NORTHERN KENTUCKY LAW REVIEW

Volume 11 1984 Number 1

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THE INSANITY DEFENSE REVISITED

by John S. Palmore*

Considering how little the average citizen knows or cares about the fundamental laws by which he is governed, it is remarkable that the idea of government by the people ever gained a foothold. It reminds this writer of a cartoon which appeared some years ago, as I recall it, in the Wall Street Journal. It depicted a long line of people, dressed in the flowing raiment indigenous to the desert areas of the Middle East, leading up to a polling place. One of the voters near the outer end of the line, turning to another, said, "I liked it better when governments really governed, instead of shirking it off on the people."

So scant is the attention routinely paid to the state of the law that public zeal for reform rarely ever arises until it is awakened by the shock of some notorious event. Thus it is that today the act of an obviously deranged young man in shooting the President of the United States resurrects an interest in the defense of insanity in criminal cases.1 Ironically, the circumstance that makes it so difficult for the public to understand is not the existence or substance of the defense, but that the government had the burden of proving beyond a reasonable doubt, in a long and expensive proceeding, that the defendant was not insane.2 Surely neither side could have had any genuine doubt that the shooting was the act of a madman, but only lawyers could understand why such an elaborate spectacle was necessary in order to reach an obvious conclusion—and why, even, it was necessary in the end to refer the matter to a jury.

Yet the government's burden of proving sanity, and proving it

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2. Id.
beyond a reasonable doubt, had been settled law ever since the United States Supreme Court so decided in 1895.3

The burden-of-proof aspect may have been the catalyst through which the searchlight of public attention came to be focused on the defense of insanity, but it is the substance of the defense that has been illuminated for scrutiny.

In assessing the defense it becomes necessary at once to ask what is its purpose. That question cannot be sensibly answered without defining the fundamental objectives of the criminal law itself, of which it is a part.

In an article published last year, Judge Irving R. Kaufman touched on this point as follows:

The purposes to be served by the imposition of criminal sanctions have been grist for the mills of legal philosophers for centuries. But from this age-old debate, four accepted objectives of criminal law have been distilled: rehabilitation, deterrence, protection of the public from dangerous individuals, and retribution (which I prefer to call just punishment).4

Retribution, or punishment for the sake of public satisfaction, private vindication, or whatever psychological ends the word may encompass, I would simply reject as not being a legitimate objective of civilized society. In so saying, I do not mean to imply that our society is free of uncivilized people and elements, but in seeking to improve the law we need to identify and root out those motivations that are unworthy or destructive.

Rehabilitation is merely a method of deterrence. Why do we wish to rehabilitate or "cure" a criminal? So he will quit being a criminal. For his sake? Of course not. For our sake. We don't want him to bother us any more.

As for deterrence, why do we want to deter criminal conduct? Obviously there can be only one reason—we want to be free of it. In other words, deterrence is a means of achieving security against future harm.

All of these things boil down to self-protection. Human beings want to prevent conduct that will do them harm. That is the raison d'être for the criminal law, and all other purposes that are

subserved by the criminal law and the criminal justice system are subsidiary to it.

The defense of insanity flies in the face of public security and protection. It exists only because a civilized society believes it unjust to inflict punishment on a person for conduct that would not have occurred but for a mental infirmity or affliction. The wholesome desire to be fair and humane in the relatively small percentage of such cases outweighs the general need for protection, especially when it is considered that the routine punishment of insane offenders would have limited protective value anyway.

The problem of society in this context is to achieve the greatest degree of security against harm to itself without unduly sacrificing the humanity we feel toward those who are mentally afflicted.

By its very nature, the defense of insanity hangs on the definition by which we identify it. Thus far, our efforts to find a satisfactory solution have consisted mainly of recasting and retooling that definition. The intense revival of interest being paid to the subject today\(^5\) is living proof that these efforts have not succeeded very well, and certainly should serve as a stimulus for us to question whether we ever have been on the right road in the first place.

In the process of considering the subject for at least a quarter of a century, I have long since concluded that we are indeed on the wrong road and are engrossed in the futile exercise of attempting to develop a better mousetrap. I do not believe that any amount of redefining will ever lead us to the destination we seek.

In an address before the New York Academy of Medicine on November 1, 1928, the late Mr. Justice Cardozo, then a member of the Court of Appeals of New York, reviewing the *M'Naghten* rule and expressing hope for its improvement, spoke as follows:

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In the early stages of our law, way back in medieval times, insanity was never a defense for crime. The insane killer, like the man who killed in self-defense, might seek a pardon from the king, and would often get one. He had no defense at law. Gradually there came in the law itself a mitigation of this rigor. A defense of insanity was allowed, but only within the narrowest limits. This was what has become known as the wild-beast stage of the defense. The killer was not excused unless he had so lost his mind as to be no more capable of understanding than if he were merely a wild beast. Then the limits of the defense were expanded, but still slowly and narrowly. The killer was excused if the disease of the mind was such that he was incapable of appreciating the difference between right and wrong. At first this meant, not the right and wrong of the particular case, but right and wrong generally or in the abstract, the difference, as it was sometimes said, between good and evil. Later the rule was modified in favor of the prisoner so that capacity to distinguish between right and wrong generally would not charge [the defendant] with responsibility if there was not capacity to understand the difference in relation to the particular act, the subject of the crime. The rule governing the subject was crystallized in England in 1843 by the answer made by the House of Lords to questions submitted by the judges in the famous case of M'Naghten, who was tried for the murder of one Drummond, the secretary of Sir Robert Peel. The answer was in effect that 'the jurors ought to be told in all cases that every man is to be presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that to establish a defense on the ground of insanity it must be clearly proved that, at the time of committing the act, the accused was laboring under such a defect of reason from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong.'

I am not unmindful of the difficulty of framing a definition of insanity that will not be so broad as to open wide the door to evasion and imposture. Conceivably the law will have to say that the risk is too great, that the insane must answer with their lives, lest under cover of their privilege the impostor shall escape. Conceivably the twilight zone between sanity and insanity is so broad and so vague as to bid defiance to exact description. I do not know, though I am reluctant to concede that science is so impotent. Attempts at formulation of a governing principle or standard have been none too encouraging, but betterment is attainable, though it be something
less than perfection. Many states ... recognize the fact that insanity may find expression in an irresistible impulse, yet I am not aware that the administration of their criminal law has suffered as a consequence. Much of the danger might be obviated if the issue of insanity were triable by a specially constituted tribunal rather than the usual jury. Of this at least I am persuaded: the medical profession of the state, the students of the life of the mind in health and in disease, should combine with students of the law in a scientific and deliberate effort to frame a definition, and a system of administration, that will combine efficiency with truth. If insanity is not to be a defense, let us say so frankly and even brutally, but let us not mock ourselves with a definition that palters with reality. Such a method is neither good morals nor good science nor good law.  

A great deal has been written on the subject since 1928, so much that it may be doubted whether any one person has read it all. Substantial efforts have been made by judges, lawyers and legal scholars to achieve a workable definition of legal insanity. In the now-famous 1954 Durham case the United States Court of Appeals for the District of Columbia Circuit, speaking through Judge David Bazelon, adopted a rule in which the test of mental culpability was whether the offensive conduct was "the product" of a diseased or defective mental condition. For good or ill, it did not gain widespread acceptance by the courts. In the 1961 Blocker case Judge Warren Burger, now Chief Justice of the United States, proposed that the test be cast in terms of whether by reason of an abnormal mental condition the accused (1) failed to understand and appreciate that the offensive act was a violation of law or (2) lacked the capacity to exercise his will and to choose not to do it. In the same year Chief Judge John Biggs, Jr., in a scholarly and well-reasoned opinion written for the United States Court of Appeals for the Third Circuit in the Currens case, for-

10. United States v. Currens, 290 F.2d 751, 775 (3rd Cir. 1961). Every student of the subject would do well to read this intelligent and extremely perceptive opinion.
mulated still another variation in which the criterion would be whether at the time of the alleged criminal act the accused (1) was suffering from a disease of the mind and (2) by reason thereof lacked substantial capacity to conform his conduct to the requirements of the law he was accused of having violated.

It is interesting to note, especially in view of the diametrically opposite position taken by the House of Delegates of the American Bar Association at its midwinter session in February of 198311 (of which more will be said in this article), that the Currens approach completely eliminates the so-called "cognitive" aspect of the test (knowledge of wrongfulness) and confines the question to whether the accused had the capacity to control his conduct.

Meanwhile, the work of Professor Wechsler and the American Law Institute [herinafter ALI] on this subject culminated in 1962 with the adoption of Section 4.01 of the MODEL PENAL CODE, as follows:

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality... of his conduct or to conform his conduct to the requirements of the law.

(2) As used in this Article, the terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

The capacity to appreciate the criminality of one's conduct is, of course, the equivalent of knowing right from wrong with respect to the conduct in question, so this phase of the ALI rule essentially preserves and restates the M'Naghten rule, whereas the Currens formulation specifically rejects it. The capacity to conform one's conduct to the requirements of the law, sometimes called the "volitional" test, also is embraced in the ALI rule, which thus embodies what has been referred to as a two-pronged "cognitive-volitional" test.12

The ALI rule or its substantial equivalent has been adopted in

twenty-six jurisdictions,\textsuperscript{13} including Kentucky.\textsuperscript{14} It was approved by the American Bar Association [herinafter ABA] at its annual meeting in 1975, but in the wake of the Hinckley\textsuperscript{15} case the House of Delegates, at its midwinter meeting in February of 1983, resolved to withdraw its approval of the "volitional" prong of the test.\textsuperscript{16} Instead, it voted to approve "in principle, a defense or non-responsibility for crime which focuses solely on whether the defendant, as a result of mental disease or defect, was unable to appreciate the wrongfulness of his or her conduct at the time of the offense charged."\textsuperscript{17}

In essence, therefore, the ABA would turn the clock back to M'Naghten. The words are different, but the meaning is the same. The long road from 1843 to 1983 has come full circle, and we have nothing to show for it but the lumps of a 140-year ride.

The social policy expressed by the M'Naghten rule is that if a man has enough wit to know right from wrong in the matter at hand it will be presumed that he is capable of submission to the deterrent effect of the law and its consequences. The rule has led a hardy existence because, like the fictional presumption that every man knows the law, it is socially useful. It helps to prevent chaos.\textsuperscript{18}


\textsuperscript{14} Terry v. Commonwealth, 371 S.W.2d 862 (Ky. 1963).


\textsuperscript{16} \textit{See supra} note 11.

\textsuperscript{17} \textit{See supra} note 11; \textit{Report, supra} note 12.

\textsuperscript{18} Newsome v. Commonwealth, 366 S.W.2d 174, 179 (Ky. 1963) (Palmore, J., dissenting). Oddly enough, though it may later be amended in this respect, the ABA statement does not confine "wrongfulness" to criminality, but substitutes the word \textit{for} criminality.
The irony of the ABA action is reflected by that portion of the committee report devoted to possible alternatives, one of which was that the defense of insanity be abolished.\textsuperscript{19} This was looked upon with righteous outrage, to be “rejected out of hand” because it “would prevent the exercise of humane moral judgment—and it is that exercise which has distinguished our criminal law heritage.”\textsuperscript{20} Being so mindful of the principles of humanity, why did the committee advocate withdrawing this humane defense from those human beings whose insanity manifests itself only in a lack of self-control? The answer to that question seems to be that it is just too hard to distinguish between offenders who were undeterrable and those who were merely undeterred, between the impulse that was irresistible and the impulse not resisted, or between substantial impairment of capacity and some lesser impairment . . . . In our opinion, to even ask the volitional question invites fabricated expert claims, undermines the equal administration of the penal law and compromises the law’s deterrent effect.\textsuperscript{21}

In other words, since it is too difficult to separate the good from the bad, it is better not to try—better to condemn them all, the good with the bad. This solution, I submit, is as much a retreat from “humanity” as would be the alternative of abolishing the defense altogether. Though I cannot profess any expertise in the field of psychiatry or mental health, I suspect that of all the crimes that are committed as the result of what we commonly regard as insanity, most are committed by people who know that what they are doing is illegal and wrong but are driven by their crazed and unbalanced compulsions to do it anyway. These poor devils, according to the House of Delegates, will just have to get accustomed to life in prison with the other misfits and outcasts of society.

I do not have any real difference with the ABA position insofar as it recognizes the futility of attempting to draw a line between those who can and those who cannot control their conduct. Nevertheless, so long as we cling to an insanity defense I think we are compelled to retain the volitional test, even though it assumes the existence of “free will.” \textit{Currens},\textsuperscript{22} I submit, has the better of it on

\begin{itemize}
\item[19.] Report, supra note 12.
\item[20.] Id. at 3.
\item[21.] Id. at 5.
\item[22.] Currens, 290 F.2d at 751.
\end{itemize}
this score. Here, however, is encountered what I consider to be the unsurmountable obstacle of attaining a truly fair and workable “defense” of legal insanity. It is that we must in fact postulate the existence of “free will”, which may very well be more of a theological fiction than it is a fact.

The concept of mens rea, guilty mind, is based on the assumption that a person has a capacity to control his behavior and to choose between alternative courses of conduct. This assumption, though not unquestioned by theologians, philosophers and scientists, is necessary to the maintenance and administration of social controls. It is only through this assumption that society has found it possible to impose duties and create liabilities designed to safeguard persons and property.  

Consider for the moment the converse—that every conscious choice, by the sane or the insane, results from preceding factors, including the hereditary and environmental factors that have made the individual what he is, have wrought his brain and power to think, his values, his perceptions, his passions, his every strength and weakness, and, in fine, represent all of the influences that will enter into the decision or choice he is about to make. All of these factors, now existing, result from the past, which is gone, and over which no one has any control. This has been so at every moment in the individual's life. At any given point in time, what he does depends on what has gone before, all of which is beyond reach or recall. If it be argued that into the crucible is injected some supernatural power that somehow changes the mix, enabling him to break free of the factors carried forward from the past, what causes him to exercise it one way as opposed to another? If he makes the wrong choice, what are the factors, and whence did they come, that combined to cause his failure? Again, I submit, either they come out of the past, over which he has no control, or they come from some external source over which he is equally devoid of influence. I am no theologian, but it does seem to me that the theory of free will is an arrogation by which man undertakes to assume in himself a power that belongs exclusively to the Almighty.

I do not expect most readers to agree with this analysis, at least without reflecting on it for a time. The teachings and assumptions of a lifetime are not easy to shake. My purpose, however, is not to

23. Id., at 773.
sell the theory of determinism, but to illustrate the abstruse nature of that which we are seeking when we attempt to establish nonculpability on the basis of what makes a human being tick. We are trying to pierce the veil of infinity, and it just can't be done. Nevertheless, fictional as the theory may be, the protection of society demands that individual freedom of choice be presumed. The problem arises in attempting to draw a hard and fast line between those who are presumed to have it and those who by reason of mental defect or disease do not—to say nothing of those who might be classified as being in the twilight zone. The more practical solution, I believe, would be to remove this function from the arena of the courtroom trial by eliminating insanity as a defense and by dealing with it exclusively at the dispositional stage following a determination of guilt.

Where would this leave our lofty notions of humanity, in deference to which we forbear to punish the sick for an act he would not have committed but for the overriding influence of his abnormality? The answer, I think, is quite simple. We would not punish him, but treat him, just as we treat the mentally ill who are fortunate enough not to have crossed the border of criminality.

The procedural requirements for accomplishing this objective need not be complicated. The first step is to determine whether the defendant is mentally ill at the present time. If he is, and if the illness substantially impairs his ability to participate rationally in his own defense, then of course he cannot be tried unless and until his capacity to do so is restored. Probably the law of every state makes provision for this familiar situation. 24

If and when the defendant is competent to stand trial, he should be tried. His mental condition (sanity vis-a-vis insanity) at the time of the alleged offense should not be an issue in the trial. The time for interposing the question of sanity should be deferred until after the defendant pleads guilty or has been found guilty, at which point he should have the right upon motion to have judgment withheld and to be referred to an appropriate state mental facility (such as Michigan's Center for Forensic Psychiatry) for the purpose of determining (1) whether he was mentally ill at the

time of the offense and if so, (2) whether it is probable that except for that condition he would not have committed the offense.

The medical findings should be certified to the trial court. If the two questions are answered in the affirmative, the judgment should simply commit the defendant indefinitely to a maximum-security state mental institution for treatment and ultimate disposition in the same manner as in the instance of ordinary civil commitments. If either of the questions be answered in the negative, judgment and sentence should be entered in accordance with the jury verdict (or guilty plea).

Unless I am mistaken, an approach of this sort should not encounter any serious constitutional problem. Abolition of the insanity defense would not result in a prison sentence for the insane offender, but would be replaced by a procedure through which the offender, following a verdict or plea of guilty, would be committed to a mental institution in lieu of being adjudged guilty of a crime.

I submit with all the vigor at my command that a courtroom trial is not now and never has been a suitable vehicle for the resolution of such questions as whether an offensive act proceeded from a mental defect or disease, and that this is the major reason we have never been able to devise a satisfactory "defense of insanity."

A trial or court proceeding is an appropriate means of ascertaining what happened, but the adversary system is no more suited to a determination of an individual's mental condition—particularly in retrospect—than it is to a determination of whether he ought to have an appendectomy. Why can't sensible judges, lawyers, and lawmakers just face up to that simple truth and get the judicial system out of the practice of medicine?

It is true, of course, that when an apparent breach of the criminal law occurs the "criminal justice system," in its assigned role as keeper of the peace, is summoned to action. The offender's act having identified him as a public menace, public security demands that he be deprived of his liberty regardless of whether he was sane or insane. His status in that respect does not become a constitutional concern until the dispositional stage of the pro-

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25. The term "criminal justice system" is more often used than defined. I refer to it as beginning with the laws that declare what conduct is illegal, continuing with the enforcement (police) and adjudicatory (courts) functions, and ending with the corrective function (prison, probation and parole).
ceeding is reached. At this point it may very well be unconstitutional, if it should be later proved that he was in fact insane at the time the act was committed, to brand him as a criminal and consign him to a prison setting, but certainly it is not unconstitutional to confine him in a treatment facility until such time as it becomes reasonably safe to release him.

In plain English, the purpose of the insanity defense is to provide an escape from the criminal sanctions otherwise imposed by the criminal justice system. This objective is satisfied, of course, by an acquittal, but it leaves unsatisfied the primary goal of the criminal justice system, which is to protect the public. Confinement in a mental institution offers the only possibility of satisfying both objectives.

When the criminal justice apparatus has proceeded to the point that the offender has been found guilty but for the possibility that he was not mentally responsible at the time of the offense, all that society owes him in the name of humanity or constitutional principles is a fair and reasonable opportunity to avoid the criminal sanctions of the law by demonstrating that he was not mentally responsible. If he fails, he remains in the custody of the criminal justice system for correction, as in the case of other offenders. If he succeeds, he is transferred out of the criminal justice system into the state mental health system.

Would the courts—or, more importantly, the United States Supreme Court—hold that the opportunity of establishing one's mental incompetency, as a means of access to medical treatment instead of criminal corrective treatment (punishment), entitles him to a jury trial on that issue? I do not know, of course, but I would be disappointed if ever it should be held that only courts can resolve such questions. After all, the bottom line is fairness, and the first essential of fairness is a competent tribunal. A procedure utilizing a board of qualified medical experts rather than lay jurors or judges should pass constitutional muster in any civilized country.

I fully realize from long years of experience that the real problem lies in the fact that a great many judges and prosecutors—reflecting, probably, the attitude of most people in general—would rather take the chance of having insane persons in prison than the prospect of having them released from mental institutions by doctors who are more concerned with their patients' health than they are with public safety and tranquility.
Assuming, however, that the imprisonment of mentally ill persons in penal institutions so offends our fundamental notions of decency that the Supreme Court would find a constitutional basis for forbidding it, how can it be justified merely because it may be too risky to entrust their custody, treatment and ultimate disposition to an agency of the state outside the aegis of the criminal justice system?

I submit that we cannot tolerate a rule of law or a system that does not erect reasonable safeguards against punishment of the mentally ill for conduct induced by their mental condition. For this reason a civilized society should not accept the so-called "cognitive" test of the M'Naghten rule and the 1983 ABA resolution as the sole criterion of mental culpability. It is a test that deliberately chooses to apply the punitive sanctions of criminal law to those mentally disabled persons whose derangement destroys their power to make a rational choice between right and wrong as distinct from their capacity to distinguish between the two. Yet the conduct, or misconduct, of these people is attributable to mental incapacity no less than is the conduct of people who are unable to distinguish right from wrong. If we are to have any insanity defense at all, it seems to me that plain logic—and, depending on what the United States Supreme Court may have to say about it, perhaps constitutional principle as well—dictates that these two classes of mentally disabled persons be treated alike. This is what the ALI definition does. The Currens rule is even better, because if a mental illness deprives the offender of the power to control his actions it really is immaterial whether he understands or "appreciates" their wrongfulness.

After 140 years in the wilderness, I doubt that any further tinkering, tightening or polishing will bring forth a better test. The problem is that with lawyers, judges and jurors we have the wrong people in charge of applying the test. It is enough for the lawmakers, whether courts or legislatures, to draw the line of legal accountability by defining it in terms that are understandable and acceptable to the medical world. The application of the test is a diagnostic function for which only the medical profession is qualified. This does not mean that any physician, or even any psychiatrist, is competent to be entrusted with such a delicate procedure. The members of a medical board authorized to make the certification should be required to have qualifications that
include a prescribed course of education designed to inculcate a healthy sensitivity to and recognition of the transcendent importance of protecting the public from exposure to harmful conduct by mental patients.

Two more recent developments in the field bear mention. As of February, 1983, two states had adopted a so-called mens rea limitation which for all practical purposes turns the clock back to the "wild beast" era mentioned by Mr. Justice Cardozo. This approach, contained also in legislation introduced in the United States Senate at the behest of Senator Strom Thurmond as a part of Senate Bill 2390, was roundly excoriated in the committee report to the ABA House of Delegates and may very well be unconstitutional unless it is supplemented by some kind of a procedure to insure a fair and meaningful sanity inquest leading to a substitution of hospitalization in lieu of penal correction for a convicted defendant found to be suffering a mental derangement which induced his criminal conduct. Eight other states (including Kentucky) had enacted legislation authorizing a "guilty but mentally ill" verdict. In rejecting this approach as well, the ABA committee report called it "a moral sleight-of-hand which simply will not do." Though I rather suspect that the ultimate judgment of history may prove to be the same, I think it is too severe.

There may be some who will confuse "guilty but mentally ill" with "guilty but insane", which would indeed be a contradiction in terms, but that is not the case. A "guilty but mentally ill" instruction is not a substitute for the insanity-defense instruction, but is an additional, "in-between" option. Assuming that juries usually obey the instructions of the court (which, like the presumption of free will, seems to be an unavoidable postulate), they will opt for

27. See supra note 6 and accompanying text.
this kind of verdict only if they find against the defendant under
the insanity instruction, so it really can do him no harm—the
alternative being a flat-out conviction. It may be conceded that
through appropriate screening an up-to-date correctional system
should discover the mental illness of a newly-admitted inmate
without its having been diagnosed by a lay jury, but it is common
knowledge that many of our correctional institutions today are in
fact not so up-to-date in that respect.

The "guilty but mentally ill" option was pioneered by Michigan
in 1975. In an admirably perceptive analysis entitled Evaluating
Michigan's Guilty but Mentally Ill Verdict: An Empirical Study,
Michigan law students Gare A. Smith and James A. Hall
concluded last year "that the new verdict has completely failed in
its intended purpose," because its primary purpose was to reduce
the number of insanity acquittals, yet during the period of
1976-1981 the number of defendants being found not guilty by
reason of insanity had not decreased from what it had been before
the statute was enacted.

Before the enactment of its "guilty but mentally ill" statute
Michigan had an automatic-commitment provision pursuant to
which all defendants found not guilty by reason of insanity were
immediately and indefinitely confined in a state mental institu-
tion. This law was declared unconstitutional by the Michigan
Supreme Court in 1974, but it may very well have been an impor-
tant factor in Michigan's having experienced such a high incidence
of "not guilty by reason of insanity" verdicts that its legislative
body felt obliged to find a means of reducing it. Unfortunately,
we do not have in this state (Kentucky) any statistical records in-
dicating the success ratio of the insanity defense, but from obser-
vation and experience as a lawyer and judge over the past 44
years I believe it is safe to say that in serious cases such as murder

33. Note, Evaluating Michigan's Guilty But Mentally Ill Verdict: An Empirical Study,
16 U. Mich. J.L. Ref. 77 (1982). The article came to this writer's attention through a com-
ment appearing in the April 4, 1983 issue of Newsweek magazine.
34. Note, supra note 33, at 80.
37. Note, supra note 33. "The automatic commitment of those who successfully raised the
defense seemed to ensure public safety through incarceration and involuntary hospitaliza-
tion, and consequently generated little public concern over the adjudication of mentally ill
patients." Id. at 81.
it has been virtually nil. The reason is that once a defendant is found not guilty by reason of insanity the public has no protection from a repetition of the same conduct except through a civil commitment proceeding.\(^38\) And until the court declared otherwise in 1981,\(^40\) it was perfectly proper for the prosecutor to remind the jury that in the event of an acquittal on the ground of insanity there would be very little, if any, assurance that the defendant would not soon be at large again.\(^40\)

Granted that a truly insane person ought not to be consigned to a penal institution, this has been the prospect for the "criminally insane" in Kentucky, and probably in most other states as well. Given the choice between setting free a rapist-killer with a long and well-established record of paranoid schizophrenia and placing him behind the walls of a prison, what the average jury will do is obvious.\(^41\) Even, therefore, if "guilty but mentally ill" is just another way of saying "guilty,"\(^42\) it does assure the prisoner of hospitalization in lieu of the rock pile, at least until he is deemed to be no longer mentally ill.\(^43\)

The mere addition of the label 'guilty but mentally ill' will not cor-

\(^38\) As a part of the act authorizing a verdict of "guilty but mentally ill," KRS § 504.030 was amended to provide that upon a finding of not guilty by reason of insanity the trial court shall conduct a civil commitment ("involuntary hospitalization") proceeding. Ky. Rev. Stat. §§ 504.030, 504.120 (1975 & Supp. 1982). Under KRS § 202A.080 (repealed by Acts 1982, ch. 445, § 44) a defendant in a civil commitment ("involuntary hospitalization") proceeding was entitled to a hearing before a jury in order to be detained for more than 60 days, and after 360 days of enforced hospitalization a new hearing was required. Ky. Rev. Stat. § 202A.080 (1980) (repealed by Acts 1982, ch. 445, § 44). The right to a hearing and a jury trial was preserved in KRS § 202A.051 and KRS § 202A.076(2). Ky. Rev. Stat. §§ 202A.051, 202A.076(2) (1982 Interim Supp.). Whereas KRS § 202A.080 was silent on the burden of proof, KRS § 202A.076(2) provides that "the manner of proceeding and rules of evidence shall be the same as those in any criminal proceeding including the burden of proof beyond a reasonable doubt."

Most assuredly, a defendant acquitted on the ground that he was insane at the time of the alleged offense would be entitled to an unconditional release if it could not be proved to the satisfaction of a jury that he is still in that condition. KRS § 504.030 does not make it clear whether the civil inquest following an acquittal is to be conducted with the same jury or a new one. Ky. Rev. Stat. § 504.030 (1975 & Supp. 1982). It could be argued on constitutional principles that an acquitted defendant has the same right to a fresh jury, free of previous knowledge and predilections concerning his case, as if he had not been tried on a criminal charge.


\(^40\) Jewell v. Commonwealth, 549 S.W.2d 807, 812 (Ky. 1969).

\(^41\) Cf. Gall v. Commonwealth, 607 S.W.2d 97, 119 (Ky. 1980).

\(^42\) Note, supra note 33, at 100.

rect the extensive problems of mental health care within the nation's prisons; however, by focusing attention on these problems the GBMI [guilty but mentally ill] statute may provide the impetus necessary to improve the treatment of the mentally ill criminal."

The purists who are so quick to ridicule the "guilty but mentally ill" statutes seem oblivious to the hard reality of what has been going on. They fail to consider it in terms of the real alternative. Being something of a pragmatist, I would defend it on the ground that it will do no harm and may very well do some good.

Nevertheless, as I have said already, I believe that the only practical solution to the problem of how to achieve a workable defense of insanity is to remove it from the courtroom. It is time we paid heed to the words of wisdom offered to us by Mr. Justice Cardozo over half a century ago.

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44. Note, supra note 33, at 105.
FRAUDULENT MISREPRESENTATION OF LAW—ARE THE EXCEPTIONS SWALLOWING THE GENERAL RULE?

by Frank J. Cavico, Jr.*

INTRODUCTION

The penchant of lawyers to cloak legal confusions in arcane Latin raiment is particularly apparent in the field of fraudulent misrepresentation of law. The conventional doctrine governing the field has found so little favor with the courts that they have resorted to many exceptions and subterfuges in order to mitigate the harshness of its rule. Today, the general rule is so perforated with exceptions as to gainsay the legitimacy of the doctrine and the honesty of its application.

The purpose of this article is to analyze the cases dealing with fraudulent misrepresentation of law. The theories sustaining the general rule as well as the problems plaguing it will be examined. The scope and effect of its numerous exceptions will be discussed. Additionally, the contributions to the literature in this field will be reviewed. Finally, this article will suggest the direction in which the law should develop.

I. THE GENERAL RULE

The generally accepted doctrine in the United States is that an action for fraud or deceit cannot be predicated upon a misrepresentation of law.¹ This principle has become so settled in the law that practically every case in which the issue of fraudulent misrepresentation of law is discussed commences its discussion with this doctrine.

The premise that there is no action for fraud based upon a misrepresentation of law has been employed in divergent factual settings. Courts have ordinarily denied recovery for a fraudulent

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misrepresentation as to the legal meaning and effect of, for example, a court ruling, a statute, an answer, a release, a guaranty, a note, a contract, a zoning ordinance, a deed, a mortgage, an option to terminate, a trust, a bond, and an insurance policy.


3. Martin’s Auto Trimming, Inc. v. Riddell, 283 F.2d 503 (9th Cir. 1960) (misrepresentation by IRS Commissioner to maker of custom made auto seat covers that he would not be required to collect excise tax from customers); Vokal v. United States, 177 F.2d 619 (9th Cir. 1949) (plaintiffs subject to renegotiation statute); Shuney v. Fuller Co., 111 F. Supp. 543 (D. R.I. 1953) (employer’s misrepresentation that employer investigated question of coverage of Fair Labor Standards Act to non-construction workers and that there was no coverage with respect thereto); Puls v. United States, 387 F. Supp. 760 (N.D. Cal. 1974) (misrepresentation by IRS official concerning company’s compliance with notice requirements for foreclosure sale); Robbins v. National Bank of Georgia, 241 Ga. 538, 246 S.E.2d 660 (1978) (misrepresentation as to existence of a state tax apportionment statute); McDonald v. Goodman, 239 S.W.2d 97 (Ky. 1951) (physician advised family that the law required an autopsy); Frederick v. Bensen Aircraft Corp., 436 S.W.2d 765 (Mo. 1968) (seller’s misrepresentation to buyer that amateur built gyrocopter kit eligible for FAA airworthiness certification).


