed for violating the regulations add nothing to respondent's claim of state action." Also, even though the state Medicaid agencies reviewed the decision of the committee, the state did not have the authority to approve or disapprove the committee's decision. The state's review was for the purpose of determining Medicaid payments at the proper level. The Court declared that "[a]djustments in benefit levels in response to a decision to discharge or transfer a patient does not constitute approval or enforcement of that decision. As we have already concluded, this degree of involvement is too slim a basis on which to predicate a finding of state action in the decision itself." 

Finally, the Court examined the "traditionally exclusive function" element identified in their preliminary analysis. Both the New York Constitution and the federal Medicaid statute "made the State responsible for providing every Medicaid patient with nursing home services." Yet the Court circumvented this legislative requirement by pointing out that the New York Constitution only required

112. Id. at 2787, n. 15.
113. Id. at 445 (1981).
114. Id. at 2788 (citations omitted).
115. Id. at 2789.
116. Id.
117. Id.
the State to “provide funds for the care of the needy . . . [and
did] not mandate the provision of any particular care, much less
long-term care.”118 Also, the federal statute did not require the State
itself to provide the services. In essence, neither piece of legisla-
tion imposed upon the State any day-to-day administrative duty
to run a nursing home. In the Court’s words, “[e]ven if the respond-
ents’ characterization of the State’s duties were correct, . . . it
[did] not follow that decisions made in the day-to-day- administra-
tion of a nursing home [were] the kind of decisions traditionally
and exclusively made by the sovereign for and on behalf of the
public.”119

In sum, the Court’s interpretation of the facts in Blum failed
to meet the three points the Court identified as prerequisite to
a finding of state actions. A state response to a private decision,
as well as substantial regulation and subsidization, did not denote
“close nexus” or “joint participation.” Neither did use of state forms,
the presence of state-imposed penalties including fines, nor the
review by state agencies of the decision comprise significant encour-
gagement, coercive power or an affirmative command. Rather, the
use of independent professional judgment superceded any subse-
quent role of the state. Finally, to meet the “traditionally exclusive
function” test, the Court implied that the state legislature would
have to mandate the specific challenged action.120

B. **Rendell-Baker v. Kohn**

A second June 25, 1982, state action case in which the Court
rendered an opinion was *Rendell-Baker v. Kohn*.121 In a 7-2 opinion
written by Chief Justice Burger, the Court determined that dis-
charged employees of a private nonprofit school for students with
special needs did not have a claim of relief under 42 U.S.C. § 1983,
because the school did not act under color of state law.122 The Court
preceded its analysis of the *Kohn* facts with a reminder that “[i]n
cases under § 1983, ‘under color’ of law has consistently been
treated as the same thing as the ‘state action’ required under the
Fourteenth Amendment.”123

118. Id. at 2789-90.
119. Id. at 2789.
120. Id.
121. 102 S. Ct. at 2764 (1982).
122. Id. at 2772.
123. Id. at 2770 (citation omitted).
Shelia Rendell-Baker was a vocational counselor for the New Perspectives School, a nonprofit institution in Brookline, Massachusetts. The school was a private school, built on private property, and administered by a private board. The New Perspectives School enrolled students who were potential high school dropouts because of drug, alcohol, or behavioral problems, or other special needs. The school's involvement with the State of Massachusetts occurred primarily as a result of state and federal legislation aimed at providing suitable education for students with special needs. The Court indicated that for several years, nearly all or, in one year, all of the school's students had been referred to it by the Brookline or Boston school committees, or by the Drug Rehabilitation Division of the Massachusetts Department of Mental Health. The cost of educating referral students was paid by the school committees in those cities or by the state. The Court noted that these public funds, including funds from a number of other state and federal agencies, accounted for 90-99 percent of the school's operating budget.

The school's eligibility to receive public funding under Chapter 766 depended upon compliance with detailed operational regulations, including written job descriptions and personnel standards and procedures, "but [the statute] impose[d] few specific requirements [as to personnel policies]." Additionally, the school, as a "contractor" with the Boston School Committee, was also required to develop and implement individualized student plans. Boston's contract "specifie[d] that school employees [were] not city

124. Id. at 2767.
125. Id.
126. Id. MASS. GEN. LAWS ANN. ch. 71 B, § 3, requires

... school committees to identify students with special needs and to develop suitable educational programs for such students. MASS. GEN. LAWS ANN. ch. 71B, § 4, provides that school committees may 'enter into an agreement with any public or private school, agency, or institution to provide the necessary special education' for these students. A student identified as having special needs and recommended for placement in private school may remain in public school, if his parents object to a placement in a particular private school, unless he is especially disruptive or dangerous. Parents who object to placement in a particular private school may also elect to place their child in a private school of their choice, in such cases; they must pay the tuition.

128. Id. (footnote omitted).
129. See supra note 126.
130. 102 S. Ct. at 2767.
employees." Also, the school was a "contractor" with the State Drug Rehabilitation Division and subject to requirements related to services provided. That contract did not specify personnel policies, however, except as to equal employment opportunity requirements. Finally, petitioner Rendell-Baker was "hired under a grant from the Federal Law Enforcement Assistance Administration (LEAA), whose funds are distributed in Massachusetts through the State Committee on Criminal Justice." While the State Committee had to approve the school's hiring decision, the Committee did not interview applicants for grant-funded positions.

The impetus for the suit was the discharge of the petitioner and five other school employees. In December 1976, Rendell-Baker publicly voiced views opposing those of the school's director, Ms. Kohn, on the role of the student-staff council in school policies. After notifying the State Committee on Criminal Justice, Kohn dismissed Rendell-Baker in January of 1977. The petitioner complained to the school's Board of Directors, as well as to the State Committee on Criminal Justice, alleging that "she had been discharged without due process because she exercised her First Amendment rights." The school responded by appointing a grievance committee to conduct a hearing and by forwarding a written explanation of her discharge to the Committee. The hearing was never held, however, due to petitioner's disapproval of the composition of the grievance committee. Subsequently, in July of 1977, she filed a § 1983 action for violations of her first, fifth, and fourteenth amendment rights. On April 16, 1980, the District Court for the District of Massachusetts granted Kohn a summary judgment based upon the "sufficiently close nexus" test using Jackson v. Metropolitan Edison as its standard.

In the meantime, five other teachers at New Perspectives had also been discharged in an alleged violation of their first amendment rights. These five petitioners had written "a letter to the school's Board of Directors urging Kohn's dismissal," had written

131. Id. (footnote omitted).
132. Id.
133. Id.
134. Id. at 2767-68.
135. Id. at 2768.
136. Id.
138. 102 S. Ct. at 2768.
a letter to the editor of the local paper, and had informed the Board president that they were forming a union. The day after these public statements were made, Kohn discharged the teachers. 139 These petitioners likewise brought a § 1983 suit, which was heard by a different District Court for the District of Massachusetts. Contrary to the district court decision for petitioner Rendell-Baker, this district court found state action by relying upon Burton v. Wilmington Parking Authority and concluded "that the school performed a 'public function.'" 140 The Court of Appeals for the First Circuit consolidated the two cases. It affirmed the dismissal of Rendell-Baker's action and reversed the other district court's refusal to dismiss. 141

The Supreme Court's certiorari review of the case resulted in affirmation of the court of appeals. The Court began its review by repeating the initial admonition of Blum: the fourteenth amendment guarantees due process only in actions by the State, and not actions of private persons or entities. Furthermore, § 1983 was said to have been enacted to prohibit "interference with federal rights under color of state law." 142 Since "under the color of law" and "state action" are coterminous, said the Court, 143 "[t]he ultimate issue in determining whether a person is subject to suit under § 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights 'fairly attributable to the State?'" 144 The Court did not reach the merits of either the first or fifth amendment violations, but only questioned whether there was state action.

Chief Justice Burger's opinion was ostensibly based upon one part of Rehnquist's analysis in Blum: had the State "exercised coercive power or provided such significant encouragement, either overt or covert, that the choice [of the private entity] must in law be deemed to be that of the State." 145 But, in actuality, the Rendell-Baker opinion examined what the Court labeled as four "factors" before reaching its conclusion that the school and its director did not serve as state actors.

139. Id.
142. 102 S. Ct. at 2770.
143. See supra note 14.
144. 102 S. Ct. at 2770 (citing Lugar v. Edmonson Oil Co., 102 S. Ct. 2744, 2754 (1982)).
145. 102 S. Ct. at 2771 (citing Blum v. Yaretsky, 102 S. Ct. at 2777 (1982)).
First, receipt of or subsidation by public funds—even to the point of dependence and 99 percent of the total budget—did not create a sufficient relationship between the state and the school to warrant state action. The school was treated by the Court as a private contractor—similar to a private corporation receiving road, bridge, dam, ship, or submarine construction contracts from the government. The Court stated that "[a]cts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts."

Second, the Court also stated that the extensive regulation was insufficient to create state action. Although the agencies regulated numerous aspects of the school, the only specific regulation applicable to personnel matters was the Committee on Criminal Justice's "power to approve persons hired as vocational counselors." The Court stated that this "regulation is not sufficient to make a decision to discharge, made by private management, state action."

Third, the Court considered the function of the school. While the school admittedly served a public function, it failed to serve a function "traditionally the exclusive prerogative of the State." Even though Massachusetts legislation had mandated a state commitment to serve special students, "[t]hat legislative policy choice in no way makes these services the exclusive province of the States." The Court's also noted that the state had only recently undertaken to provide such education.

Finally, the Court rejected any finding of a "symbiotic relationship" between the school and the state. The Court distinguished a restaurant paying rent to a state parking garage as in Burton from the state paying a school to perform services for the government. The distinction may have been based on the fact that in Burton, the restaurant paid the state for use of the parking garage,
while in Rendell-Baker, the state paid the school for its services. The monetary profit derived by the states was a primary consideration in Burton.\textsuperscript{154} In any case, in Rendell-Baker, the school was a private contractor, while in Burton, the restaurant was a state actor.

In sum, according to the Court, the factors of public funding, state regulation, education as a public function, and symbiotic relationship failed to constitute state action in this case. The significance of the Court's language in its result will be treated subsequently in Section III.

C. Lugar v. Edmundson Oil Co.

In Lugar v. Edmundson Oil Co.,\textsuperscript{155} the Court used a third set of phrases resulting in a two part "fair attribution" analysis of the state action concept. Even though five Justices held that state action was present, this case has different precedential value due to its factual basis. As previously indicated, the Court has developed a line of cases considering due process requirements in garnishment and prejudgment attachment cases.\textsuperscript{156} In Lugar, the Court stated that this case "falls on the Sniadach, and not the Flagg Brothers, side of the[d] distinction."\textsuperscript{157} For this reason, review of Lugar will be limited to a more cursory examination of its application to state action analysis.

In Lugar, the petitioner was indebted to Edmundson Oil Co. which, pursuant to a Virginia state law, used the Virginia prejudgment attachment \textit{ex parte} procedure to sequester the petitioner's property.\textsuperscript{158} Thirty-four days later, that attachment was dismissed for "fail[ure] to establish statutory grounds for attachment alleged in the petition."\textsuperscript{159} The petitioner sued the company under § 1983 and said that the attachment amounted to a joint effort by the state and the company to deprive him of his property. The first half of the Court's opinion analyzed the relation between "state action" and "under color of state law." The Court said that Congress intended to create "a remedy as broad as the protection of the Fourteenth Amendment affords the individual... [Thus if] the challenged conduct of respondent constitutes state action as

\textsuperscript{154} 365 U.S. at 723.
\textsuperscript{155} 102 S. Ct. at 2754 (1982).
\textsuperscript{156} See supra note 6.
\textsuperscript{157} 102 S. Ct. at 2749.
\textsuperscript{158} VA. CODE § 8-519 (1950).
\textsuperscript{159} 102 S. Ct. at 2748 (footnote omitted).
delimited by our prior decisions, then that conduct was also action under color of state law and will support a suit under § 1983. In Lugar, however, the Court also specified that while conduct equaling state action also equaled “under color of state law,” not all conduct found to have been performed under color of state law would meet fourteenth amendment state-action requirements. Evidently the under color of state law standard is narrower than fourteenth amendment state action principle.

The Court then turned to the requirement of state action. Lugar established a new two-part “fair attribution” test to determine whether “conduct allegedly causing the deprivation of a federal right must be fairly attributable to the state.” This requirement focused upon whether the deprivation could be “ascribed to any governmental decision” directly connected with the challenged decision. If the challenged decision of the private party had not been made as a result of a government decision to adopt an unconstitutional policy, then no state action was present. In essence, this first part of the test looked at the state policy involved in the challenged conduct.

The second part required that the defendant be a “state actor,” either as a state official, or as a recipient of significant aid by state officials, or as a participant in conduct “otherwise chargeable to the state.” The Court noted that in Flagg Brothers, a private party’s use of a state statute did not create “a state actor.” Something more—such as a public function, state compulsion, or a close nexus—was required.

In Lugar, the private party’s decision to use the state preattachment statute was not a result of a state decision and thus it was held that generally there would be no state action. The Court stated “that [because] respondents invoked the statute without the grounds to do so could in no way be attributed to a state rule or a state decision.” But the procedural defects in this attachment statute were the result of a state decision or “policy” and thus met the first prong of the two-part “fair attribution” test.

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160. Id. at 2753 (footnote omitted).
161. Id.
162. Id. at 2754.
163. Id. at 2755.
164. Id. at 2754.
165. Id. at 2755.
166. Id. at 2756.
167. Id.
The second prong—the state actor element—was also met due to the "joint participation" or significant aid offered by state officials in the seizure/attachment of the property. Thus, in Lugar, the Court found state action to be present when a private party invoked the aid of state officials in using this state attachment procedure.

III. THE TOWER OF BABEL COMES FALLING DOWN

As Section II indicates, the Court has used a different system of analysis and language in each of the three 1981-82 cases, thereby increasing the burden upon, or at least the confusion of, persons seeking fourteenth amendment protection as well as for those defending against these suits. In Blum, formerly separate and independently-sufficient approaches were implicitly aggregated such that all must be alleged and proved in order to constitute state action. In Rendell-Baker, formerly separate approaches to state action were relegated to "factors." And in Lugar, a new two-part test made its first appearance. As the following analysis will seek to demonstrate, these three different opinions will likely result in increased burdens for practicing attorneys dealing with the state action requirement.

The language used in Blum v. Yaretsky results in confusion about the role of previously separate approaches to state action: the public function, close nexus, and affirmative command theories. While the Court in Blum did treat the three approaches to state action as broad principles instead of factors, the Court failed to specify the interrelationship between the three approaches. In Flagg Brothers, the Court implicitly acknowledged that state action could be found either under the public function doctrine or alternatively, under the compulsion doctrine. But in Blum, the Court began with a summary analysis which implied that all three approaches are required:

First . . . [t]he complaining party must also show that "there is a sufficiently close nexus" . . . . Second, . . . [the] State [is] . . . responsible only when it has exercised coercive power or has provided such significant encouragement. . . . . Third, the required nexus may be

168. Id.
169. Id. at 2756-57.
170. 102 S. Ct. at 2771-72.
171. In Rendell-Baker, the Court relegated the broad approaches of public function and symbiotic relationship to factors." See infra notes 177-196.
172. Rowe, supra note 27, at 761 n.10. See also 436 U.S. at 157-66.
present if the private entity has exercised powers that are "traditionally the exclusive prerogative of the State." Analyzed in light of these principles, the Court of Appeals' finding of state action cannot stand.173

This opening language of the Court leaves one guessing whether the Court now requires that all three approaches be proved. The United States Law Week's 1982 review of Blum states that Justice Rehnquist "cited three requirements for state action" that must be proved: 1) sufficiently close nexus, 2) coercive power or significant encouragement, and 3) traditionally exclusive public function.174

In the Blum Court's subsequent analysis of these three "requirements," it focused upon one specific fact—the decision to transfer/discharge the patients—in determining that none of the three approaches resulted in state action. On the basis of this one fact, the Court held that the state did not command the decision, approve or disapprove the decision, fund or regulate the decision, or delegate to the nursing homes a public function, since the "day-to-day" administrative decisions were not "decisions traditionally and exclusively made by the sovereign for and on behalf of the public."175

The Court's analysis may have been simply in response to arguments made by counsel for both sides of the Blum case. Plaintiff-Yaretsky had argued that state action "was satisfied under several state action tests . . . whether considered separate or in the aggregate."176 Yaretsky proceeded to justify the presence of a sufficiently close nexus, a symbiotic relationship, or a public function. The defendant-Blum conversely argued that the decision to change the level of nursing home care was a medical decision regardless of whether the patient's care was paid privately or by Medicaid. Therefore, there was no compulsion by the state, no exclusive public function, and no symbiotic relationship.177 While the Court may have simply omitted an explanation from their analysis of whether these approaches are alternatives or an aggregate, the

173. 102 S. Ct. at 2786 (citations omitted).
174. 51 U.S.L.W. 3068. (Review of Supreme Court's Term—Individual Rights (Aug. 10, 1982)).
175. 102 S. Ct. at 2789-90. See supra note 152 (Court's discussion of alleged delegation of public function).
177. Brief for Petitioner Blum, Comm'r. of the N.Y. State Dep't. of Social Services, at 30-39. 102 S. Ct. 2777 (1982) (The Court of Appeals held that there was state action and thus defendant Blum petitioned for certiorari).
result is at best ambiguous. In essence, the Court implied that the plaintiff must attempt to prove not only the approach the plaintiff believed most likely to create state action, but all other approaches as well, thus substantially increasing both the plaintiff's and defendant's burden. As evidenced in the case of *Watkins v. Reed,* trial level attorneys subsequently relying upon the *Blum* analysis have concluded that all three approaches are required.

In another of the 1981-82 opinions, *Rendell-Baker,* the Court relegated two formerly autonomous approaches to state action—public function and symbiotic relationship—to subservient roles as cumulative factors in state action analysis. To answer the ultimate question whether state action existed in *Rendell-Baker,* the Court examined what it labeled as the "factors" of funding, regulation, public function, and symbiotic relationship. As indicated in Section I, the concepts of public function and symbiotic relationship were previously separate, broad approaches used to determine the presence of state action. But in *Rendell-Baker,* the Court demoted these approaches to minor indicia from their position as ultimate labels describing the relationship necessary to comprise state action. By renaming the originally broad approaches of public function and symbiotic relationship to no more than specific factors of state action (similar to funding and regulation), these originally separate approaches to state action have been stripped of their former significance.

In *Rendell-Baker,* the Court's use of the term "factors" may have been in response to language used by counsel and the court of appeals. The petitioners did not argue any of the three specific approaches to state action, but instead presented the issue in terms of a delegation question, or alternatively requested the Court to adopt a balancing approach. Petitioners sought certiorari to answer the unanswered question in *Evans,* *Jackson,* and *Flagg*

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180. 102 S. Ct. at 2771-72.
181. Evans v. Newton, 382 U.S. 296 (1966) (raised the question whether a State can avoid constitutional duties by creating a "sham arrangement" with private parties in order to disguise a provision of public service as an act of private entity. A white benefactor had devised land to the city of Atlanta to be used as a park for use by whites only. The city appointed private trustees to manage the park, in an attempt to circumvent state action. The Court rejected this attempt and found that the racial provision violated the fourteenth amendment).
182. Jackson v. Metropolitan Edison Co., 419 U.S. 354 (1974) (if the challenged action had been an exercise of power delegated by the state which was a traditional sovereign function, then the result might be different).
Brothers,183 whether a state may

by paying a private contractor to provide a public service which the
state would be otherwise required to provide, so disassociate itself
from the provision of that public service that the private entity to
which the state delegates authority avoids all constitutional scrutiny
in the manner in which it provides that service.184

In arguing for certiorari, petitioner sought the Courts' examina-
tion of "whether the state has attempted to shed authority and
responsibility by paying others."185

After certiorari was granted, petitioners presented two different
theories to warrant constitutional protection. On the one hand, they
argued, the state had delegated a statutory obligation that was
a public function because (1) education, itself, was a public function,186
(2) the education in question was a legislatively-declared sovereign
function,187 and, (3) public education has been traditionally exclu-
sively reserved to the state.188

Alternatively, petitioners argued that the Court should balance
the indicia of state action against the competing constitutional in-
terest at hand, i.e., the petitioners' right to first amendment pro-
tection. In weighing the indicia of state action, petitioners suggested
the following "factors:" whether the state's involvement was
"significant"; had the state compelled the action; was there a close
nexus; was there a public function; was the action approved by
regulation; and how many attributes of the state did the private
entity possess.189 Petitioners concluded that there was substantial
indicia of state action and that petitioners' free speech rights
deserved more protection than the school's interest in privacy, thus
resulting in the application of fourteenth amendment protection
to petitioners.190 The problem with petitioners' argument, however,
and its reference to factors to be weighed, is that the Court had

183. Flagg Brothers, Inc. v. Brooks, 436 U.S. 149 (1976) (recognized but did not answer
the question whether the state can delegate functions and avoid fourteenth amendment
protection).
185. Id. at 25.
v. Norwich, 441 U.S. 68 (1979), which held that education was a "governmental function"
for equal protection purposes. Id. by 75. Petitioner argued that education should be con-
sidered a public or government function for state action purposes also.
187. Brief for Petitioners at 10, 21. See supra note 126 for text of Chapter 766 providing
public funded special education for Massachusetts students.
188. Brief for Petitioners at 22-25.
189. Id. at 26-28.
190. Id. at 34.
clearly rejected the balancing approach in determining state action results. Thus, the Court should avoid an indication that it is willing to consider utilizing the balancing approach, unless the Court is willing to rewrite the entire outline to determining state action and fourteenth amendment applications.

Rejecting petitioners' balancing approach, the state respondent relied solely upon public function analysis. Interestingly enough, the state's attorneys primarily argued that while no public function existed, if there were a public function, they would bifurcate constitutional protection applicable to matters related to the school's public function responsibility to its students from the allegedly collateral matters dealing with personnel. In other words, counsel argued that the private school's behavior could make it a state actor with respect to one challenged act and not for another act. Specifically, counsel argued that "termination of a teacher for open advocacy of student participation in a private school's general personnel matters, is [not] an activity directly related to the school's contracted public function of providing special education." 93

Counsel for the second respondent, denied any application of the public function doctrine. Although the importance of education was recognized, education, and more specifically, special education, had never been held to be an exclusive public function. Thus, respondent argued that since petitioner did not contest the lack of a close nexus or symbiotic relationship, and because there was no exclusive public function, there could be no state action.

The court of appeals also may have been a source for the Supreme Court's adoption of the term "factors." The parties at the trial court level had represented opposing views on the application of the joint participation test. The court of appeals resolved the conflict and found the Burton test inapplicable because none of the "factors" of Burton were present. According to the First Circuit, the result in Burton had depended upon the presence of

191. See supra notes 26-30.
194. See supra note 140. The New Perspectives School was the respondent in Klug v. New Perspectives School, No. 80-1451 (D. Mass. 1980), and filed a separate brief.
private use of public property, a state's expressed intention to control the private institution, and the state's actual purpose of evading constitutional requirements. The court of appeals concluded that it was not "persuaded that any of the particular factors we have discussed apply[d] to the New Perspectives School, or that any other factors justify a finding that the challenged action occurred 'under color of state law.'" In addition, petitioners had argued to the court of appeals that four aspects of the relationship between the school and the state created state action: funding, regulation, public function, and a mutual or symbiotic benefit. But the court of appeals held that "these factors, together as well as separately, do not demonstrate that the state has so dominated the school as to make all the school's actions, and particularly those related to personnel, attributable to the state."

In sum, the language in *Rendell-Baker* labelling public function and symbiotic relationship as "factors" may have either been based upon arguments made for adopting a balancing approach to state action, or, alternatively, on the court of appeals reference to factors relevant in conducting joint participation analysis. In either case, application of the "factor" language to the public function and symbiotic relationship approaches is again, at best, ambiguous. Do the theories of public function and symbiotic analysis remain, or has the Court, in fact, terminated their role as self-sufficient approaches to state action? The opinion of *Watkins v. Reeds* again lends support to the idea that the trial courts will reduce the approaches to "factors" in determining state action results.

The third case, *Lugar v. Edmondson Oil Co.*, announced a new two-part test that "may change the shape of state action doctrine under section 1983." Under one interpretation of *Lugar*, the Court may have imposed the burden of showing a relevant state policy or regulation as well as conduct being performed by state actors. In *Lugar*, the Court found that Count One, which charged the state statute with being procedurally defective under the fourteenth amendment, was the only challenged conduct creating state action.

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197. Id.
198. Id. at 27. Petitioners did not repeat their argument before the Supreme Court that these four aspects created state action.
200. Id.
in this case. If the plaintiff had been challenging the private misuse of or the misapplication of the statute to himself, then no state policy as exemplified in a state regulation would be present to fulfill the first part of the test.