6. Ford Motor Credit Co. v. Milburn, 615 F.2d 892 (10th Cir. 1980) (whether guaranty loan applied only to single loan involved or was continuing guaranty).


9. Watt v. Patterson, 125 Cal. App. 2d 788, 271 P.2d 200 (1954); Marks v. Fields, 160 Fla. 789, 36 So. 2d 612 (Fla. 1948) (lessor’s misrepresentation that city zoning ordinance did not prohibit use of property for sale of used cars); Gignilliat v. Borg, 131 Ga. App. 182, 205 S.E.2d 479 (1974) (vendor’s misrepresentation of zoning classification of land made to purchasers); Northernaire Prod., Inc. v. County of Crow Wing, 309 Minn. 386, 244 N.W.2d 279 (1976) (misrepresentation by chairperson of county board of commissioners and chairperson of planning and zoning commission to promoters of “rock” festival that permit would not be necessary).

10. Hutton v. Ming, 155 Mont. 149, 467 P.2d 688 (1970) (realtor’s misrepresentation to owner that only way to avoid immediate loss of home was to sign quitclaim deed); Ritchie v. Clappier, 109 Wis. 2d 399, 326 N.W.2d 131 (Wis. App. 1982) (grantee’s misrepresentation that quitclaim deed embodied only the parties’ agreement regarding return of plaintiff’s security deposit).


15. Mutual Life Ins. Co. v. Phinney, 178 U.S. 327 (1900) (insurer’s agent misrepresenta-
The doctrine of non-responsibility for fraudulent misrepresentations of law has also been applied to misrepresentations regarding the existence of a contract, personal capacity to be sued, jurisdiction, the expenditure of funds by a city official, the compromise of a claim, the nonassessability of stock, whether particular conduct will or will not lead to legal liability, the legal right to sell liquor, the existence of a valid divorce, alien status and the like.

An analysis of the preceding decisions discloses that the courts postulate two assumptions, often in the same case, to support the general rule denying recovery for a fraudulent misrepresentation of law. First, representations of law are commonly regarded as mere expressions of opinion, rather than representations of fact. The rule prevailing in the United States, that a misrepresentation of fact is a necessary component of fraud, connotes that a misrepresentation of law is insufficient as a basis for fraud. The "opinion that policy lapsed); Fields v. Life and Casualty Ins. Co. of Tenn., 349 F. Supp. 612 (E.D. Ky. 1972) (insurer's agent's misrepresentation that wife, after divorce, continued to have insurable interest in husband's policies); Johnson v. St. Paul Ins. Co's., 305 N.W.2d 571 (Minn. 1981).

17. Mahler v. Paquin, 142 Ga. App. 582, 236 S.E.2d 512 (1977), vacated, 238 S.E.2d 692 (1978) (plaintiff's representation to defendant that he need not answer because he was not being sued in personal capacity).
18. Ryan v. Lumberman's Mutual Casualty Co., 485 S.W.2d 548 (Tenn. 1972) (area workers' compensation claim manager's misrepresentation to claimant that "Tennessee would not accept jurisdiction") of claimant's case).
23. Ad Dernehel and Sons Co. v. Detert, 186 Wis. 113, 202 N.W. 207 (1925).
ion” argument, that misrepresentations of law are mere opinions, asserts that no person, at least without special teaching or expertise, can be presumed to know the law. Therefore, the representee must have understood that the representor was simply stating an opinion. 28 The branding of a statement of law as an “opinion” also negates the “reliance” ingredient to fraud. The “reliance” rule, which also prevails in the United States, holds that one who relies on a misrepresentation can recover for losses caused thereby only if the law regards the reliance as “reasonable.” 29 This limitation on liability arises from the policy requiring parties to an exchange to negotiate at a distance, 30 and mirrors the conventions and mores of the marketplace, which customarily permit some leeway for deceit in negotiations. 31 Statements of opinion are ordinarily made under circumstances which controvert the finding of reasonable reliance. Since no one is entitled to reasonably rely on such “opinions” of law, a representee will not be heard to remonstrate of being deceived by such representations. 32

The second reason supplied by the courts to sustain the general rule supposes that every person is presumed to know the law. 33 Therefore, a representee, theoretically, cannot be deceived by a misrepresentation of law nor be permitted to remonstrate about being misled. 34 This maxim that “every person is presumed to know the law” originated from the criminal law maxim, ignorantia legis neminem excusat, or “ignorance of the law is no excuse,” 35

30. W. Prosser, supra note 26, at 725.
which in turn is grounded in "public policy." This basis for the general rule found its way into the civil law through the channel of criminal law doctrines.

Despite some courts' almost ritualistic incantation of the formulae underpinning the general rule, the bases for the doctrine are criticized by other courts. The reasons for the general rule are totally in conflict. Every person is supposed to discern the law, hence one cannot reasonably depend upon the misrepresentation of law; yet, no person can be presumed to know the law, so the representee must have realized that the representor was only offering an opinion. Furthermore, the assumptions upholding the doctrine are incorrect. The dogma that "every person is presumed to know the law" is condemned by various courts as an "outdated ... trite, sententious saying, by no means universally true;" an "almost humorous and wholly suppositious presumption ... contrary to both law and sense;" an "unreal assumption ... [t]his court will not accept blindly;" and a maxim with "little support in fact (and) ... doubtful if ... ever intended to excuse fraud." Such a maxim throws a fictitious light on the rule. Of course the law cannot assume that everyone is familiar with it. No attorney, or even a judge, is bound to know all the law. If unfamiliarity with the law did not in fact exist, "we would not have lawyers to advise nor courts to decide what the law is."

This presumption is a perverted expedient of expressing the criminal law axiom from which it arose that "ignorance of the law is no excuse." The latter is a very difficult concept, indeed.

36. Note, supra note 1, at 308.
42. Id.
45. Keeton, supra note 27, at 412-13; W. Prosser, supra note 26, at 724.
Public policy demands that one guilty of wrongdoing not be allowed absolution by pleading ignorance of the law. Should this criminal law maxim apply to civil law cases of fraud? Does the same necessity mandate the maxim when a party who has been innocent of any wrongdoing, but in fact has had a wrong perpetrated against him, seeks to compel the wrongdoer to make him whole? The use of the maxim in such a situation, as one court declared, is highly dubious:

There has been misuse also of the rule that ignorance of the law excuses no one. There is such a rule, but it goes only to the extent of making legal duty inescapable because of the subject’s ignorance of the law. Neither in letter, spirit, nor purpose does it justify or even suggest that a loss should be imposed on one and an unconscionable gain be permitted another party merely because of the former’s ignorance of the law.\(^47\)

Some courts urge, as previously noted, that there exists a public policy which demands that representations of law be placed in a unique category, and routinely be treated not as the assertion of fact, but as the mere expression of opinion. Such a “public policy” denies an innocent, aggrieved victim any legal redress. A public policy which runs so directly counter to principles of fairness and justice certainly requires further analysis and consideration.\(^48\)

A review of those cases utilizing the general rule additionally discloses two related problems. In many cases, distinguishing between law and fact, “come(s) so near the borderline that the point of demarcation is not always apparent.”\(^49\) Moreover, even when the misrepresentation is apparently one of “law,” some courts, hesitant about denying relief, prefer to resort to rather forced constructions of what constitutes a misrepresentation of “fact.”\(^50\)

An examination of the flawed foundation propping up the general rule indicates that the misrepresentation of law field does

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47. Stark, 205 Minn. at ____, 285 N.W. at 469; Spry Funeral Homes, Inc. v. Deaton, 363 So. 2d 786, 789 (Ala. 1978).
48. For a criticism of said policy see Note, supra note 1, at 308.
not deserve an iron-clad rule which allows a fraudulent repre-

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the courts still customarily pay homage to the doctrine that fraud cannot be predicated on a misrepresentation of law, they have been inclined, whenever possible, to qualify the general rule by creating exceptions to it. As one court noted: "so harsh a rule, founded on a presumption so arbitrary, ought to be modified in its application by every exception which can be ad-

Accordingly, there are numerous exceptions which permit a misrepresentation of law to be actionable under peculiar facts and circumstances.²²

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resentor is accompanied by some inequitable conduct by the representer which induces the representee to rely on the misrepre-

sentation. Redress is permissible, therefore, where the parties stand in a relation of trust and confidence or where the repre-

sentor possesses, or professes to possess, superior knowledge of the law. When there is a relation of trust and confidence between the parties, as in the case of kinship,³³ marriage,⁴⁴ guardian and ward,⁵⁵ professional and client,⁶⁴ franchisor and franchise,⁶⁷ incorpor-

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52. W. Prosser, supra note 26, at 725-26; 37 Am. Jur. 2d Fraud and Deceit § 77 (1968) (ex-
59. Id.
61. For a further listing of "trust-confidence" case exceptions see Note, supra note 32, at 1023; Note, supra note 27, at 455.
62. W. Prosser, supra note 26, at 726; 37 Am. Jur. 2d Fraud and Deceit § 77 (1968) (fur-
honest and complete disclosure inherent in such a relationship supersedes the traditional maxims. In addition, the special circumstances make it reasonable for the representee to accept the representor's misrepresentation, even if branded "opinion," and to act upon it, and so excuse a suspension of the suspicion considered necessary between parties dealing at arms' length. The "trust and confidence" exception, then, provides some limited protection from the general rule. One difficulty with this approach, however, occurs when a court, repelled by the dictates of the general rule, tends to create such an exception in situations where that relationship does not really exist.

A second exception arises where the party making the misrepresentation possesses superior knowledge of the law, or professes to have such knowledge. The representor thereupon takes advantage of the representee's ignorance of the law, intentionally makes a misrepresentation of the law and succeeds in deceiving the representee. In such a case, the representor is liable for the misrepresentation and relief is granted on the grounds of fraud. Where the misrepresentation of law is made by an attorney, the courts uniformly hold such misrepresentations to constitute fraud. If the attorney represents the party to whom the statement is made, the result is grounded on the first exception—"trust and confidence." In the more prevalent circumstance, however, where the misrepresentation is by the attorney for the adverse party, or where the attorney is the adverse party, the second exception, "superior knowledge," is customarily utilized to afford redress. Note that when a lawyer makes a misrepresentation of law to a layperson, relief is afforded even though the layperson knows the lawyer represents an antagonistic interest. A layperson who


63. Note, supra note 27, at 454-55.
64. W. Prosser, supra note 26, at 726.
65. See, e.g., Mullen v. Fridley, 600 S.W.2d 125, 128 (Mo. Ct. App. 1980); Keeton, supra note 27, at 414-15.
68. See, e.g., Sainsbury v. Pennsylvania Greyhound Lines, Inc., 183 F.2d 548, 550-51 (4th Cir. 1950) (misrepresentation by bus company claims adjuster, who was also an attorney, that plaintiff, because in government service and thus entitled to free medical attention, could only recover for pain and suffering as a result of injury from bus accident); Waugh v.
seeks the opinion of an attorney on a point of law may presume that the attorney is cognizant of the law. A layperson is furthermore warranted in presuming professional probity from an attorney. The layperson, therefore, may defensibly depend on the attorney’s opinion, even though the layperson knows the attorney is representing a hostile interest. 69

Even if the representor is not an attorney, he may possess, or purport to possess, superior knowledge that will enable him to form a reliable opinion. Thus, when a real estate agent or broker70 or an insurance agent71 gives an opinion on a routine problem to a layperson, the layperson is justified in depending upon the agent to know enough about real estate or insurance law to form a dependable opinion.72 This exception, of course, is not limited to brokers and agents. Any person, by virtue of extensive ownership, operation, or knowledge of a particular business, is deemed to possess “superior knowledge,” at least with respect to the simpler legal problems connected with the business, so as to trig-


70. See, e.g., Dixon v. Dodd, 80 A.2d 282, 284 (D.C. 1951) (agent’s misrepresentation to owner that owner could cancel plaintiff’s exclusive listing without liability); Cellucci v. Sun Oil Co., 2 Mass. App. Ct. 722, 724 (1974) (oil company’s misrepresentation to vendor that vendor was bound to sell property to company and could not sell to competing oil company because vendor had signed oil company’s standard form purchase and sale agreement); Mullen v. Fridley, 600 S.W.2d 125, 128 (Mo. Ct. App. 1980); Hartley Realty Co. v. Casady, 332 S.W.2d 291, 295 (Mo. 1960); Peterson v. Auvel, 275 Or. 633, 635, 552 P.2d 536, 540 (1976) (broker’s misrepresentation to plaintiff-buyer that earnest money agreement not enforceable in court); RESTATEMENT (SECOND) OF CONTRACTS § 170 comment c (1977).

71. See, e.g., Fawcett v. Sun Life Assur. Co. of Canada, 135 F.2d 544, 545-46 (10th Cir. 1943); Stark v. Equitable Life Assur. Soc. of the United States, 205 Minn. 138, 141, 285 N.W. 468, 469 (1939); Peterson v. Great Am. Ins. Co., 74 S.D. 334, 344, 52 N.W.2d 479, 481-82 (1952) (insurance adjuster’s misrepresentation to farmer that grain had reached insurable stage under hail insurance policy); RESTATEMENT (SECOND) OF CONTRACTS § 545 comment d (1977).

72. RESTATEMENT (SECOND) OF CONTRACTS § 170 comment b (1979); RESTATEMENT (SECOND) OF TORTS § 545 comment d (1977).
ger the operation of this exception. And any evidence that the representee is illiterate, uneducated, elderly, a recent arrival to the jurisdiction, unfamiliar with the law, or that the representor prevented or dissuaded him from seeking legal advice, is relevant to the applicability of this exception.

If the maker of the misrepresentation possesses, or purports to possess, such “superior knowledge,” which the recipient does not possess, reliance on the maker’s opinion is deemed justifiable. The statement of an opinion very often carries with it an implied assertion, not only that the maker knows no facts which would prevent such an opinion, but also that the maker does know of facts which justify the opinion. Therefore, the opinion becomes, in

73. See, e.g., Harazim v. Lynam, 267 Cal. App. 2d 127, 72 Cal. Rptr. 670, 673-74 (1968) (defendants, who advertised and gave lectures in money management in which they held themselves out as experts, misrepresented legal effect of trust to plaintiffs, members of general public with no investment experience); Hembry v. Parrocco, 81 A.2d 77, 79 (D.C. 1951) (defendant, in business of excavating, loading and transporting dirt in Maryland, misrepresented to plaintiff driver, District of Columbia resident, that he did not need any additional Maryland tag or registration for truck); Dettler v. Santa Cruz, 403 S.W.2d 651, 655 (Mo. Ct. App. 1966) (misrepresentation by vendor to buyer that dwelling could be rented as three apartment units, when vendor knew from continuing notices sent from city that such use would violate zoning law); Gamel v. Lewis, 373 S.W.2d 184, 191-92 (Mo. Ct. App. 1963) (defendant, who had long owned and operated motel and trailer park business, misrepresented zoning classification of property to plaintiff, who had no knowledge or experience of business); Sawyer v. Pierce, 580 S.W.2d 117, 125-26 (Tex. Civ. App. 1979) (misrepresentation by seller, who knew county regulations prohibited more than 15 trailers in mobile home park, to buyer, totally inexperienced in business, that it was possible to place 30 trailers on land); Askew v. Smith, 246 S.W.2d 920, 923 (Tex. Civ. App. 1952) (defendant, who had been engaged in vending machine business for 16 years and represented to plaintiff that he was an expert thereon and familiar with all laws concerning the operation thereof, misrepresented the legality of vending machine business to plaintiff, an auto mechanic, who had never engaged in said business and who was totally unfamiliar with laws pertaining thereto).


75. Camerlin v. New York Cent. R. Co., 199 F.2d 698 (1st Cir. 1952); Mullen v. Fridley, 600 S.W.2d 125, 128 (Mo. Ct. App. 1980); Hartley Realty Co. v. Casady, 322 S.W.2d 291, 295 (Mo. 1960).

76. Stark, 205 Minn. at 138, 285 N.W. at 469; Hartley Realty Co. v. Casady, 322 S.W.2d at 295.


79. Fawcett v. Sun Life Assur. Co. of Canada, 135 F.2d 544, 545-46 (10th Cir. 1943); Note, supra, note 63, at 455-56 (further listing of cases).

80. RESTATEMENT (SECOND) OF CONTRACTS § 170 comment b (1979); RESTATEMENT (SECOND) OF TORTS § 545 comment d (1977).
effect, an affirmation outlining the maker’s knowledge. When the parties are deemed not to be bargaining as peers with respect to ready knowledge, the basis for the individualistic element in the common law is eliminated.

The “superior knowledge” exception, while laudably expanding the scope of relief from the general rule, presents problems. As with the “trust and confidence” exception, the courts exhibit a tendency to stretch the facts in order to find the requisite “superior knowledge.” More troublesome, however, is the discovery that the “superior knowledge” exception is really a crude endeavor to assess the dissimilarity of legal knowledge between the parties in the action at bar. Such an evaluation practically invalidates the maxim that “everyone is presumed to know the law” as regards fraudulent misrepresentations of law.

A third exception to the general rule emerges where the representation pertains to the law of a foreign jurisdiction (i.e., a sister state or foreign country). Since a statement as to the law of a foreign jurisdiction is universally regarded as a representation of fact, a misrepresentation as to that law is actionable as fraud.

This exception is explained both in terms of pleading and proof and “reliance.” As the courts do not take judicial notice of foreign law, the rules of evidence require it to be proved as “fact.” Moreover, even if the statement of foreign law is regarded as actually only an “opinion,” the representee’s reliance is more likely justifi-

81. W. Prosser, supra note 26, at 726.
82. Id. at 727.
83. See, e.g., Safety Casualty Co. v. McGee, 127 S.W.2d 176, 178 (Tex. Comm’n App. 1939) (representee was college educated and technically trained electrician who had been in business for several years).
84. Note, supra note 32, at 1024; Keeton, supra note 27, at 415.
85. Restatement (Second) of Torts § 545 comment d, at 100 (1977).
88. W. Prosser, supra note 26, at 725; J. Calamari & J. Perillo, supra note 32, at 286; Restatement (Second) of Torts § 545 comment d at 100 (1977).
able because he is less able to develop determination as to foreign law or to have available access to sources of knowledge of that law. 89

The "foreign law" exception, however, also raises some vexing questions. Does not the treatment of a statement of foreign law as "fact" directly impugn both suppositions supporting the general rule? 90 Where is the rationality, moreover, in imposing a technical pleading and proof rule in the lexicon of misrepresentation? 91 Certainly, this evidentiary explanation is highly artificial, particularly where the real issue is one of reasonable reliance. 92 Finally, does not the statement of law of a sister state or foreign country involve more of an opinion than a statement of domestic law with a concomitant decrease in the right to rely upon it? 93 Nevertheless, despite these defects in the logic fundamental to the "foreign law" exception, any relief it provides from the general rule is welcome.

Where the courts are unable to employ the three preceding "traditional" exceptions to avoid the general rule, there is even a resort to "public policy," with the court holding that "an exception exists where it would be contrary to public policy to deny relief." 94 Such an unwieldy exception, while possibly affording an individual plaintiff relief, also avoids any unpleasant questioning of the conventional wisdom.

An analysis of the cases demonstrates that modern courts, dissatisfied with the protection afforded by the "traditional" exceptions, have carved out two additional exceptions to the general rule.

One exception confers a right of action if the misrepresentation of law constitutes an implied assertion that the maker knew of facts which justified the conclusion of law represented. 95 Even though the rhetoric of the representation is in the form of an opinion, it may carry with it an implied assertion that the representor

89. RESTATEMENT (SECOND) OF TORTS § 545 comment d at 100 (1977); RESTATEMENT (SECOND) OF CONTRACTS § 170 comment b at 465 (1979).
90. W. Prosser, supra note 26, at 725; S. Williston, supra note 44, at 369.
92. W. Prosser, supra note 26, at 725.
knows no facts which are irreconcilable with the opinion and that the representor does know facts which support the opinion.\(^96\)

Examples abound of statements of law that imply the existence of accurate facts which have legal significance but are not part of the law itself. Where the representor asserts a broad conclusion of law, such as one of "marriage," "ownership," or "title," the statement, though in a sense a statement of "law," for practical purposes implies accurate facts to support it. Thus, if the facts are inaccurate or non-existent, the statement is deemed actionable as a misrepresentation of "fact."\(^97\) Specifically, the statement that the representor has good title or ownership of land, although in manner a statement of legal conclusion, implies the presence of those conveyances or other incidents indispensable to vest good title or ownership in the representor.\(^98\) Likewise, a statement that a business has a legal right to operate in a state conveys an implied assurance that it actually has taken all the steps necessary to attain eligibility.\(^99\) A representation of law may imply that the actions and agreement necessary for the formation of a contract are complete,\(^100\) or may imply also the existence or non-existence of the application judicial decision, statute, regulation or ordinance.\(^101\)

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97. Keeton, supra note 27, at 419; F. HARPER & F. JAMES, supra note 32, at 564; Note, supra note 32, at 1022.
98. Keeton, supra note 27, at 418; Restatement (Second) of Torts § 545 comment c (1977).
99. Hembry v. Parreo, 81 A.2d 77, 79 (D.C. 1951); W. PROSSER, supra note 26, at 725; James & Gray, supra note 31, at 494; Restatement (Second) of Torts § 545 comment c (1977).
100. Nodak Oil Co. v. Mobil Oil Corp., 533 F.2d 401, 407 (8th Cir. 1976); Applegate Realty Corp. v. Morrisart Realty Corp., 114 N.Y.S.2d 677, 678-79 (1952); James & Gray, supra note 31, at 494.
101. See, e.g., Allison v. Stevens, 269 Ala. 288, ___, 112 So. 2d 451, 453 (1959) (misrepresentation by testator to the effect that he had, by his will which was previously made, given his property to his children); Bobak v. Mackey, 107 Cal. App. 2d 55, ___, 236 P.2d 626, 627 (1951) (misrepresentation by vendor of realty that purchaser could lawfully carry on light manufacturing business and that premises were in city zone where light manufacturing could be carried on); National Conversion Corp. v. Cedar Bldg. Corp., 23 N.Y.2d 621, ___, 298 N.Y.S.2d 499, 505 (1969) (landlord's misrepresentation that demised premises were in unrestricted zone); Unger v. Eagle Fish Co., Inc., 185 Misc. 194, ___, 56 N.Y.S.2d 265, 266 (1945) (misrepresentation that a frozen fish not subject to ceiling price or regulations of OPA); Sorensen v. Gardner, 215 Or. 255, ___, 334 P.2d 471, 474 (1959) (builder's misrepresentation that plumbing complied with all building code requirements); see also James & Gray, supra note 31 (for further categories of cases).
Pursuit of the elusive dividing line between law and fact has at least yielded this novel qualification to the general rule. The courts, moreover, are increasingly inclined to avoid the general rule by finding statements of fact "implied" in representation of law. Strict adherence to this exception, however, entails making protracted encroachments in the applicability of the general rule. Since most representations of law are not made in isolation but rather presuppose some foundational facts, it appears that very little would remain of a general rule confronted with such an exception. Another problem inherent in the "law based on fact" exception is the confusion which results from employing a general rule and then applying an exception which strips it of vitality.

The most recently developed exception to the general rule holds that a misrepresentation of law is actionable if made as a representation of fact, so intended by the person making it and so understood by the one to whom it is made. Thus, for example, a misrepresentation as to whether property is subject to a zoning ordinance has been viewed as a misrepresentation of fact. In one particularly illuminating case, involving a misrepresentation by a landlord that the demised premises were located in an unrestricted zone, the court reasoned:

[The statements in this case... exemplify ideally an instance in which the statements are not intended or understood merely as an expression of opinion. Landlords said they knew the premises were in an unrestricted district. This meant that they knew, as a fact, that the zoning resolution did not restrict the use of the particular premises, and the tenant so understood it... It is equally clear the tenant understood the statement to be one of fact, namely, what the zoning resolution provided by description, map, and requirements as to the area in question. The misrepresented fact... was what the zoning resolution contained by way of description, map, and requirements, hardly opinions as to the law albeit matters to be found in a law.]

102. W. Prosser, supra note 26, at 725; Note, supra note 32, at 1022.
This exception has also been applied to misrepresentations of the legal authority of a public official,\textsuperscript{106} the existence of a remedy under the law,\textsuperscript{107} the provisions of a will,\textsuperscript{108} the existence of a contract,\textsuperscript{109} the effect of an insurance policy,\textsuperscript{110} the legality of operating a business,\textsuperscript{111} and the effect of the provisions in a note on the Statute of Limitations.\textsuperscript{112} Arguably, this exception would also apply to an assertion that a particular statute has been enacted or repealed or that a particular decision has been rendered by a court.\textsuperscript{113} These assertions are factual incidents and constitute a part of the information essential to ascertain the consequences that the law fastens to another set of facts. The rules that fix liability for a fraudulent misrepresentation of these assertions should be the same as those fixing liability for the fraudulent misrepresentation of any other fact.\textsuperscript{114}

Of course, a statement that is confined to the maker's opinion as to the legal import of a set of facts and does not amount to an assertion of the facts themselves is an assertion of opinion only.\textsuperscript{115} Thus, for example, prophecies of what the courts will do with a particular factual situation, however positive, are statements asserting only the speaker's legal opinion.\textsuperscript{116}

This final exception has the meritorious effect of eliminating the distinction between "law" and "fact" and recognizing the reality that a statement as to the law, like a statement as to anything else, may be intended and understood either as one of fact or one of opinion, according to the circumstances. Perhaps this distinc-

\textsuperscript{106} State v. Deschambault, 159 Me. 223, ___, 191 A.2d 114, 117-18 (1963).
\textsuperscript{109} Nodak Oil Co. v. Mobil Oil Corp., 533 F.2d 401, 406-07 (8th Cir. 1976).
\textsuperscript{113} Keeton, \textit{supra} note 27, at 417; \textit{Restatement (Second) of Torts} § 545 comment a (1977).
\textsuperscript{114} \textit{Restatement (Second) of Torts} § 545 comment b (1977); \textit{Restatement (Second) of Contracts} § 170 comment a (1979).
\textsuperscript{115} \textit{Restatement (Second) of Torts} § 545 comment d (1977); \textit{Restatement (Second) of Contracts} § 170 comment b (1979).
\textsuperscript{116} James & Gray, \textit{supra} note 31, at 495; Keeton, \textit{supra} note 27, at 420; \textit{Restatement (Second) of Torts} § 545 comment a (1977).
tion, based on the speaker's intent, is the most useful in determining whether an action for fraudulent misrepresentation exists.

CONCLUSION

The general rule does not pertain to a cause of action for fraud in which the essence of the injury is the fact that the victim has been deliberately deceived. The origin of the general rule is apparently mixed up with the old canard that "everyone is presumed to know the law." As this presumption is in fact incorrect, one should discard the doctrine that fraud cannot be based on a misrepresentation of law. The law should not assume what it distinctly knows is not the truth, namely, that everyone is learned in the law, especially where such an assumption is undesirable from the point of view of justice. There is no logical connection between this presumption and the maxim "ignorance of the law is no excuse" because the latter is efficacious only in criminal law. The criminal law maxim's adoption into the civil side of the law, under a distorted guise of presumption of knowledge, is both unfortunate and unjustifiable. The real issue is not whether the ignorance of the defrauded representee should be excused, but rather whether "a loss should be imposed on another, or an unconscionable gain be allowed merely because of a promisor's ignorance of the law."117 Clearly a person can be as completely damaged by representations of law as of fact. There exists no good reason why the wrongdoer generally should be permitted to say that the aggrieved person had no right to rely upon the misrepresentation made. It was "never any credit to the law to allow one who had defrauded another to defend on the ground that his own word should not have been believed."118

Contemporary courts, although ritually incanting the traditional maxims, generally treat the cases in such a fashion as to indicate the conventional doctrine is no longer taken seriously. The alleged general rule is now so perforated with exceptions as to contradict either the influence of the traditional theories or the honesty of their usage. The trend discerned from an examination


of decisions indicates that the courts are substantially trying to make the law ruling misrepresentation of law approximate to the law governing misrepresentation of fact. As the traditional bases supporting the doctrine are further rejected, the general rule continues to dissolve by the introduction of new exceptions and the liberal construction and application of old ones.

The continuing use, however, of the standard “general rule-exceptions” format poses problems. Perplexity perforce ensues from utilizing a general rule and then adopting exceptions which render the doctrine altogether meaningless. Also, this use sporadically sows the seeds of lamentable rulings, with a static court drawing the conclusion that it must employ the traditional tenets.

The law has outgrown not only the oversimple dichotomy between misrepresentations of law and fact, but also the “general rule—exceptions” methodology of resolving such issues of fraud. The standard rules and approaches no longer bear analysis and should be rejected. On principle, there should be no distinction between misstatements of fact and law. A statement as to a matter of law should be subject to the same rules as are other assertions. That is, such a statement may or may not be one of opinion. The contemporary inclination, as manifested by the latest exception to the general rule, is forcefully predisposed to discard the difference between law and fact and comprehend that a statement of law, like any other remark, may be intended and understood either as one of fact or opinion, depending on the facts of the case. One may safely predict that the time is rapidly approaching when the courts will do directly what they have been doing indirectly, and unequivocally hold that, if all the other essential elements are present, an action for fraud will lie regardless of whether the misrepresentation is one of law or fact.
THE DOCTRINE OF COMPARATIVE NEGLIGENCE SHOULD BE ADOPTED IN KENTUCKY

by Joseph L. White*

INTRODUCTION

This article advocates the immediate adoption of the comparative negligence in Kentucky. The reason this change is so strongly urged is simple: comparative negligence is a doctrine of fairness and equity which avoids the harsh and often nonsensical results produced by the rigid application of the contributory negligence rule. The majority of jurisdictions in the United States, as well as most foreign countries, have recognized this patent unfairness and have accordingly adopted comparative negligence in one form or another.¹

Throughout its judicial history Kentucky has curiously clung to the contributory negligence concept even though the rule's application has produced almost indefensible results in its own courtrooms. Interestingly, Kentucky holds the dubious honor of having fostered the case which, according to one authority, represents "the classic inequity of the effect of the rule of contributory negligence."² In Louisville & Nashville R.R. Co. v. Fisher,³ the Kentucky Court of Appeals held that the driver of an automobile, who was killed when a train struck his vehicle at a crossing, was contributorily negligent as a matter of law and barred from recovery because he should have seen the approaching train at "some indeterminate point"⁴ between a stop sign and the track. The court maintained this position even though the railroad company was negligent in permitting weeds, eight feet in height, to grow on its right of way, obscuring the motorist's vision from the road.

In Fisher, it is apparent that comparative negligence would have provided a more just outcome and a more socially desirable

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The assistance of Jeffrey T. Royer, member of Northern Kentucky Law Review, in the preparation of this article is gratefully acknowledged.

3. 357 S.W. 2d 683 (Ky. 1962).
4. Id. at 686.
loss distribution than the harsh result achieved by the rigid application of the contributory negligence doctrine, which barred the plaintiff from any recovery. Notwithstanding that result, Kentucky continues to reject the comparative negligence doctrine both legislatively and judicially.\textsuperscript{5} The reason for legislative inaction in this area is unclear. The lethargic judicial response, however, is less defensible. Kentucky courts have chosen not to adopt comparative negligence even while recognizing that contributory negligence is harsh and unfair.\textsuperscript{6}

This article will attempt to examine the origins of contributory negligence as well as describe the operation of the comparative negligence concept. Additionally, some cogent arguments will be advanced in an effort to advocate that Kentucky should join the majority of United States jurisdictions and adopt the far fairer doctrine of comparative negligence.