The absence of state policy involvement also may have been dispositive in Blum and Rendell-Baker. In Blum, the Court said that, even though the state regulations required the nursing homes "to make all efforts possible to transfer patients to the appropriate level of care" and also furnished detailed criteria on forms provided by the states to determine this level of care, the decision was ultimately based upon independent professional judgment. Therefore, no state policy was present. Also, in Rendell-Baker, the fact that none of the governmental regulations specifically dealt with personnel matters made the decision to discharge the teachers non-state action. Justice White, in his concurrence in Rendell-Baker, stated that, for him, "the critical factor is the absence of any allegation that the employment decision was itself based upon some rule of conduct or policy put forth by the State." Thus, unless the particular actions being challenged were specifically subject to a state policy promulgated through a state regulation, the decision must invariably be that of a private party.

Furthermore, even if there is a state policy behind the private conduct, there also must be joint participation between the private party and a state actor. The Court relied upon the language of Adickes for its rule on joint participation and found that "invoking the aid of state officials to take advantage of state created attachment procedures" was sufficient when "the state has created a system whereby state officials will attach property on the ex parte application of one party to a private dispute."

It is unclear whether the Court will apply this two-step analysis

201. 102 S. Ct. at 2756. Although Court One was unclear, the Court "agree(d) with the lower courts that the better reading of the complaint is that petitioner challenges the state statute as procedurally defective under the Fourteenth Amendment." Id. (footnote omitted). Court Two claimed that respondents were "malicious, wanton, willful, oppressive [sic] unlawful" in their attempt to take petitioner's property. But the Court states "[t]hat respondents invoked the statute without the grounds to do so could in no way be attributed to a state rule or a state decision. Count two, therefore, does not state a cause of action under 1983 but challenges only private action." Id. Count Three was a pendant claim based on state tort law.

202. 102 S. Ct. at 2787 (quoting 10 N.Y.C.R.R. §§ 416.9(d)(1), 421.13(d)(1) (footnote omitted)).

203. 102 S. Ct. at 2773.


205. 102 S. Ct. at 2756-57.
when the defendant is a state official. Arguably, "[i]f the defendant were himself a state actor, it would be unnecessary to examine whether he was acting pursuant to a state policy." But if the defendant is not a state actor, the Court will then inquire into whether there is both a relevant state policy in play and whether there was joint participation with a state actor in the alleged deprivation. In one commentator's opinion, "[a]fter Lugar, a plaintiff cannot bring a section 1983 suit against a private party who instigates official misbehavior, though under Monroe the right to sue the misbehaving official remains." In sum, these three decisions seemingly result in three different—and formerly unheard of—methods of analyzing state action. Because of the ambiguity within each separate opinion, as well as the lack of consistency between the three opinions, arguably the concept of state action has been rendered even more confusing and onerous, at least to practicing attorneys—and innocent law students. The following description of the case of Watkins v. Reed provides evidence for the argument that the Court has in fact altered state action analysis.

As previously suggested, the case of Watkins v. Reed, which is the only published federal trial court opinion relying on these 1982 Supreme Court cases to date, indicates support for the contention that the Supreme Court has, on the one hand, merged or cumulated the state action approaches, and, on the other hand, relegated broad approaches to mere factors. The case of Watkins v. Reed involved a taxicab driver at the Greater Cincinnati-Northern Kentucky Airport who had been suspended for 30 days for failure to place the required one dollar in the gate of the holding area before proceeding to pick up a passenger. This airport was gov-

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206. See supra note 197, at 245.
208. See supra note 197, at 245-46.
209. 557 F. Supp. 278 (E.D. Ky. 1983). There were actually two cases filed, No. 82-15, Watkins v. Reed, and No. 82-28, Bowman v. Reed. The two cases were consolidated, however, in order to determine the state action issue.
210. The decision of Folsom Inv. Co., Inc. v. Moore, 681 F.2d 1032 (5th Cir. 1982) relied upon the decision in Lugar but did not mention either Blum or Rendell-Baker.
211. According to airport taxicab procedure, taxis wait in a holding area (bullpen) in the order in which the taxi driver arrives at the airport. To exit, a driver waits his turn, then puts four quarters ($1.00) in a coin-operated gate to get out of the holding area. According to Plaintiff-Watkins, the incident occurred between 3:00 a.m. and 6:00 a.m. during the first part of August, 1981. Delta Flight 357 was arriving and Watkins pulled around the two drivers asleep in their taxis in the bullpen area, deposited his $1.00 and proceeded
erned by the Kenton County Airport Board pursuant to state legislation granting authority to the Board to "regulate the traffic . . . of motor vehicles" on airport grounds.\textsuperscript{212} The Airport Board contracted with cab companies to operate cabs at the airport, and required the companies to operate a starter system\textsuperscript{213} to regulate the flow of cabs at the airport. The Board charged a fee to the companies as well as one dollar to exit from the holding area. But the Board returned all the fee and over half of each one dollar to the cab companies to fund the starter system.

In order to cooperatively operate the starter system, the cab companies formed the Airport Taxicab Association (ATA). The ATA is composed of one representative from each of the companies with contracts with the Airport Board.\textsuperscript{214} The ATA has established its own set of rules and meets monthly to conduct Association business, including imposing sanctions for driver violations. Two drivers filed a complaint with the ATA against Watkins when he allegedly "ran the gate" by not depositing the required one dollar. The ATA notified Watkins's Cab Company of the complaint and the Cab Company informed Watkins.\textsuperscript{215} Watkins was not present at the monthly ATA meeting at which he was suspended for 30 days.\textsuperscript{216}

Watkins was suspended for allegedly picking up a passenger out of turn, even though the passenger refused to use the two taxis that were ahead of Bowman. Watkins\textsuperscript{v. Reed, 557 F. Supp. 278 (E.D. Ky. 1983).} Watkins subleased his airport license from the Radio Cab Company. The Radio Cab Company informed Watkins of the complaint at least three days before the monthly ATA meeting.

\textsuperscript{212} Ky. REV. STAT. § 183.885 (Baldwin 1982). The Greater Cincinnati-Northern Kentucky airport is located in Boone County, Kentucky and is administered by the Kenton County Airport Board, though it serves over 1.5 million people of the metropolitan region of Cincinnati, Ohio, northern Kentucky, and southern Indiana.

\textsuperscript{213} A starter system consists of persons who signal the taxi drivers in the holding area when passengers are waiting at certain terminals. The Wackenhut Company provided the starter system at the airport at the time of this suit.

\textsuperscript{214} At the time of Watkins's suspension, nineteen companies had contracts with the Board. No cab company has operated at the airport without being a member of the Association since the Association's formation in 1974. Although an individual company was theoretically free not to join the ATA, that independent company would have to furnish its own starter system and integrate its taxis with the flow of ATA taxis, as well as abide by ATA rules. See Dep. of D. Keith, Director of Airport Operations, at 6-7, 30-37.

\textsuperscript{215} Watkins stated that he did not believe he was allowed to attend the ATA monthly meetings. At least one other cab driver, however, had attended the meeting in order to express his side of the story on a complaint made against him. See Dep. of Watkins. The specified sanction for "running the gate" was a thirty-day suspension for the first offense.
then brought a § 1983 action for alleged deprivation of due process under the fourteenth amendment and named as defendants the President of the ATA, the Airport Director of Operations, the Director of Aviation, and the Airport Board. Watkins sought $280 in lost wages, $25,000 in compensatory and $100,000 in exemplary damages. The United States District Court for the Eastern District of Kentucky granted the defendants’ motions for summary judgment due to lack of state action.

Although the trial court’s opinion stated that the Supreme Court had “tended to merge [the] inquiries” in arriving at a result in state action claims,217 the briefs presented by counsel clearly demonstrated the argument that the Court has led parties to believe that the three approaches have been aggregated and must be cumulatively present. Counsel for the plaintiffs quoted the initial language of Blum in which Justice Rehnquist listed the three requirements of state action.218 From this language, the plaintiff attorneys concluded that

several principles stand out clearly in the above statement on state action. First, the complaining party must show a sufficiently close nexus between the State and the private entity. Secondly, the State must have provided significant encouragement to the private entity to act in the way that it has acted. Thirdly, the required nexus may be present if traditionally the exclusive prerogative of the State.219 Thus, the plaintiff attorneys interpreted Blum to require that each of the three requirements must be met before state action can be found.

In addition, attorneys for the defense referred to the “tri-pronged analysis” of the Blum decision.220 Based upon the Blum opinion, defense counsel sought to disclaim any finding of close nexus, coercive power, significant encouragement, and traditional public function. As a result of Blum’s ambiguities and confusion, parties on both sides argued the merits of state action using a tri-part, cumulative approach.

Dep. Watkins, Exhibit B. Airport taxicab Rules and Regulations, no. 11. Watkins was reinstated after only four days of suspension, however, allegedly because he had employed an attorney. Dep. Watkins, at 29.
218. See supra note 170.
The opinion in *Watkins v. Reed* provides evidence of the contention that in *Rendell-Baker* the Court has relegated formerly autonomous approaches to mere "factors." In *Watkins*, the district court opinion relied upon the "factors" from *Rendell-Baker* and *Blum*: regulation, coercive power or significant encouragement, exclusive public function, and symbiotic relationship. In analyzing the first factor, the court found that the only relevant state regulation was the requirement that the taxicab companies operate a starter system. The state had no rules governing the starter system operation and did not "approve or disapprove the ATA regulation," thus circumventing the "affirmative command" or significant encouragement approach. The district court also gave particular credence to the independent judgment of the ATA which the district court believed analogous to the medical review committee in *Blum*. The ATA was acting independently of any state body or personnel and thus its decision to suspend the plaintiff was not a decision of the state.

The district court also relied upon the public function "factor." Even though the Kentucky legislature "conferred on the Board the obligation to regulate the traffic . . . of motor vehicles" on airport grounds, and although the district court appeared to recognize that the Board had effectively delegated part of this statutory duty to the ATA, the regulation of traffic was found not

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221. 557 F. Supp. at 281.
222. Id. In response to plaintiff's motion to amend the court's memorandum opinion and order of Feb. 4, 1983, the court amended the opinion to include the existence of two other requirements included in the airport license agreements concerning safety inspections and personal appearance of drivers. The court noted, however:

... that this in no way affects the result, since as the opinion emphasizes, the presence of a large body of state regulations will not support a finding of state action, if the state is not responsible for the decision of the private body who employs the regulations. *Blum v. Yaretsky*, 50 U.S.L.W. 4859 (1982) [102 S. Ct. 2777]. Here, the requirements concerning personal appearance and safety are duplicated by ATA regulations and the ATA is responsible for penalizing drivers who fail to follow these requirements.

223. 557 F. Supp. at 281. The district court stated:

[The court is not convinced that the fact the decision-making body in Blum was composed of medical professionals dictates a different result when the private actor is a group of taxicab operators. The Supreme Court emphasized not the nature of the judgments employed but that they were based on independent standards not established by the state.

*Id.* at 9, n.26 (emphasis in original).
to be an exclusive public function because of the miles of private roadways and parking lots in the Airport which are not subject to regulation by the state.225

Finally, the district court rejected any claim of a "symbiotic relationship" between the Board and the ATA because there was no proof that the Board profited from the challenged conduct.226 In sum, the Court stated that "it may be seen that all of the factors unsuccessfully asserted in Blum [actually Rendell-Baker] in support of a finding of state action are present here and likewise unsuccessful."227 Thus, the first federal district court to apply these Supreme Court cases determined that the public function and symbiotic principles are merely one of the many factors to be weighed in determining state action.

While the Watkins court did not specifically rely upon Lugar,228 the absence of an appropriate state regulation would have been dispositive under the Lugar state policy-state actor approach. Without a state policy requiring suspension of airport taxi drivers, and a state actor actually imposing the suspension, fourteenth amendment protection would be inapplicable to these petitioners. Thus, in Watkins, the application of each of the new sets of language in the 1982 Supreme Court cases resulted in a finding of no state action.

Conclusion

Petitioners requested certiorari in these cases in order to clarify the necessary relationship between private entities and the state under the state action prerequisite for fourteenth amendment application.229 Yet, as the preceding analysis has indicated, the

226. Id.
227. Id. (emphasis added).
228. The district court noted that "though Lugar furthers understanding of the state action concept, factually it is not similar to the present case. It concerned the exercise of a state-created rule by a private person acting with aid from state officials." Id. at 280 n.8 (citation omitted).
229. Rendell-Baker v. Kohn, Petition for Writ of Certiorari by Rendell-Baker, "Question Presented: Is an ostensibly private school, to which local governments have delegated their statutory obligation to provide public education to special needs children at public expense and which is subject to extensive state regulation, subject to constitutional constraints in connection with the provision of such education?" Brief of respondents Bellotti and Highgass in opposition to the petition for the writ of certiorari, "Question Presented: Is the dismissal of a teacher for open advocacy of student participation in a private school's
Court’s language in these three cases fails to offer precise guidelines for what relationship(s) must exist between private parties and the state in order to satisfy state action. Arguably, the Court has continued its previous route of further reducing the scope of alleged action that will result in a finding of state action. Rather than continue the process which had added exclusivity to public functions, required the state to be involved in the nexus, and replaced encouragement with compulsion, the Court instead has replaced these formerly separate (although increasingly restricted) approaches with ambiguous and inconsistent language. If any of these interpretations of the 1982 cases—that the three approaches are cumulated, that the two approaches are mere factors, or that there must be both a state policy and a state actor—are followed in additional trial court cases, then certainly the Court’s restrictive treatment of state action has been further implemented. The problem is that parties will not know whether to rely upon the cumulative approach of Blum, the “factor” approach of Rendell-Baker, or the two-part state policy-state actor test of Lugar. Inevitably, then, all three approaches will be employed in trial arguments. While fewer section 1983 cases may result because of this increased burden, those cases that are filed will require even greater court and attorney time and cost because of the increased time involved in arguing and analysing so many different approaches. Truly, the state action Tower of Babel has been crumbled into so many little pieces.

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personnel matters an activity directly related to the school’s contracted public function of providing special education.”

Blum v. Yaretsky, Petition for Writ of Certiorari by Blum. “Questions Presented: (2) Is the transfer of a patient from one level of care to another, by a private physician or other private party, affected by state action solely because the patient is Medicaid-funded and one result of the transfer is a change in the amount of benefits paid on his behalf.”
WRONGFUL PREGNANCY: RECOVERY FOR RAISING A HEALTHY CHILD

Introduction

In American society, the birth of a child is generally a joyful event. Certainly this is so when the child is healthy. But when the child is unhealthy, or the pregnancy unplanned and unwanted, the parents' reaction is not always so positive. Thus, when a claim can properly be made that the reason the child was born at all was, for example, a doctor's failure to properly perform a sterilization procedure or to inform the parents of genetic or medical risks, the response is, with increasing frequency, a lawsuit. This propensity to sue has resulted in a body of law that has acquired labels that appropriately, though perhaps counterproductively, typify the emotion surrounding the factual settings from which the cases derive: wrongful birth, wrongful pregnancy and wrongful life.

Although these terms have similar connotations, they, in fact, denote strikingly different causes of action, both theoretically and practically. A claim for wrongful birth is brought by the parents, typically against a physician who “failed to inform parents of the increased possibility that the mother would give birth to a child suffering from birth defects . . . [thereby precluding] an informed decision whether to have the child.” A claim for wrongful pregnancy is also brought by the parents. Damages are sought, however, for the unexpected pregnancy and birth of a healthy child after a sterilization procedure had been negligently performed. Both wrongful birth and wrongful pregnancy causes of action are now widely recognized. A claim for wrongful life, on the other hand,

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1. “Obstetricians and gynecologists face ten times the risk of being sued as most other physicians.” Appleton, “Wrongful Birth” Suits on the Rise, 67 A.B.A.J. 1255 (1981). In part, this results from the increased burden imposed on these docto as their knowledge has increased. Id. Additionally, family planning in general, and sterilization in particular, is now widely accepted. Robertson, Civil Liability Arising from “Wrongful Birth” Following an Unsuccessful Sterilization Operation, 4 AM. J. L. MED. 131, 135 (1978).
2. “The concepts of ‘birth’ and ‘life,’ and the values inherent therein, are emotionally charged subjects about which people tend to have deeply entrenched feelings or ideas.” Robertson, supra note 1, at 133.
4. See Phillips v. United States, 508 F. Supp. 544 (D.S.C. 1981), in which cases are collected. Most courts have not yet distinguished a wrongful pregnancy and wrongful birth cause of action. “Wrongful pregnancy” is a term that should be reserved for denoting a very narrow group of cases that are frequently, but erroneously, included in discussions
is brought solely on behalf of a child born with birth defects who claims injury because of the failure to prevent its birth. With the exception of two intermediate appellate courts, this cause of action has not been recognized by the courts.

Despite recognition of an action for wrongful pregnancy, courts have remained divided on the issue of recovery for rearing expenses in the birth of a healthy baby. This comment will analyze the approaches taken by courts on this issue, as well as briefly review the development of this whole area of law.

Background

The landmark decision in the area of wrongful life is *Gleitman v. Cosgrove.* In *Gleitman,* an action was brought on behalf of a child who was born with birth defects after the defendant physician had informed Mrs. Gleitman that the measles she had contracted would not affect the health of her child. Rejecting the infant plaintiff’s claim that the doctor was responsible for its birth by failing to provide his parents with information which would have prompted them to terminate the mother’s pregnancy, the court stated that the plaintiff was asking the court to “measure the difference between his life with defects against the utter void of nonexistence, [even though] it is impossible to make such a determination. This Court cannot weigh the value of life with impairments against the nonexistence of life itself.” Some courts have subsequently disagreed that damages were immeasurable. They have, nevertheless, rejected this cause of action for other reasons: the action

of this so-called ‘wrongful life/wrongful birth’ body of case law.” Holt, *Wrongful Pregnancy,* 33 S.C.L. REV. 759 (1982). “Wrongful birth cases are actions for wrongfully allowing an impaired, defective life to come into being. Wrongful pregnancy cases, however, are actions for the wrongful creation of life itself.” *Id.* at 761.


7. *Id.* at 28-29, 227 A.2d at 692.

"would have wide-ranging social ramifications, [it would be against] social policy, and [there would be] a lack of damages."¹⁹

Conversely, the wrongful birth cause of action has been widely accepted.¹⁰ Gleitman was also the first case in this area.

In Gleitman, the court rejected the parents' wrongful birth claim on essentially the same grounds that the wrongful life claim was denied: the difficulty of measuring damages. Additionally, public policy "supporting the preciousness of human life."¹¹ precluded acceptance of termination of the pregnancy by abortion. Subsequent decisions, however, have recognized that if the claim is legally cognizable, mere difficulty in the ascertainment of damages would be insufficient to preclude the action.¹² Further, the argument that wrongful birth claims violated a policy against abortion was undercut by the decision of Roe v. Wade.¹³

Similarly, the wrongful pregnancy action is also widely recognized. The essence of the parents' claim is that pregnancy occurred as a result of the defendant's negligence in performing a sterilization procedure. In Christensen v. Thornby,¹⁴ for example, the plaintiff had undergone a vasectomy fearing that his wife's health would be endangered by another pregnancy. The operation failed and plaintiff's wife gave birth to a healthy child. Although holding that public policy did not bar a therapeutic sterilization, the court, nevertheless, rejected the cause of action reasoning that the plaintiff "has been blessed with the fatherhood of another child."¹⁵ In Shaheen v. Knight,¹⁶ the court recognized a right to elective sterilization but similarly rejected the cause of action for the birth of a healthy child. It reasoned that "to allow damages for the normal birth of a child is foreign to the universal public sentiment of the people."¹⁷ In Custodio v. Bauer,¹⁸ however, the court rejected the reasoning of these earlier cases and recognized a cause of action for the birth

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11. 49 N.J. at 26, 227 A.2d at 693.
15. Id., at 126, 255 N.W. 622.
of a healthy child. Specifically, the court rejected the argument that the birth of a healthy child must always be a benefit, and concluded that, if liability were established, plaintiffs had a right to more than "nominal damages." 19

Finally, it can also be argued that public policy favors a plaintiff in a wrongful pregnancy action because the right to a personal choice regarding birth control and family planning is constitutionally protected. 20

**Damages**

Despite recognizing a cause of action for wrongful pregnancy, the courts are sharply divided over the issue of damages, particularly for the costs of rearing a healthy child. This discord is not surprising given the nature of the question. It "searches the nature and validity of our civil law system which allows money damages to compensate for wrongs that are intangible, such as wrongful death or emotional anguish, things which cannot really be made right by money." 21

Recent decisions 22 have identified four approaches to the issue of damages in a wrongful pregnancy action: 23 1) parents have no right to recover any damages or expenses; 2) parents have a right to recover all damages and expenses, including the cost of rearing the child; 3) parents have a right to recover all expenses and damages incurred or to be incurred, subject to a deduction for the

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19. Id. at 325, 59 Cal. Rptr. at 477.

> It is one thing to compensate destruction; it is quite another to compensate creation. This so-called "wrong" is unique: it is a new and ongoing condition. As life, it necessarily interacts with other lives. Indeed, it draws its 'injurious' nature from the predilections of the other lives it touches. It is naive to suggest that such a situation falls neatly into conventional tort principles, producing neatly calculable damages.

23. Possible damages might include: the "expense of childbirth; pain and suffering; the husband's loss of consortium; cost of raising the child; cost of another sterilization operation and possibly the pain and suffering which would accompany it; mental distress, ... and, loss of love and affection to other children in the family." Comment, Pregnancy After Sterilization: Causes of Action for Parents and Child, 12 J. OF FAM. L. 635, 641 (1972-73).
benefit that will be enjoyed by the parents; and 4) parents have a right to recover all damages and expenses occurring because of the pregnancy and birth, but they have no right to recover the costs of rearing the child. 27

Representative of the cases cited for adopting a no-damages approach is Shaheen v. Knight, 28 wherein the court reasoned that [t]o allow damages in a suit such as this would mean that the physician would have to pay for the fun, joy and affection which plaintiff Shaheen will have in the rearing and educating of this, defendant’s fifth child. Many people would be willing to support this child were they given the right of custody and adoption, but according to plaintiff’s statement, the plaintiff does not want such. He wants to have the child and wants the doctor to support it. In our opinion to allow such damages would be against public policy. 29

Recent decisions, however, have rejected this approach. It has been aptly stated that “the argument that there can be no injury by virtue of the birth of a healthy child may be a reasonable statement of personal values, but it is an untenable position of law to take.” 30

Similarly, the approach permitting recovery of all damages has received little support. Seemingly, the lone exception is Cockrum v. Baumgartner. 31 There, the court rejected the public policy argument which would limit damages to pregnancy and birth related costs. 32 Instead, the court allowed the full measure of “all damages


These courts have either expressly adopted the Restatement (Second) of Torts § 920 benefits rule or have impliedly adopted it.


29. Id. at 23, 11 Pa. D. & C.2d at 45-46.

30. Note, supra note 9, at 173.


32. Id. at 273, 425 N.E.2d at 970.
proximately caused by the physician's negligence."\textsuperscript{33} The court reasoned that the right to determine whether to have a child is legally protected. To permit recovery of rearing costs merely recognizes the importance of this right.\textsuperscript{34}

The vast majority of cases, however, have adopted one of two middle-ground approaches.\textsuperscript{35} Both of these approaches permit recovery for expenses and damages related to the pregnancy and birth. They differ, however, in their treatment of costs of rearing a healthy child.

The majority of courts do not allow damages for rearing.\textsuperscript{36} The underpinning of this approach is that the benefits related to raising a child outweigh the costs as a matter of law.\textsuperscript{37} This approach is also defended by a number of public policy contentions. In \textit{Rieck v. Medical Protective Company},\textsuperscript{38} the court reasoned that

\begin{quote}
[t]o permit the parents to keep their child and shift the entire cost of its [upbringing] to a physician who failed to determine or inform them of the fact [of the] pregnancy would be to create a new category of surrogate parent. Every child's smile, every bond of love and affection, every reason for parental pride in a child's achievement, every contribution by the child to the welfare and well-being of the family and parents, is to remain with the mother and father. For the most part, these are intangible benefits, but they are nonetheless real. On the other hand, every financial cost or detriment—what the complaint terms "hard money damages"—including the cost of food, clothing and education, would be shifted to the physician who
\end{quote}

\textsuperscript{33} \textit{Id.}

\textsuperscript{34} \textit{Id.} Specifically, the court stated, "regardless of motivation, a couple has the right to determine whether they will have a child. That right is legally protectable and need not be justified or explained." \textit{Id.}

\textsuperscript{35} See, e.g., \textit{supra}, note 26 and accompanying text.