I. THE ORIGINS OF CONTRIBUTORY NEGLIGENCE

Contributory negligence is a judicially conceived doctrine which provides that there can be no recovery of damages for injuries negligently inflicted by one person on another if the injuries in any way were caused by or were contributed to by the injured party. From a legal perspective this doctrine is of relatively recent origin, and the early nineteenth century case \textit{Butterfield v. Forrester}\textsuperscript{7} is generally reputed to be its progenitor. The court held that a person injured by another's conduct does not dispense with the duty to exercise ordinary care for himself. The case said two events must occur to support an action: (1) a hazard created by the fault of the defendant; and (2) the observance of ordinary care to avoid the hazard on the part of the plaintiff. Some fifteen years later, the rule was adopted in the United States in \textit{Washburn v. Tracy},\textsuperscript{8} where the Vermont Supreme Court held that where the injury arises from the plaintiff's own misconduct or lack of ordinary caution, notwithstanding the defendant's negligence, the plaintiff cannot recover. After \textit{Washburn} the con-

\textsuperscript{5} See, e.g., Mackey v. Greenview Hosp., Inc., 587 S.W. 2d 249 (Ky. Ct. App. 1979); Vinson v. Gobrecht, 560 S.W. 2d 242 (Ky. Ct. App. 1977); Williams v. Chilton, 427 S.W. 2d 586 (Ky. 1968).

\textsuperscript{6} See, e.g., Cook v. Holland, 575 S.W. 2d 468 (Ky. 1978); General Tel. Co. of Ky. v. Yount, 482 S.W. 2d 567 (Ky. 1972); Johnson v. Morris' Adm'x., 282 S.W. 2d 835 (Ky. 1955).

\textsuperscript{7} 11 East 60, 103 Eng. Rep. 926 (1809).

\textsuperscript{8} 2 D.Chip. 128 (Vt. 1824).
tributory negligence concept was quickly and virtually unanimously accepted in every jurisdiction in the United States.⁹ Many legal scholars have posited that one of the principal reasons that this country so rapidly and pervasively embraced the contributory negligence principle was that the Industrial Revolution was at the pinnacle of its growth. It is believed that the rule was viewed as an economic necessity to protect the developing industries from anticipated sympathetic juries and to keep industrial liabilities within manageable limits.¹⁰ In short, the injured, the maimed, and the dead were sacrificed for the perceived "greater" good of industrial prosperity.

It quickly became apparent to the courts in this country that purist form contributory negligence worked extremely harsh results; soon courts in every jurisdiction fashioned exceptions to avoid its application.¹¹ The injustice inherent in the doctrine permitted defendants to totally escape liability, regardless of the egregiousness of their negligent conduct, provided the plaintiff was, to the slightest degree, negligent.

In theory, the doctrine requires "perfect" behavior on the part of the plaintiff in the tortious event that causes his harm. From a practical perspective, such perfect conduct is not humanly possible nor realistic; humans are simply not blessed with perfection nor can they achieve it. The forces that control the course of human behavior in the events of daily life are often without explanation, and accidents provide no exception. Each person is a unique individual, subject to his own life forces; therefore, each incident of life is accordingly made unique, not only because of the individuals involved, but also because of the time, place, and other elements involved. Most thoughtful people, and most thoughtful courts which have dealt with contributory negligence, both recognize these aspects of the human condition and the role these aspects play in life's harm-producing events. Moreover, a consideration of these dynamic elements in specific situations further underscores the harshness and injustice which results from the rigid application of contributory negligence.¹²

Because pure contributory negligence forces a jury (or a court)

⁹ 78 A.L.R. 3d 339, 344-45, n.10 (1970); see also 57 AM. JUR. 2D Negligence § 289 (1971).
¹⁰ 78 A.L.R. 3d 339, 345 (1970); see also 57 AM. JUR. 2D Negligence § 290 (1971).
¹² See James, Contributory Negligence, 62 Yale S.J., 691, 705 (1953).
to decide that a plaintiff cannot recover if the plaintiff’s conduct is found to be even slightly negligent, specious exceptions soon developed in virtually every jurisdiction to circumvent application of the rule. These exceptions, largely fictional in substance, included: “last clear chance”; permissable recovery for “wanton”, “willful”, or “reckless” acts; the “distraction” rule; “negligence per se” (certain statutory violations by a defendant); “strict liability”; the “reasonable risk theory”; the “dangerous places theory”; “lack of capacity”; and the “sudden peril” doctrine. These approaches permitted courts, who recognized that the doctrine was unfair, to mitigate harsh results. When implemented in practice, however, these devices resulted in judicial manipulation, intellectual gymnastics, and issue evasion. What is more, these exceptions lent further credence to the notion that the law is a morass of tricks and loopholes designed to trap the unwary and protect the tort feasors.

Despite the widespread acceptance of these basic rules and exceptions in the law of negligence, it is contended by this writer that justice is more consistently accomplished by methods and means which are direct and forthright, rather than through devices which are fictional and contrived. Furthermore, from a more basic perspective, one fact appears clear: the ameliorating devices which have developed over time are simply insufficient and, to a degree, ineffective in preventing the harsh and unfair dispositions made inevitable by the existence of the contributory negligence doctrine.

II. THE ORIGINS AND RATIONALE OF COMPARATIVE NEGLIGENCE

Comparative negligence, like last clear chance and other such fictional devices mentioned above, developed to abrogate the harshness of contributory negligence. Unlike the other theories,
however, comparative negligence does not attempt to detract from the effects of contributory negligence through a fictional exception, but rather it serves to displace the contributory negligence rule altogether. As a general proposition, comparative negligence takes into account the degree to which the plaintiff's own negligence or fault has contributed to the course of his own harm, and accordingly lessens a defendant's obligation to pay based on that fault determination. Broadly, the term "comparative negligence" includes any civil legal rule which considers the relative degrees of negligence of each of the parties involved, and accordingly determines whether, and to what degree, each party should be held responsible for the consequences of his own conduct. Dean Prosser has stated that "comparative negligence" is not an accurate label to be applied to this doctrine. He suggests that "apportionment of damages" would be a more appropriate term to employ since the practical operation of the rule serves to diminish the damages a plaintiff may recover from a defendant rather than to relieve a defendant of liability altogether.

The earliest attempt to implement a comparative scheme in the United States surfaced in Illinois in 1858. Though this early formulation proved to be unworkable, and was abrogated some twenty-seven years later, it was at least demonstrative of an early recognition that a change in negligence law was necessary to promote justice and fairness. In the latter half of the nineteenth century, a few other states also experimented with the comparative concept. Shortly after the turn of the century, a noticeable trend away from common law contributory negligence was readily discernable as many jurisdictions began to adopt com-

23. BLACK'S LAW DICTIONARY 255 (5th ed. 1979) provides this definition: Comparative negligence. Under comparative negligence statutes or doctrines, negligence is measured in terms of percentage, and any damages allowed shall be diminished in proportion to amount of negligence attributable to the person whose injury, damage or death recovery is sought. Many states have replaced contributory negligence acts or doctrines with comparative negligence. Where negligence by both parties is concurrent and contributes to injury, recovery is not barred under such doctrine, but plaintiff's damages are diminished proportionately, provided his fault is less than defendant's and that, by exercise of ordinary care, he could not have avoided consequences of defendant's negligence after it was or should have been apparent.

27. See Lanark v. Doughtery, 153 Ill. 163, 38 N.E. 892 (1894).
parative negligence in one form or another. Georgia in 1948 judicially adopted and legislatively codified a comparative negligence rule which remains in force today.\textsuperscript{28} By 1976, the majority of states had adopted, either legislatively or judicially, some form of comparative negligence. Twenty-nine states at present have adopted the comparative doctrine in some form,\textsuperscript{29} nine states having done so through judicial decision.\textsuperscript{30}

III. THE MAJOR FORMS OF COMPARATIVE NEGLIGENCE

Three principal forms of comparative negligence have surfaced in the jurisdictions of the United States: “pure”, “modified”, and “slight versus gross”.\textsuperscript{31} Additionally, different jurisdictions have varied in their respective applications of these three forms.\textsuperscript{32}

Pure comparative negligence “provides for the apportionment between a negligent defendant and a contributorily negligent plaintiff, regardless of the extent to which either party’s negligence contributed to the plaintiff’s harm”\textsuperscript{33} as long as both are negligent to some degree. It does not matter that the plaintiff’s negligence is greater than the defendant’s; the plaintiff can be 99% negligent and still recover 1% of his damages.

Modified comparative negligence permits a plaintiff to recover from a defendant only if the plaintiff’s negligence is less than that of the defendant. The plaintiff, in short, cannot recover at all unless his negligence is less than 50% of the cause of his harm. If the plaintiff’s conduct is less than 50% of the cause of his injuries, then his damage award is reduced by the corresponding degree of his causative negligence.\textsuperscript{34}

The “slight versus gross” formulation permits the plaintiff to recover in situations where, in contextual comparison, he is slightly negligent and the defendant is grossly negligent. The plaintiff’s negligence is considered by the jury “in mitigation of damages in proportion to the amount of contributory negligence

\textsuperscript{29} See Bagby, Contributory Negligence on the Decline, 46 KENTUCKY BENCH AND BAR 8 (January 1982); see also 26 Personal Injury Newsletter 283 (April 11, 1983).
\textsuperscript{30} 26 Personal Injury Newsletter 283 (April 11, 1983).
attributable to the plaintiff." The test of what constitutes "slight" and "gross" negligence is not based upon absolute degrees of negligence; rather, it is based upon "a comparative test of the relative negligence of each part." In other words, the respective negligence of the plaintiff and the defendant is not evaluated as 'slight' or 'gross' standing alone. Rather, this determination is made by comparing the acts of each litigant in the context of the accident circumstance giving rise to the claim.

IV. THE ARGUMENTS AGAINST COMPARATIVE NEGLIGENCE: LACK OF SUBSTANTIAL MERIT

Many arguments have been advanced by scholars and legal writers in opposition to the comparative negligence concept for damage apportionment. As will be demonstrated, however, many if not all of these arguments lack substantial merit when the trends evident in modern negligence law are examined.

As an initial matter, many opponents of comparative negligence argue that express adoption of the doctrine must emanate from the legislature, not the judiciary. It is reasoned that this is necessary because contributory negligence has been applied continuously and consistently through stare decisis, and therefore its application must be continued unless serious detriment will result to the public at large. This argument, however, falls of its own weight for three reasons. First, detriment to the public does result from the continued adherence to the contributory negligence rule: a rigidly simple application of the doctrine in all cases often results in injustice and unfairness. It has always been the province of the common law to adapt and change as society's needs have evolved. The principles that govern the common law demand that rules of law previously adopted be changed or altered if, in light of current social and economic customs, and modern conceptions of equity and fairness, they do not achieve justice. Contributory negligence simply does not achieve the justice that the public demands in the affairs of modern life.

Second, the courts of Kentucky have recognized that the judiciary, as the exponent of the common law, has this duty to

36. Id.
change. They have accordingly abrogated archaic rules of law when the needs of society have so required it. 38

Third, due to the political climate in which they operate, legislators are often slow to act and are much more susceptible to political influences than judges. What is more, powerful and affluent political interest groups, who would be adversely affected by a comparative scheme, exert their influence to retard the adoption of comparative negligence, even though society would best be served by enacting the rule.

The state of Iowa has taken the most pragmatic and logical approach to the judicial/legislative controversy. In judicially adopting comparative negligence in *Goetzman v. Wichern*, 39 the Iowa court stated:

There are . . . times when there exists a mutual state of inaction in which the court awaits action by the legislature and the legislature awaits guidance from the court. Such a stalemate is manifest injustice to the public. When such a stalemate exists and the legislature has, for whatever reason, failed to act to remedy a gap in the common law that results in injustice, it is the imperative duty of the court to repair that injustice and reform the law to be responsive to the demands of society. 40

Another objection often raised in opposition to comparative negligence is that this "apportionment" concept is too difficult for juries to apply. This contention is also specious, however, in light of modern experience. Juries regularly apportion damages in admiralty cases and Federal Employee's Liability Act cases, as well as in general negligence cases in the comparative negligence jurisdictions, and all with considerable success. Furthermore, in Kentucky, juries are often called upon to apportion damages amongst defendants; 41 there is no cogent reason why juries cannot perform the same task between plaintiff and defendant.

A third argument advanced by some is that a plaintiff should be barred from recovery because his negligence constitutes an intervening and superceding cause sufficient to preclude the

38. For example, in Parker v. Redden, 421 S.W. 2d 586 (Ky. 1967), the Court of Appeals eliminated the time-honored negligence defense of assumption of risk. The court realized that, while traditionally a defense, assumption of risk was really a factor for evaluating the plaintiff's exercise of due care.
39. 327 N.W. 2d 742 (Iowa, 1982).
40. Id. at 751.
41. See Orr v. Coleman, 455 S.W. 2d 59 (Ky. 1970).
liability of the defendant. This argument, however, ignores the well established principle of "proximate cause" (or, in Kentucky, "substantial cause") that, in order to be actionable, a defendant's negligence need not be the sole cause of an injury; it is sufficient if the defendant's negligence is a substantial cause or a concurring cause.42

Some proponents of the contributory negligence rule contend further that the contributory principle serves a significant penal function somewhat akin to the "clean hands" doctrine. In other words, a plaintiff should not be afforded a remedy if he, as a complainant, was himself at fault. But the history of the contributory rule itself deflates any merit this argument may possess. The fictional exceptions which were devised by courts in the past to offset the harshness of contributory negligence (i.e. last clear chance) operated to permit a plaintiff to recover notwithstanding the fact that he stood before the bar without the "cleanest of hands".43 In short, these plaintiffs were permitted recovery despite the fact that they were themselves negligent.44

Finally, comparative negligence opponents unconvincingly submit that the existence of contributory negligence deters accidents by denying recovery to those who fail to exercise proper care for their own safety. But, as Professor Prosser has so eloquently articulated:

"The assumption that the speeding motorist is, or should be, meditating on the possible failure of a lawsuit for his possible injuries lacks all genuine reality [or basis in human experience; and it would be just] as reasonable to say that the rule promotes accidents by encouraging the negligent defendant [to hope the person he injures will also be negligent].45"

In summary, it is apparent that the arguments in support of the retention of contributory negligence are ill-conceived and unrealistic in light of modern practice and experience. The most likely reason for the continued vitality of the contributory rule is the firmly-entrenched anachronistic protectionsim that originally spawned the doctrine. That justification has always lacked legitimacy, but it particularly does so today.

42. See e.g., Deutsch v. Shein, 597 S.W. 141 (Ky. 1980); Michael v. United States, 338 F.2d 219 (1964); see also 32 A.L.R. 3d 463, 470 (1970).
43. See supra section I.
45. Prosser, supra note 25 at 468 (emphasis added).
V. COMPARATIVE NEGLIGENCE IN KENTUCKY

A. Perpetuating a Doctrinal Relic

Aside from certain federally controlled causes of action (i.e. admiralty, F.E.L.A.), comparative negligence simply does not exist in Kentucky. The courts of this state have continually, in general common-law negligence actions, refused to adopt any comparative negligence scheme, intimating that such a change must be made by the legislature.46

As a general proposition, it cannot be refuted that comparative negligence produces fairer and more equitable results than the "all or nothing" impact of the contributory negligence rule.47 Underlying these considerations of equity and fairness, moreover, is the notion that tort law, and negligence law in particular, is guided and shaped by the policies and political issues prevalent at given points in time in modern society. Granted, many basic foundational concepts remain static in the face of changing societal demands. But other aspects of the law, many of them deeply rooted in tradition, have demanded constant reassessment and reevaluation as the underlying purposes they once served change with time.

The problems postured by the Industrial Revolution led to the development of workers' compensation laws, social security laws, and other social program legislation. The legal rules formulated by the courts of the day likewise reflected the need to establish doctrines of law which fairly addressed the important problems engendered by the era's activities. The contributory negligence rule was a product of that judicial and economic era; it sought, as a primary goal, to protect the budding industries of the nation from potential financial ruin.48 The interest in achieving fairness, while important, was simply insufficient on balance to outweigh the greater interests in industrial and economic stability.

But the times have changed. No longer is it necessary, in this age of insurance and corporate giantism, to perpetuate through

46. See, e.g., Mackey v. Greenvue Hospital, 587 S.W. 2d 249 (Ky. Ct. App. 1979); Vinson v. Gobrecht, 560 S.W. 2d 242 (Ky. Ct. App. 1977); Williams v. Chilton, 427 S.W. 2d 586 (Ky. 1968); Felix v. Stavis, 385 S.W. 2d 72 (Ky. 1964).
47. See, e.g., Cook v. Holland, 575 S.W. 2d 468 (Ky. Ct. App. 1978); General Tel. Co. of Ky. v. Yount, 482 S.W. 567 (Ky. 1972); Johnson v. Morris' Adm'x., 282 S.W. 2d 835 (Ky. 1955).
48. See supra section I.
judicial decree this industrial protectionism. On balance, the need for greater fairness and justice has become paramount, especially in light of modern corporate policies which emphasize high technology, high efficiency, and often, high risk.

The comparative negligence doctrine is unquestionably the product of this philosophy. It recognizes that equity is more consistently achieved in an age of hustle, bustle, and, inevitably, carelessness, when the defendant's conduct is examined in comparison with the plaintiff's conduct and liability (or non-liability) is imposed consistent with their respective degrees of fault. Several states have recognized these modern day realities and they have accordingly adopted comparative negligence to advance these interests through the force of law.

B. The Cogent Reasoning of Other State Courts

To adequately explore the justifications for adoption of comparative negligence, it is necessary to examine the reasoning advanced by other state courts that have embraced the doctrine. Their insight provides valuable support for the immediate adoption of comparative negligence in Kentucky.

The California Supreme Court judicially enacted comparative negligence in *Li v. Yellow Cab Co.* In that case the court stated that the central reason for adopting a system of "pure" comparative negligence was the inherent injustice of the contributory negligence rule. The court further pointed out that the doctrine of contributory negligence was inequitable in its operation because it failed to distribute responsibility in proportion to fault. Recognizing that devices such as last clear chance had proved to be not even remotely adequate to remedy this unfairness, the court reasoned that, since a primary concept of negligence law is that liability is based upon fault, the extent of fault should govern the extent of liability or loss.

The Florida Supreme Court also judicially adopted "pure" comparative negligence in *Hoffman v. Jones,* where it stated that the best argument in favor of the movement from contributory

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50. Id.
51. Id. at 810, 532 P.2d at 1230, 119 Cal. Rptr. at 862.
52. See generally supra note 47.
53. 280 So. 2d 431 (Fla. 1973).
negligence to comparative negligence is that comparative principles simply provide a more equitable system of determining liability and provide a more socially desirable method of loss distribution. Contributory negligence, the court noted, is a harsh rule which either placed the burden of loss for which two or more parties are responsible on only one party, or it relegated the determination of damages in mutual negligence situations to luck.\textsuperscript{54} The court further recognized that at times the harshness of contributory negligence might be ameliorated by the fact that juries tend to disregard the instructions given by the trial judge in an effort to afford some semblance of justice. But, as the court perceptively indicated, there is something fundamentally wrong with a rule of law that is so contrary to the convictions of the lay community that the jury refuses to enforce it even when so instructed by the judge.\textsuperscript{55}

\subsection*{C. Pragmatic Reasons for Adopting Comparative Negligence}

There are additional practical reasons in support of adopting comparative negligence in Kentucky. The Kentucky court system, like most across the country, is annually becoming more and more congested with litigation. Each year, the number of cases on court dockets throughout the state increases, and the cases before these courts are becoming increasingly more complex. Repudiation of contributory negligence and adoption of a comparative rule would provide considerable relief to this problem. Many defendants often elect to proceed to trial because they feel they have "a shot" at complete relief through the contributory negligence defense. What is more, if the defendant is unsuccessful at trial, he has another "shot" at relief through a potential reversal on appeal.

The comparative negligence doctrine would eliminate this "crap shooting" aspect of negligence law practice and it would promote the settlement of many borderline cases. Many defendants will be less likely to "stick to their guns" if their potential exposure to at least \textit{some} financial liability is greatly increased. This will have the double-barreled effect of both reducing the trial and appeals court dockets while simultaneously promoting greater justice and fairness.

\textsuperscript{54} Id. at 437.

\textsuperscript{55} Id.; see also Annot., 78 A.L.R. 3d 399, 374.
CONCLUSION

Thirty-nine, or roughly 78%, of the states in this country have adopted comparative negligence to promote greater justice and fairness for their citizens. It is time for Kentucky to do the same. Since the legislature, for many reasons, is not likely to initiate this change, the burden falls upon the courts to assume their role as vanguards of the common law and adopt comparative negligence for the good of this state.

When it is so widely and generally recognized that a rule of law is harsh and unfair, it should be eliminated. There is no need to “pass the buck” or wait. The doctrine of contributory negligence is an anachronism, a vestige of archaic special interest protectionism that should be abolished. Justice should be neither delayed nor denied any longer.
COMMENTS

PROPERTY VERSUS CIVIL RIGHTS: AN ALTERNATIVE TO THE DOUBLE STANDARD

INTRODUCTION

During the 1950s and 1960s, some commentators criticized the Supreme Court for having established a "double standard" in the application of its power of judicial review, whereby the Court deferred to legislative majorities on matters of economic rights, while exercising close scrutiny over legislative treatment of civil rights. This comment is a comprehensive reexamination of this double standard. First, the views of the Founding Fathers and of liberal theory toward property rights will be examined. Then the treatment of property through the double standard will be explored. Next, it will consider how the Court over the past twenty years has become more sympathetic to property rights claims. At least in part this change is a response to the evolving concept of what is considered to be property, a new series of tests when first amendment and property rights conflict, and the Court's willingness to expand the concept of a taking of property as opposed to a regulation. Finally, the implications of these changes will be considered in order to create an alternative to the "double standard," which will give the vital liberal goal of individual development even greater protection.

I. PROPERTY RIGHTS AND THE FRAMERS OF THE CONSTITUTION

C.B. Macpherson has declared:

[T]o have a property is to have a right in the sense of an enforceable claim to some use or benefit of something, whether it is a right to share in some common resource or an individual right in some particular things. What distinguishes property from mere momentary possession is that property is a claim that will be enforced by society or the state, by custom or convention or law.¹

The rights inherent in the ownership of property are those of investment, modification, consumption, exchange, and gift.² The con-

cept of property rights is inescapably political because a proprietary claim is meaningless without protection from the state and because it excludes other people from these state-guaranteed rights.  

Property rights were considered to be essential by the creators of the American republic. The Constitutional Convention was convoked, in part, by the concerns for protection of property aroused by Shays’ Rebellion. While the results of that Convention have been attributed to the selfish motives of the Framers, leading constitutional architects such as James Madison grounded their defense of private property in important philosophic premises. The Founders considered property and liberty to be closely related. Thus, Madison wrote, “Man had not only rights in property, but also a property in his rights,” and Hamilton commented, “Adieu to the security of property[,] adieu to the security of liberty.” John Adams insisted, “[P]roperty is surely a right of mankind as really as liberty. . . . The moment the idea is entered into society that property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence.”

These beliefs were institutionalized with several provisions of the force of law and public justice that is the United States Constitution. Its preamble maintained that one of its purposes was to secure the blessings of liberty. Article I, § 9 provided for no arbitrary tax laws. The fifth amendment protected persons from confiscations of their property without just compensation and the deprivation of their property without due process of law. During the period before the adoption of the Constitution, capital formation was hindered, and paper money lengthened time payments for debts. Creditors had failed to secure relief at the state level, so they tried to create a national government that would protect the

5. See, e.g., C. Beard, An Economic Interpretation of the Constitution of the United States (1914).
6. Madison wrote in the The Federalist No. 10, “The diversity in the faculties of men, from which the rights of property originate, is not less an insuperable obstacle to an uniformity of interests. The protection of these faculties is the first object of Government.” Quoted in T. Anderson & P. Hill, The Birth of a Transfer Society 26 (1980).
7. Quoted in Bruchey, supra note 4, at 1137 (footnotes omitted).
obligation of contract and prohibit paper money. The Founders were concerned with creating a stable financial system. Article I, § 10 was developed to prevent the states from infringing on property rights. By granting Congress a stronger taxing power than had existed under the Articles of Confederation, there was a greater assurance that the federal government could fulfill its function as a protector of private property. Congressional power to raise an army and navy was designed in part to guard against debtor revolts and other intrastate threats to property rights. Military authority, in combination with strong commerce, would convince other countries not to oppose the fledgling republic militarily or economically. Further, it also could be used to acquire foreign markets. Of course, the Commerce Clause allowed protection for American goods and a common market for products. Even the fourth amendment protects property rights. All these provisions serve as indications that "[p]erhaps the most important value of the Founding Fathers of the American Constitutional period was their belief in the necessity of securing property rights."

The political ideas of the English philosopher John Locke were very much in the minds of those alive during the American Revolution. Property was a crucial tenet in Lockeian political theory. Locke argued that a man has property in his own person, and so what his body and hands produce is his own:

Whatever, then, he removes out of the state that Nature hath provided, and left in, he hath mixed his labor with it, and joined to it something that is his own, and thereby makes it his property.

9. C. BEARD, supra note 5, at 32.
10. Id. at 35.
11. Bruchey, supra note 4, at 1145.
12. C. BEARD, supra note 5, at 32.
13. Id. at 171-73.
14. Id. at 175. Nor must one be a believer in economic determinism to reach similar conclusions. See, e.g., Burger, Remarks at the American Law Institute 6, 7 (May 18, 1982).
16. Bruchey, supra note 4, at 1136. "The Constitution was essentially an economic document based upon the concept that the fundamental private rights of property are anterior to government and morally beyond the reach of popular majorities." C. BEARD, supra note 5, at 324.
17. P. LARKIN, PROPERTY IN THE EIGHTEENTH CENTURY WITH SPECIAL REFERENCE TO ENGLAND AND LOCKE 171 (1930).
18. While all liberal theory gives some role to property, Locke's theory is the most protective of these rights.
It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it that excludes the common right of other Men. For this “labour” being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough and as good left in common with others.¹⁹

It was the act of putting something of oneself in order to shape the environment in one’s own image that made an object property.²⁰ Property was not an end in itself for Locke, but rather a means for individual self-fulfillment: “... [T]he condition of humane life, which requires labour and materials to work on, necessarily introduce private Possessions.”²¹

A second limitation Locke placed on property was that no one could possess so much as to cause spoilage.²² The creation of money, however, eliminated spoilage as a practical limitation on the amount of property someone may possess.²³ The right to unequal property, even to what was more than actually useful, was justified by natural law, so long as it was in monetary form or in property that could not spoil.²⁴ Locke said that men form societies in order to protect property; nevertheless, there were justifications by Locke for both the taking and regulation of property with the consent of the citizen. The most obvious was to raise revenue to support the government created to protect property:

It is true governments cannot be supported without great charge, and it is fit every one who enjoys his share of the protection should pay out of his estate his proportion for the maintenance of it. But still it must be with his own consent—i.e., the consent of the majority, giving it either by themselves or their representatives chosen by them. ...²⁵

These ideas, however, comprise only part of the Lockeian role

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¹⁹. J. Locke, The Second Treatise of Government § 27 (1980). Nozick has criticized the logical implications of Locke’s mix of labor theory: “(Nozick’s example: If I empty a can of tomato juice into the ocean, do I own the ocean?)” Radin, supra note 15, at 958.
²⁰. With appropriation, items are no longer external, but part of man’s will. See 2 T. Green, Works in Property: Mainstream and Critical Positions, supra note 1, at 105.
²¹. J. Locke, supra note 19, § 35 (emphasis added).
²². Id., § 31.
²³. Id., § 48. “And as different degrees of industry were apt to give possessions in different proportions, so this invention of money gave them the opportunity to continue and enlarge them.” (emphasis added) Id.
²⁴. Id., § 50.
²⁵. Id., § 140. In this case, Locke referred to “property” to mean not only material property, but life and liberty as well. See also id., §§ 94, 134, 138, 222.
of government in relation to property rights. He believed that "in Government the laws regulate the rights of property." Though C.B. MacPherson argues that Locke allowed absolute property rights that "override[] any moral claims of the society," Locke in §§ 130 and 131 of the Second Treatise of Government did allow restrictions on property rights:

For being now in a new state, wherein he is to enjoy many conveniences from the labour, assistance, and society of others in the same community, as well as protection from its whole strength, he is to part also with as much of his natural liberty, in providing for himself, as the good, prosperity, and safety of the society shall require, which is not only necessary but just, since the other members of the society do the like.

A state which created protections for property rights had the authority to regulate those rights. It is not difficult to see why Locke permitted regulation.

The Constitution cannot be understood without reference to John Locke. The Lockeian theory of property rights is the framework for their constitutional basis. The Framers shared this belief in the regulation of property, permitting Congress to exercise regulatory power over interstate commerce, and by allowing the states reserved police powers.

II. THE SUPREME COURT AND PROPERTY RIGHTS TO 1937

The role of the early Supreme Court in this system was to apply Lockeian political theory as an institutionalized "appeal to heaven." The natural right status of property as a limitation on government power was fully accepted. But the antebellum Court

26. Id., § 50. See also P. Larkin, supra note 17, at 89.
28. J. Locke, supra note 19, § 130.
30. See Pound, Liberty of Contract, 18 Yale L.J. 465 (1909); see also P. Larkin, supra note 17.
31. The Commerce Clause provided a definite grant of regulatory power. It was not intended merely to prevent state regulation of interstate commerce, but to allow positive federal action. The interpretation of the Commerce Clause by T. Anderson & P. Hill, appears to be in error. See supra note 6, at 32.
32. J. Locke, supra note 19, at 14.
33. See Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) quoted in G. Dietze, supra note 8, at 79.
also upheld the power of government to regulate the use of property. It also subordinated absolute use of private property when it conflicted with the common good: "[w]hile the rights of property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and well-being of every citizen depends on their faithful preservation." Throughout this period, the two portions of Locke's views of private property were given comparable diligence of protection, and so were other individual liberties.

As the nineteenth century progressed, however, Lockeian political ideas had to be adjusted to accommodate an urban, commercial, industrial society. The end of the frontier diminished chances for Lockeian acquisition of new land. In every era the cases that come before the Supreme Court reflect the major public issues of the day. Predictably, the Court decided cases concerning the growth of regulatory legislation that began during this period. In 1877, in *Munn v. Illinois*, the Court, speaking through Chief Justice Waite, almost seemed to paraphrase §§130 and 131 of Locke's *Second Treatise* in order to uphold an Illinois law requiring grain storage licenses and setting prices for storage services, on the ground that the grain elevators "do affect the public interest" and therefore were properly subject to state regulation. Although this result was reached, the gravamen of the majority's argument clearly implied that other businesses which were not so "affected with a public interest" could not constitutionally be regulated by a state under the Due Process Clause of the fourteenth amendment. That, in turn, tacitly recognized

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34. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). For an alternative to this view, see B. Siegan, *Economic Liberties and the Constitution* 64-79 (1980). Siegan's interpretation of the *ex post facto* and contract clauses is unlikely considering their potential impact on bankruptcy legislation.