\textsuperscript{36} See, e.g., \textit{supra}, note 27 and accompanying text.


[A] parent cannot be said to have been damaged by the birth and rearing of a normal, healthy child. . . But it is a matter of universally-shared emotion and sentiment that the intangible but all-important, inestimable but invaluable "benefits" of parenthood far outweigh any of the mere monetary burdens involved. . . Speaking legally, this may be deemed conclusively presumed by the fact that a prospective parent does not abort or subsequently place the "unwanted" child for adoption. . . On a more practical level, the validity of the principle may be tested simply by asking any parent the purchase price for that particular youngster. Since this is the rule of experience, it should be, and we therefore hold that it is, the appropriate rule of law. It is a rare but happy instance in which a specific judicial decision can be based solely upon a reflection of one of the humane ideals which form the foundation of our entire legal system. This, we believe, is just such a case. \textit{Id.}, at 1085-86.

\textsuperscript{38} 64 Wis. 2d 514, 219 N.W.2d 242 (1974).
allegedly failed to timely diagnose the fact of pregnancy. We hold that such result would be wholly out of proportion to the culpability involved, and that the allowance of recovery would place too unreasonable a burden upon physicians, under the facts and circumstances here alleged.\textsuperscript{39}

The court in \textit{Rieck} also argued that the awarding of the cost of rearing would open the “way for fraudulent claims and would [cause courts to] enter a field that has no sensible or just stopping point.”\textsuperscript{40} Additionally, in \textit{Maggard v. McKelvey},\textsuperscript{41} the court held that requiring a doctor to pay for rearing a child in such a situation falls outside the “scope of his duty to the patient, as commonly thought of by both the lay public and the medical profession.”\textsuperscript{42}

Another public policy argument proposed is that by permitting someone else to pay for raising a child, that child is harmed. Essentially, awarding damages to the parents may cause “psychological harm to the child when, at a later date, it learns of its parents' action for its wrongful birth, [thereby creating an] emotional bastard,”\textsuperscript{43} and resulting in an “undermin[ing] of society's need for a strong and healthy family relationship.”\textsuperscript{44}

Further, a necessary corollary to this approach is rejection of application of the “benefit rule” under the Restatement (Second) of Torts.

When the defendant's tortious conduct has caused harm to the plaintiff or to his property, and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent this is equitable.\textsuperscript{45}

The courts have rejected this approach for several reasons. Primarily, it is felt that measurement of damages under the benefits rule would require speculation. In \textit{Coleman v. Garrison},\textsuperscript{46} the court stated:

A child is born—how can it be said within the ambit of legal predictability that the monetary cost of that life is worth more than its value?

\textsuperscript{39} Id. at 518-19, 219 N.W.2d at 244-45.
\textsuperscript{40} Id. at 519, 219 N.W.2d at 245.
\textsuperscript{41} 627 S.W.2d 44 (Ky. Ct. App. 1981).
\textsuperscript{42} Id. at 48.
\textsuperscript{43} Robertson, supra note 1, at 153.
\textsuperscript{44} Id. See also Wilbur v. Kerr, 628 S.W.2d 568 (Ark. 1982). “We have not become so sophisticated a society to dismiss that emotional trauma as nonsense.” Id. at 571.
\textsuperscript{45} RESTATEMENT (SECOND) OF TORTS, \S 920 (1979).
\textsuperscript{46} 349 A.2d 8 (Del. 1975).
We recognize that a few courts, approaching the problem in clinical terms, have applied a “balancing test” which, presumably, permits a jury to say that a life has been weighed and found wanting and thus the parents have been “damaged.” We respect the efforts of other Courts to provide a remedy under the circumstances but it seems to us that that kind of judgment, if appropriate at all in an American Court of law, might be applied at the end of a life, after it has been lived and when the facts can be identified. But, in our view, any attempt to apply it at birth can only be an exercise of prophecy, an undertaking not within the specialty of our fact-finders.47

A related problem concerning awarding the costs of rearing a child, is whether these should be assessed “according to the standard of living of the family into which the child is born . . . , or . . . assessed objectively by reference to the normal expenses that the average family incurs in raising a child.”48 Similarly, courts have noted that if damages are awarded for the care and maintenance of the child, the question arises concerning what should be done with the money.49 Alternatives would be the money being used as the parents see fit, the money being placed in a special trust fund, or the appointment of a guardian ad litem for the benefit of the child to insure application of the money toward rearing the child.50

The second middle ground approach allows all expenses and damages, including rearing costs, offset by benefits. A substantial minority of courts have adopted this approach.51 Commonly, these courts apply the Restatement (Second) of Torts benefits rule.52 Implicit in this approach is rejection of the belief that the benefits of having a healthy child exceed the costs as a matter of law. Thus, in Sherlock v. Stillwater Clinic,53 the court stated that “[a]lthough public sentiment may recognize that to the vast majority of parents the long-term and enduring benefits of parenthood outweigh the economic costs of rearing a healthy child, it would seem myopic to declare today that those benefits exceed the costs as a matter of law.”54

47. Id. at 12 (citations omitted).
48. Robertson, supra note 1, at 152.
49. See Boone v. Mullendore, 416 So. 2d 718, 723 (Ala. 1982).
50. Id.
51. See supra note 26 and accompanying text.
52. See supra note 45 and accompanying text.
53. 260 N.W.2d 169 (Minn. 1977).
54. Id. at 175.
Furthermore, supporters of this approach stress that the benefits rule permits flexibility in dealing with a limitless variety of claims. Application of the benefits rule permits a trier of fact to find that the birth of a child has materially benefitted the newly wed couple, notwithstanding the inconvenience of an interrupted honeymoon, and to reduce the net damage award accordingly. Presumably, a trier of fact would find that the “family interests” of the unmarried coed has been enhanced very little.

The essential point, of course, is that the trier must have the power to evaluate the benefit according to all the circumstances of the case presented. Family size, family income, age of the parents, and marital status are some, but not all, the factors which the trier must consider in determining the extent to which the birth of a particular child represents a benefit to his parents. That the benefits so conferred and calculated will vary widely from case to case is inevitable.

Additionally, these courts are not deterred by the contention that application of the benefits rule is inappropriate as being speculative and as requiring a balancing of different interests. In *Ochs v. Borrelli*, the Supreme Court of Connecticut argued that there was no basis to distinguish a wrongful pregnancy case, and the application of the benefits rule, from other tort cases where damages are fixed for wrongful death or for loss of consortium. Nor is the seeming limitation to like interests that is contained in the rule deemed insurmountable. In *Troppi v. Scarf*, the court stated, “Since pregnancy and its attendant anxiety, incapacity, pain and suffering are inextricably related to child bearing, we do not think it would be sound to attempt to separate those segments of damage from the economic costs of an unplanned child in applying the ‘same interest’ rule.”

Furthermore, it has been argued

56. See *supra* notes 46, 47 and accompanying text.
57. 187 Conn. 253, 445 A.2d 883 (1982). “The argument that the ‘complex human benefits of motherhood and fatherhood’ are immeasurable is wholly unpersuasive, especially in light of the fact that in several jurisdictions such damages are recoverable for the wrongful death of a child.” *Note, supra* note 9, at 175.
58. Damages resulting from an invasion of one interest are not diminished by showing that another interest has been benefitted. Thus, one who has harmed another’s reputation by defamatory statements cannot show in mitigation of damages that the other has been financially benefitted from the publication . . . . unless damages are claimed for harm to pecuniary interests. *Restatement (Second) of Torts*, § 920, comment b, (1979).
60. *Id.* at 255, 187 N.W.2d at 518.
that since the benefit rule derives from the principle of unjust enrichment, it would be inconsistent to strictly apply the “same interest” limitation.\textsuperscript{61}

Similarly, followers of this approach are able to counter public policy arguments espoused by proponents of the other approaches. First, these courts reject the arguments that damages and expenses of rearing a child were not proximately caused. In \textit{Pierce v. DeGracia},\textsuperscript{62} the court argued that “[t]he costs of rearing an unplanned child to majority are damages which proximately flow from either the tort of medical negligence or the breach of contract by a physician who fails to properly perform a vasectomy.”\textsuperscript{63} Further, the argument of “the emotional bastard” theory has been refuted by the argument that a child would feel no less an “emotional bastard” because its parents were allowed to recover all damages instead of some damages.\textsuperscript{64} Also, it is argued that permitting the full recovery relieves the economic pressure of raising an unexpected child and permits the parents to concentrate on giving the child love.\textsuperscript{65} Finally, it has been contended that the purpose of a claim for the cost of rearing in a wrongful pregnancy action is not to recover for the cost of “the new life as such, but rather for the diminution in the family wealth that necessarily resulted in a hardship to the other family members.”\textsuperscript{66} Further, proponents of this approach reject the argument that acceptance of rearing expenses presents a risk of fraudulent claims or places an unreasonable burden upon the medical profession. It has been contended that such an argument indicates lack of faith in the jury system and that there is no reason to favor doctors over others.\textsuperscript{67} Finally, proponents of this approach have noted various public policies supporting their view. In \textit{Beardsley v. Wierdsma},\textsuperscript{68} concurring Justice Rose argued that to deprive plaintiffs an opportunity to prove all their damages contravened the basic “policy of this state and its court system to provide relief to those injured by tortfeasors and to authorize compensation for damages proxim-
mately caused by acts of negligence." In Ochs v. Borrelli, the court contended that public policy did not "support an exception to tort liability when the impact of such an exception would impair the exercise of a constitutionally protected right . . . to employ contraceptive techniques to limit the size of their family." In addition, it has been contended that the allowance of these damages would serve as a deterrent.

Against this array of public policy arguments and counter arguments, in Public Health Trust v. Brown, dissenting Judge Pearson declared:

I am confident that the majority recognizes that any decision based upon a notion of public policy is one about which reasonable persons may disagree. . . .

I have previously admitted that I have no special capacity to intuit, and am possessed of no extensive empirical evidence from which I can infer, the manifest will of the people. The majority, I submit, have failed to observe the caveat that public policy "is a very unruly horse, and when once you get astride it, you never know where it will carry you. It may lead you from the sound law." Having, in my view, been led from the sound law, the majority [in rejecting the benefit rule] couches its result as humane. I dissent from that as well. I firmly believe that the result reached by the majority in the name of humaneness is, unwittingly, inhumane. I see nothing humane in denying a parent the wherewithal which might save a child from deprivation or, in many cases, abject poverty. I see nothing humane in a rule of law that could enhance the already dire need of the parents and existing siblings. I see nothing humane in a decision which effectively immunizes physicians from their negligence and victimizes a mother who sought to relieve herself and her family from the additional burden of another child.

One argument which might be made, but has not been strongly pressed, is mitigation of damages. For example, a parent who can successfully argue that the expenses of raising a child outweighs the benefits of raising that child should have to mitigate damages by either placing the child for adoption or aborting. Such an argument, however, would be without merit. Only reasonable means are required in the minimization of damages. G. McCORMICK, DAMAGES, § 33 (1935). Accordingly, in Troppi, the court stated that "[t]he defendant does not have the right to insist that the victim
Conclusion

The two extreme approaches, permitting all or no damages, are untenable and have properly received very little support. To permit recovery of all expenses for raising a healthy child simply cannot be defended in a society that places so much value on children. Thus, when confronted with the issue of damages in a wrongful pregnancy action, courts generally have felt constrained to choose between not allowing rearing expenses, or allowing those expenses offset by emotional benefits. Although neither approach is entirely adequate, given this choice, a denial of all rearing expenses is preferable. As a basic tenet, this approach holds that as a matter of law, the benefits of rearing a child outweigh the expense. Certainly this is not contrary to sentiment. Its rigidity could, however, lead to inequitable results in certain situations. Particularly, this would be so where parents simply could not financially afford another child.

Unfortunately, the alternative considered by the courts, the benefits rule, simply cannot be applied in a wrongful pregnancy action. First, despite appealing arguments to the contrary, a determination of the emotional benefits of raising a child is speculative. Assuming, arguendo, that calculation in wrongful death and loss of consortium actions are not similarly speculative, there is, nevertheless, a critical distinction that proponents of this argument disregard. In a wrongful death or loss of consortium action involving older children, the alleged damages are, in theory, subject to being proved. The relationship (or services) upon the loss of which damages will be based, has already occurred. The nature of this relationship or services is therefore available for consideration in the estimation of damages. In a wrongful pregnancy action, however, the trier of fact is without benefit of even this minimal guidance and must determine the emotional benefits to parents for a life and relationship not yet experienced. This is pure prophecy.

In wrongful death and loss of consortium actions involving infant deaths, the situation arguably is similar to a wrongful pregnancy action. It is not feasible, however, to argue that calculation of such damages is not speculation. Rather, society recognizes that specu-
lation is warranted in view of the undeniable devasting loss. Conversely, there is not a similar justification to engage in such speculation in a wrongful pregnancy action where the issue itself is the existence of damage.75

Second, the Restatement benefits rule was not intended to apply to a balancing of different interests. Arguments for liberal application notwithstanding, the very language of the rule and comments preclude such application.

Finally, a rule that invites parents to appear in court and publicly discount the emotional benefits of their child presents serious policy concerns. The potential detriment to that child cannot be discounted. Nor is it adequate to argue this is simply another item of damages to reimburse the family exchequer. This item alone involves an express weighing of emotional benefits.

What is recognized by the courts discussed above, to their credit, is that some flexibility is needed. What is clearly demonstrated by the decisions in the area of wrongful pregnancy, however, is that traditional damages rules do not equip the courts to adequately deal with this issue.76 If the needed flexibility is to be provided, then, it must be by legislation.

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75. Commentators have argued that this contention of speculative damages “ignores the distinction between uncertainty as to the fact of damage, which precludes recovery, and uncertainty as to the amount of damage, which does not.” Note, Wrongful Conception: Who Pays For Bringing Up Baby?, 47 FORDHAM L. REV. 418, 430 (1978). It can be argued that the issue confronted by the courts in a wrongful pregnancy action for the costs of rearing a healthy child is, in fact, whether there has been any damage, and not simply a determination of amount.

76. “The result of [judicial] treatment of wrongful birth has been the granting of speculative damages, offset by speculative benefits, without regard to basic principles of law. While ostensibly treating wrongful birth as a simple negligent tort, the courts actually pick and choose among various tort principles. Such an approach encourages fraud and provides unjust enrichment by permitting plaintiffs to forego their usual duty to mitigate damages—in this situation by either adoption or abortion. Hence, it is not only an unwarranted attempt that judicial legislation, but also an inadequate one.” Note, Wrongful Birth Damages: Mandate and Mishandling by Judicial Fiat, 13 VAL. U. L. REV. 127, 174 (1978).
TORTS—INTENTIONAL TORTS IN THE WORKPLACE—FURTHER EROSION OF THE WORKER'S COMPENSATION ACT EXCLUSIVE REMEDY BAR TO TORT ACTIONS—
Blankenship v. Cincinnati Milacron Chemicals, Inc., 69 Ohio St. 2d 608, 433 N.E.2d 572 (1982).*

A. Introduction

Workers' compensation statutes evolved in the early 1900's as a legislative response to the state of affairs where workers injured in the course of employment had no effective remedy at common law. In those times, the employee injured on the job seldom successfully sued for damages. Not only were the workers more dependent upon their employers and therefore less inclined to sue, but in addition the "unholy trinity" of defenses, namely contributory negligence, assumption of the risk, and the fellow servant rule effectively precluded a successful suit.¹

In response to the lack of an effective remedy at law organized labor pushed for legislative reform, and, not surprisingly, employers vigorously opposed the enactment of legislation which would improve the workers' prospects of successfully suing the employer for damages for injuries arising out of the employment. The conflict was eventually resolved in a compromise which took the form of the typical worker's compensation statutes. These statutes represent a trade-off wherein the employee obtained the assurance of a speedy and certain compensation and the employer obtained immunity to tort liability for any injuries arising out of the course of employment. This immunity is often referred to as the exclusive remedy provision, i.e., the employee's exclusive remedy is compensation from the insurance fund set up under the worker's compensation statute.

Traditionally, the exclusive remedy provisions were almost always construed as barring any action in tort against the employer, and this bar included actions for intentional torts. Today, the majority still follows the traditional view but there is a growing minor-

* Copyright 1982, Robert G. Gough, Ph.D.
ity which holds that an employee injured by an intentional tort by his employer has a common law action for damages. On the third of March, 1982, the question was squarely faced by the Ohio Supreme Court in Blankenship v. Cincinnati Milacron Chemicals Inc.

In Blankenship, the court first concluded that an intentional tort by the employer is not contemplated by the employee as part of the employment relationship, and therefore an intentional tort does not arise out of employment within the meaning of the Ohio Workers' Compensation Act. Having so concluded, the court then went on to hold that the Workers' Compensation Act does not immunize employers from civil liability for their intentional torts, and that an employee may resort to a civil suit for damages.

B. The Facts and Proceedings Below

On February 22, 1979, eight current or former employees of Cincinnati Milacron Chemicals Inc. filed suit seeking compensatory and punitive damages against their employer and several fellow employees. The plaintiffs alleged that they were exposed to toxic chemicals within the scope of their employment and suffered various injuries as a result. The plaintiffs further alleged that their employer had knowledge and notice that dangerous health conditions and serious health hazards existed where the plaintiffs worked, and that the employer failed to correct such dangerous conditions and failed to report such conditions to state and federal agencies as required by law. In addition, the complaint alleged that, the employer failed to warn the plaintiffs about the hazardous conditions, and failed to provide medical examinations which the plaintiffs claim were required by law because of the employer's alleged knowledge that occupational diseases were being contracted by the plaintiffs.

The plaintiffs asserted that these omissions were intentional, malicious, and in willful and wanton disregard of the employer's duty to protect the health of its employees, and that the plaintiffs were injured as a direct and proximate result.

Since it was undisputed that the employer was fully self-insured in compliance with the Workers' Compensation Act, the key issue

3. 69 Ohio St. 2d 608, 433 N.E.2d 572 (1982).
5. 69 Ohio St. 2d at 613, 433 N.E.2d at 576.
was whether the type of injury fell within the ambit of the statute. The employer contended that the alleged injuries were within the ambit of the statute and moved to dismiss on the grounds that the statute's exclusive remedy provision barred the plaintiffs' cause of action and therefore plaintiffs had failed to state a claim upon which relief could be granted. The trial court granted the employer's motion and dismissed the action with prejudice and entered a final judgment in favor of the employer on all claims. The holding was appealed and affirmed by the Court of Appeals on January 14, 1980.

C. The General Rule

An employee's right to sue his employer for intentional torts may arise expressly from the worker's compensation statute, by the decisional law of the jurisdiction, or under the dual capacity doctrine. These sources are treated separately below.

1. The Decisional Law

Although commentators have advanced several theories under which an employee injured by an intentional tort by his employer would have a cause of action at common law, only a minority of jurisdictions permit such actions, and the majority hold that the employee's exclusive remedy is worker's compensation. Moreover,

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7. OHIO R. CIV. P. 12(b)(1), (6).
10. Three theories have been proposed under which a common law action could be maintained for an intentional tort notwithstanding a worker's compensation act exclusive remedy bar to tort actions. The first theory is that the employer who injures his employee by an intentional tort will not be heard to say that his intentional act caused an accidental injury. Since worker's compensation acts are generally construed to apply only to accidental injuries a common law action may then be brought for the intentional tort. The second theory has been called the estoppel theory. Under this theory the injured employee may claim that the intentional tort is proof that the employer had terminated the employment relationship, and the employer is estopped from denying that the employment relationship was in fact terminated. The third theory is that an intentional tort cannot arise out of the employment relationship because the parties to the employment relationship do not contemplate intentional torts by the employer as part of the relationship. Professor Larson characterizes this third theory as the most fictitious of all. See 2A A. Larson, supra note 2, § 68 at 13-1.
the decisional law of most of the jurisdictions which permit a
common law cause of action for intentional torts by the employer
is based on cases involving either a direct and purposeful assault
or battery by the employer, or a type of injury which arguably
was not intended to be covered by the applicable worker's com-
penation statute, e.g., false imprisonment, or intentional inflict-
on of mental distress.

Thus, where a common law action is permitted for an intentional
tort by the employer, the cause of action is usually limited to pur-
poseful acts, and the traditional bifurcated definition of intent as
either purpose (desire) to cause the consequence of the act or the
belief or knowledge that the consequence is substantially certain
to result is not applied. In other words, a necessary element for
a common law action is an "actual intent" to injure the employee.
If there is an accidental quality about the "precise event produc-
ing [the] injury" then the accidental quality is inconsistent with
the presence of sufficient intent to give rise to a common law cause
of action, and the employee's exclusive remedy will be worker's
compensation. Therefore, employer conduct which may be
characterized as gross, wanton, willful, deliberate, reckless, culpable,
malicious or even intentional will not support a common law action
if the requisite purpose or "actual intent" is absent.

This narrow view of intent is illustrated in the following cases.

28 (Ark. 1950); Skelton v. W. T. Grant Co., 331 F.2d 593 (5th Cir. 1964) (interpreting Georgia law);
Hing, 180 Minn. 470, 231 N.W. 233 (1930); Rumbolo v. Erb, 19 N.J.Misc. 311, 20 A.2d 54
(1941); Garcia v. Gusmack Restaurant Corp., 150 N.Y.S.2d 232 (1954); Le Pochat v. Pendleton,
134, 191 A.2d 694 (1963); Stewart v. McLellan's Stores Co., 194 S.C. 50, 9 S.E.2d 35 (1940);
Richardson v. The Fair Inc., 124 S.W.2d 885 (Tex. Civ. App. 1939); Mandolidis v. Elkins
Industries, Inc., 246 S.E.2d 907 (W. Va. 1978); California might be included in this list. Magliulo
v. Superior Court, 47 Cal. App. 3d 760, 121 Cal. Rptr. 621 (1975); but see Johns-Manville
Products Corp. v. Superior Court, 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980)
(not allowing tort action for original injury but allowing tort action for aggravation of the
injury).

12. In at least eight of the states in the minority the rule is based on facts where the
employer purposely committed assault or battery against the employee. These states in-
15. Restatement (Second) of Torts § 8A (1965).
16. 2A A. Larson, supra note 2, § 68.13.
17. 2A A. Larson, supra note 2, § 68.13 at 13-9.
18. See 2A A. Larson, supra note 2, § 68.13 at 13-5.
In *Artonio v. Hirsch*\(^{19}\) the court held that a complaint which alleged the plaintiff-employee was injured as a result of the employer's willful, reckless and unlawful act in tampering with a safety device on a power press failed to state a cause of action because of the employer's immunity under the exclusive remedy provision. The court distinguished contrary cases on the ground that they involved not accidental injuries but deliberate harm to the employee. Presumably, in *Artonio* the court believed the employer did not act with the purpose to harm the employee when the safety devices were tampered with, and thus lacked the requisite "actual intent".

In *Keeley v. Industrial Acc. Comm'n*,\(^{20}\) a foreman's failure to provide adequate precautions when he knowingly placed an employee in a dangerous position was held to be not an intentional tort by the employer, although it was held to be serious and willful misconduct within the meaning of the California statute. In *Santiago v. Brill Montford Co.*,\(^{21}\) the employer's act of removing a safety guard from a machine was not an intentional tort and worker's compensation was the exclusive remedy of the employee injured as a result. And in *Southern Wire and Iron, Inc. v. Fowler*,\(^{22}\) it was held that the employer did not commit an intentional tort within the meaning of the worker's compensation statute when he ordered the employee to work with his bare hands in an acid vat even though the employee was not familiar with the hazard and the employer knew the acid was damaging to human tissue.

Perhaps the clearest illustration of the narrow view of intent as applied to worker's compensation cases is found in the law of California. On one hand, where the court clearly finds the employer acted with the purpose to injure the employee a tort cause of action will lie. Thus, where an employer personally and purposely struck and pushed the injured employee, the court held that the employer

\[19. 3 A.D.2d 999, 163 N.Y.2d 489 (1957). \text{Although the majority in } \text{Blankenship cite } \text{Artonio in support of their holding it appears to detract from as much as support their position.} 69 \text{ Ohio St. 2d 608, 614 n.9, 433 N.E.2d 572, 576, n.9 (1982). In } \text{Artonio the court did not allow a common law cause of action against the employer, but did allow a third party cause of action against the other employees under a theory that they had acted beyond the scope of their employment when the safety devices were tampered with.} \]

\[20. 55 \text{ Cal. 2d 261, 359 P.2d 34, 10 Cal. Rptr. 636 (1961).} \]


lost his immunity to civil suit. On the other hand, in *Johns-Manville Products Corp. v. Superior Court* the court held:

[If the complaint alleged only that plaintiff contracted the disease because defendant knew and concealed from him that his health was endangered by asbestos in the work environment, failed to supply adequate protective devices to avoid disease, and violated governmental regulations relating to dust levels at the plant, plaintiff's only remedy would be to prosecute his claim under the workers' compensation law.]