37. T. Anderson & P. Hill, *supra* note 6, at 58.

38. 94 U.S. 113 (1877).

39. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.

*Id.* at 126. "We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by legislatures, the people must resort to the polls, not to the courts." *Id.* at 134.
what came to be called the concept of "substantive" due process—that due process bars some infringements of property rights even when the state regulation in question had satisfied the standards of "procedural" correctness in every way.

It was some years after Munn, when the composition of the Court had changed, that the Court finally began to consistently void state regulations of property. An enormous increase in the Court's supervisory discretion occurred with adoption of tests which considered the "reasonableness" of legislation. Any "unreasonable" regulation was considered a deprivation of property without due process of law.

The Industrial Revolution challenged a number of Lockeian conceptions of property. Karl Marx believed that the workers were entitled to the fruits of their labor, but that under nineteenth century capitalism the capitalists received the fruits of their employees' labor. He was not alone in this claim, for latter-day liberals, such as John Stuart Mill, made identical observations.

The social legislation, however, of the period of Theodore Roosevelt's administration more closely approximated Locke's views than Mill's. Nonetheless, when New York State passed a law setting maximum hours for bakery employment, the Supreme Court overlooked Locke's §§ 130-31 principle that members of society relinquish certain liberties in order for that society to protect the common good. Instead the Court invalidates the law, in Lochner v. New York, concentrating on § 60 of Second Treatise, that all people are equally able to discover the law of nature and to "shift for themselves" in contracting out their own labor.

By basing its approval of legislation on the law's "reasonableness," however, the Supreme Court occasionally failed to protect property rights when legislatures actually violated them. In a 1915 decision which upheld a Los Angeles zoning regulation that destroyed a man's brick manufacturing business, the Court stated: "There must be progress, and if in its march private in-

41. See Property: Mainstream and Critical Positions, supra note 1, at 65.
42. Id. at 83. Tawney also made this point. Id. at 143.
43. See P. Larkin, supra note 17, at 169-70.
44. 198 U.S. 45 (1905).
45. J. Locke, supra note 19, § 60, at 34. See also C. B. MacPherson, supra note 27, at 245.
46. For a favorable critique of Lochner, see B. Segan, supra note 34, at 115-19. Most of the scholarly work, however, is critical of such decisions. See, e.g., Pound, supra note 30, at 482.
terests are in the way they must yield to the good of the community." 47 Such subjective factors as "reasonableness" or "progress" either were created in order to, or by coincidence allowed the justices to read their political values into the Constitution. When this policy began, such views were not out of step with the majority of Americans. But when such interpretations remained which struck down minimum wage legislation in 1923 and again in 1936, the Court's decisions pleased fewer and fewer people. 48

Although by the time of the New Deal the old Court, in Nebbia v. New York, 49 did allow states to set milk prices, the reasonableness test imposed during the era of substantive due process ordinarily enabled regulatory legislation to be struck down if it conflicted not with the Constitution, but with the views of individual judges. 50 Such conditions led to a confrontation with the executive branch in the form of Franklin Roosevelt's 1937 attempt to pack the Court. Although unsuccessful, the plan's objectives were nonetheless achieved when the Court abdicated its protection of property rights when it upheld minimum wage legislation in West Coast Hotel Co. v. Parrish. 51 "Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process." 52 Later that year the Court even further reduced its discretion by eliminating "reasonable" from its test of due process. 53

III. THE DOUBLE STANDARD: THE FIRST QUARTER CENTURY

Once the Supreme Court withdrew from its traditional role as defender of property rights, it had to modify its theoretical basis

48. Morris Cohen said that the 1923 minimum wage case, Adkins v. Children's Hospital, 261 U.S. 525, showed "private monetary interests receive precedence over the sovereign duty of the state to maintain decent standards of living." Cohen, Law and the Social Order in Property: Mainstream and Critical Positions, supra note 1, at 157.
49. 291 U.S. 502 (1934). Justice Owen J. Roberts wrote that "[w]ith the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and unauthorized to deal. See also id. at 527-28.
50. The Court equated liberty with unrestricted capitalism, the ability to pursue a lawful calling, and freedom of contract. See Latham, The Majoritarian Dilemma in the United States Supreme Court, 2 Confluence 27 (1953). "Holdings like these [Lochner, et. al] seemed, at best to be unrealistic and naive about the facts of modern industry." Id. at 28. See also P. Larkin, supra note 17, at 168.
51. 300 U.S. 379 (1937).
52. Id. at 391.
for its power of judicial review. The Court could relinquish all power of judicial review, or it could create a new rationale to exercise judicial review only when certain rights were under consideration. It chose the latter. The Senate Judiciary Committee report opposing the Court-packing plan had based its objection in part on the American value of protection of minority rights. "At the basis of this view of the society is concern for the individual and his self-fulfillment, to the extent to which his endowments permit."\textsuperscript{54} But since 1937, as Earl Latham maintained, the Supreme Court "has tried to distinguish between the rights of economic minorities and those of non-economic minorities. The Court has attempted to subordinate the first to the desires of legislative majorities, and to exalt the second above legislative majorities."\textsuperscript{55} The double standard was born.

\textbf{A. The Property Standard: The "Rational Basis Test"}

Before considering the justifications for the Court's shift of its power of judicial review to "civil rights," it is useful to consider the changes in the Court's economic decisions after 1937. Dissenters in the \textit{laissez-faire} Court had urged adoption of a rational basis test for judging economic legislation, and this view was adopted by the new majority. The rational basis test stipulates that economic legislation will be presumed constitutional unless it can be proved that the legislature had no rational basis for passing the law. If the legislature identified an economic problem and enacted measures it could have rationally expected to address that problem, the law would be upheld. Whereas the reasonableness concept almost presumed the unconstitutionality of regulations and permitted broad discretionary power for the Court, the rational basis test left all questions regarding the wisdom and effectiveness of economic legislation to the sole discretion of the legislative branch. The test was made extremely weak.\textsuperscript{56} Almost any statute that regulates property rights would be upheld by the Court.\textsuperscript{57}

It is instructive to examine cases involving economic minorities

\textsuperscript{54} Quoted in Latham, supra note 50, at 24.
\textsuperscript{55} Id. at 25.
who challenged laws that they felt denied them of one of the most important of property rights, the pursuit of a calling. In 1947 the Court upheld a Louisiana law requiring a six-month apprenticeship for becoming a riverboat pilot.58 The plaintiff had had fifteen years' experience before the law was passed, but the certified pilots trained only their relatives and friends. The Court, speaking through Justice Black, noted the state interest in preventing collisions by assuring that pilots be familiar with local waters and recognized that piloting was an occupation usually passed from one relative to another.59 The law was upheld in recognition of the legislators' desire to maintain the morale benefits that would result from a system of nepotism.60

Similarly, in 1948 the Court upheld a Michigan regulation that permitted only women whose husbands or fathers owned bars to become barmaids.61 Justice Frankfurter, writing for the majority, noted that the moral dangers present in bartending might have made the legislators prohibit that occupation to women, but equally plausible, they might have felt the presence of a male relative would minimize the difficulties.62 "We cannot cross-examine either actually or argumentatively the mind of Michigan legislators nor question their motives."63

The following year saw the Court sustain a law that prevented owners of trucks in the form of trucks from displaying advertising on the trucks on the grounds that it was a rational traffic safety regulation.64 The same year, the Court upheld a South Carolina statute that prohibited life insurance companies from being undertakers and undertakers' life insurance companies.65 The Court upheld the law against claims that the insurance lobby had forced it through the legislature stating that the Court could only examine results, not motives of economic legislation.66

The Court continued to be reluctant about striking down any economic legislation on due process grounds. If ever there was a

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59. Id. at 558.
60. Id. at 563.
62. Id. at 466.
63. Id. at 466-67.
66. Id. at 224.
law with no rational basis for passage, it was the one questioned in *Williamson v. Lee Optical Co.*\textsuperscript{67} There the Court upheld as protective of health, some sections of an Oklahoma law that forbade anyone to fit, duplicate, or replace lenses without a prescription from a state-licensed optometrist or ophthalmologist. Writing for the majority, Justice Douglas said: “The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts to balance the advantages and disadvantages of the new requirement.”\textsuperscript{68} While the Court recognized that when, for example, someone broke his glasses there might not be a relation to health, the frequency of such connections might have compelled the legislators to require a medical review. Perhaps they thought a preventive medical examination should be required, even when the mere replacement of a lost lens was involved. But, as Justice Douglas admitted, under the law an examination was not required if an optician had an old prescription from an ophthalmologist or optometrist on file. This incongruity, however, did not stop the Court from upholding the law: “[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.”\textsuperscript{69}

Although in theory the Court retained a measure of scrutiny over legislation affecting property rights under the “rational basis” test, in practice it exercised none over the first quarter-century of the double standard.

**B. The Civil Rights Standard: “Preferred Freedoms”**

The Supreme Court’s eventual decision to take under its aegis the so-called “individual liberties” was in some ways a total reversal of its historical role, but not one without some previous basis in its decisions, primarily dissents. There were four causes for a stricter standard when civil liberties were at issue: World War I,

\textsuperscript{67} 348 U.S. 483 (1955).
\textsuperscript{68} Id. at 487.
\textsuperscript{69} Id. at 487-88. The only economic regulations the Court struck down as irrational concerned denying property rights to non-economic minorities. See *Schware v. Board of Bar Examiners of N.M.*, 353 U.S. 232 (1957) (members of Communist Party); *Tot v. United States*, 319 U.S. 463 (1943) (violators of criminal law were denied due process). The Court even denied due process to very Lockeian farmers. See *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942).
the extremism of the economic conservatives, a social interpretation of first amendment rights and the federalization of the Bill of Rights.

Until 1918, the Court hardly ever heard what today would be considered "civil liberties" cases. When the United States fought authoritarianism and the Russian Revolution in World War I, the Court was more willing to protect such freedoms as the "outstanding difference" between the two systems. Some argue that a second standard was developed for civil liberties with the "clear and present danger" test in *Schenck v. U.S.* Under this interpretation, the Court merely demanded "reasonableness" to uphold economic regulation, but required a much stronger "clear and present danger" to endorse infringements of first amendment liberties.

When the war ended, and the extremism over economic regulation resumed through the crisis of 1937, these non-economic liberties received greater emphasis. Various members of the Court, angered by the subjective jurisprudence of their more conservative brethren, wanted to end any supervisory role over economic legislation and instead concentrate on protecting civil rights. "Arguably, Stone did not introduce the double standard; it was already an implicit constitutional doctrine by 1937." The new Court wanted to show that it was more enlightened than its predecessor.

In addition to reaction to extremism as a cause of the double standard, the purpose of protecting certain rights emerged as a factor. While property rights were merely individual rights, "preferred freedoms" were more important to the society as a whole than to the individual. These rights allowed corrective access to the political process, which was vital for an open society in a way that property rights were not. The liberal idea of the free marketplace of ideas postulated that if everyone had virtually unrestricted access to the political process, not only would everyone be more likely to peacefully obey laws instead of becoming advocates of violent change, but the laws created would in some measure be objectively the best for the present good and

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70. Lusky, *Minority Rights and the Public Interest*, 52 YALE L.J. 1, 14 (1942).
72. Funston, supra note 57, at 264. See also McCloskey, supra note 56, at 43.
future progress of society. While previously the Bill of Rights had been viewed as important for the individual only, the Supreme Court's adoption of the free marketplace of ideas concept allowed the Court to believe in a public interest in first amendment freedoms greater than the individual's. This reinforced significantly the weight these freedoms carried when they were balanced against the claims of the state. 73

One of the earliest statements of this collective idea of the first amendment came from a dissent by Justice Brandeis in *Gilbert v. Minnesota* 74:

The right of a citizen of the United States to take part, for his own or the country's benefit, in the making of federal laws and in the conduct of the Government, necessarily includes the right to speak or write about them; to endeavor to make his own opinion concerning laws existing or contemplated prevail; and, to this end, to teach the truth as he sees it. . . . Full and free exercise of this right by the citizen is ordinarily also his duty; for its exercise is more important to the Nation than it is to himself. 75

In other words, the government tells its citizens how best to be free. In a sense, individual free choice to do what one wants is less free than the government stipulating what people have a duty to perform. The government urges people to be free, and then limits what it considers to be important freedoms. It elevates national fulfillment above individual development.

These causes combined into institutional form in *Palko v. Connecticut* 76 in 1937. The Court created a test for determining which provisions of the Bill of Rights would be made applicable to the states through the fourteenth amendment. With the background just described, it is not surprising that Justice Cardozo, in evaluating which freedoms were "implicit in the concept of ordered liberty," 77 said about freedom of thought and speech: "Of that freedom one may say that it is the matrix, the indispensable condition of nearly every other form of freedom. With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal." 78

73. Lusky, *supra* note 70, at 7.
74. 254 U.S. 325 (1920).
75. *Id.* at 337-38 (Brandeis, J., dissenting).
76. 302 U.S. 319 (1937).
77. *Id.* at 324-25.
78. *Id.* at 327.
The icing on the cake came in 1938 with what would have been otherwise a very routine case: *United States v. Carolene Products Co.* The Filled Milk Act of 1923 was upheld under the rational basis test. There was rational support for the idea that any milk made with other than milk fat could be dangerous to public safety. There was no doubt that the Court was divesting itself of all authority over legislation concerning the nation's economy: the Court would presume such legislation to be constitutional. In essence, the Court turned Brandeis' Gilbert dissent "I cannot believe that the liberty guaranteed by the Fourteenth Amendment includes only liberty to acquire and enjoy property" into "I cannot believe that the liberty guaranteed by the Fourteenth Amendment includes liberty to acquire and to enjoy property."

With *Carolene Products* the Court explicitly stood the two standards side by side. After enunciating the rational basis test for regulatory legislation, in the famous footnote four, the Court, through Justice Stone, argued that judicial review should be exercised with greater frequency when personal expression was at issue, or when the rights of "discrete and insular minorities" were at stake. While paragraph one of the footnote on its face might seem to deny presumption of constitutionality of a law that affected the Bill of Rights, Stone meant for it to apply only to the first amendment.

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79. 304 U.S. 144 (1938).
80. Id. at 152.
81. 254 U.S. at 343 (Brandeis, J., dissenting) (emphasis added).
82. There might be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced by the Fourteenth. . . .

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibition of the Fourteenth Amendment than are most other types of legislation. . . .

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, . . . or national, . . . or racial minorities, . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

304 U.S. at 152, n.4.
C. Justifications for the Double Standard

From the beginning, some observers were uneasy with such a discrepancy of treatment of the two kinds of cases. One of America’s leading jurists, Learned Hand, commented, “Just why property itself was not a ‘personal right’ nobody took the time to explain...”84 The Court was creating a distinction which ran counter to a legal and philosophical tradition that dated back to ancient times.85 Part of the problem seemed to stem from the lack of any coherent rationale for the protection of “basic rights” over property rights. Even on the Court, there were different rationales being offered. Chief Justice Hughes favored first amendment freedoms due to their specificity whereas Justice Stone was more attracted to the effective operation of the political process; unwise legislation could be corrected by the political branches, but when the processes themselves are threatened or when minorities lack access to them, the Court must act or the first amendment rights do not exist.86

One defense of the double standard is an elaboration of Stone’s position, that freedom of the press, speech, worship, and vote all are vital for a functioning democracy in a way that property rights simply are not. The Bill of Rights was designed specifically to place these beyond the reach of majoritarian infringement.87 Because of the social benefits of free discussion, the Court has an obligation to “be alert to legislative intrusions that prevent the effective operation of free government; it must extend its benefits to the novel, the unpopular, the unorthodox.”88 In this way, all ideas will be represented in the free marketplace of ideas, thus making more likely the possibility that what is best for society will be enacted. By allowing bad laws to be changed, the Court promoted political obligation by reducing the need for violent op-

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85. Funston, supra note 57, at 262.
86. A. Mason, The Supreme Court: Palladium of Freedom 156 (1962). “In other words, judicial self-restraint in passing on social and economic regulations (unless operation of the political process is involved) simply means that the Court ‘conserves its strength to strike more telling blows in the cause of a working democracy.’” Id., quoting R. Jackson, The Struggle For Judicial Supremacy 285 (1941).
88. A. Mason, supra note 87, at 535.
position to the government. By allowing new majorities to be formed, the impact of unwise laws is reduced and eventually eliminated.

Although persuasive in theory, there are problems with this line of reasoning. As one critic has noted in a recent study, there are no empirical studies to lend support to the idea. If regulation helps to prevent the excesses and reduce the limitations of the economic marketplace, could the possibility be discounted that such regulation might benefit the marketplace of ideas as well? As Robert McCloskey noted, while the open society argument supports the concept of a first amendment,

[It is not entirely clear why liberty of economic choice is less indispensable to the "openness" of a society than freedom of expression. . . . It is one thing to argue that economic liberty must be subject to rational control in the "public interest;" it is quite another to say in effect that it is not liberty at all. . . .]

A second argument for the double standard is the wording of the first amendment itself. The *laissez-faire* Court protected "property" which was an undefined term as was "due process," reading into the clause views that were at most implicit. The post-1937 Court, on the other hand, had the "no law" language to support its jurisprudence. It lends credence to the idea of a hierarchy of values, even if read in a non-absolute way because of its specificity. Justice Douglas offered such a basis for the double standard:

The First Amendment is couched in absolute terms—freedom of speech shall not be abridged. Speech has therefore a preferred position as contrasted to some other civil rights. . . . There is room for regulation of the ways and means of invading privacy. No such leeway is granted the invasion of the right of free speech guaranteed by the First Amendment.

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89. Lusky, supra note 70, at 21.
90. B. SIEGAN, supra note 34, at 256.
91. Id.
92. "A decision to protect Peter does not necessarily involve the decision to abandon Paul." McCloskey, supra note 56, at 48. See also id. at 49.
93. H. ABRAHAM, supra note 83, at 22-23.
94. Id. No one but an irresponsible right-winger would dispute Abraham's claim that "such fundamental rights as freedom of expression and religion simply are not delegatable to the majority will; such economic-proprietarian problems as the rate of income tax assuredly are." Id. at 22. But this is an unfair example. There are many property rights issues, such as takings, discussed infra, which should, as much as first amendment rights, not be delegatable to the whim of the majority.
But this rationale is also not without severe flaws. Although in practice the Court has extended the application of the first amendment in order to fully guarantee its provisions, the literal language of the amendment applies only to Congress, only to laws, and only to abridgements. "The words used in the amendment are far from absolute and precise in meaning; they are not beyond interpretation." In short, the specificity of wording rationale works against itself.

A third reason advanced for the double standard is institutional. No other government institution has been able or willing to protect these rights. The Court is uniquely well-suited for this task because people consider it the least political, most disinterested branch. Very few people contend that its forte is to judge the validity of regulatory legislation. Instead, this is a task better resolved by electorally responsible representatives creating experiments necessary for good public planning. Furthermore, even if the Court could try to devise experiments, economic issues are too difficult for it to resolve without the benefit of the legislative process, including investigative committee hearings. And while the legislature can balance economic and social variables, it provides precious little balancing of free speech and press.

Part of the problem with this analysis is its assumption that past legislative neglect of civil liberties will continue in an era when the importance of such rights is recognized. Certainly in an age of greater governmental activity, it is more imperative that the channels of communication to the political process remain open. But this line of reasoning still does not compel one to accept the preferred view of these freedoms. Even if many economic issues are difficult, not all of them are, nor do all involve stemming the tide on issues of great public concern. The Court can protect property rights of opticians to replace lost lenses without passing on the validity of minimum wage legislation. In addition, many complex subjects in areas of civil rights are delegated to the Court which force the Court to consider foreign affairs, military and intelligence policy, and other areas in which the Court cannot claim special competence by virtue of its expertise.

96. B. Siegan, supra note 34, at 254.
98. Id. See also A. Mason, supra note 86, at 173.
100. McKay, supra note 71, at 1198.
101. McCloskey, supra note 56, at 53.
The fourth defense of the double standard derives from historical preferences of first amendment freedoms. Those who drafted the Bill of Rights considered securing freedom of expression to be the major reason for including the amendments. Madison believed, "[T]he freedoms embodied in the First Amendment must always secure paramountcy."\textsuperscript{102} However, there is persuasive historical evidence that the Founding Fathers believed as much in protecting property rights as first amendment rights as inseparable components of the personal liberty required for individual development.\textsuperscript{103}

The final justification of preferred freedoms concerns the participation of minorities in the political process. Unless rights of speech, assembly, and press are vigorously protected by the Supreme Court, racial and religious minorities will not have a voice in national politics.\textsuperscript{104} There is no doubt that members of a number of minority groups have been denied access to the arena of advocating social change in an effort to secure individual fulfillment. But do well-financed groups such as the Communist Party of the 1950s or the Unification Church today deserve special judicial protection of their rights to participate in the political process?\textsuperscript{105}

Some of the early critics were understandably concerned that the justifications for the double standard were not always convincing. Earl Latham was uneasy about the Court deferring to legislative majorities over economic issues and then assuming the unconstitutionality of legislation affecting first amendment rights. He feared the surrendered authority over the first would diminish its ability to protect the second.\textsuperscript{106} McCloskey later was wary of the lack of specific rationales for the double standard that actually appeared in the decisions.\textsuperscript{107} Others saw this policy as merely political and self-interested, because judges, whose occupations value words and ideas, considered their marketplace more important than the economic marketplace.\textsuperscript{107}

\textsuperscript{102} Quoted in McKay, \textit{supra} note 71, at 1185. One might wonder why the same could not also apply to property rights.

\textsuperscript{103} See \textit{supra} notes 4-16 and accompanying text.

\textsuperscript{104} A. Mason, \textit{supra} note 86, at 158.

\textsuperscript{105} Latham, \textit{supra} note 50, at 25-30.

\textsuperscript{106} McCloskey, \textit{supra} note 56, at 44.

\textsuperscript{107} Ronald Coase argues:

The market for ideas is the market in which the intellectual conducts his trade. The explanation of the paradox is self-interest and self-esteem. Self-esteem leads the in-
IV. THE COURT MAINTAINS THE DOUBLE STANDARD

For a brief period, the fears of Latham in particular were justified. If with World War I the Supreme Court had become more alert to the protection of civil liberties, the approach of World War II made the Court more aware of the need of the state to preserve itself. The Court accepted legislative infringements on political rights, thus questioning the need for any judicial review at all. But, over time, Latham's worries generally have been unjustified. Not only has the Court been able to preserve the double standard, its self-imposed lack of authority over the economic realm has not impaired its ability to go to great lengths to protect the freedoms it considers more important, even when the challenged first amendment regulation is passed during wartime.

Two cases considered together, Martin v. Struthers and Breard v. Alexandria, show this as well as the contrast between the two standards. In Martin, Jehovah's Witnesses went door to door to present pamphlets about a meeting. One was convicted for violating a city ordinance prohibiting the ringing of doorbells to distribute such material. The city was a steel manufacturing center, and many of its citizens rested during the day. They passed the ordinance to allow citizens to sleep during the day and to reduce the danger of burglary. The Court, through Justice Black, struck down the ordinance as a violation of freedom of

tellectuals to magnify the importance of their own market. That others should be regulated seems natural, particularly as many of the intellectuals see themselves as doing the regulating. But self-interest combines with self-esteem to insure that while others are regulated, regulation should not apply to them. And so it is possible to live with these contradictory views about the role of government in these two markets. It is the conclusion that matters. It may not be a nice explanation, but I can think of no other for this strange situation.

B. SIEGAN, supra note 34, at 252, quoting Coase, The Market for Goods and the Market for Ideas, 64 AM. EUR. REV. 384, 386 (1974). Martin Shapiro connects the Carolene Products footnote 4 with the New Deal. The Court would no longer protect business because business was the enemy of the New Deal. The political processes favored the "New Dealers" over the "economic royalists." The Court also advanced positions likely to win votes from intellectuals, and ethnic, religious and racial minorities. B. SIEGAN, supra note 34, at 189, quoting Shapiro, The Constitution and Economic Rights, in ESSAYS ON THE CONSTITUTIONS OF THE UNITED STATES 85 (M. Harmon, ed. 1978).

111. 319 U.S at 144.
speech and press, over the strenuous dissent of Justice Jackson.\textsuperscript{112} This conclusion was reached by balancing these rights and the public's interest in a free society with the state's protection in denying access to information whether the homeowner wished it or not.\textsuperscript{113} With a balance such as this, it is not surprising that the property owners lost the case. This idea of "balance" predetermines the outcome for virtually any set of circumstances.\textsuperscript{114}

Compare that result to \textit{Breard v. Alexandria}. Breard had been arrested for selling magazines door to door in violation of a city ordinance that required the prior consent of all homeowners approached. Justice Reed upheld the regulation because while Breard was prohibited from ringing doorbells, he could still use radio, magazines, or the mail to convey his message.\textsuperscript{115} Although Reed noted that the majority of all magazine subscriptions purchased resulted from such canvassing, and the alternatives he offered were not as effective, such considerations were "constitutionally . . . immaterial and a matter for adjustment at the local level. . . ."\textsuperscript{116}

The Court distinguished \textit{Breard} from \textit{Martin} because of the commercial solicitation involved.\textsuperscript{117} In short, the Court held that the freedom of telling people that they are doomed to go to hell\textsuperscript{118} is more important as a source of self-fulfillment than earning a livelihood. However, the rational basis for the regulation in \textit{Breard} was the disturbing nature of doorbells, and that nuisance is the same regardless of who is ringing at the door. One might have expected that Justice Black would have dissented for reasons of consistency. However, his dissent was based not on a salesman's right to ring the doorbell in the absence of a sign, but that the regulation was a violation of freedom of press due to the nature of the commodity.\textsuperscript{119} In fact, he would have upheld the conviction if the man had been "selling pots."\textsuperscript{120}

\textsuperscript{112} Douglas v. Jeanette, 319 U.S. 157, 181 (Jackson, J., dissenting. Justice Jackson filed one opinion dissenting in \textit{Martin} and concurring in the result in \textit{Douglas}, a companion case to \textit{Martin}).
\textsuperscript{113} Martin, 319 U.S. at 143.
\textsuperscript{114} For a ratifying view of Black's test, see McKay, supra note 71, at 1196-1203.
\textsuperscript{115} 341 U.S. at 631-32.
\textsuperscript{116} Id. at 638.
\textsuperscript{117} Id. at 643.
\textsuperscript{118} Douglas, 319 U.S. at 173 (1943) (Jackson, J., dissenting in \textit{Martin} and concurring in the result in \textit{Douglas}).
\textsuperscript{119} Id. at 650 (Black, J., dissenting).
\textsuperscript{120} Id. at 650, n. * (Black, J., dissenting).
In the process of adamantly defending first amendment rights, the new Court began to fall into the same traps as the old Court. Justices Black and Douglas applied natural law philosophy to their decisions. Once *Marsh v. Alabama* was decided in 1946, making company town property as open to the first amendment as municipal property generally, Chief Justice Stone feared that the *Carolene Products* footnote had been misapplied. It normally required a clear and present danger of destruction of life and property for the Court to accept any regulation of first amendment rights.

Another case illuminates the Court’s refusal to consider economic groups as minorities under double standard constitutional law. In 1952 a state law was upheld which mandated that every employee be allowed to leave work for four hours to vote, despite the fact that it forced employers to have their property taken by prohibiting a wage deduction for such time-off. Using the rational basis test, the Court through Justice Douglas, postulated that Missouri wanted to protect workers from employer influence in casting ballots. Justice Jackson dissented, noting that the employee, while being paid, took only five minutes to vote, and worked for increased voter participation for the rest of the

123. See A. Mason, *supra* note 86, at 167. However, ideas often have consequences not intended by their originator. While Stone may not have wanted originally to create a presumption of unconstitutionality for laws affecting the first amendment, those who picked up the idea of preferred freedoms did.
126. *Id.* at 424.
period. Furthermore, employers had to pay workers whether or not they voted. "Such legislation stands in a class by itself and should not be uncritically commended as a mere regulation of 'practices in the business-labor field.'" 127

In 1963, in Ferguson v. Skrupa, 128 the Court upheld a Kansas statute that permitted only lawyers to act as debt adjustors. Skrupa claimed that his business was "useful and desirable" and that his activities were not violations against the public welfare, and, consequently, could not be prohibited. Kansas claimed that debt adjusting led to harm against very poor debtors—so much so that the state could prohibit such practices. 129 Lower courts had upheld Skrupa's claim under a 1917 ruling, Adams v. Tanner, 130 which held that the Due Process Clause forbids a state from abolishing a business which is "useful" and not "inherently immoral or dangerous to public welfare." As predicted, 131 Justice Black, speaking for the Court, argued that cases such as Adams had incorporated into constitutional interpretation the personal predilections of justices, something a more enlightened Court had reversed in 1937. He repeated the standard line that it was the duty of legislatures rather than courts to "decide on the wisdom and utility of legislation," 132 at least economic legislation. As long as the police power could be constitutionally justified, economic hardship would no longer justify setting aside such laws.

Black, however, added a new component to the double standard when he said, "Unquestionably, there are arguments showing that the business of debt adjusting has social utility, but such arguments are properly addressed to the legislature, not to us." 133

The Court was saying that despite the fifth and fourteenth amendments, a person's choice of vocation was not a liberty that it would protect. 134 Surely, however, this is a right of personal fulfillment, and the general welfare of society includes the personal fulfillment of the individuals who comprise it. For if the state bars someone altogether from pursuing the calling of his choice, are the freedom of expression alternatives equally fulfilling, especially if

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127. Id. at 426 (Jackson, J., dissenting).
129. Id. at 727.
130. 244 U.S. 590 (1917).
131. Ferguson, 372 U.S. at 728-29.
132. Id. at 731.
133. See Funston, supra note 57, at 267 (footnote omitted).
the individual is not highly verbal? If a right to pursue a calling that does not adversely affect public health or safety is an important means for achieving individual development, and the state prohibits this freedom, then arguments such as Skrupa's are indeed as properly brought before the judiciary as are any other claims of abridgements of individual rights. For the explicit constitutional provisions and the broadened view of the general welfare demand no less for a society whose most fundamental value is the self-realization of the full potential of every individual as he alone determines.\footnote{\textsuperscript{134}}

We have seen the position of the critics of the preferred freedom doctrine as of 1963: while civil liberties were very important, the Supreme Court had failed to explain why these rights were more crucial than property rights. Instead, they insisted that property rights were fully as important. But these criticisms of the double standard will no longer suffice in 1984. During the course of the last twenty years the double standard has been modified in subtle ways, property theory has changed, and new directions in constitutional adjudication have supplemented the original concept of preferred freedoms. The double standard has been altered in rulings dealing with the blurred relationship between property and civil rights, cases concerning conflict between property and civil rights, and decisions interpreting property-oriented provisions of the Constitution. The remainder of this article considers each of these in turn, and considers their ramifications for a post-industrial society.