However, the court concluded that although a common law action would not lie against the employer where the above conduct resulted only in the initial injury, the same conduct after the employer had knowledge of the employee's injury would give rise to a common law action for aggravation of the injury. This latter holding was based on the theory that the employer's conduct in intentionally withholding information about the employee's injury and thereby causing an aggravation is not contemplated by the employee as part of the employment relationship and is therefore not a work-related injury.

In summarizing the decisional law of the minority, an employee will have a common law action for any injury caused by an intentional tort of the employer only if: (1) there is no accidental quality about the injury, (2) the employer acted with "actual intent", i.e., purposely acted to directly harm the employee, or (3) the injury or tortious conduct is of such a type as is not commonly associated with employment.

*Blankenship* involved allegations that the employer had knowledge and notice of dangerous health conditions and serious health hazards, that the employer failed to correct such conditions, failed to report the conditions to state and federal officials, failed to warn the plaintiffs, and failed to provide plaintiffs with medical examinations. In the light of both the majority view and the prevalent minority view based on the above decisional law, the allegations in *Blankenship* would not support a common law cause of action against the employer. Even when viewed in the light most favorable to the plaintiffs, the allegations do not support the con-

24. 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980).
25. *Id.* at 474-75, 612 P.2d at 954, 165 Cal. Rptr. at 864.
26. *Id.* at 477-78, 612 P.2d at 955-56, 165 Cal. Rptr. at 865-66.
27. *Id.* at 477, 612 P.2d at 955, 165 Cal. Rptr. at 865.
clusion that the employer acted with actual intent or purpose to directly harm the employee.

2. The Dual Capacity Doctrine

The worker's compensation exclusive remedy bar to tort actions by the employee against the employer is being simultaneously eroded away by two forces. One force is the growing minority which allows common law actions for intentional torts by the employer, the subject of this note. The other force is the growing minority which follows the dual capacity doctrine. Although a discussion of the dual capacity doctrine is beyond the scope of this note, a brief comment is in order because both forces are acting to produce the same result, i.e., the erosion of the exclusive remedy bar.

Under the dual capacity doctrine an employer may be liable in tort for an injury proximately caused by the employer's breach of a duty arising from a legal persona separate and distinct from his status as an employer. A typical case is where the employee is injured in the course of his employment and the injury is caused by a defective product manufactured and introduced into general commerce by the employer. In such a case the employee has a tort cause of action grounded in products liability against the employer because the employer's duty to users of his product introduced into general commerce is separate and distinct from the employer's duty to his employee as an employer. Another common example is where the employer is not under a duty to provide medical aid to his employees but voluntarily undertakes to do so, and the medical aid is negligently administered and the employee is injured. The employee then has an action in tort against the employer because the act of administering the medical aid is not part of the employment relationship.


29. See 2A A. Larson, supra note 2, § 72.81 at 14-229. Although commonly referred to as the dual capacity doctrine, Larson now prefers the label of dual persona doctrine.


Thus, when the dual capacity doctrine applies, an employee may sue his employer in tort for an injury arising out of employment. Moreover, the action is not restricted to intentional torts but may also be grounded in negligence or even strict liability in a products liability based action.

3. The Statutory Law

In addition to the decisional law discussed above, Kentucky, New Jersey, Oregon, Washington and West Virginia provide by statute that the employee may elect either to take the worker's compensation remedy or to sue at common law for intentional torts by the employer. However, except for West Virginia, the courts in construing these statutes have given the same narrow construction to intentional tort as applied in the decisional law.

In view of the narrow construction given to intentional torts, it is not surprising that the great majority of jurisdictions treat employee injuries arising from the employer's acts of gross negligence or willful, wanton or reckless conduct as being subject to the exclusive remedy bar. A few states provide otherwise by statute: an option to sue at common law is given by statute for willful misconduct in Arizona, for willful acts or gross negligence causing death in Texas, and for willful, wanton and reckless misconduct in West Virginia.

Ten states by statute provide for specified percentage increases in the compensation award as a penalty for certain types of employer misconduct. Most notably, California and Massachusetts provide a penalty of 50% and 100% respectively when the employee injury arises from serious or willful misconduct by either employer.

33. The West Virginia statute, supra note 32, permits a common law tort action for damages or wrongful death where the employer commits an intentional tort or engages in willful, wanton and reckless misconduct.
34. See 2A A. LARSON, supra note 2, § 69.20 at 13-43.
38. The ten states are: Cal., Ky., Mass., Mo., N.M., N.C., Ohio, S.C., Utah and Wis. See 2A A. LARSON, supra note 2, § 69.10.
or supervisory personnel. Ohio provides for a 15 to 50% penalty for employee injuries caused by failure to provide safety devices or failure to comply with safety regulations. Similarly, Kentucky provides for a 15% penalty for the same misconduct.

As a practical matter, the effect of these penalty provisions is to broaden the scope of employer misconduct explicitly covered by the statute and to correspondingly narrow the scope of conduct which may arguably give rise to a common law action. For example, in *Johns-Manville Products Corp. v. Superior Court* conduct egregious enough to warrant punitive damages in an action for aggravation of an injury would not suffice to create a common law action for the initial injury because the conduct causing the initial injury would fall under the serious or willful misconduct provision of the California statute allowing for a 50% increase in the worker's compensation award.

4. Summary of the General Rule

Although at first impression it appears that either by decisional law or by statute a substantial minority of states would allow an employee to bring a common law action for an intentional tort by his employer, only a small minority do in fact allow the common law action for the full range of the traditional intentional torts. Most of the states in the minority group limit the availability of the common law remedy to assault, battery or other circumstances where there is no accidental quality about the injury and where the employer directly acted with actual intent, i.e., with the purpose of causing the injury, or where the injury or tortious conduct is of such a nature that it is not contemplated as arising from the employment relationship. In addition, a small minority of jurisdictions allow a common law action where the dual capacity doctrine is applicable.

D. The Prior Ohio Rule

Prior to *Blankenship* the Supreme Court of Ohio had steadily followed the majority rule and held that the exclusive remedy for

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40. OHIO CONST. art. II, § 35.
41. KY. REV. STAT. ANN. § 342.165 (Baldwin 1981).
42. 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980).
injuries arising out of employment was worker’s compensation, even in the case of intentional torts by the employer. The court had adhered to this rule even when the results appeared unjust. Thus, in Greenwalt v. Goodyear Tire and Rubber Co., the court held that an employee did not have a common law cause of action even if the employer fraudulently represented to the employee that his compensation claim had been filed and made weekly payments to the employee until the statute of limitations for filing the claim had run, and then ceased to make any further payments to the employee.

In deciding Greenwalt the court relied on Bevis v. Armco Steel Corp., which was an action for deceit in which the court held that the employer was immune to suit even if it was alleged that the employer did “knowingly, wilfully, intentionally, and fraudulently represent to plaintiff’s husband . . . that there existed ‘no evidence of silicosis’ in his lungs, . . . .” It is worth noting that the Greenwalt and Bevis decisions are 27 and 31 years old respectively. More recently, in Delamotte v. Midland Ross Corp., the Court of Appeals for Lucas County rejected Greenwalt and Bevis and held that “[a]n employee’s remedy under the Worker’s Compensation Act is not exclusive and the employee may still resort to a civil action for tortious damage where his injury arose out of an intentional or malicious tort of the employer . . . .”

It was with this background that the court turned to decide Blankenship.

E. Blankenship

In Blankenship the court abandoned the rule Ohio had followed since 1924, and held that an intentional tort by an employer is conduct which does not arise out of the employment relationship, and that the Ohio Workers’ Compensation Act does not bar an employee from bringing a civil suit for damages for an intentional tort by the employer.

43. 164 Ohio St. 1, 128 N.W.2d 116 (1955).
44. 156 Ohio St. 295, 102 N.E.2d 444 (1951).
45. Id. at 296, 102 N.E.2d at 444 (emphasis added).
46. 64 Ohio App. 2d 159, 411 N.E.2d 814 (1978).
47. Id. at 164, 411 N.E.2d at 818.
48. OHIo REV. CODE ANN. §§ 4123.01-99 (Page 1980).
49. The majority opinion was written by Justice W. B. Brown, in which Celebrezze, C.J., Sweeny and C. F. Brown, J.J., concurred. A concurring opinion was written by Chief Justice
The majority reasoned that an employee would not contemplate the risk of an intentional tort by the employer as being part of the employment relationship, therefore an injury caused by an intentional tort by the employer does not arise out of the employment and the exclusive remedy provision of the Workers' Compensation Act does not apply. In support of this proposition the majority looked to the Ohio Constitution which provides in part that:

> For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers . . . Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation . . . shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease.\(^{50}\)

This constitutional provision is implemented with Section 4123.74 of the Ohio Revised Code which provides:

> Employers [who pay the premium or compensation] . . . shall not be liable to respond in damages at common law or by statute for any injury, or occupational disease, or bodily condition, received or contracted by any employee in the course of or arising out of his employment . . . \(^{51}\)

Since the court reasoned that an intentional tort by the employer would not be contemplated by a reasonable employee as part of the employment relationship, then the resultant injury would not be "occasioned in the course of such workmen's employment" and would not be "arising out of his employment." Therefore the exclusive remedy provision would not apply.

In reaching the conclusion that the above cited language of the constitution and Workers' Compensation Act was not intended to bar employee actions at common law for intentional torts, the court relied on the statutory provision that the Workers' Compensation

\(^{50}\) OHIO CONST. art. II, § 35 (emphasis added).

\(^{51}\) OHIO REV. CODE ANN. § 4123.74 (Page 1980) (emphasis added).
Act shall be liberally construed in favor of employees, and also noted that neither the constitution nor the statute expressly extends the grant of employer immunity to common law actions for intentional torts.

There is, however, some merit to the contention that the Ohio Constitution and the Workers' Compensation Act do indeed bar common law actions for intentional torts. The argument is grounded in the history of Section 35, Article II of the Ohio Constitution. Prior to 1924, Section 35 provided in part that "no right of action shall be taken away from any employee when the injury, disease or death arises from failure of the employer to comply with any lawful requirement for the protection of the lives, health and safety of employees." Therefore, prior to 1924, an employee at least had a common law right of action for intentional torts by the employer involving the employer's failure to comply with any lawful requirement for the protection of employees. But, in 1924 Section 35 was amended to delete the above language and substitute the following language which has remained in effect to this date:

Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation . . . shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease.

The significance of this amendment to the constitution was interpreted by the court in *State ex rel. Engle v. Industrial Commission of Ohio.* There the court stated:

After the effective date of the amendment, regardless of how the injury occurred, the rights of the workman . . . were determined by the Industrial Commission under the compensation act. Thereafter the courts were without jurisdiction to entertain an action for damages for death, personal injury or occupational disease brought by or on behalf of a workman against his complying employer . . .

Thus, in the light of the history of Section 35, Article II of the Ohio Constitution, there is substantial merit to the argument that in the language "[s]uch compensation shall be in lieu of all other

54. Id. at 300, 102 N.E.2d at 446.
55. 142 Ohio St. 425, 52 N.E.2d 743 (1944).
56. Id. at 430-31, 52 N.E.2d at 746 (emphasis added).
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rights to compensation . . .”57 the words “all other rights” include the right to a common law action for intentional torts and therefore the common law cause of action is precluded.58

Further support for the above contention can be found in the history of the statutes implementing Section 35, Article II of the Ohio Constitution. In 1931 the General Assembly repealed sections 1465-76 of the General Code which had provided in part that:

Where a personal injury is suffered by an employee . . . and in case such injury has arisen from the willful act . . . [by the] employer . . . then in such event, nothing in this act contained shall affect the civil liability of such employer, but such injured employee . . . may, at his option, either claim compensation under this act or institute proceedings in the courts for his damages on account of such injury . . . .

. . . .

The term ‘wilful act’ . . . shall be construed to mean an act done knowingly and purposely with the direct object of injuring another.59

The repealed sections were replaced by the present Ohio Revised Code, Section 4123.74, which provides in part that:

Employers [who pay the premium or compensation] . . . shall not be liable to respond in damages at common law or by statute for any injury, or occupational disease, or bodily condition, received or contracted by an employee in the course of or arising out of his employment . . . .

In making these changes it appears that the General Assembly intended to make it clear that there could be no action at common law for an intentional tort by the employer.

In light of the foregoing history of Section 35 and the Workers’ Compensation Act, the court held in Bevis v. Armco Steel Corp. that:

[If]sofar as provisions relating to workmen’s compensation bar suits against an employer, the fact, that an action is based upon ‘the defendant’s intentional, wrongful and malicious act,’ does not result in a plaintiff having any greater rights to recovery than if such action had been based merely upon negligence of the defendant.61

57. OHIO CONST. art. II, § 35.
60. OHIO REV. CODE ANN. § 4123.74 (Page 1980) (emphasis added).
Four years later, the reasoning of the court in *Bevis* was reaffirmed by the court in *Greenwalt v. Goodyear Tire and Rubber Co.* In *Greenwalt*, despite allegations of particularly egregious conduct on the part of the defendant, the court said "the careful analysis of the constitutional and statutory provisions made [in *Bevis*]... is persuasive." In *Blankenship*, however, the court no longer found *Bevis* to be persuasive, and dismissed *Greenwalt* as being distinguishable on the grounds that the intentional conduct in *Greenwalt* involved an omission, whereas the alleged intentional conduct in *Blankenship* involved commission.

Instead of following *Greenwalt* and *Bevis* the court turned to *Delamotte v. Midland Ross Corp.* In *Delamotte* the Court of Appeals held that an injured employee could bring a common law action for the intentional tort of the employer who had fraudulently withheld medical reports showing the employee had contracted an occupational disease. *Delamotte* relied heavily on the proposition that a 1959 amendment of Section 4123.74 of the Ohio Revised Code was for the purpose of invalidating *Bevis* and *Greenwalt*. The 1959 amendment added the qualifying phrase emphasized in the following portion of Section 4123.74:

Employers who comply... shall not be liable to respond in damages at common law or by statute for any injury, or occupational disease or bodily condition, received or contracted by any employee in the

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63. *Id.* at 8, 128 N.E.2d at 121.
64. The court's distinction that *Greenwalt* involved an act of omission whereas *Blankenship* involved an act of commission is not persuasive. 69 Ohio St. 2d 608, 612 n.7, 433 N.E.2d 572, 576 n.7 (1982). In *Greenwalt* the plaintiff alleged that the defendant employer represented that he would file plaintiff's application for compensation with the Industrial Commission of Ohio, and that the employer failed to file the application, and that the employer made payments to the employee so as to lead the employee into believing the application had been filed and approved, and that after the statute of limitations had run for plaintiff's application, the employer ceased to make any further payments. The plaintiff further claimed that the employer "wilfully and fraudulently withheld the filing of said... application for the purpose of defeating plaintiff's claim..." *Greenwalt v. Goodyear Tire and Rubber Co.*, 164 Ohio St. 1, 2-3, 128 N.E.2d 116, 117-18 (1955). In *Blankenship* the plaintiffs alleged that the defendant had knowledge that dangerous health conditions existed and failed to correct said conditions, failed to warn plaintiff-employees of the dangers and conditions that existed, failed to report said conditions to state and federal agencies, and failed to provide medical examinations. Plaintiffs' First Amended Complaint, paras. 20, 21, 22, 27; 69 Ohio St. 2d at 609, 433 N.E.2d at 574.
65. 64 Ohio App. 2d 159, 411 N.E.2d 814 (1978).
are therefore subject to the exclusive remedy bar. In particular, the majority concluded that the General Assembly intended the judiciary to have the discretion to decide whether injuries caused by intentional torts of the employer arise out of employment. This interpretation is based on the observation that "neither the relevant constitutional language nor the pertinent statutory language expressly extend the grant of immunity to actions alleging intentional tortious conduct . . ." and that the Workers' Compensation Act "shall be liberally construed in favor of employees and the dependents of deceased employees."

Although the court's interpretation of the 1959 amendment is plausible, it lacks persuasive force because, in light of the legislative history set forth in Part E above, it seems probable that the General Assembly would have employed more specific language if its purpose had been to allow a common law cause of action for intentional torts by the employer.

Even more problematical for the majority opinion is the 1924 amendment to Section 35, Article II of the Ohio Constitution, which, of course, is controlling over the statute. As discussed in Part E of this note, there is substantial merit to the argument that the 1924 amendment to the constitution repealed the previously existing right to bring a common law action for intentional torts. If so, then the majority's interpretation of Section 4123.74 would be contrary to the constitution and therefore invalid. Unfortunately, despite the controlling nature of this issue the court did not address it in the Blankenship decision.

In support of its decision the court relies on two policies. First, worker's compensation is basically an insurance scheme, and to insure against intentional torts is against public policy. Second, the inclusion of intentional torts within the scheme of worker's compensation would not advance the purpose of the statute to promote a safe working environment because "an employer could commit intentional acts with impunity with the knowledge that, at the very most, his workers' compensation premiums may rise slightly."

70. 69 Ohio St. 2d at 612-13, 433 N.E.2d at 576.
71. Id. at 612, 433 N.E.2d at 575-76.
72. Id. at 612, 433 N.E.2d at 576 (quoting OHIO REV. CODE ANN. § 4123.95).
73. Cf. e.g., the language employed by the General Assembly in Sections 1465-76 of the GENERAL CODE prior to 1931, discussed supra in Part E.
74. 69 Ohio St. 2d at 615, 433 N.E.2d at 577.
75. Id. at 615, 433 N.E.2d at 577.
course of arising out of his employment . . . whether or not such injury, occupational disease or bodily condition . . . is compensable . . . .

In Delamotte the Court of Appeals reasoned that the addition of the qualifying phrase in 1959 shows that the General Assembly intended to overrule Greenwalt and Bevis and to limit the categories of injuries for which the employer is exempt from civil liability.67

Although the majority in Blankenship apparently did not fully subscribe to the reasoning of the Delamotte court, and felt constrained to distinguish Greenwalt, the majority concluded that “by its use of this phrase, the General Assembly has seemingly allowed the judiciary the freedom to determine what risks are incidental to employment . . . .”68 In the exercise of this freedom the court determined that where an employee asserts in his complaint a claim for damages based on an intentional tort by the employer, the substance of the claim is not an injury “arising out of his employment” within the meaning of the Workers’ Compensation Act, and therefore the employee’s common law action is not barred by the exclusive remedy provision.

F. Discussion

If the Blankenship decision is to avoid the stamp of judicial legislation, then its justification must rest on the court’s interpretation of the 1959 amendment which added to Section 4123.74 of the Ohio Revised Code the qualifying phrase “received or contracted by any employee in the course of or arising out of his employment . . . .”69 The majority concluded that the intent of the General Assembly in adding this limiting phrase was to allow the judiciary the discretion to decide what type of injuries arise out of employment and

67. Delamotte v. Unicast Division of Midland Ross, 64 Ohio App. 2d 159, 163, 411 N.E.2d 814, 817 (1978). But see Brief for Defendants-Appellees at pp. 13-15, 69 Ohio St. 2d 608, 433 N.E.2d 572 (1982). There the defendants show that from 1939 to 1953 a similar qualifying phrase existed in GENERAL CODE § 1465.70, the predecessor to O.R.C. § 4123.74. Defendants suggest that when the Revised Code was adopted in 1953 the qualifying phrase was inadvertently omitted because it was contained in a paragraph whose primary purpose was to bar retroactive application, a purpose no longer needed in 1953. Then, after the General Assembly discovered the error, the phrase was restored by the 1959 amendments. Defendants thus argue the purpose of 1959 amendment, coming four years after Greenwalt, was not to overrule Bevis and Greenwalt but merely to restore the phrase inadvertently omitted in 1953.
68. 69 Ohio St. 2d at 612-13, 433 N.E.2d at 576.
69. OHIO REV. CODE ANN. § 4123.74 (Page 1980).
But the weight of the policy against the insurance of intentional torts must be evaluated in the light of the policy underlying the worker's compensation acts, i.e., to improve the safety of the workplace and to assure workers of fast and certain compensation for injuries arising out of employment. Thus, worker's compensation acts were designed to replace time consuming and risky litigation with a rapid and certain insurance scheme for compensation. But, litigation on an intentional tort claim is just as time consuming and uncertain as litigation on a negligence claim, therefore inclusion of intentional torts would also advance the purpose of the statute. Since inclusion of intentional torts would further advance the goals of the statute the preferred construction would be to include intentional torts absent clear legislative intent to the contrary. As the previous discussion on legislative history shows, the legislative intent is not clear but on balance favors the interpretation that intentional torts are within the scope of the Workers' Compensation Act. Therefore, the policy against insurance of intentional torts must be balanced against the furtherance of the policy of improving the safety of the workplace and providing a fast and certain remedy for employee injuries. When viewed in this light, the latter must surely prevail.

Second, the court suggests that the inclusion of intentional torts within the worker's compensation scheme would deter rather than advance the goal of improving the safety of the workplace because employers could commit intentional torts with impunity. But, as Justice Krupansky points out in her dissent, the same reasoning would apply to employer negligence. Therefore, an extension of the court's reasoning to negligent conduct might lead to the conclusion that worker's compensation should cover only no-fault injuries, a result which would practically eviscerate worker's compensation. To the extent that the goals of worker's compensation statutes are advanced by the inclusion of negligent conduct they are also advanced by the inclusion of intentional torts.

Perhaps the real underlying issue is the adequacy of the worker's compensation scheme in today's society. It can be argued that the worker's compensation acts conceived in the early 1900's are no longer relevant to today's society. Contributory negligence has been replaced with comparative negligence in many jurisdictions, and organized labor's efforts to expand the exceptions to the exclusive

76. Id. at 623, 433 N.E.2d at 582 (Krupansky, J., dissenting).
remedy bar bespeaks a lack of concern about the once fearsome “unholy trinity” of contributory negligence, fellow servant rule, and assumption of the risk. Moreover, extensive regulation of workplace safety has become the rule under federal and state occupational safety and health acts, resulting in a safer workplace and undermining the need for worker's compensation.

Ironically, the worker's compensation acts in today's society seem to operate more to the benefit of the employer than the employee. In contrast to the very large judgments that are typically awarded for serious personal injuries in tort or products liability actions, most worker's compensation statutes set a maximum compensation at 50-65% of the state's average weekly wage. 8

To the extent that the Workers' Compensation Act provides an inadequate remedy for injuries arising out of employment the statute should be amended or repealed. This, of course, is a matter for the General Assembly rather than the judiciary. Moreover, it is a matter with which the General Assembly is better able to cope. The General Assembly, for example, may wish to increase the compensation or give the employee an election between an action at common law and compensation from the insurance fund. The Blankenship decision, by contrast, will force all employees injured by intentional torts of the employer to seek remedy by litigation regardless of whether the attendant delay and risk of losing is in their best interest.

A major question left unanswered by the Blankenship decision is how the court will define intent. Will the court follow the bulk of the states in the minority and require “actual intent” or purpose to cause the injury, or will the court adopt the traditional definition of intent as being purpose or knowledge to a substantial certainty? In Blankenship the signals are mixed. On one hand, since the plaintiffs did not allege that the employer acted with the purpose of injuring the plaintiffs, it would appear that the court intends to apply the traditional definition of intent as being purpose or knowledge to a substantial certainty that the tortious result will occur.

On the other hand, it would appear that the majority has re-

78. 1 A. LARSON, LAW OF WORKMEN'S COMPENSATION § 2.50 at 11 (1978 & Supp. 1982).
jected the traditional definition because Justice Locher, dissenting in part, argues for the adoption of the traditional definition of intent. 79

To further obscure the issue, the court’s decision to distinguish Greenwalt on the basis that Greenwalt involved an omission whereas Blankenship involved a commission suggests the court might intend to decide on a case by case basis whether the injury arose out of the course of employment. 80

A clear picture of how the court will define intent must await further litigation. Advocates for defining the term to mean “actual intent” or purpose will find substantial precedent for their views in the decisional law of most of the states in the minority which allow a common law action for intentional torts. Advocates for the traditional definition of intent will find support in the facts of Blankenship, the dissent of Justice Locher, and the lack of a persuasive reason for having a special definition of intent for torts involving worker’s compensation.

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79. 69 Ohio St. 2d at 621, 433 N.E.2d at 581 (Locher, J., concurring in part and dissenting in part).

80. As noted earlier, supra note 64, the court’s distinction between Blankenship and Greenwalt is very subtle. If the court was motivated by more than a desire to avoid overruling Greenwalt then a case by case analysis could turn on very subtle fact differences.