V. THE BLURRED LINES OF PROPERTY AND CIVIL RIGHTS

One cause for the modifications in the double standard in recent years is a realization that the distinction between civil rights and property rights is not as neat as previous members of the Court had assumed. Although the Court's decisions at the high tide of the double standard period confirmed the Justices' concern for identifiable civil rights, Justice Frankfurter was a bit more skeptical, and, more importantly, a bit more accurate and far-sighted:

Yesterday the active area in this field was concerned with "property." Today it is "civil liberties." Tomorrow it may again be "property." Who can say that in a society with a mixed economy,
like ours, that these two areas are sharply separated, and that certain freedoms in relation to property may not again be deemed, as they were in the past, aspects of individual freedom?\(^{135}\)

In the years since Frankfurter made that statement the relationship between civil and property rights has been recognized in two types of cases: those involving the "new property" and those in which the "old property" served important personal interests.

In 1964, Charles Reich in "The New Property"\(^{136}\) had anticipated a revision in the double standard as the Court recognized that newer forms of property could also not be protected under the general theory of deference to the legislature in economic matters. Reich noted that a new kind of property had greatly expanded in recent years, one which consisted of government largess. These benefits were vital for an individual, who, through no fault of his own, suffered from misfortune and deprivation:

The aim of these benefits is to preserve the self-sufficiency of the individual, to rehabilitate him where necessary, and to allow him to be a valuable member of a family and a community; in theory they represent part of the individual's rightful share in the commonwealth. Only by making such benefits into rights can the welfare state achieve its goal of providing a secure minimum basis for individual well-being and dignity in a society where each man cannot be wholly the master of his own destiny.\(^{137}\)

Reich maintained that benefits, jobs, licenses, subsidies and the like were so important to an individual's status that they should be denied only after procedural due process, including judicial review.\(^{138}\) No longer were government payments privileges; rather, they were rights that individuals could not be deprived of arbitrarily.\(^{139}\) The Supreme Court accepted this argument, but it could not rely on the Due Process Clause because economic due process had been discredited so thoroughly. Thus, the Court initially considered a reinterpretation of the Equal Protection Clause as a means for affording the "new property" substantive protection.

The Court achieved this result when "it established a 'double standard within a double standard' by creating a substantive due
process *cum 'new' equal protection dichotomy between 'suspect' and 'nonsuspect' categories of legislative actions...".\textsuperscript{140} Suspect categories were expansions of the "discrete and insular minorities" in whose interests Carolene Products' footnote four had demanded closer scrutiny when affected by legislation. For such legislation, a compelling state interest had to be advanced in order to sustain the law. A regulation reaching groups that were not considered "suspect" need only carry a rational basis to be upheld. The similarity to the old double standard was its application of two tests for determining the constitutionality of laws affecting different groups; the differences were that it was based on the fourteenth amendment's Equal Protection Clause rather than its Due Process Clause, and that it was not obvious which groups would be designated suspect and which not.

In addition, with the advent of suspect classes arose the "fundamental rights" distinction. Under this element of constitutional interpretation, legislation that affected a "fundamental right" needed to advance a compelling state interest in order to be constitutional.\textsuperscript{141} But the creation of the "double standard within a double standard" affected the original double standard as well. For a time, it appeared both that poverty would be considered a suspect class and that welfare would be made a fundamental right.

Several Warren Court decisions indicated that poverty was a suspect category which might prevent the exercise of fundamental rights.\textsuperscript{142} In *Shapiro v. Thompson*,\textsuperscript{143} the Court struck down a Connecticut one-year residency requirement for welfare assistance. Justice Brennan, speaking for the Court, noted the waiting requirement created two classes of poor residents, only one of whom received welfare. The result was that one class was "denied welfare aid upon which may depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life."\textsuperscript{144} Although the state advanced a


\textsuperscript{141} *Id.* at 15.


\textsuperscript{143} 394 U.S. 618 (1969).

\textsuperscript{144} *Id.* at 627.
justification in that the regulation saved money, Brennan stated that that objective was impermissible when it promoted an "invidious classification." Brennan did not claim welfare was a fundamental right, although his reference to its provision of necessities implied such a result. Nonetheless, he could tie a compelling interest standard to the state's interference with another fundamental right, that of interstate travel, which the residency requirement impeded by penalizing interstate moves.

The biggest flaw with the fundamental interest doctrine is the same as that inherent in substantive due process: the limitation of legislative action by values not mandated by the Constitution. Although the Warren Court only considered a few interests as meriting fundamental status, commentators applied the rule to other areas such as welfare as well, expecting forthcoming rulings to that effect.

When the Chief Justiceship passed from Warren to Burger, many feared that the egalitarian Warren Court precedents would be overruled; few were, especially in the area of criminal law. However, a great many were not extended, including those involving fundamental rights. In Lindsey v. Normet and San Antonio Indep. School Dist. v. Rodriguez, the Court held that housing and education, respectively, were not fundamental interests.

The Court also decided that welfare was not a fundamental right, in 1970 in Dandridge v. Williams. A Maryland (AFDC) welfare plan was alleged to violate the Equal Protection Clause because it set an upper limit on the amount one family could receive, regardless of size. Justice Stewart speaking for the Court, ruled that there was no violation of equal protection. If the state regulation was struck down, it would further the "double standard within a double standard;" if the law were upheld, it would continue the original double standard. Apparently, the

145. Id. at 633.
146. Id. at 634.
149. 405 U.S. 56 (1972).
Court believed one double standard was enough:

[Here we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment only because the regulation results in some disparity to the largest AFDC families. For this Court to approve the invalidation of state economic or social regulation as "overreaching" would be far too reminiscent of an earlier era when the Court thought the Fourteenth Amendment gave it power to strike down laws "because they may be unwise, improvident, or out of harmony with a particular school of thought." That era long ago passed into history.

In the area of economics and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.\textsuperscript{152}

As there was no suspect category or fundamental interest presented in this case, the state need only show a rational basis for the Court to sustain the law. Both the encouragement of employment and the preservation of a semblance of equality between welfare families and the working poor qualified under that test.\textsuperscript{153} Until 1970, only businesses and others making economic claims had been losers under the double standard. "Dandridge, thus, demonstrated that the double standard need not be a judicial sword with a single ideological edge, nor could it be easily cabined."\textsuperscript{154}

Any remaining doubts were quashed in 1971 in \textit{James v. Valtierra}.\textsuperscript{155} A provision of the California Constitution prohibited the construction of low income housing projects without the approval of a majority of local voters. Not only did the Court, speaking through Justice Black, not consider the provision a violation of equal protection, but it commended the opportunity of California voters to directly participate in the political process in matters concerning themselves and their community.\textsuperscript{156} The Court refused to allow substantive equal protection as an alternative to the double standard. "In these cases the Court has made plain that while the Constitution 'does not enact Mr. Herbert Spencer's Social Statics,' neither does it embody John Rawls's A Theory of

\textsuperscript{152} Id. at 484-85 (footnotes and citations omitted).
\textsuperscript{153} Id. at 486.
\textsuperscript{154} Funston, \textit{supra} note 57, at 271.
\textsuperscript{155} 402 U.S. 137 (1971).
\textsuperscript{156} Id. at 143.
If the Court were going to fight poverty and injustice, and still preserve the double standard, it could not do so through the Equal Protection Clause, for the double standard prevented that approach. Consequently, the Court turned to the Due Process Clause, although admittedly only in a procedural fashion, as Reich had originally proposed. As a result, the gap between the property and civil rights standards was narrowed.

The Court first applied Reich's analysis to the Due Process Clause in *Goldberg v. Kelly*\textsuperscript{158} which challenged the lack of personal appearance and confrontation of the witnesses against a claimant in New York's procedures to terminate AFDC. Justice Brennan, speaking for the Court, virtually parroted Reich by saying that due process required an evidentiary hearing prior to the discontinuance of welfare payments.\textsuperscript{159} The unconstitutional aspects of New York's plan were that it did not allow the recipient to speak with an official nor to cross-examine witnesses.\textsuperscript{160} A written response was insufficient because the typical welfare collector could not write very well. Nor could the caseworker present the recipient's case because he gathered the facts that led to the termination of benefits.\textsuperscript{161}

The Court continued this reasoning the following year in *Bell v. Burson*.\textsuperscript{162} The Court held unconstitutional the Georgia Motor Vehicle Safety Responsibility Act, which provided that the driver's license of an uninsured motorist involved in an accident would be suspended unless he could post enough money to cover the damages claimed by the other party. The pre-suspension hear-

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\textsuperscript{158} 397 U.S. 254 (1970).

\textsuperscript{159} Id. at 262, n. 8.

\textsuperscript{160} Id. at 268.

\textsuperscript{161} "It is obvious that today's result does not depend on the language of the Constitution itself or the collective principles of other decisions, but solely on the collective judgment of the majority as to what would be a fair and humane procedure in this case." Id. at 276 (Black, J., dissenting). "The Court's action today seems another manifestation of the now familiar constitutionalizing syndrome: once some presumed flaw is observed, the Court then eagerly accepts the invitation to find a constitutionally 'rooted' remedy. If no provision is explicit on the point, it is then seen as 'implicit' or commanded by the vague and nebulous concept of 'fairness.'" *Wheeler v. Montgomery*, 397 U.S. 280, 283 (1970) (Burger, C.J., dissenting) (*Wheeler* was a companion case to *Goldberg*).

\textsuperscript{162} 402 U.S. 535 (1971).
ing did not consider responsibility for the accident. While it would have been permissible for the state to deny licenses to all motorists without liability insurance or who did not post security, this law applied only to those who had accidents. Since the licenses were important to people, and they depended on them to earn a livelihood, the state could not deprive the motorist of the license without due process of law.\textsuperscript{163}

Another component of Reich's views was that government employees often felt limitations on their right to free expression and privilege against self-incrimination. Were they to fully exercise these rights, they could suffer economic loss, or even a threat to the necessities of life.\textsuperscript{164} But when \textit{Board of Regents v. Roth}\textsuperscript{165} appeared in its docket, the Supreme Court said that it would no longer be so responsive to new property arguments. Roth had been hired as an assistant professor at the University of Wisconsin for one year, and was then not rehired. He had no tenure rights because Wisconsin law required four years' service to qualify for such rights. The Court said that due process would be necessary if the state was accusing Roth of dishonesty or immorality as the reason for its decision. As he was not denied the right to a position elsewhere in the university system, his reputation was not at stake, and, therefore, he had not been denied due process in contravention of the fourteenth amendment.\textsuperscript{166}

The Court rejected the \textit{Goldberg/Burson} rationale, that due process was required when the benefit was important to the person threatened with its denial. Instead, "property" actually had to be at stake for it to be deprived without due process of law: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."\textsuperscript{167} One such "legitimate claim" is state law. But the Court noted that the state had granted a term of only one year. Consequently, Roth had no property interest that was being deprived, nor could he thus demand due process of law.\textsuperscript{168} The dissent had a slightly broader view of what con-

\textsuperscript{163} Id. at 539.
\textsuperscript{164} Reich, supra note 136, at 764.
\textsuperscript{165} 408 U.S. 564 (1972).
\textsuperscript{166} Id. at 573.
\textsuperscript{167} Id. at 577.
\textsuperscript{168} Id. at 578.
stituted a property interest: "In my view, every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment. This is the 'property' right I believe is protected by the Fourteenth Amendment and that cannot be denied 'without due proces of law.'" 169

In the companion case, Perry v. Sindermann, 170 appellee claimed that he had been refused an eleventh successive one-year teaching appointment without a hearing because of his criticisms of the Board of Regents. Although there was no formal tenure system at the college, the state system had guidelines indicating that after seven years, tenure was granted. Here the Court said another "legitimate claim of entitlement" was rules or "mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at the hearing." 171 The Court did not grant tenure, but did say that Sindermann had the right to a hearing to raise this question. 172

The Court was subjected to a great deal of criticism when it enunciated the Roth test: rather than the all-encompassing "new property" test indicated by Burson or Goldberg, had state law created a property interest, and were its procedures for terminating that interest suitable? 173 Some commentators argued that even though "property" may not be definable under the Constitution, it is plausible to assume that the fourteenth amendment protects against infringements of expectations presented by laws. 174 Others argued that there has to be a basis for property rights in the Constitution rather than just in state law, or else the fifth amendment's Takings Clause would be meaningless because the state does not recognize such property under its law. 175 The Court was clear that its test applied to property interests rather than rights, and that there could indeed be a constitutional basis for protection of the old property. John Hart Ely, in an oft-quoted remark, said:

170. 408 U.S. 593 (1972).
171. Id. at 601.
172. Id.
173. See Tushnet, supra note 169, at 282.
175. Tushnet, supra note 169, at 268.
It turns out, you see, that whether it's a property interest is a function of whether you're entitled to it, which means the Court has to decide whether you're entitled to it before it can decide whether you get a hearing on the question whether you're entitled to it.) The line of decisions has been subjected to widespread scholarly condemnation, which suggests that sometime within the next thirty years we may be rid of it.176

Others also opposed the fundamental shift. By defining each word of "life, liberty, or property" rather than considering the phrase as a whole to protect all valued interests, the Court was no longer protecting citizens from state conduct that might cause them serious harm.177

Nonetheless, these analyses may be unfairly critical. A litigant "cannot anchor a claim to freedom from procedural grossness per se in any clause of the Constitution."178 This is so because the fourteenth amendment neither prevents one's due process rights from being deprived without due process of law, nor any state from denying any person either equal protection of the laws or due process of law.179 It merely states that "[n]o person shall be deprived of life, liberty, or property without due process of law..."180 Consequently, for the Court to rule that due process is required for government largess to be deprived, it must insure that the largess is actually property. Not only is the Goldberg/Burson approach unsound because it is subjective; such an idea prevents the state from regulating the rights it creates. This is as impermissible for the new property as it is for the old. For the Goldberg/Burson test to prevail would mean a quite serious modification of the double standard indeed: the property the Court considered immune from state regulation would be as secure as it was before 1937. By basing the procedural due process test on state law or explicit mutual guarantees, the Court not only relied on an objective standard for determining which of the new property is actually property, it prevented a return to the bad old days of economic due process.

The Roth analysis was extended in Arnett v. Kennedy181 in

177. See Monaghan, supra note 151, at 409.
179. Id.
1974. Although no opinion garnered the support of a majority, the plurality opinion of Justice Rehnquist was the most important because it showed what portended for future new property litigants. A civil servant’s claim of a property interest in the continuance of an expectation in the job from which he was dismissed was denied because the civil service law specifically detailed the procedures for terminating a job, and such procedures did not include a hearing. "If the property right is defined by the procedures, then whatever procedures the legislature provides must be constitutionally adequate, so long as state law alone defined the property right." The state granteth; the state taketh away.

Such a standard would not prevent the Court from upholding a new property interest when state law actually created one. Despite its recognition that there was no federal right to education, the Court in Goss v. Lopez upheld a state law property right to education, based upon claims of due process violations made by students who had been suspended from school without any hearing. Justice White, speaking for the Court maintained: "Having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred." Although the state had violated the property interest merely for a ten-day suspension, such deprivation was not de minimus, and therefore could not occur without procedural due process. In this case, the minimum standards of due process of law included some sort of hearing and notice.

The Arnett plurality opinion was accepted as the majority opinion in 1976 in Mathews v. Eldridge. At issue was whether the Due Process Clause of the fifth amendment applied to Social Security disability benefits. Conceding that the respondent’s interest in continuing to receive disability benefits was a property interest under the fifth amendment, and that some form of hear-

182. Id. at 151-52 (opinion of Rehnquist, J.).
183. Tushnet, supra note 169, at 270.
185. Id. at 574.
186. Id. at 576.
189. Id. at 579.
189. Id. at 332.
ing was required,\textsuperscript{190} the majority noted, through Justice Powell, that there were several other factors which needed to be considered. These included the extent of the private interest, the likelihood of official error under its procedures, and the likely value of any additional procedural guarantees.\textsuperscript{191} The Social Security Administration procedures were summarized as a provision of evidence for the cancellation decision with a chance for the beneficiary to examine his file. If dissatisfied, the beneficiary could request a Social Security examiner, and if still dissatisfied, the recipient could begin anew. Then, an administrative law judge and a nonadversary hearing would be provided, plus the opportunity of judicial review beyond that.\textsuperscript{192} Since Eldridge had the opportunity to receive retroactive benefits, and the lack of such benefits during the appeal period was not normally threatening of subsistence as welfare checks were, the majority reasoned, no evidentiary hearing was required by due process.\textsuperscript{193} In addition, the decision to end disability benefits was based on a medical assessment, not the subjective considerations applicable to welfare. The Court would not, in the name of justice and fairness, impose its own standards for the freak occurrences when these assumptions did not hold: "[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions."\textsuperscript{194}

Due process was measured in terms of marginal costs and benefits:

Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some administrative decision. But the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources is a factor that must be weighed. At some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost.\textsuperscript{195}

Furthermore, the Court would adopt a policy of judicial restraint

\textsuperscript{190} Id. at 333.
\textsuperscript{191} Id. at 334.
\textsuperscript{192} Id. at 338.
\textsuperscript{193} Id. at 341.
\textsuperscript{194} Id. at 344.
\textsuperscript{195} Id. at 348.
in assuming that the administrators of social welfare programs made good-faith efforts to fairly examine the claims of benefit recipients.196

The importance of the "new property" was further altered in the 1976 Supreme Court decision in Bishop v. Wood.197 Bishop was a policeman who had been fired without a hearing. He did not just claim that he had a property interest in continuing to be a policeman; rather, he based his claim on a city ordinance which considered him a "permanent employee."198 Although this law had never been interpreted by a state judge, the Court, speaking through Justice Stevens, concluded that there was no guarantee in accepting petitioner's reading of it as creating a property interest. Hence, there was no property interest that Bishop was being deprived of without due process of law.199 In many ways, the Court had no choice but to read the statute in this fashion. When § 1983 of Title 42 of the United States Code allowed federal litigation about almost every local and state administrative decision, the already overburdened federal courts had to absorb another flood of legal action. To avoid these problems, the Court tried to limit the claims of new property holders that every such grievance was a constitutional issue.200

We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error. In the absence of any claim that the public was motivated by a desire to curtail or to penalize the exercise of an employee's constitutionally protected rights, we must presume that official action was regular and, if erroneous, can best be corrected in other ways. The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.201

There are several important ramifications of Bishop. First, even if it wanted to, the Court realized that it is impossible for it to right every wrong in society. Potential litigants would have to "suffer the slings and arrows of outrageous fortune." Second, the original

196. Id. at 349.
198. Id. at 342-43.
199. Id. at 347.
200. See Monaghan, supra note 151, at 407-08.
201. 426 U.S. at 349-50. For a critical analysis of Bishop, see Van Alstyne, supra note 178, at 468-69.
double standard returned. If there was a rational basis without invidious discrimination against minorities to justify the termination of new property benefits, the Court would accept the state action. If the recipient felt wronged, the results could "best be corrected in other ways." Is there any doubt that this meant working through the first amendment's political process?

For those who consider the new property to be a vital human need, the double standard must be altered to protect it. The traditional double standard can lead the Court only to its conclusions in Bishop.\textsuperscript{202} While in cases such as Roth and Lopez the Court still recognizes that some benefits can be property, it narrowly limits that classification to those created by state or federal law as in Sinderman and Roth, as well as limiting the due process available, as in Bishop.\textsuperscript{203}

VI. THE REEVALUATION OF THE OLD PROPERTY

This article began with a statement that the double standard has been modified as a result of the new property cases. By focusing on the nature of the new property claims as providing necessities for individual development, the Court also found itself considering how the old property might serve the same function. A generation had passed since the constitutional revolution of 1937, and the Court could reduce the distance between the two standards under procedural due process without necessarily evoking cries of "substantive due process." In these cases, the Court explicitly recognized the relationship between property rights and civil rights.

\textit{Lynch v. Household Finance Corp.}\textsuperscript{204} was the vehicle for this change. Prior to serving Mrs. Lynch with process for a suit alleging nonpayment of a promissory note, Household Finance garnished her savings account in accordance with Connecticut law. Mrs. Lynch claimed she had no opportunity to be heard, and filed suit in federal court. The District Court dismissed her suit saying that § 1983's counterpart, § 1343(3) of Title 28 of the United States Code applied only to the infringement of "personal" rather than "property" rights.\textsuperscript{205} In the Court's ruling, Justice Stewart,

\begin{itemize}
\item \textsuperscript{202} Funston, supra note 57, at 270.
\item \textsuperscript{203} Dorsen & Gora, supra note 157, at 200-01.
\item \textsuperscript{204} 405 U.S. 538 (1972).
\item \textsuperscript{205} Id. 542.
\end{itemize}
speaking for the Court, challenged the theretofore unquestioned ability of the double standard bearers to separate property from civil rights in order to give the latter the stricter protection they deserved:

[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized (citations omitted).206

Gerald Gunther argues that this view can provide something for everyone: procedural protection of the old property for the conservatives, and procedural protection of the new for the liberals.207

Later that same year, the Court decided Fuentes v. Shevin.208 Fuentes had purchased a gas stove and stereo from Firestone on an installment plan. Although the company retained title, she had possession until such time as she defaulted on payments. When payments did cease, Firestone went to small-claims court and received a writ of replevin for the sheriff to seize the goods, prior to Fuentes receiving a summons. Fuentes sued claiming a violation of the fourteenth amendment's Due Process Clause.209 Under Florida law, the applicant for a writ of replevin did not need to prove default. Rather, if a company said that a default had occurred, the court clerk could issue a writ. Once the writ was granted, the property could be held three days to allow the defendant to post bond for double the value of the property, and a hearing was to be held after its confiscation. If no bond were posted, the property would be possessed by the plaintiff pending outcome of the suit.210

The Court, again speaking through Justice Stewart, said the right to a hearing was important because "the provision against

206. Id. 552 (citations omitted).
207. Gunther, supra note 147, at 40.
209. She also sued as a violation of the fourth amendment because the officials entered her house to seize the goods. Id. at 71.
210. Id. at 74-75.
the deprivation of property without due process of law reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference.\textsuperscript{211} The opportunity to be heard protects against arbitrary deprivation. For the hearing to serve its purpose, it must occur while the deprivation can be halted.\textsuperscript{212} Although the law contained a bond provision, even a temporary deprivation of property was still a deprivation that required due process of law.\textsuperscript{213}

One might fairly inquire how Mrs. Fuentes had any property rights at all. The title to the property belonged to Firestone until all the bills were paid. It was here that the influence of the new property can be inferred, Justice Stewart noting, "The Fourteenth Amendment's protection of 'property' ... has never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend protection to 'any significant property interest, including statutory entitlements.'"\textsuperscript{214} Fuentes had such an interest because she had made installment payments, and thus had a property interest in the goods' continued use. If a default had occurred, that was for a hearing to determine.\textsuperscript{215} And to make clear that the double standard was changing, Stewart said due process applied to all property, new or old, whether it was a necessity, as \textit{Goldberg} had hinted, or not.\textsuperscript{216} Not only were property rights interdependent with civil rights, the personal liberty guaranteed by property rights was vital for individual liberty in general:

The Fourteenth Amendment speaks of "property" generally. And, under our free-enterprise system, an individual's choices in the marketplace are respected, however unwise they may seem to someone else. It is not the business of a court adjudicating due process rights to make its own critical evaluation of those choices and protect only the ones that, by its own lights, are "necessary."\textsuperscript{217}

The first aspect of the double standard to be challenged was its confidence in knowing which rights were property and which civil.

\textsuperscript{211} Id. at 81.
\textsuperscript{212} Id.
\textsuperscript{213} Id. at 85.
\textsuperscript{214} Id. at 86 (citations omitted).
\textsuperscript{215} Id. at 86.
\textsuperscript{216} Id. at 88-89.
\textsuperscript{217} Id. at 90 (footnote omitted).
Fuentes was modified in 1974 in Mitchell v. W.T. Grant Co.\textsuperscript{218} Grant said Mitchell owed it money on several items, and claimed a vendor's lien on the goods. Mitchell alleged that he not only had possession of the goods, but a property interest as well which required due process prevention of the seizure without prior notice and hearing. Justice White, speaking for the Court, considered the state law in this case to differ from the Florida law challenged in Fuentes. He said that resolution of the due process question required not only an examination of the buyer's interest, but the seller's as well.\textsuperscript{219} Here, the signature of a judge was required to issue the writ for seizure, which also distinguished this case from Fuentes.\textsuperscript{220} White noted that if payments stopped, the seller's interest in the property was reduced until a hearing was held. Hence, the state could allow posting of bond from the parties to protect each other's rights, and if the defendant could not post bond, the property could be lawfully seized.\textsuperscript{221} While property rights do not always correspond to rights of ownership, they very often do. There is no reason to criticize the Court for protecting the property rights of both debtors and creditors. Despite Mitchell, the reevaluation of the double standard still stood.

In addition, the Court recognized that an individual's civil rights could be advanced through the old property. In protecting these substantive civil rights, the Court also gave the property substantive protection. In Spence v. Washington,\textsuperscript{222} petitioner was arrested for displaying, outside his apartment, a flag "which he owned" with a peace symbol taped to it, which conduct violated a Washington statute prohibiting the affixing of symbols to the flag. The Court went to great lengths in a \textit{per curiam} opinion to note that the flag had been flown on private property:\textsuperscript{223}

\begin{quote}
[T]his was a privately owned flag. In a technical property sense it was not the property of any government. We have no doubt that the State or National Governments constitutionally may forbid
\end{quote}

\begin{footnotes}
\item[218.] 416 U.S. 600 (1974).
\item[219.] \textit{Id}. at 604.
\item[220.] \textit{Id}. at 606, 615-18.
\item[221.] \textit{Id}. at 608. Tushnet criticizes the decision because summary procedures prevent the debtor from making a defense before the goods are taken. The lack of an adversary proceeding does not concern Tushnet; instead, he feels there are not enough issues raised at the hearings. He also believes that the occurrence of computer errors makes a hearing before repossession vital. Tushnet, \textit{supra} note 169, at 263-65.
\item[222.] 418 U.S. 405 (1974).
\item[223.] \textit{Id}. at 406, 411.
\end{footnotes}
anyone from mishandling in any manner a flag that is public property. But this is a different case. . . . Appellant displayed his flag on private property. 224

Spence had affixed the symbol to the flag to show that he felt America should stand for peace rather than war. Since the incident took place immediately after the invasion of Cambodia and the killings at Kent State, the Court ruled that communication had taken place. It interpreted property as expressive of the idea in a more direct and effective way. 225 Although it specifically neglected commercial activity, 226 the Court ruled that speech through property could also be considered protected within the marketplace of ideas. "[T]he flag use case pitted the tangible property interest in private ownership of a flag against the less tangible interest in public control of the symbol, and the traditional property interest prevailed." 227

Likewise, the Court prohibited the state from mandating an ideological message on the private property of its citizens in Wooley v. Maynard. 228 The Maynards were Jehovah’s Witnesses who resided in and registered their car in New Hampshire. Consequently, they were forced to bear license plates with the motto “Live Free or Die,” with the prospect of criminal sanctions if they obscured the numbers or motto on the license plate. The Maynards found the motto to violate their moral, religious, and political beliefs, and therefore they covered it, and were arrested several times. Chief Justice Burger, speaking for the Court, struck down the New Hampshire law as "requir[ing] an individual to participate in the dissemination of an ideological message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public." 229 The law forced residents to "use their private property as a ‘mobile billboard’ for the state’s ideological message." 230 That the element of private property was the deciding factor in this case is indicated by Justice Rehnquist’s observation that if the state taxed its citizens to construct billboards bearing the same message there would have

224. Id. at 408-09.
225. Id. at 409-10.
226. Id. at 413.
227. Dorsen & Gora, supra note 157, at 206.
229. 430 U.S. at 707-08, 713.
230. Id. at 715.
been no denial of constitutional rights, even though the Maynards
would be fostering the communication of an ideological position
which they opposed.\textsuperscript{231} Not only did the Court recognize
the abstract interdependence of civil and property rights, it realized
as well that property rights could be an important means for exer-
cising the preferred freedoms.

In 1976, the Court considered the first amendment to protect sub-
stantive property rights of commercial and corporate speech and re-
versed its 1942 holding that "the Constitution imposes no . . .
restraint on government as respects purely commercial advertis-
ing."\textsuperscript{232} In \textit{Virginia State Bd. of Pharmacy v. Virginia Citizens
Consumers Council, Inc.}\textsuperscript{233} The court struck down a Virginia regula-
tion effectively banning the advertising of prescription drug
prices, Justice Blackmun noted that the Court had not, since
\textit{Breard v. Alexandria}, applied this permissive view of commercial
speech regulation in order to deny its first amendment's applica-
tibility.\textsuperscript{234} Blackmun contended that speech was not to lose its first
amendment protection solely because its purpose was economic
gain.\textsuperscript{235} Blackmun's contribution to the modification of the double
standard was in allowing for the potential equality of the market-
place of ideas and the economic marketplace. Since there was
variation in pricing of drugs which were necessary to the con-
somer's survival, and his interest in that was likely to exceed his
political concerns, the importance of the economic marketplace
was considerable indeed.\textsuperscript{236}

So long as we preserve a predominantly free enterprise economy,
the allocation of our resources in large measure will be made
through numerous private economic decisions. It is a matter of
public interest that those decisions, in the aggregate, be intelligent
and well-informed. To this end, the free flow of commercial informa-
tion is indispensable. And if it is indispensable to the proper
allocation of resources in a free enterprise system, it is also in-
dispensable to the formulation of intelligent opinions as to how
that system ought to be regulated or altered. Therefore, even if
the First Amendment were thought to be primarily an instrument

\textsuperscript{231} \textit{Id.} at 721 (Rehnquist, J., dissenting). \textit{Cf.} Nashville, C. & St. L.R. Co. v. Walters, 294
\textsuperscript{232} Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).
\textsuperscript{233} 425 U.S. 748 (1976).
\textsuperscript{234} \textit{Id.} at 759. \textit{See supra} text and footnotes accompanying notes 115-118.
\textsuperscript{235} \textit{Id.} at 762.
\textsuperscript{236} \textit{Id.} at 763-64.
to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.\textsuperscript{237}

In dissent, Justice Rehnquist stated that he believed the first amendment's function of facilitating decision making in a democracy applied to political issues "rather than the decision of a particular individual as to whether to purchase one or another kind of shampoo."\textsuperscript{238} Although some do criticize the application of advertising to the first amendment, there is at least some validity to the approach in its public economic ramifications.\textsuperscript{239}

Although "the Burger Court, through the use of the first amendment, is producing results consonant with free market competition and the maintenance of property values,"\textsuperscript{240} it is unlikely that the Court would uphold every instance of commercial speech, even if not deceptive or obscene. For instance, it is unlikely that the Court would find unconstitutional the law which bans radio and television advertising for cigarettes. Not only are legitimate police powers involved, but it is likely that the alternative forms of advertising available would mitigate the loss. Further, it is improbable that mandating the surgeon general's warning on the permissible signs would amount to forcing the tobacco companies to create "[im]mobile billboards for the state's ideological message."\textsuperscript{241} While property rights have received substantive protection under an enlarged view of the range of the first amendment, they still are not absolute. Even in the pre-1937 era, there were limits on freedom of contract.

The Court continued to apply protection to commercial and corporate speech. Justice Powell, speaking for the Court in \textit{First National Bank v. Bellotti},\textsuperscript{242} in 1978, held that a Massachusetts law which prevented corporations from speaking out on referenda not directly related to its business was unconstitutional, for not only did it limit the information available to the public, but it additionally allowed the state to specify discussable topics and speakers.\textsuperscript{243} Two years later, again speaking for the Court in \textit{Cen-

\textsuperscript{237} Id. at 765 (footnotes and citations omitted).
\textsuperscript{238} Id. at 787 (Rehnquist, J., dissenting).
\textsuperscript{239} Dorsen & Gora, supra note 157, at 214-15.
\textsuperscript{240} Id. at 215 (footnote omitted).
\textsuperscript{241} Id.
\textsuperscript{242} 435 U.S. 765 (1978).
\textsuperscript{243} Id. at 783-85. See, Dorsen & Gora, supra note 157, at 208-12.
Central Hudson Gas & Electric Corp. v. Public Service Comm. Justice Powell struck down a New York Public Service Commission regulation that prohibited promotional advertising by electric utilities in the interest of conserving low fuel supplies. Powell reaffirmed the Court's protection of corporate speech because of its ability to further society's interest in the widest possible circulation of information. But as commercial speech is to be protected less than other forms of speech, it more easily can be regulated. However, the nature of the expression and the alleged government interests had to be weighed in order to determine if the regulation was permissible. Since this particular regulation was not directly related to the state's interest in preserving fuel, and since prohibition of promotional advertising was not the least restrictive regulation possible, the Public Service Commission regulation was invalid.

In the companion case to Central Hudson, Consolidated Edison Co. v. Public Service Comm., another Public Service Commission regulation, which prohibited utility companies from inserting with their bills material discussing controversial public policy, was challenged. Con Ed's insert promoted nuclear power as an energy source. The Court, through Justice Powell, argued that a time, place, or manner regulation of speech could not be based on content or subject matter, a statement which elicited one of Justice Stevens' more famous opening lines. Although the speech was made by a corporation instead of an individual, "To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." Further, the Court considered relevant the fact that Con Ed was using its own billing envelopes to make its views known.

244. 447 U.S. 557 (1980).
245. Id. at 561-62.
246. Id. at 562-63.
247. Id. at 564.
249. Id. at 536.
250. "Any student of history who has been reprimanded for talking about the World Series during a class discussion of the First Amendment knows that it is incorrect to state that a 'time, place, or manner restriction may not be based upon either the content or subject matter of speech.' Ante, at 536." Id. at 544-45 (Stevens, J., concurring in judgment).
251. Id. at 538 (majority opinion).
252. Id. at 540.
With these decisions, it would be fair to say that the 1963 double standard had been weakened through its reconsideration of the importance of the economic marketplace, as well as its acceptance of commercial and corporate participation in a broadened marketplace of ideas.

VII. PROPERTY RIGHTS VERSUS FIRST AMENDMENT RIGHTS

In addition to the modification of the double standard when civil rights and property rights were not only compatible, but interdependent and complementary, the Court repealed the double standard with respect to cases in which property rights claims were directly opposed to first amendment rights. As with other property rights decisions, the Warren Court had widened the gap between the civil liberties and property standards. In *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, the Court, through Justice Marshall, required that a shopping center permit picketing on a porch in front of a market which was used as a parcel pickup zone, and which "function[ed] as a sidewalk." Very often a decision is reached in a constitutional case merely by the assumptions the Court considers in adjudicating it, and *Logan Valley* was no exception. Enhancing a standard it created in 1946, Marshall stated that the Court would "start from the premise that peaceful picketing carried on in a location open generally to the public is, absent other factors involving the purpose or manner of picketing, protected by the First Amendment." It was "clear" to the Court that the shopping center was "not privately owned" because it constituted the business district of a municipality. Because Logan Valley was open to the public, it was obviously the functional equivalent of a business district, and so picketing could not be prohibited, especially since the speech here related to the normal use of the property.

This analysis was rejected by as stalwart a defender of the first amendment as Justice Black, who had enunciated the business dis-

254. *Id.* at 310.
256. *Logan Valley*, 391 U.S. at 313 (citations omitted).
257. *Id.* at 315.
258. *Id.* at 318.
259. *Id.* at 319-20.
strict equivalent standard. Black noted that the parcel pickup zone was exclusively for customers to pick up their groceries, and was thus a necessary part of the store. He could not imagine how “even . . . the wildest stretching of Marsh” could say this area existed for the public’s benefit. It was only because the corporate town possessed all the attributes of a municipality that the first amendment was made applicable. The first New Deal Justices admonished his brethren that “whether this Court likes it or not, the Constitution recognizes and supports the concept of private property. . . . [T]here is no right to picket on the private premises of another to try to convert the owner or others to the views of the pickets.”

As mentioned earlier, when Warren Burger succeeded Earl Warren as Chief Justice, there were generally few reversals of Warren Court precedents. But the new property cases illustrate the tortuous maneuvers that new majorities will perform in order to preserve a semblance of stare decisis, and yet mold new constitutional doctrine by narrowing its applicability to one set of circumstances. For, in general,

[W]hether free speech claims receive protection in the Burger Court turns on the presence of an underlying “proprietary” interest. . . . Free speech values are protected when they coincide or are augmented by property interests. Conversely, free expression has received diminished protection when First Amendment claims clash with property interests. . . . [W]hen free speech claims are weighed on the balance, property interests determine on which side of the scales “the thumb of the Court” will be placed.

Four of the Justices who had decided Logan Valley had departed from the Court when it decided Lloyd Corp. v. Tanner, a case involving similar facts to Logan Valley. Justice Powell, speaking for the Court, reduced Logan Valley’s relevance to free speech activities directed at a particular store or its operations instead of basing it on the functional equivalent of a business district test. By distinguishing Logan Valley in this fashion, Powell

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261. 391 U.S. at 328 (Black, J., dissenting).
262. Id. at 330.
263. Dorsen & Gora, supra note 152, at 197 (footnote omitted).
265. Id. at 560.
266. Id. at 562.
could deny peace advocates who had distributed handbills for the general public first amendment access to the shopping center when public areas could be used as effectively.\textsuperscript{267} If they had been allowed to distribute their message on private property when the general public was the primary audience, there would have occurred an unfair reduction in property rights without a meaningful addition to the protection of the preferred freedom.\textsuperscript{268} There was quite a difference between Powell's statement of the question presented in \textit{Lloyd} and Marshall's in \textit{Logan Valley}:

The basic issue in this case is whether respondents, in the exercise of asserted First Amendment rights, may distribute handbills on Lloyd's private property contrary to its wishes and contrary to a policy enforced against \textit{all} handbilling. In addressing this issue, it must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on \textit{state} action, not on action by the owner of private property used nondiscriminatorily for private purposes only.\textsuperscript{269}

Powell asserted that the preferred position of the first amendment did not necessitate a right to engage in those activities on private property when all political speech was banned uniformly.\textsuperscript{270} Some commentators took this to mean that the preferred freedoms position was being overturned, and apparently they could not imagine a balance in which property rights were actually weighed equally with civil liberties.\textsuperscript{271} Powell was in the difficult position of trying to argue that property did not lose its private status merely by inviting the public to use it for specific purposes\textsuperscript{272} without overruling \textit{Logan Valley} as well.

But this juggling act could not be continued, for the distinctions Powell had taken great pains to draw between the two cases were at most tenuous. The Court acknowledged as much when it for-

\textsuperscript{267} Id. at 564.
\textsuperscript{268} Id. at 567.
\textsuperscript{269} Id. (emphasis in original).
\textsuperscript{270} Id. at 567-68.
\textsuperscript{271} See Dorsen & Gora, \textit{supra}, note 157, at 222; see also Henely, \textit{Property Rights and First Amendment Rights: Balance and Conflict}, 62 A.B.A. J. 77, 80-82 (1976). "When one compares these observations with the statement in \textit{Marsh} that judicial balancing of property rights against first amendment rights must be 'mindful of the fact that the latter occupy a preferred position,' [326 U.S. at 509] it becomes clear that the priority of speech over property had yielded to a parity of speech over property, if not a preference for the latter." See Dorsen & Gora, \textit{supra}, note 157, 222; see also Henely, \textit{supra}, note 273 at 80-82.
\textsuperscript{272} 407 U.S. at 569.
mally overruled *Logan Valley* in *Hudgens v. NLRB* 273 in 1976. Striking employees of a warehouse wanted to picket at its retail stores, which could only be entered from an interior mall. The general manager of the mall told them to leave, and they claimed a violation of § 7 of the National Labor Relations Act. With a fact situation indistinguishable from *Logan Valley*, Justice Stewart conceded that “the reasoning of the Court's opinion in *Lloyd* cannot be squared with the reasoning of the Court's opinion in *Logan Valley*. 274 Stewart said that *Logan Valley* should have been overruled rather than distinguished by *Lloyd*, and that the first amendment was inapplicable to privately owned shopping centers. 275 There is nothing in this statement that should trouble first amendment defenders. Municipal parks are built with the furtherance of first amendment freedoms in mind; this is not the case with shopping centers. Property rights are also protected by the Constitution, and if the double standard has to bend to recognize this fact, then the Court is willing to bend it. The marketplace of ideas is important and should be wide, but there is no reason why every territorial square inch under the jurisdiction of the United States should constitute the political arena. After all, the Court has recognized the importance of the economic marketplace as well. There are more than adequate opportunities and locations for every member of society to utilize his freedom of speech, press, and assembly without turning every private establishment into Speakers' Corner.

The Court showed that it would not generally position property rights above freedom of speech in *PruneYard Shopping Center v. Robins*. 276 Robins was expelled from PruneYard Shopping Center for violating the center's policy which prohibited the circulation of petitions unrelated to its commercial dealings. Although the Court recognized that there was no first amendment right of access, Justice Rehnquist did permit the states to expand individual liberties more in their own constitutions than that provided by the Federal Constitution, so long as its use of the police power did not constitute a taking without just compensation. 277 No taking was involved because the center was not bearing all of the public's

274. Id. at 518.
275. Id. at 520-21.
277. Id. at 81.
burdens, and because no interference had occurred with its reasonable investment-backed expectations.\textsuperscript{278} Promoting free speech and petition rights was a valid public regulation of private rights in the public interest since it was not "arbitrary and capricious" and it had a "real and substantial relation" to the desired goal.\textsuperscript{279} Additionally, PruneYard could not make a \textit{Maynard} claim that it was being forced to help disseminate an ideology on private property because a shopping center, unlike a car, is open to the public, and political positions will not be associated with its owner. Further, the state did not prescribe the message, and Prune Yard was free to post signs disavowing any opinions expressed.\textsuperscript{280} Justice Marshall, in a concurring opinion, examined what a decision in favor of the petitioner would have produced:

Appellants' claim in this case amounts to no less than a suggestion that the common law of trespass is not subject to revision by the State, notwithstanding the California Supreme Court's finding that state-created rights of expressive activity would be severely hindered if shopping centers were closed to expressive activities by members of the public. If accepted, that claim would represent a return to the era of \textit{Lochner v. New York}. . . .\textsuperscript{281} Justice White's concurrence noted that the access occurred only in common areas of the mall, rather than in individual stores.\textsuperscript{282} Justice Powell's concurrence questioned the majority's distinction between the automobile and the shopping center; had New Hampshire in \textit{Maynard} required "Live Free or Die" be posted on "shop windows" instead of license plates, it would have been just as unconstitutional.\textsuperscript{283}

Contrary to what one's initial reaction to the case might be, the decision does not really revive the double standard for these cases:

Had the Court reversed the California court's restriction of the shopping center's right to exclude, it would have had to employ the Due Process Clause to place severe limits on the state's ability to define and condition property rights. Such a ruling would have

\textsuperscript{278. Id. at 83.}
\textsuperscript{279. Id. at 85.}
\textsuperscript{280. Id. at 87.}
\textsuperscript{281. Id. at 93 (Marshall, J., concurring).}
\textsuperscript{282. Id. at 95 (White, J., concurring).}
\textsuperscript{283. Id. at 97 (Powell, J., concurring).}
altered settled doctrine governing the state's police power to regulate property rights. . . .

While the preferred freedoms doctrine has been held inapplicable when property and civil rights claims conflict, the Court still permits regulation of property rights. If the shopping center had won in Prune Yard, the Court would have revived economic due process, which it refused to do, and rightly so. No one can argue that property rights are more important than first amendment rights.

The Court has similarly changed the double standard when first amendment freedom of the press as well as freedom of speech claims have conflicted with property rights apart from shopping centers. Young v. American Mini-Theatres, Inc.,285 concerned Detroit's zoning laws which distinguished between movie houses that showed "adult" but not obscene films and those which did not. The laws prohibited two of the adult theaters from being located within 1000 feet of each other or 500 feet of a residential area. The developers of a proposed theater sued the city for allegedly violating their first amendment rights. Justice Stevens, speaking for the Court, speculated that a city could rationally believe that concentrations of such theaters could lead to undesirable transients, increased prostitution, an exodus of business and residents, and an adverse effect on property values.286 Stevens continued to treat this business regulation as any other such regulation, finding no evidence that the community was "unable to satisfy its appetite for sexually explicit fare,"287 and Justice Powell's concurrence was cast even more in the light of a city using its police powers to protect property.288

A very unusual case gave the Court the chance to protect freedom to pursue a calling above freedom of the press. In Zacchini v. Scripps-Howard Broadcasting Co.289 the performance of a fifteen-second "human cannonball" act at county fairs was filmed by a reporter and televised on the news without Zacchini's consent. Justice White, speaking for the Court, appreciated that the performer was not arguing that his performance was not newsworthy

284. Dorsen & Gora, supra note 157, at 225.
286. Id. at 55.
287. Id. at 62.
288. Id. at 78 (Powell, J., concurring).
or that it could not be reported. "His complaint is that respondent filmed his entire act and displayed that film on television for the public to see and enjoy. This, he claimed, was an appropriation of his professional property." White maintained that the first amendment does not allow the media to broadcast an entire event without the performer's consent. The act's economic value depended on its controlled publicity, for if the act could be seen for free on television, fewer will pay to view it at a fair. Since "the broadcast of petitioner's entire performance . . . goes to the heart of petitioner's ability to earn a living as an entertainer," he was entitled to damages from Scripps-Howard for its action.

A recent analysis of these conflicting property rights and first amendment rights cases summarizes the Burger Court as applying a different, tighter, more conservative view of liberty: liberty as security of private property; liberty as freedom of entrepreneurial skill; liberty from the impositions of government and of third parties from disposing of "one's own." Liberty, in brief, more in the mode of John Locke and of Adam Smith and somewhat less in the mode of John Mill (or of John Rawls.)

The Court's analysis must be reasonably persuasive, for two analysts who, although speaking only for themselves, both engage in litigation for the ACLU have concluded, "Although they [civil liberties and private property] may frequently be in conflict, the values embodied in the two concepts play a complementary role in the maintenance of a liberal democracy, however imperfect." Whether it is fair for the Court to apply Locke instead of Mill will be considered later in this article. But first, an examination of the last area of property rights decisions is in order: those involving the clauses explicitly guarding property rights, such as the fifth amendment's Eminent Domain Clause. For in these cases, the willingness to reexamine the double standard has appeared only recently and to a small degree.

290. Id. at 569.
291. Id. at 575.
292. Id. at 576.
294. Dorsen & Gora, supra note 157, at 238.
VIII. THE TAKINGS CLAUSE

One of the specific constitutional clauses designed to guarantee property rights is the fifth amendment's Takings Clause: "... nor shall private property be taken for public use without just compensation." Like many other clauses, this one derives from the writings of John Locke, specifically, § 138 of the Second Treatise, that property cannot be taken without the consent of the owner.\(^5\) Section 139 declares that the government "can never have a power to take to themselves the whole, or any part of the subjects' property, without their own consent; for this would be in effect to leave them no property at all."\(^6\) Protection of property from confiscation is also a protection of various civil liberties as well, for if the government can seize the property of people who speak or pray in subversive ways, the marketplace of ideas will be narrowed due to fear of ensuing economic hardship.\(^7\) In addition, security of property ownership has a long history in liberal thought due to the "expectations" argument. Locke believed that no one would mix his labor with the land unless the expected benefits of that effort were realized. To let others acquire the "benefits of another's pains" would be unjust.\(^8\)

A. The Supreme Court and the Takings Clause to 1969

The Court has alternatively conceived of police power regulations as being automatically valid or as becoming takings of property if their impact is to destroy property rights. Current applica-

\(^{295}\) Men, therefore, in society having property, they have such right to the goods which by the law of the community are theirs, that nobody hath a right to take them, or any part from them, without their own consent; without this they have no property at all. For I have truly no property in that which another can by right take from me when he pleases against my consent...[I]n governments where the legislative is in one lasting assembly, always in being...there is danger still, that they will think themselves to have a distinct interest from the rest of the community, and so will be apt to increase their own riches and power by taking what they think fit from the people. For a man's property is not at all secure, though there be good and equitable laws to set the bounds of it between him and his fellow subjects, if he who commands those subjects have power to take from any private man what part he pleases of his property, and use and dispose of it as he thinks good.

J. Locke, supra note 19, § 138.

\(^{296}\) Id., § 139.

\(^{297}\) B. Siegan, supra note 34, at 83.

\(^{298}\) See L. Becker, supra note 2, at 35.
The property precedent for Takings Clause jurisprudence dates back almost one hundred years to *Mugler v. Kansas.* There the Court first applied the former standard to uphold a prohibition law despite the claims of alcohol manufacturers that it took their property. Since the property was noxious, it was no longer to be considered "property." Since that time, a multitude of precedents has been developed, all seeming to lack rhyme or reason. No one doubts that a "taking" requires just compensation, but there is a great deal of controversy as to what constitutes a taking as differentiated from a "mere regulation."

*Hadacheck v. Sebastian* is one of the early twentieth century cases involving the clause. Hadacheck owned a brick manufacturing business, originally outside the city limits of Los Angeles. The land later was annexed by the city, and a regulation was passed prohibiting the manufacture of bricks in residential areas. The regulation prohibited Hadacheck from any reasonable use of his land, because once turned into a clay pit, the land was worthless for any other purpose. Nevertheless, the Court, speaking through Justice McKenna, stated that the scope of the police power was extremely broad:

> It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not applied arbitrarily. ...  

For McKenna, any rational use of the police power was by definition incapable of becoming a taking. He recognized that perhaps the objectives Los Angeles was pursuing might be equally as well served by a non-prohibitory regulation of brick manufacturing, but the Court had to defer to the good faith judgment of the city council. Such an interpretation of the Takings Clause would appear to leave as many restrictions upon legislative treatment of property rights as *Ferguson v. Skrupa* left under the Due Process Clause.

However, the schizophrenic other half of Takings Clause jurisprudence, that a regulation could be considered to amount to a

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299. 123 U.S. 623 (1887).
300. 239 U.S. 394 (1915).
301. Id. at 410.
302. Id. at 413-14.
taking, was initiated in *Pennsylvania Coal Co. v. Mahon*[^303] in 1922. A Pennsylvania law which prohibited the mining of coal that would damage homes in violation of contracts between coal companies and homeowners was challenged. Justice Holmes, for the Court, preferred to rest his holding on the Takings Clause, however, rather than the Contract Clause. Although he admitted that the government cannot function without its normal activities reducing property values, “the implied limitation must have limits or the contract and due process clauses are gone.”[^304] One factor to be weighed in limiting the police power is the diminution of value. At some level, compensation is required.[^305] Hadacheck had lost nearly ninety percent of his property’s value, but the Court had not applied such a standard then.

Holmes recognized that the state could “take” property without appropriating it and without damaging it. This regulation went too far because it denied the coal company of any profitable use of its property, even though the company retained title and the coal was still intact. It was a relative question requiring a judgment call, and the complete elimination of value was on the unconstitutional side of the line. Holmes realized that the only reason why the right to mine coal had value was its potential for profit. He found no constitutional difference between preventing that activity and destruction or confiscation.[^306] While Holmes realized that in a small number of very unusual situations, such as the razing of a house to prevent the spread of a fire, the state could destroy property without just compensation, “[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.”[^307] The state may, under its police power, destroy property when the only alternative is an imminent threat to life or property. Locke also raised the question of the balance between regulating and taking, but reached no firm conclusion about where one ended and the other began. Holmes cautioned the public not to pursue the general welfare at the expense of the Constitution. But he also could not define a taking as against a regulation: “[T]his is a question of degree—and therefore cannot be disposed of by general proposi-

[^303]: 260 U.S. 393 (1922).
[^304]: Id. at 413.
[^305]: Id.
[^306]: Id. at 414.
[^307]: Id. at 415-16.
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In dissent, Justice Brandeis adopted the view that any police power regulation was not a taking. For Brandeis, so long as title was not directly transferred to the state, no taking could occur. A total diminution of the use value of property still did not constitute a taking: "Restriction upon use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can then be properly put." A total diminution of the use value of property still did not constitute a taking: "Restriction upon use does not become inappropriate as a means, merely because it deprives the owner of the only use to which the property can then be properly put." Since 1922, the Court has vacillated between these two positions, applying now the one standard and now the other while accumulating precedents for both views. The result was incoherent jurisprudence, with almost no definite conclusions that could be applied in deciding future cases. In 1926, the Court upheld as protective of property values village zoning restrictions of industrial development despite claims of a taking levelled by those who owned property whose value was diminished when its zoning was changed to residential. Two years later, the Court sustained a Virginia law that ordered the destruction of red cedar trees to halt a blight that could damage adjacent apple orchards, even though the law did not compensate the cedar owners. Justice Stone, speaking for the Court in Miller v. Schoene, noted that the only way to prevent the spread of the disease was to cut the cedars. "When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public." While some commentators argue that this case established that diminution in value could never be a sole criterion for determining a taking because the tree was totally destroyed, a more accurate analysis would consider the case in a different light. The Virginia law was similar to the exception Holmes expressly provided for in Pennsylvania Coal. Just as buildings could be destroyed to prevent the spread of a fire, so could trees to prevent the spread of blight. The clear and present danger test had its property equivalent here.

308. Id. at 416.
309. Id. at 417 (Brandeis, J., dissenting).
310. Id. at 418.
313. Id. at 279-80.
315. B. Siegan, supra note 34, at 165.
may be restricted so that owners of adjoining property may use their property as fully as before the takings litigant threatened it.\textsuperscript{316} To argue otherwise, as Holmes did not, would be to miss the forest for the trees.

Despite its general retreat from protection of property rights after 1937, the Court still continued to equate some governmental activities as takings. In \textit{U.S. v. General Motors Corp.},\textsuperscript{317} Justice Roberts, speaking for the Court, maintained that property was not just a thing, but a group of rights in relation to a thing, such as possession, use, and disposal. He also argued that government action could be a taking even without confiscation or physical invasion, "if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter.\ldots"\textsuperscript{318} The following year, in the \textit{Causby} decision the Court considered frequent military flights over appellee's property to be a taking.\textsuperscript{319} Justice Douglas, speaking for the Court, noted that the noise was startling and that a total of 150 of respondent's chickens had died from crashing into the henhouse walls due to fright. "The result was the destruction of the use of the property as a commercial chicken farm."\textsuperscript{320} Although the government owned the airspace, and was thus not liable to endless trespass suits for a transcontinental flight, a taking is measured by the owner's loss rather than the taker's gain.\textsuperscript{321} Even without a direct physical invasion of the property, a taking requiring compensation had occurred.\textsuperscript{322} Justice Black, in dissent, adopted the typical double standard approach of leaving the decisions to Congress.\textsuperscript{323}

During the next several years, the Court continued to apply the standard first adopted in \textit{Pennsylvania Coal}. The crucial point of \textit{United States v. Dickinson},\textsuperscript{324} decided in 1947, was that the Court, through Justice Frankfurter, considered a taking to have occurred when a property owner had acquired "servitude"\textsuperscript{325} in relation to

\textsuperscript{317} 323 U.S. 373 (1945).
\textsuperscript{318} \textit{Id.} at 378 (footnote omitted).
\textsuperscript{319} \textit{United States v. Causby}, 328 U.S. 256 (1946).
\textsuperscript{320} \textit{Id.} at 259.
\textsuperscript{321} \textit{Id.} at 261.
\textsuperscript{322} \textit{Id.} at 264.
\textsuperscript{323} \textit{Id.} at 271 (Black, J., dissenting).
\textsuperscript{324} 331 U.S. 745 (1947).
\textsuperscript{325} \textit{Id.} at 748.
the government. In 1952, in Youngstown Sheet & Tube Co. v. Sawyer, the Court ruled that private property cannot ordinarily be seized without just compensation, even for reasons of national security during a national emergency, although the case was primarily one involving presidential power.

Prior to the Warren Court, two alternatives existed for takings rulings. The Court could apply the Mugler test that any police power regulation as incapable of becoming a taking. This line of cases included Hadacheck, the Brandeis dissent in Pennsylvania Coal, as well as the spirit of the other property rights cases decided after the adoption of the double standard. As a second alternative, the Court could choose to apply the rule first set down in Pennsylvania Coal that there were limits on the police power that could not justify the disregard of other constitutional provisions. The Court had more consistently applied the second standard under Chief Justices Stone and Vinson, although Mugler and Hadacheck were never overruled. Under the second test, property was a bundle of rights, and a regulation which caused servitude or the loss of most of an owner’s interest in his property constituted a taking.

Under the Warren Court, the Stone and Vinson Court decisions were altered with ones more befitting Mugler, the Brandeis dissent in Pennsylvania Coal, and the double standard. Nonetheless, the Court did not overturn the Pennsylvania Coal line of cases. The result was a confused set of precedents pointing in two equal and opposite directions. Either test could be applied to any set of circumstances to allow any result that the Court wanted to reach.

In Berman v. Parker, Justice Douglas expanded the police power to include beauty and cleanliness as a limitation on the reach of the Takings Clause. He then said that the police power “admits of no exception merely because the power of eminent domain is involved.” Two years later, in United States v. Central Eureka Mining Co., the Court, through Justice Burton, ruled that the WPB’s World War II order closing gold mines was not a

326. 343 U.S. 579 (1952).
329. Id. at 32.
taking. The WPB did not physically possess the mines, or require them to dispose of their equipment.\footnote{331} Justice Burton instead saw the order as a means of voluntarily regulating mine production in general from the less essential to the more essential.\footnote{332} He reached back to \textit{Hadacheck} rather than \textit{Pennsylvania Coal}:

\begin{quote}
[T]he mere fact that the regulation deprives the property owner of the most profitable use of his property is not necessarily enough to establish the owner's right to compensation. . . . [W]artime economic restrictions, temporary in nature, are insignificant when compared to widespread, uncompensated loss of life and freedom of action which war traditionally demands.\footnote{333}
\end{quote}

Burton allowed violations of property rights which would be unconstitutional under the \textit{Pennsylvania Coal} standard so long as the public benefitted. This is exactly what Holmes had warned against. Justice Harlan appreciated this in dissent, arguing that the owners were not merely deprived of the most profitable use of their mines, but their complete halt and ensuing layoff of workers, results no different from physical possession by the United States.\footnote{334} "In these circumstances making the respondent's right to compensation turn on whether the Government took the ceremonial step of planting the American flag on the mining premises is surely to permit technicalities of form to dictate consequences of substance."\footnote{335}

If a case such as \textit{Causby} proved that a taking could occur without direct physical invasion, then \textit{YMCA v. United States}\footnote{336} showed that a direct physical invasion could occur without creation of a compensable taking. In deciding one of the few Supreme Court cases to arise from the Canal Zone, the Court, speaking through Justice Brennan, ruled that the U.S. Army's occupation of petitioner's building during the 1964 riots in order to protect it from destruction was not a taking. YMCA had sought compensation for that damage caused by rioters after the troops had occupied the building.\footnote{337} Brennan compared the unplanned entry to firefighters occupying property to protect it from a conflagration. The troops

\footnotesize
\begin{enumerate}
\item \textit{Id.} at 158-60.
\item \textit{Id.} at 166-67.
\item \textit{Id.} at 168.
\item \textit{Id.} at 181 (Harlan, J., dissenting).
\item \textit{Id.}
\item 395 U.S. 85 (1969).
\item \textit{Id.} at 87.
\end{enumerate}
did not prevent YMCA from using its building because the rioters had already done that by attacking it.\textsuperscript{338} It is fair to say that this logic falls within the exceptions demarcated by \textit{Pennsylvania Coal}.

\textbf{B. The Burger Court and the Takings Clause}

Although it did not decide any major takings cases in the early and middle 1970's, the Court in 1978 decided \textit{Penn Central Trans. Co. v. New York City},\textsuperscript{339} a case that can fairly be considered the \textit{Ferguson v. Skrupa} of the Takings Clause because it rewrote the past century of just compensation law. But more recently, the Court has issued decisions that cannot be squared with that landmark case. The primary criticism of the Court's takings jurisprudence is its incoherent collection of precedents. While differentiating takings from regulations may be difficult, it is not an impossible process.

In \textit{Penn Central}, New York City's Landmarks Preservation Law was challenged. New York adopted the law because a number of historic structures had been destroyed, and because such historic structures enhance the quality of life for all. In addition, they would add civic pride, enhance the city's attractiveness to visitors, stimulate business activity, and provide education.\textsuperscript{340} If the city honored a building with landmark status, the owner had to keep the building in good repair at his own expense. Any changes in the external architecture needed advance approval by a city commission.\textsuperscript{341} In this case, the commission had denied a request to add a 55-story office building above Grand Central Terminal that would have required tearing down some architectural features. It also, in the determination of the commission, would have destroyed the "majestic approach" view observable from the south.\textsuperscript{342} The Court upheld the ordinance.

Justice Brennan, speaking for the Court, opened with a summary of takings jurisprudence. He noted that the Just Compensation Clause was designed to prevent private property owners from bearing public burdens. Brennan said that the Court had been unable to separate cases requiring compensation from those

\textsuperscript{338} Id. at 93.
\textsuperscript{339} 438 U.S. 104 (1978).
\textsuperscript{340} Id. at 108-09.
\textsuperscript{341} Id. at 111-12.
\textsuperscript{342} Id. at 117.
which did not. He stated that some decisions had considered as a factor whether the economic impact of a regulation interfered with legitimate investment-backed expectations, or whether a physical invasion of the property had occurred.

These tests would all seem to support Penn Central's argument. But then Brennan proceeded to apply precedents as he desired in order to uphold laws that were on the books in thousands of communities. He interpreted *Miller v. Schoene* to mean that a state could choose to preserve one class of property over another, totally neglecting the context of imminent physical danger to the very existence of neighboring property that was crucial in that case. *Penn Central* had claimed, as *Causby* before it, that since there was no gainful use of air rights, the city needed to compensate it for the adjacent airspace. Brennan rejected this analogy by expanding the geographic position of the property that had to be interfered with for a taking to occur:

Taking jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature of the interference with rights in the parcel as a whole—here, the city tax block designated as the "landmark site." Thus, Brennan restricted the application of another takings precedent as well.

Brennan need only have cited *Hadacheck* to demolish *Penn Central* ’s argument that because the site's value had been diminished a taking had occurred. Penn Central's lawyers had anticipated these arguments, and had distinguished the instant case from *Hadacheck, Miller*, and others on the ground that those decisions concerned the government's prohibition of a noxious use of property. Since the proposed building conformed to all provisions of applicable zoning law, there was no noxious use. Brennan accomplished the revision of constitutional history when he redefined the relevant cases as being

better understood as resting not on any supposed "noxious" quality

343. *Id.* at 124.
344. *Id.*
345. *Id.* at 126.
346. *Id.* at 130-31.
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of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce a widespread public benefit and applicable to all similarly situated property. 347

Even a cursory examination of the facts reveals the intellectually dishonest acrobatics Brennan performed with that statement. He himself characterized the Virginia law in Miller as requiring the removal of the trees because "they produced cedar rust fatal to apple trees cultivated nearby. . . ." 348 Brennan was correct in stating that Hadacheck said that lesser alternatives than the harshness of outright prohibition could not be considered in judging the existence of a taking. However, Justice McKenna did not have the opportunity to apply the test that Brennan had added: a regulation may be a taking "if it has an unduly harsh impact upon the owner's use of the property." 349 It is likely that had McKenna applied that standard to the 87% diminution present in Hadacheck, he would have found it "unduly harsh." The reason why courts rather than legislatures were entrusted with the preservation of important constitutional provisions was due to their respect for prior decisions. The rationale in precedents does not exist for future Justices to redefine as they wish those cases had been decided. 350

In conclusion, Brennan would not question the city council's determination of the benefits that would accrue to the community as a result of the law. Furthermore, the regulation did not interfere with investment-backed expectations because Penn Central could continue to use its property exactly as it had for sixty-five years, as a railroad terminal with office space. They also had not been deprived of the right to use any space above the Terminal, for if the proposed changes were harmonious in scale, material, and character of the structure, then it would be permissible. As a gesture of consolation, Brennan also made the point that the air rights above Grand Central Terminal could be transferred to eight other buildings in the area of the Terminal, thus reducing

347. Id. at 133 n. 30. See also G. DIETZE, supra note 8, at 114.
348. 438 U.S. at 126.
349. Id. at 127.
350. In a different context, one commentator argues, "The Court's re-rationalization of the earlier cases is wholly startling to anyone familiar with those precedents. . . . Fair treatment by the Court of its own precedents is an indispensable condition of judicial legitimacy." Monaghan, supra note 151, at 424.
the impact of the regulation. The result was a decision upholding the constitutionality of the New York City ordinance. More importantly, it reinterpreted sixty-five years of takings law in order to reach that conclusion, which the Court felt to be desirable public policy.

Justice Rehnquist, in dissent, commented on other difficulties in the majority opinion which made it unpersuasive. Landmark status designation cannot fairly be compared to zoning because under the latter, all property owners are made to observe rules for the welfare not only of the general public, but of each other as well. In this case, the restrictions created for individuals are much greater, and there is no reciprocal advantage. Rather, there are affirmative duties to preserve the structure. "To suggest that because traditional zoning results in some limitation of the property zoned, the New York City landmark preservation scheme should likewise be upheld, represents the ultimate in treating as alike things which are different." Rehnquist applied the General Motors standard that property is rights rather than things, and that a taking is measured as a loss to the owner rather than gain to the government. The fifth amendment's protection of the right to use property had been denied because although Penn Central could use the Terminal as it had in the past, otherwise New York "exercise[d] complete dominion and control over the surface of the land." Brennan's idea of compensation through transfer of air rights was ersatz because even if they had been offered as such, just compensation is not provided by legislative enactment.

Some analysts recognized the departure from historic takings decisions that Penn Central was. One federal judge sees no way to differentiate the airspace above the Grand Central Terminal from the coal beneath the surface in Pennsylvania Coal. In an insightful analysis of the current state of takings law, Judge Oakes states the two "rules" that determine whether a takings claim will be successful:

1. The takings "jurisprudence" of the Supreme Court is still in

351. 438 U.S. at 137.
352. Id. at 140 (Rehnquist, J., dissenting).
353. Id.
354. Id. at 146 (quoting United States v. Causby, 328 U.S. 256, 262 (1946)).
355. 438 U.S. at 150 (Rehnquist, J., dissenting).
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an unsatisfactory ad hoc stage, with a lack of development of analytical principle or reconciliation of conflicting lines of precedent; and

2. As a result, in a gray area case like *Penn Central*, that jurisprudence permits purely subjective results, with the conflicting precedents simply available as makeweights that may fit pre-existing value judgments as to the relative worth of the legislation as opposed to the importance or dollar value of the property rights at stake.\(^{357}\)

In cases since 1978, both parts of this analysis have been applied. But the Court has allowed more possibility for it to declare that a taking has occurred than *Penn Central* seemingly allows. In fact, one recent ruling cannot be squared at all with that decision, indicating a shift in double standard theory could be pending.\(^{358}\)

Justice Brennan again spoke for the Court in *Andrus v. Allard*.\(^{359}\) The Endangered Species Act made it unlawful to trade or barter bird feathers, but did not prohibit possession or transportation of such parts if those birds predated the act.\(^{360}\) Brennan denied that the law effected a taking:

> The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety. In this case, it is crucial that appellees retain the right to possess and transport their property and to donate or devise the protected birds.\(^{361}\)

For Brennan, a taking seemed to require either outright dispossession of ownership or the physical destruction of the property. He felt that some economic return was still allowed under the law, as appellee could display the feathers for an admission charge. Courts could not predict potential profitability, so this argument was hardly compelling for alleging a taking.\(^{362}\) One commentator

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357. *Id.* at 613 (footnote omitted).
359. *Id.*
360. *Id.* at 56.
361. *Id.* at 65-66 (citations omitted).
362. *Id.* at 66.
notes that "if the market value of the thing approaches zero, then there is good reason to believe that [its owner] would think it merely a bad joke to be told that, despite the new statute, the thing remains his." 363 The right to dispose of non-noxious property for money cannot be eliminated without demanding just compensation.

Justice Rehnquist was able to temporarily nudge Justice Brennan out of the position as the writer of the Court's takings opinions and to reapply the Pennsylvania Coal standard in 1979, in Kaiser Aetna v. United States. 364 There, a pond, which under Hawaii law is private property, was developed into a private marina and connected to a nearby bay and the Pacific Ocean. The Army Corps of Engineers claimed that by creating a navigable waterway, Kaiser Aetna, the owners, had opened its pond to Congressional regulation under the Commerce Clause. Rehnquist announced that the relevant factors he would consider included economic impact, interference with expectations, and character of the action. 365 He believed that the government's attempt to create a public right of way to the pond was a taking under Pennsylvania Coal because before the private development the pond was incapable of navigability and because the pond had been initially connected to navigable waters with the consent of the government. These created expectations of a right to exclude that could require compensation. 366 In addition, the regulation allowed a physical invasion of the privately owned marina, not an insubstantial devaluation of the property. 367 Although some argue that this result is inconsistent with Roth because it gives constitutional status to property expectations, 368 Hawaii law did consider the pond to be private property. Another analyst considers Rehnquist's statement that one of the most essential sticks in the property rights bundle is exclusion shows "shades of John Locke." 369 Thus, in another area of double standard jurisprudence, John Stuart Mill has been subordinated to John Locke.

365. Id. at 175.
366. Id. at 178-79.
367. Id. at 180.
369. Oakes, supra note 356, at 616. "This is the first case I have seen suggesting that some 'sticks' are more fundamental than others." Id. at 616 n.202.
The Court continued to apply traditional Takings Clause jurisprudence in *Agins v. City of Tiburon*. Petitioner owned five acres of unimproved land for residential purposes when the State of California required the city to have open-space zoning. He claimed the new zoning was a taking. The land had fine views of San Francisco Bay, and were the most valuable in the city. Since it could no longer be utilized for residences, the city had destroyed its value, he purported. Justice Powell, speaking for the Court, acknowledged that a balance between public and private interests had to be conducted to see if a private individual was being unjustly burdened with the exercise of state power. He considered that the public benefits were to prevent the ill effects of urbanization. In addition, he noted that zoning, through the implicit compensation inherent in its reciprocal advantages, ordinarily did not result in a taking of property:

The zoning ordinances benefit the appellants as well as the public by serving the city’s interest in assuring careful and orderly development of residential property with provision for open-space areas. There is no indication that the appellant’s 5-acre tract is the only property affected by the ordinances. Appellants therefore will share with other owners the benefits and burdens of the city’s exercise of its police power. In assessing the fairness of the zoning ordinances, these benefits must be considered along with any diminution in market value that the appellants may suffer.

Bearing this consideration in mind, one can heartily approve of the decision. There is no comparison between these ordinances and the New York Landmarks Preservation Act. “[A]ny contrary decision in this case would have stunned the real estate world to its foundations.” It also would have impaired the ability of government to protect private property in the public interest.

But the Court nearly reached a different result in the application of open-space zoning in another instance. A majority of the Court refused to decide *San Diego Gas & Electric Co. v. San Diego* because it did not constitute an appropriate appeal under § 1257 of Title 28 of the United States Code. The four dissenting

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371. Id. at 260-61.
372. Id. at 261.
373. Id. at 262.
374. Oakes, supra note 358, at 618.
Justices, speaking through Justice Brennan, did consider the case to be an acceptable appeal, and went on to decide it on its merits. They concluded that the law amounted to a taking because the rezoning of land as open-space deprived its owner of any profitable use. Although police power deprivations of property made in accordance with procedural due process under the fourteenth amendment never require compensation, fifth amendment takings under eminent domain need to be compensated.\textsuperscript{376} In \textit{Agins}, while the Court had ruled that zoning restrictions ordinarily could not be takings, if the ordinances did not advance legitimate state interests or "den[ied] an owner economically viable use of his land," then such regulation could indeed amount to a taking.\textsuperscript{377} Brennan noted the difficulty that the Supreme Court had encountered in deciding such cases:

One distinguished commentator has characterized the attempt to differentiate "regulation" from "taking" as "the most haunting jurisprudential problem in the field of contemporary land use law ... one that may be the lawyer's equivalent of the physicist's hunt for the quark." C. Haar, Land Use Planning 766 (3d ed. 1976).\textsuperscript{378}

He seemed to reverse his earlier statement of only two years before in \textit{Allard} that a destructive physical invasion or outright confiscation was necessary to turn a regulation into a taking:

It is only logical, then, that government action other than acquisition of title, occupancy, or physical invasion can be a "taking," and therefore a \textit{de facto} exercise of the power of eminent domain, where the effects completely deprive the owner of all or most of his interest in the property.\textsuperscript{379}

This was true even if the taking was temporary and reversible.\textsuperscript{380} The Court seemed to be retreating from its high water mark standard in \textit{Penn Central} and \textit{Allard}, especially since Justice Rehnquist's concurrence made clear that he had few reservations about the merits of the dissent's argument.\textsuperscript{381} All the Justices who decided the issue on its merits reached the same conclusion. Such an opinion, if accepted by a majority, would represent a major

\textsuperscript{376} 450 U.S. at 641 (Brennan, J., dissenting).
\textsuperscript{377} Id. at 647 (footnote omitted).
\textsuperscript{378} Id. at 649.
\textsuperscript{379} Id. at 653.
\textsuperscript{380} Id. at 657.
\textsuperscript{381} Id. at 633-34 (Rehnquist, J., concurring).
alteration of the double standard as applied to takings. But even if this view did become the opinion of the Court, no one could tell what effect it would have on Hadacheck or Mugler because Brennan did not say whether this test would overrule those cases.

Allowance of the police power in negating property rights claims continued in Texaco, Inc. v. Short. An Indiana law stipulated that an unused serverance interest would revert to the surface owner unless the mineral owner filed a claim in the county recorder's office. The Court, speaking through Justice Stevens, applied the Roth rule and said that the state could impose reasonable conditions on property rights. The state did not take the property by its action; rather, it was Texaco's failure to use the property that ended the right. Further, requiring that after two decades of non-use an owner must file a claim or lose it was not in itself a taking. Justice Brennan dissented on procedural due process grounds, fully consistent with his San Diego Gas & Electric dissent. One recent analysis of the case considers the statute as having forced the proprietor to transfer his claim to the surface owner. He believes that a state cannot declare by fiat that property has been abandoned; under common law, proof of abandonment requires an intent by the owner to relinquish all rights to the property. Rather than abandoning the property, Texaco had not registered its claim because it did not know of the law's existence. Instead of considering the non-registration as causing the absence of a taking, the legislation itself caused a taking. The analysis is inconclusive because the state can grant property rights and then, through legislation that is published, regulate those rights. While it may be a close call, no taking occurred under this law.

In 1982, the Court made another turn in its confusing adjudica-

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382. Justice Black had held in United States ex rel. T.V.A. v. Welch, 327 U.S. 546, 552 (1946) that in all economic cases, the Court should defer to Congress. See Dunham, Griggs v. Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law, 1962 Sup. Ct. Rev. 63, 65.
385. 454 U.S. at 530.
386. Id. at 542-49 (Brennan, J., dissenting).
388. Id. at 361.
389. Id.
tion of takings cases in *Loretto v. Teleprompter Manhattan CATV Corp.*, although the decision still furthered the general trend away from *Penn Central*. A New York law provided that a landlord must allow a cable television company to install cable facilities on his property. Landlords did not bear the installation costs, and could not raise a tenant’s rent solely because he wanted a cable subscription. The New York Court of Appeals considered the law legitimate under the police power because by prohibiting landlord fees that interfered with cable television, it promoted educational and community benefits. In addition, it was a regulation without large economic impact when measured against Loretto’s total property rights, a standard which Brennan had applied in *Penn Central*, and jeopardized no reasonable investment-backed expectations. Under the indirect benefits test considered by the Court of Appeals, virtually any regulation would be precluded from being considered a taking. Teleprompter was successful in marketing these benefits without the addition of legislative requirements.

Speaking for the Court, Justice Marshall rejected this argument, and implied that there were limitations on the police power in securing public benefits. For the first time in the twentieth century, the Court made a definitive statement that defined when a regulation became a taking: a permanent physical invasion of property was a taking, even without actual confiscation. Since the state had authorized Teleprompter to install cable equipment on appellant’s property, a physical invasion had occurred, even though only a fraction of the property had been occupied. “We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms the rule, recent cases do not question it, and the purposes of the Takings Clause compel its retention.” *Penn Central* had said merely that a physical invasion was more apt to be viewed as a taking, as well as considering the relevant property as a whole. Although regulation in the public interest was ordinarily not a taking, a direct physical invasion was entirely a different matter. When such an intrusion

391. *Id.* at __, 102 S. Ct. at 3170.
393. 454 U.S. at __, 102 S. Ct. at 3171.
394. *Id.* at __, 102 S. Ct. at 3171.
occurs, the balancing test of weighing public benefits against private losses was over, for such activity is a determining factor that a taking has occurred.\(^{395}\) This result cannot be squared with Penn Central because it makes the character of the action a deciding factor, and does consider the property in segments. Prior to Teleprompter, for more than one hundred years, the Court had been moving away from a physical interference with a property object in evaluating takings cases and toward a consideration of the regulation's interference with the legal rights over property.\(^{396}\) Marshall related the physical occupation standard to the earlier bundle of rights standard of use, possession, and disposal, most recently applied in Kaiser Aetna, that "[t]o the extent that the government permanently occupies physical property, it effectively destroys each of these rights."\(^{397}\)

An advocate of property rights might be pleased that Justice Marshall had judged the regulation to have "gone too far." However, the rationale is troubling because property should be viewed as rights to possess, exclude, dispose, and use, rather than a physical thing that is the object of these relations. If a permanent physical occupation is the sole way to guarantee that a regulation will be considered a taking, then it might be concluded that property is an object that can be taken only if seized or physically invaded. If one stick in the bundle of property rights is taken, compensation is as fully required as if all of the sticks have been taken\(^{398}\) an assumption upon which Marshall relied. Although he upheld the sanctity of property rights in this case, he may by implication have weakened the Takings Clause when applied to other fact situations that should require compensation. His test is only one way in which a regulation can become a taking. The dissent's view, by Justice Blackmun, that if the state can require a landlady to provide mailboxes or fire escapes at her expense, it can regulate the installation of cable television equipment at public expense,\(^{399}\) ignores the different levels of public interest in the regulation in question.

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\(^{395}\) Id. at ___, 102 S. Ct. at 3175-76.
\(^{397}\) 454 U.S. at ___, 102 S. Ct. at 3176.
\(^{398}\) Berger, supra note 327, at 270. See also Sax, supra note 318, at 163; Van Alstyne, supra note 316, at 2 n.5.
\(^{399}\) 454 U.S. at ___, 102 S. Ct. at 3183 (Blackmun, J., dissenting).
C. An Alternative Inquiry for Takings

Clearly, the takings cases are conflicting. There is hardly any guidance for a takings litigant to know if his claim will be upheld because each time the Court says the case has to be reviewed under its own circumstances. The Court has narrowed the distance between the property and civil rights standards since *Penn Central*, but in a hesitant and unconnected fashion. Only when the Court adopts a consistent set of criteria for evaluating if in fact a taking has occurred can it properly overturn legislation which violates constitutional protection of property rights. Currently, the Court can choose from a grab-bag of precedents and relevant issues in deciding any takings case. However, there are contained within the decisions and corresponding commentaries enough statements to create a consistent theory. In short, it is possible to discover the quark, rather than merely hunt, or, more accurately, grope for it. Certainly it is not an easy question to resolve when a regulation becomes a taking, so a complex test must be developed. There are five factors which should be considered, and which must be applied as a coherent whole.

1. As stated by Justice Marshall in *Teleprompter*, a permanent physical invasion of private property automatically is a taking, although the government can occupy property to protect it, as in *YMCA*, or to prevent immediate harm to life or property, such as in *Miller*.

2. A regulation can still be a taking in the absence of a direct physical invasion. As Justice Frankfurter noted in *Dickinson*, if the regulation creates a relationship to the government equivalent to private servitude, a taking has occurred. “Servitude” may be defined as the elimination of all profitable use or control of the property, or the imposition of all public burdens upon a distinct individual or group. Justice Rehnquist adopted this test in *Kaiser Aetna*. Even *Penn Central* recognized that a taking could occur without a direct physical invasion. A regulation can still be a taking in the absence of permanent confiscation or destruction. As Justice Brennan’s opinion in *San Diego Gas & Electric* noted, even a temporary prohibition on all profitable use is still a taking. A state works a taking if it orders a proprietor to destroy some-

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400. Van Alstyne, supra note 314, at 2.
401. Epstein, supra note 387, at 355-56.
thing,\textsuperscript{403} for a cause apart from a danger such as that present in \textit{Miller}.

3. Diminution of value created by a regulation apart from temporary or permanent invasion or confiscation is a factor in determining if a taking has occurred as in \textit{Pennsylvania Coal}. Contrary decisions such as \textit{Hadacheck}, which was decided before this standard was first applied, or \textit{Penn Central} should be overruled. Since, as Holmes noted, this is a question of degree, if a regulation deprives an owner of all or most of his interest in the property, a taking has occurred as in \textit{General Motors} and \textit{San Diego Gas & Electric}. Even if a single regulation does not create any of the results above, a quantity of such regulations could effect a taking. If there are so many restrictions regarding use of a property, for instance, that their combined effect is to deprive an owner of all or most of his interest in the property as in \textit{San Diego Gas & Electric} and \textit{General Motors}, the effect of the regulations is to create a taking. The use of the police power to achieve a negligible public benefit can still constitute a taking. There are indirect public benefits whose societal importance is too minimal to justify interference with private property rights, as Justice Marshall implicitly recognized in \textit{Teleprompter}. These are also questions of degree: the degree of diminution and the degree to which the regulation serves an important state interest.

4. A regulation which eliminates any of the strands in the bundle of property rights, such as exclusion in \textit{Kaiser Aetna} is a taking, regardless of the effects on the total property object. \textit{San Diego Gas & Electric} indicates that the same applies when use potential is destroyed, since the fifth amendment is designed to prevent the costs of society's police power legislation from being unjustly concentrated.\textsuperscript{404} Other sticks include possession, investment, modification, and exchange. Since property is a series of rights, including capital investment and improvement, rather than a thing, the relevant question is whether restrictions on those expectations of \textit{rights} have occurred, as \textit{General Motors} stipulated. This requires overruling \textit{Central Eureka Mining} and \textit{Allard}. The reasonable investment-backed expectations test must be discarded because the Court considers only those expectations for use anticipated at the original purchase of the property to be rea-

\textsuperscript{403} B. \textsc{Ackerman}, \textit{supra} note 363, at 130.

\textsuperscript{404} Oakes, \textit{supra} note 356, at 623-24.
sonable. If the government leaves someone title to his car, but in an effort to conserve energy, prohibits him from using it outside the garage, a taking has occurred.

5. If an activity is prohibited, and the legislature could have accomplished the same legitimate end through means that are less harsh in impact, a taking has happened as in *Penn Central*. This is another reason for relegating *Hadacheck* to the ashcan of constitutional history. The repeated citation of an unfairly decided case in adjudicating new takings claims does not make the original decision correct.

If a case can be placed into one of these categories, a taking has occurred.

**IX. PROPERTY IN THE POST-INDUSTRIAL AGE: AN ALTERNATIVE TO THE DOUBLE STANDARD**

The real world of practice suggests a reevaluation of the double standard. The niceties of its assumptions have been challenged, and during the last twenty years, the Court has responded by granting additional protection to property rights. In decisions beginning with *Roth*, the Court has granted procedural due process protection to the new property without falling into the trap of substantive due process or equal protection, despite Warren Court movements in that direction. A reexamination of the old property resulted from the recognition that the new property could be important as a personal right, and this view was applied in *Lynch* and its progeny.

In addition, the Court has considered property and civil rights to be inseparable in cases such as *Spence* and *Maynard*, when property was used as a means of personal expression in the political arena. The Court has shown in several rulings that it appreciates the ability of commercial and corporate speech to further society's interest in the widespread flow of information, postulating the equality of the marketplace of ideas and the economic marketplace. Further, the Court as a result of the *Hugens* decision now weighs equally first amendment and property rights. Lastly, after reducing the force of the fifth amendment's Takings Clause in *Penn Central*, the Court in *Teleprompter* declared that in an

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406. B. Ackerman, *supra* note 363, at 130.
age of explosive regulatory growth, certain regulations are automatically takings. In all these ways, the nonconformity of the assumptions of Ferguson v. Skrupa to the actual conditions of contemporary existence has caused the Burger Court to tacitly grant greater weight to property rights than its immediate predecessors.

But the double standard can also be criticized on a theoretical level, as well as from practical considerations, because in all three types of cases, the views of John Locke have been applied more often than those of John Stuart Mill. The key question for the remainder of this essay is to determine if that switch is fair in today's and tomorrow's America. To do so, the place of regulation in liberal political theory must be analyzed. When the sixth takings standard has been developed as a result of that analysis, then a comprehensive alternative to the double standard can be provided which will give the vital liberal goal of individual fulfillment even stronger protection.

Part of the problem in trying to repeal the double standard, even with the fissures that have appeared in the last two decades, is the popular conception of how property has changed as a result of the Industrial Revolution and the growth of the corporation. Since liberty and property rights were viewed as conflicting concepts, the notion became entrenched that corporations could only decrease individual freedom and that state regulation could only enhance freedom. Even defenders of property make concessions that corporate property lessens property's relation to individuality. Berle actually claims that because the government receives forty-six percent of a corporation's profits that the two are nearly equal partners in the production of society's wealth. There is no fulfillment for an individual in being a shareholder because with


408. See Berle, Property Production and Revolution, 65 Colum. L. Rev. 1, 11-12 (1965).

409. G. Dietze, supra note 8, at 137-38. See H. Belloc, The Restoration of Property 100 (1936). Berle contended that the separation of management and ownership reduces the traditional logic of property rights, supra note 410, at 10. See also A. Berle & G. Means, The Modern Corporation and Private Property 64-65 (2d ed. 1968).

modern property, management is distinct from ownership. As a result, directors are not bound by the wishes of shareholders.411 Before industrialization, ownership included the risk of capital, management, and responsibility. Since the stockholder retains the risk, but control is left to management, Berle believes the traditional logic of property no longer applies.412 Since the shareholder has no possibility of personal satisfaction apart from the income generated, there is no longer an extension of personality present in property.413 Additionally, there is no individual development because stockholders' votes are of "negligible importance" in setting corporate policy.414 Yet this view ignores that the effect of one vote in a national election is similarly or even less meaningful, but still constitutes individual freedom of expression in order to achieve self-realization. Rather than arguing that the increased importance of mutual and pension funds augments the extension of individual personalities represented in corporate ownership, Berle claims this trend removes people even further from management.415

Even today, these arguments are repeated uncritically, and with no supporting evidence by some of the nation's most influential economists, such as John Kenneth Galbraith.416 Corporations are viewed as pursuing bigness rather than profitability for their stockholders. They are portrayed as aging bureaucracies who hire personnel and pursue policies on the basis of those that are currently in effect.417 They are presumed to continue in this fashion forever, without any recourse from their stockholders.

These beliefs, however, represent only one way of looking at the corporation. There are alternatives that today may be well worth exploring. An individual could not possibly own some of the property of the industrial age, such as an automobile plant or a nuclear power generating facility. Indeed, a corporation may be the only means to preserve the "extension of individual private property"418 and personality in the industrial and post-industrial era. For if individual mixing of labor with the land is impossible as

411. Id. at 2.
413. Id. at 64-65.
415. Id. at 14.
417. Id.
418. Property: Mainstream and Critical Positions, supra note 1, at 4-5.
a means for receiving the benefits of modern technology, a corporate structure is the only alternative for a mostly free enterprise society. The Court considers that in American society, it is a given that the means of production are privately owned. Despite Berle's claims, corporations do not always become an everlasting enterprise engaged in exploitation. A company such as Braniff that pursues bigness as a measure of prestige eventually pays the price for that decision. Corporations that do not offer to the public what the populace desires due to inertia will be replaced by newer, more adaptable firms that will be only too happy to satisfy the consumer demand.

Even if stockholders do not have a great deal of management power, if stockholders purchase shares for income purposes and management pursues policies of profit maximization, then individual self-fulfillment is even more clearly achieved. Should management follow policies that do not represent the wishes of the owners, investors can sell their shares. Additionally, they can use their judicially-protected first amendment rights to combine with similarly dissatisfied stockholders to replace the current management. They can place advertisements in the media urging a vote against management at the next annual meeting. They also can speak or write to each other to achieve this goal. Further, if they prefer, they can write to the current management to protest current policies, perhaps offering the suggestion that alteration of those offending policies might result in a pro-management vote at the annual meeting. These prescriptions are far more effective and offer many more avenues for redressing grievances than does the relief provided by judges in classic double standard jurisprudence of appealing to the legislature. While for the past twenty years, most management group changes have resulted from tender offers requiring large amounts of money, the increased frequency of proxy fights at GAF, Superior Oil, and other firms means that even individuals who hold insignificant share amounts can attempt to replace inept management.

Corporations are virtually Lockeian social contracts in which a

421. "Wealth unquestionably does add to an individual's capacity and range in pursuit of happiness and self-development." Berle, supra note 410, at 17.
group of individuals is entrusted with the responsibility of protecting the natural rights of shareholders in pursuing a common goal. Just as unions are formed to protect the economic interests and individual development of their members, so do corporations serve similar functions for stockholders. In the state of nature, new advances in technology could not be pursued because of no guarantee of the exclusive use of the benefits for the one whose labor produced them. Without the ability to join together for the common good to protect natural property rights, no new developments designed to improve the quality of life could be pursued. Since in the state of nature, there would be no defense of these rights, an organization must be created in which each member gives and gains something for the common good. This institution is the state. But although the state and civil society eliminates the political state of nature, individuals still need intermediary associations to fulfill themselves in other areas of human endeavor. These are intermediary in that they serve individuals, but they are creations of the state. These facts justify regulation, but they also demand organizational freedom for these organizations because of their relation to individual development. In this sense, the corporation can be considered a social contract, for as Locke noted:

the only way whereby one divests himself of his natural liberty and puts on the bonds of civil society is ... by agreeing with other men, to join and unite into a community for their comfortable, safe, and peaceable living, one amongst another, in a secure enjoyment of their properties, and a greater security against any that are not of it. This any number of men may do, because it injures not the freedom of the rest; they are left as, they were, in the liberty of the state of Nature.

But it is Berle’s views of the corporation that the nation adopted when it vastly increased the scope of the federal government in the New Deal period and after. While this activity increases the importance of protecting the channels of free discussion more than when the state acted in a laissez-faire manner, so does it heighten the importance of protecting property rights. For if society appreciates property rights as being vital to personal

423. J. Locke, supra note 19, § 95.
development, it will be less likely to infringe property rights without a compelling public interest in the first place. Some argue that federal intervention adds to freedom by stopping monopoly and allowing union activity.\textsuperscript{424} But such logic resembles that of the American military officer in Vietnam who said that he had to destroy a village in order to save it. If the state continues to grow larger and larger, not only is individual freedom diminished, but the government's power can be used to more easily deny other rights, such as free expression. Even a diligent judiciary armed with a double standard would require time to reverse a large number of infringements.

Some recently have turned the concept of property on its head, arguing that personhood demands an entitlement to a certain amount of property.\textsuperscript{425} Courts began to protect tenant rather than landlord rights because occupancy is supposed to be more related to personhood than ownership of property.\textsuperscript{426} But while Radin argues that "fungible" property can be taken without just compensation,\textsuperscript{427} the fifth amendment prohibits all takings of property, "fungible" or not. Others suppose that property is less necessary now due to the increasing role of government. The argument has been advanced that such action makes property more important to secure, due to its relationship with personality and civil rights.

The regulatory sections of Locke were given scant attention in America's first century because the nation was primarily agricultural. When industrial conditions developed, more regulatory legislation was passed. Such a change was a new emphasis on §§ 130 and 131 of the \textit{Second Treatise}. Since 1937, the Court's decisions have not only continued this trend, but added John Stuart Mill's concern for the freedoms embodied in the first amendment. As Justice Frankfurter noted in 1949, the Industrial Revolution reduced the connections between property and personality.\textsuperscript{428} But because technological changes have occurred since that time-

\textsuperscript{424} See H. Belloc, supra note 409, at 35.


\textsuperscript{426} Radin, supra note 15, at 993. "[P]rivate law should cease allowing some people's fungible property rights to deprive other people of important opportunities for personhood." \textit{Id.} at 995-96.

\textsuperscript{427} \textit{Id.} at 1005.

constrained statement was made, regulation has flaws today apart from the practicality of its implementation.

In a sense, the post-industrial era serves to reduce the relevance of Locke's limitations on accumulation of property, and even reduces the importance of §§ 130 and 131. The invention of money eliminated spoilage as one Lockeian limitation on accumulation of property. The development of artificial intelligence removes the practical application of the requirement that "there be enough and as good left in common with others." In addition, the mixing of physical labor is no longer necessary as a justification for property rights. There is even more creative labor than in Lockeian times. Consequently, there is more justification for property rights because the fruits of the mixing of more creative labor demand even greater defense. Such labor also serves to reduce the distance between the property and civil rights standards because the labor is much more analogous to the process of exercising first amendment rights due to its intellectual content. Given today's economic system, the property created comes from intelligent machines owned by capitalists. The result is a new basis for the social contract.

[W]e are looking at a sequence in which at the point that we can disconnect labor content from output there are no limits to productivity except the availability of materials, energy, and investment capital. There is no longer a relationship between how hard you work and how many goods and how much capital you produce. That is the change in social contract that we have to address. It is an extremely difficult one that does not fit any of our experience. Never in the history of our civilization have we ever had the growth of wealth in a generic scale, a broad-based human scale, which is disconnected from work.429

With the horizons of high technology so bright for both entrepreneurs and investors, there is almost unlimited opportunity for individuals to gain access to property. The post-industrial society portends no restrictions on accumulation of property, more leisure and money for individual fulfillment, and property derived from intellectual achievement rather than physical labor. When there are robots exposed to potential carcinogens instead of human be-

ings, there is less justification for regulations. Thus, the advent of intelligent machines forces a reexamination of the role of regulation in liberal thought. While Galbraith says the questions about the future raised here have no answers, the fact is that his arguments are irrelevant if these events come to pass.

Today, and continuing into the future, the concerns of Mill that industrial capitalists unfairly received the product of their employees' labor are also becoming less and less relevant. We are moving towards an era of production by robots and highly trained engineers; our factories will be designed to be "manless." However, the effect of this trend will not only be to replace blue collar union workers, but white-collar workers who do production scheduling, quality control, process control, inventory, and billing. "[T]he impact of intelligent machine technology on the factory floor is trivial compared to the impact this same technology will have when applied to the functions of the white-collar work force in the service industries." Although during the past thirty years there have been sixteen to twenty million manufacturers in the work force, it is estimated that by very early in the next century, there will be only half as many such workers, and, of course, an even greater reduction in their proportion of the total work force. Do these conditions affect the strength of Mill's argument, since there will no longer be the significant physical human labor that argument presumes?

The liberal distrust of large concentrations of power should apply as much to government as to any other institution. The primary method of preventing an unlimited government is by ensuring through property rights the wide dispersal of economic power. "It is only because the control of the means of production is divided among many people acting independently that nobody has complete power over us, that we as individuals can decide what to do with ourselves." Property maintains the individuality of the citizen by preventing majoritarian interference, much as

430. Galbraith, supra note 418.
432. Id. at 168.
433. Id.
434. Id. at 170.
435. This distrust stems from the ability of powerful institutions to abridge man's natural rights in violation of the social contract.
436. F. HAYEK, THE ROAD TO SERFDOM 103-04 (1944).
first amendment rights are exempt from majority will. While the Bill of Rights only is relevant in unusual cases, property serves this function every day. 437 "[I]n the final analysis, the Bill of Rights depends upon the existence of private property. . . . Civil liberties must have a basis in property, or bills of rights will not preserve them." 438 The wide dispersal of property as a limit upon government in this country dates back to Jefferson. 439 The England of Locke's day presumed a wide distribution of property, 440 and this period became the base for American liberalism.

It should be noted that, while in Jefferson's day, property dispersed among large numbers of yeoman farmers could effectively restrain the power of a government that performed only minimal societal activities, today's large and powerful government requires some concentrations of property to effectively counteract that power. Property may be simultaneously distributed both widely and deeply. Small pockets will hardly be an effective bulwark against a government that controls as many resources as does our own. This argument recognizes "[t]he great error of the public interest state is that it assumes an identity between the public interest and the interest of the majority." 441

Property also imposes a limit on otherwise uncontrollable power because it can satisfy the desires of those who seek power. All people have some desire for power, and some have dangerous ambition for self-aggrandizement. Without property, instead of dominating specific items, these individuals might turn to politics to gain power, with potentially wide-ranging impact directly over human beings. 442 By satiating such desires, property thus can reduce one threat to democracy. Just as one justification for the double standard is the first amendment's ability to promote political obligation by reducing the likelihood of violent opposition to government, so property can serve the same function.

CONCLUSION

The rise of litigation in the form of suits alleging government

437. Reich, supra note 136, at 771.
438. Id.
440. P. Larkin, supra note 17, at 57.
441. Reich, supra note 136, at 774.
442. E. Bowen, Bowen's Court 455 (1942).
violations of property rights can be viewed as a recurrence of a belief that property serves as protection against an expanding state.443 Instead of balancing an individual's property with regulatory police power, as the Supreme Court does, always with the same outcome, the Court should use a sixth factor in judging regulations. It should consider widely dispersed property as a limitation on the power of the state as constituting part of the general welfare which, like freedom of expression, is not always considered by legislators. As the state's power poses a threat to individual development, society has an interest in preserving private property that can effectively prevent government abrogation of the rights of its citizens, whatever the particular rights in question. The double standard began with the conclusion that individual rights of self-expression could win in a balance test with state interests only if the state considered such expression to be a social good. The double standard can be abolished in accordance with the circumstances of today and in light of the framers' views when the Court sees that individual property rights are also a social good.

The language of the fifth and fourteenth amendments and American political tradition argue for such an interpretation. The weakened double standard as a result of the interdependent property and civil rights cases, the altered test when property and civil rights conflict, and the emerging trends in takings allow the Court to adopt this view. Were the Supreme Court to discover the legal equivalent of the quark, it would further the most important element of liberal political theory, personal fulfillment.

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DEFAMATION: PROBLEMS WITH APPLYING TRADITIONAL STANDARDS TO NON-TRADITIONAL CASES—SATIRE, FICTION AND “FICTIONALIZATION”

INTRODUCTION

Is it legally possible for a “real person” to be defamed in a work of art? In a parody of a cartoon series about a fictional six-year-old girl? In an episode of a television drama series?

These examples may, at first glance, seem contrary to the traditional understanding of the law of defamation, which almost exclusively involves statements which purport to be true but which the plaintiff claims are false and defamatory. Recently, however, American courts have found their attention increasingly focused on defamation actions as to “statements” which, in context, negate any pretense of being truthful assertions of fact; cases involving “statements” made in novels, television dramas, satirical fantasy and even, in one recent case, a painting. Such fiction-defamation cases are relatively rare—less than forty—but it appears that they are becoming more prevalent: ten of the cases cited herein have been decided since 1980. The number of cases which fall in the category of fiction-defamation may vary according to the definition of fiction chosen for the analysis. For the purpose of this comment, a relatively expansive definition was chosen, defining fiction as any work in which the creator indicates, expressly or impliedly, that the content is not to be taken as a serious assertion of fact.


6. In addition to the cases cited in this comment, see Blake v. Hearst Publications, 75 Cal. App. 2d 6, 170 P.2d 100 (1946); Callahan v. Israels, 140 Misc. 295, 250 N.Y.S. 470 (1931); Merle v. Sociological Research Film Corp., 166 A.D. 376, 152 N.Y.S. 829 (1915).

7. Other commentators discussing defamation actions have used other definitions of “fiction.” Professor Wilson argues that “[t]he central issue that must be determined is whether the allegedly defamatory work is fiction, or reportage thinly disguised as fiction,” and that the determination is based on “the writer’s statements and the critics’ opinions,” Wilson,
This comment will briefly examine the common law treatment of fiction-defamation cases, review some arguments which have been advanced asserting the need for constitutional protection of fiction, and advance a theory, involving an analysis of two important considerations, which justifies the results reached in the majority of the cases. The first of these considerations suggests a continuum of first amendment protection of free speech, which would afford maximum constitutional protection to a communication intended as informative or educational and little or no protection to a communication which merely exploits its subject or audience and has limited informational or educational value. The second consideration involves an analysis of the probability that a "fictional" communication will be misinterpreted by its audience as an assertion of a truthful fact about the plaintiff. The fiction-defamation cases clearly indicate that, when a communication is intended as an artistic or political communication of an idea and when there is little or no chance that a reasonable reader or viewer would misinterpret it as an assertion of fact, the defendant should be relieved of the burden of litigation.

I. HISTORICAL TREATMENT OF FICTION-DEFAMATION

Traditionally, courts have treated fiction-defamation cases the same as other defamation cases. The plaintiff, to establish his

The Law of Libel and the Art of Fiction, 44 LAW & CONTEMP. PROB. 27, 44 (1981). Another asserted that a "reasonableness test" is appropriate to determine "whether the written piece purports to be factual, with the goal of informing, as opposed to fictional, with the goal of enlightening or commenting on some aspect of the human experience." Comment, Defamation in Fiction: The Case for Absolute First Amendment Protection, 29 AM. U.L. REV. 571, 592-93 (1980).

The test employed in this comment is based on the one used by the authors of a 1982 article which identified 25 fiction-defamation cases. See Franklin & Trager, Literature and Libel, 4 COMM/ENT 205, 206. That article points out that this definition is broad enough to include newspaper or news accounts of "true" stories which state that the names used in the article are fictitious. Id. at 206 n.6; see, e.g., Smith v. Huntington Publishing Co., 410 F. Supp. 1270 (S.D. Ohio 1975). This definition would not, however, include claims arising from portions of an article which the author asserted, expressly or impliedly, were true accounts of the event. Franklin & Trager, supra, at 206 n.6.

A different treatment is required for a new type of fiction writing which has been called "faction." This writing uses the names of famous people, some of whom are still living, for characters placed in fictitious settings and situations. For a discussion of the law of defamation in relation to the peculiar problems created by this type of writing, see Silver, Libel, the "Higher Truths" of Art, and the First Amendment, 126 U. PA. L. REV. 1065 (1978).

prima facie case, had to show the publication of a false statement, of and concerning him, which harmed his reputation. Prior to New York Times Co. v. Sullivan, strict liability was usually imposed upon a showing that the statement involved "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." The falsity of the statement was presumed, as were damages, which were awarded without any proof of actual injury.

In a fiction-defamation case at common law, however, the fictional context of the statement created unique problems in terms of the elements of the prima facie case and the available defenses.

**Defamatory content:** The plaintiff in a fiction-defamation lawsuit has seldom had much difficulty showing that the statement involved has harmed his reputation. In most instances, the issue of proof of harm is dismissed summarily or satisfied by minimal testimony. One commentary accredits this to the fact that "authors writing what purports to be fiction are likely to develop characters whose flaws are explicit."

There are a few recent cases, however, in which courts have held that the statement involved is so fantastical or unbelievable that it cannot be defamatory as a matter of law. These cases have relied on the Supreme Court's holding in the 1970 case of Greenbelt Coop Publishing Association v. Bresler that, as a matter of constitutional law, the term "blackmail" in a news article

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10. RESTATEMENT (SECOND) OF TORTS § 559 (1938).
11. See W. PROSSER, LAW OF TORTS § 113 (4th ed. 1971). Dean Prosser comments that this strict liability approach effectively placed use of the "printed, written and spoken word in the same class" as engaging in hazardous activities such as the "use of explosives or the keeping of dangerous animals." Id.
12. See Kelly v. Loew's, 76 F. Supp. 473 (D. Mass. 1948) (court doubted that the portrayal of plaintiff naval officer harmed him in the eyes of the general public, but allowed recovery on the basis of evidence that several naval officers had viewed the movie and the court's conclusion that it was possible that the portrayal caused them to think less of plaintiff as a naval officer); Bindrim v. Mitchell, 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, cert. denied, 444 U.S. 984 (1979) (plaintiff psychologist established through testimony of his colleagues that he was injured in his profession). But see Salomone v. MacMillan Publishing Co., 77 A.D.2d 501, 429 N.Y.S.2d 441 (1980) (complaint dismissed because plaintiff was unable to adequately plead special damages; under New York law, mental anguish and embarrassment are insufficient to support a cause of action unless concomitant with damage to reputation).
13. Franklin & Trager, supra note 7, at 213.
describing the plaintiff's actions at a city council meeting could not be understood by readers as an assertion that he was guilty of the crime of blackmail. "Even the most careless reader," the Court said, "must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered [the plaintiff's] negotiating position extremely unreasonable." 15

In the context of fiction, a court may apply the Greenbelt "rhetorical hyperbole" principle to find that statements in satirical or humorous works are not actionable, either because they constitute "statements of critical opinion" that could not be viewed by any reasonable person as assertions of fact, or because they are such "pure fantasy" that it is "impossible to believe that a reader would not have understood" that real events were not being described. The Greenbelt "rhetorical hyperbole" principle has, therefore, been helpful to defendants in cases involving humor, satire and new types of literary expression, but it is of little aid to the creator of traditional fiction who has endeavored to create believable characters and believable situations.

Falsity: If the statement in a fiction-defamation case is found to be capable of a defamatory interpretation, it is almost inevitably going to be false. At common law, the defendant creator of fiction was inherently unable to utilize the defense that the statement

15. Id. at 14. See also National Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974) (use of word "scab" in labor dispute is not actionable); Gregory v. McDonnell Douglas Corp., 17 Cal. 3d 596, 552 P.2d 425, 131 Cal. Rptr. 641 (1976) (statements regarding union officers' willingness to sacrifice interests of members to further their own positions were opinions and not actionable). But see Good Gov't Group of Seal Beach, Inc. v. Superior Court, 22 Cal. 3d 672, 586 P.2d 572, 150 Cal. Rptr. 258 (1978) (defendant's motion for summary judgment could not properly be granted because whether references to "extortion" and "blackmail" were statements of opinion or fact was substantial fact issue).

16. Silberman v. Georges, 8 MEDIA L. REP. (BNA) 2647 (N.Y. App. Div. 1982) (painting "Mugging of the Muse" was an allegory and not an accusation that the defendants were violent criminals); Myers v. Boston Magazine Co., Mass. 403 N.E.2d 376 (1980) (humorous article listing "Best and Worst" and stating that plaintiff was the "only newscaster in town enrolled in a course for remedial speaking" could not, in context, be interpreted as an assertion of fact).

17. Pring v. Penthouse, 695 F.2d 438, 443 (10th Cir. 1982) cert. denied, ___ U.S. ___ 103 S. Ct. 312 (1983) (humorous magazine article describing the sexual activities of a contestant on stage at the Miss America Pageant described "impossible" incidents in an "impossible setting.")

18. For an interesting discussion on the relationship between defamation and a new type of literature the author terms "faction" (a mixture of fact and fantasy in which historical or public figures, some of whom are still living, are inserted into historical events or imaginary situations), see Silver, supra note 7.
was true since to do so would constitute an admission that the work of "fiction" was not fictional at all, but was actually an account of true events.

"Of and concerning": The result is that, since the statement is usually defamatory and almost inevitably false, the major obstacle between the plaintiff and recovery is satisfying the "of and concerning" requirement. Since, in most works of fiction, the author is holding out the characters as creations of his imagination—as deliberate falsehoods—the identification requirement becomes an anomaly when applied to fiction: plaintiff claims the similarities between the character and himself are sufficient to establish identification, while claiming at the same time that any dissimilarities are defamatory. Nonetheless, the courts have recognized that, to a great extent, much fiction is necessarily drawn from events in the creator's life and the people he has known, and, therefore, recovery may be justified in cases where the defendant has either negligently or intentionally failed to adequately "disguise" the true identity of the character.

In an effort to balance the competing considerations of a creator's need to draw from real life in his fictional portrayals and the plaintiff's right to not be defamed by a supposedly fictional portrayal, the majority of courts faced with an "of and concerning" problem in a fictional context have turned to a "reasonable reader" test. Once the court has found that a statement is capable of a defamatory interpretation, it is up to the jury to determine if the "reasonable reader" would identify the plaintiff as the

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19. See Comment, supra note 7; Wilson, supra note 7, at 33-34. Professor Kalven also noted this problem: "First it is argued that . . . a statement referred to the plaintiff; then, that it falsely ascribed to the plaintiff something that he did not do, which should be rather easy to prove about a statement that did not refer to plaintiff in the first place." Kalven, The New York Times Case: A Note on "The Central Meaning of the First Amendment", 1964 Sup. Ct. Rev. 191, 199.

20. See, e.g., Fetler v. Houghton Mifflin Co., 364 F.2d 650, 651 n.3 (2nd Cir. 1966) (recognized experts warn publishers to be especially wary of first novels as "they tend to be autobiographical and twentieth century fiction is replete with examples of writers whose first novel . . . leaned heavily on the author's (usually unflattering) portrayal of and judgment on his family." [citation omitted]); Corrigan v. Bobbs-Merrill, 228 N.Y. 58, 126 N.E. 280 (1920) ("works of fiction not infrequently depict as imaginary events . . . actually drawn or distorted from real life").

21. See, e.g., Lyons v. New American Library, Inc., 78 A.D.2d 723, 432 N.Y.S.2d 536 (1980). This is in accord with the treatment of any defamation case; the court makes a threshold determination that the statement in question is capable of a defamatory meaning as a matter of law.
character and, therefore, interpret the description of the character as a statement of fact about the plaintiff.\(^{22}\)

The "reasonable reader" test is not without its problems or critics.\(^{23}\) A recent case, *Bindrim v. Mitchell*,\(^{24}\) illustrates the potential questionable results of the test. The case involved the depiction of a character, "Dr. Simon Herford," in the novel *Touching*, written by defendant Gwen Davis Mitchell. Mitchell had attended a nude encounter session run by plaintiff Dr. Paul Bindrim, a psychologist. In the novel, Dr. Herford is described as using crude, vulgar and abusive language during a nude encounter session. Despite the significant differences between "Dr. Herford" and the plaintiff—Herford is depicted in the novel as a psychiatrist, a "Santa Claus-type" with long white hair and white sideburns and Bindrim was a psychologist, clean-shaven with short hair—the court permitted the jury to find that the passages referring to Dr. Herford were actually "of and concerning" Dr. Bindrim. The jury, in reaching the conclusion that a "reasonable reader" would identify the plaintiff with the character, considered the testimony offered by plaintiff’s witnesses, colleagues and patients who testified that they understood the passages to refer to Dr. Bindrim.\(^{25}\) Over the dissent’s objection that this proof, consisting solely of the testimony of three witnesses who had attended nude therapy sessions conducted by the plaintiff combined with the fact that many other therapists engaged in similar nude sessions, was inadequate to show that a "reasonable reader" who didn’t know Bindrim would identify the character with the plaintiff,\(^{26}\) the court refused to overturn the jury finding as it was not apparent that no reasonable person could reach that conclusion.\(^{27}\)

The inevitable result at common law is that once the plaintiff hurdled the "of and concerning" barrier, liability followed. The common law never contemplated recognizing a privilege for fictional communications, and even the privileges of fair comment

\(^{22}\) E.g., *Pring v. Penthouse*, 695 F.2d 438 (10th Cir. 1982) cert. denied, ___ U.S. ____

\(^{23}\) See *Wilson*, supra note 7, at 33-34.


\(^{25}\) Id. at 76, 155 Cal. Rptr. at 37.

\(^{26}\) Id. at 86, 155 Cal. Rptr. at 43-44 (Files, P.J., dissenting).

\(^{27}\) Id. at 78, 155 Cal. Rptr. at 39.
and report traditionally had applied only to communications which purported to be true.28

II. CONSTITUTIONAL IMPLICATIONS: New York Times

ACTUAL MALICE

The ramifications of New York Times and its progeny have created additional problems in the context of fiction-defamation cases. The courts faced with fictional statements have made valiant efforts to stay within the guidelines established by the New York Times line of cases,29 but the actual malice test (publishing with knowledge of the statement’s falsity or reckless disregard as to its falsity) is particularly unsuited to fiction cases where the defendant purposely and intentionally has published non-truthful creations of his imagination. Professor Wilson has illustrated this inapplicability:

Although in a superficial sense all fiction is false because it is invention rather than representation, the form known as fiction is not equivalent to falsehood, “calculated” or inadvertent. Nor does it purport to express literal truth. Therefore, to inquire in the New York Times fashion into the writer’s consciousness in creating the fictional character identified by the plaintiff as himself—to ask, “Did the writer realize he was falsifying?”—is to pose a meaningless question. The author indeed realizes that what he is writing is fiction . . . . The outcome will inevitably follow that the work can be deemed libelous by its very nature—libelous because it is fiction.30

28. Franklin & Trager, supra note 7, at 214-15. Professor Wilson notes that the New York Times actual malice rule was based on the minority fair comment rule as stated in Coleman v. MacLennan, 78 Kan. 711, 98 P. 281 (1908) (statement concerning a matter of political interest made without malice was privileged even if untrue and derogatory). This granted protection to statements not totally supported by actual fact. Wilson, supra note 7, at 41-42. The majority rule required that the statement be supported by actual fact. W. Prosser, supra note 11, at § 118. This greatly reduced the usefulness of the fair comment privilege in common law fiction-defamation cases in majority rule jurisdictions.


30. Wilson, supra note 7, at 28 (citations omitted).
*Bindrim v. Mitchell*\(^3\) is a case on point. Having found that the statements in question were capable of a defamatory interpretation, the court, recognizing the principles set down in *New York Times*, proceeded to determine whether the plaintiff had shown by clear and convincing evidence that the defendant had acted with actual malice.\(^2\) The jury compared excerpts from the fictional account of the nude therapy session in the novel with a tape recording of the session that the author actually attended. Because of the discrepancies between what transpired and what was written in the novel, the court, in a footnote, dismissed the fact that the work was fictional and concluded that "certainly defendant Mitchell was in a position to know the truth or falsity of her own material, and the jury was entitled to find that her publication was in reckless disregard of that truth or with reckless knowledge of falsity."\(^3\)

These problems led the Illinois Supreme Court to hold that the *New York Times* actual malice test does not apply to fiction. In *Leopold v. Levin*,\(^3\) an action for invasion of privacy, the court stated that "the motion picture, play and novel, while 'suggested' by the crime of the plaintiff, were evidently fictional and dramatized materials and they were not represented to be otherwise. They were substantially creative works of fiction and would not be subject to the 'knowing or reckless falsity' actual malice standards."\(^3\)

If the *New York Times* standard is inapplicable, however, what standard should be applied in fiction-defamation cases? The answer to this question must begin with an analysis of the level of first amendment protection properly granted to fiction. Courts have long recognized that fiction is a protected form of expres-

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32. Plaintiff Bindrim admitted he was a public figure for purposes of the suit. *Id.* at 72, 155 Cal. Rptr. at 35.
33. *Id.* at 73 n.3, Cal. Rptr. at 36. The court admitted in a footnote that this discrepancy was not necessarily indicative that the defendant acted with malicious motives, noting that her intent may have been to be "colorful or dramatic."
34. 45 Ill.2d 434, 254 N.E.2d 250 (1978).
35. *Id.* at 445, 229 N.E.2d at 256. It should be noted, however, that Time Inc. v. Hill, 385 U.S. 374 (1967) applied the *New York Times* actual malice standard to actions for invasion of privacy and that courts have consistently attempted to apply the actual malice standard in post-*New York Times* fiction-defamation cases. See, *supra* note 29.
sion. Motion pictures, comic books, theatrical production, novels, sensationalist magazines, and posters all fall within the protective penumbra of the guarantee of free speech. The rationale of the New York Times decision supports such protection of various forms of communication, at least to the extent that each contributes to "uninhibited, robust, and wide-open" debate on public issues. As the Court has observed:

It cannot be doubted that motion pictures are a significant medium for the communication of ideas. They may affect public attitudes and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression. The importance of motion pictures is not lessened by the fact that they are designed to entertain as well as to inform. As was said in Winters v. New York, 333 U.S. 507, 510 (1948): "The line between the informing and the entertaining is too elusive for the protection of [freedom of speech and press]. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine."

The constitutional privileges granted, however, are not absolute. In Garrison v. Louisiana, the Supreme Court suggested that the Constitution does not protect deliberately false statements for two reasons: (1) "the use of a known lie as a tool is ... at odds with the premises of democratic government and with the orderly manner in which economic, social or political change is to be effected," and (2) "calculated falsehood falls into that class of utterances which 'are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the

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36. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952). The Court in Burstyn, however, also suggested that, as each form of media presents its own peculiar problems, different standards may apply to assess the appropriate level of first amendment protection.
43. Burstyn, 343 U.S. at 501.
44. 379 U.S. 64 (1964).
45. Id. at 75.
social interest in order and morality ...." In the vast majority of cases, fiction is far different from the "calculated falsehood" deplored in Garrison; fiction often serves as an important tool in advocating and promoting "economic, social or political change" and, rather than having "slight social value as a step to truth," most works of fiction and art aim to arrive at an abstract truth or idea through the presentation of imaginary or fictionalized situations. Since fiction does not fall within the Garrison definition of unprotected "calculated falsehood," it must be granted first amendment protection, but the appropriate level of protection remains a debatable subject.

The courts could conclude that all discussion of issues of public interest or concern would be granted an absolute privilege from libel claims, a theory often referred to as the Meiklejohn theory of the first amendment. The Supreme Court has granted no form of expression absolute immunity and absolute immunity for works of fiction has been routinely rejected by the courts. It is interesting, however, to consider that courts which have summarily dismissed complaints because a work was "obviously fictional" have, in effect, granted the publication absolute immunity solely because it is fiction.

A second approach would be to grant immunity to all statements which deal with issues of public interest or concern, an immunity based on the concept underlying the common law privilege of fair comment. This approach requires a recognition that fiction is essentially the creator's opinion as to how certain characters would react in a given situation and that, so long as the work is clearly presented as fiction (i.e. understood as opinion),

46. Id.
47. Meiklejohn, The First Amendment is an Absolute, 1961 SUP. CT. REV. 245.
48. See, e.g., Miss America Pageant v. Penthouse, 524 F. Supp. 1280 (D.N.J. 1981) (fictional classification is not a complete defense to libel actions); Corrigan v. Bobbs-Merrill, 228 N.Y. 58, 126 N.E. 260 (1920) (rejecting the defense that work was fictional and, therefore, could not be libelous).

Even commentators who strongly favor absolute immunity recognize a potential for abuse. Professor Wilson, for example, proposes a test which puts great emphasis on the fact that the work is identified as fiction, but would not allow an author who intentionally defamed a plaintiff to be protected. Wilson, supra note 7, at 46-49.

See also Comment, supra note 7, at 593.
50. As was noted earlier, the constitutional rule laid down in New York Times was based on the common law minority rule of fair comment. See, supra note 28.
the privilege of fair comment should apply.\textsuperscript{51} This approach also
would protect publications in the form of satire, parody and
humor so long as readers and viewers understood the statements
were not intended as serious assertions of fact.\textsuperscript{52}

Even if the judiciary never chooses to adopt one of these
theories expressly, fiction must be afforded some level of protec-
tion under the first amendment.\textsuperscript{53} The Supreme Court’s decision in
\textit{Gertz v. Robert Welch, Inc.}\textsuperscript{54} makes it clear that imposing liability
without a showing of some degree of fault is constitutionally im-
permissible.\textsuperscript{55} In \textit{New York Times} the Court spoke of the in-
hibiting effect which results from the fear of “libel judgments vir-
tually unlimited in amount” and the expense of defending a de-
famation case.\textsuperscript{56} Adoption of a theory of strict liability for authors,
publishers, artists and producers would undoubtedly result in a
stifling of creative expression, the same chilling self-censorship.

Moreover, the adoption of a single standard of constitutional
protection for fiction in general could be unwise because fiction
takes such a wide variety of forms and serves a variety of diverse
purposes in society. It seems logical, therefore, to divide fiction in-
to at least several broad categories and determine if the purpose
of the creator—whether to inform and educate, to criticize, or
merely to entertain—has had a bearing on the level of scrutiny ap-
plied by the courts and, consequently, the level of protection af-
forded the author, publisher or producer in a defamation action.

This comment divides the cases into three categories: satire or
parody, fiction, and “fictionalization” (fiction based on historical or
actual events). These classifications stem in part from the purpose
and intent of the author or creator; if his intent was to make a pol-
tical statement or criticize society by greatly exaggerating or dis-
torting facts, the work is properly classed as satire; if the creator
intended solely to entertain an audience, the work would be

\footnotesize{\textsuperscript{51} See Silver, supra note 7, at 1069. Professor Silver argues this approach is especially
well-adapted to the context of “faction.”}

\footnotesize{\textsuperscript{52} Miss America Pageant v. Penthouse, 524 F.Supp. 1280, 1282 (D.N.J. 1981) (“whether
the story contains any ‘constitutionally protected opinions’ . . . depends upon a finding that
the work is opinion, satire or parody”) (emphasis in original).

\textsuperscript{53} See, supra text accompanying notes 36-41.

\textsuperscript{54} 418 U.S. 323 (1974).

\textsuperscript{55} Yet, in effect, courts are imposing strict liability when, after finding the statement is
“of and concerning” the plaintiff, liability follows without providing the defendant a line of
defense. See, supra text accompanying note 28.

\textsuperscript{56} 376 U.S. at 279.
“pure” fiction. There is, of course, a wide range of overlap—the author of a novel often intends to make a statement about an abstract truth and thereby add to the public debate of an issue—but he intends to make his point much more subtly than the satirist.

Even before the *New York Times* line of cases outlawed strict liability in defamation cases involving a media defendant, the courts in fiction-defamation cases showed great reluctance to impose liability without a showing of some degree of fault. For example, courts have been very reluctant to impose liability when a character was accidentally and coincidentally named the same as the plaintiff, but have had no hesitancy finding liability when it appeared that the defendant was using the guise of fiction to purposely defame the plaintiff. The courts appear to have implicitly recognized two basic tenets underlying the *New York Times* line of cases: “uninhibited, robust and wide-open debate” on public issues is of upmost importance and some degree of abuse or error must be tolerated, and there is no such thing as a “false idea” and, therefore, only false statements of fact about the plaintiff are actionable.

One commentary remarks that the line of fiction-defamation decisions “elicits no clear decisional pattern . . . [or] a line of satisfactory analysis . . . . Rather, we find judicial ‘intuition’ generally correct; that is, money . . . changes hands in defensible directions despite the unpersuasive and inconsistent rationales used.” Although it is true that the expressed rationales are inconsistent and often unpersuasive, the cases show a remarkable degree of consistency when analyzed in terms of a balancing process. It appears that the courts have considered the plaintiff’s right to be free from harm caused by defamatory references in fictional works, and “intuitively” balanced that right against two considerations which flow naturally from the concepts discussed in the *New York Times* line of cases:

1) What function does the alleged defamatory publication serve in society—is it primarily created to inform or make a statement

58. E.g., Corrigan v. Bobbs-Merrill, 228 N.Y. 58, 126 N.E. 260 (1920).
61. Franklin & Trager, supra note 7, at 207.
about a "higher truth", thereby demanding a higher standard of first amendment protection, or is it primarily of entertainment value, which may require a lesser degree of protection?\(^{62}\)

2) Would the average, "reasonable" viewer/reader understand the statement to be one of fantasy or opinion, incapable of defamatory interpretation as a matter of law, or can it reasonably be interpreted as an assertion of fact about the plaintiff "real person"?\(^{68}\)

III. SATIRE

Satire is clearly distinguishable from other types of fiction because of the function it serves in society and because of the low probability that a reader or viewer will misinterpret a satirical work as an assertion of fact.

Satire is defined as a "composition holding up human or individual vices, folly, abuses or short-comings ... with an intent to bring about improvement."\(^{64}\) In other words, the creator of satire clearly intends his work to contribute to debate on public issues. Because this is the goal of satire, courts have recognized that the expressions of satirists must be granted the fullest level of protection under the first amendment.

This protection must be afforded regardless of the court's opinion of the merits of the work: "Miss Wyoming Saves the

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62. The authors of an article concerning right to privacy and right to publicity actions also considered the purpose of the publication to be significant in assessing the appropriate level of first amendment protection. Felcher & Rubin, Privacy, Publicity, and the Portrayal of Real People in the Media, 88 YALE L.J. 1577 (1979). The authors suggest a hierarchy of first amendment protection with fullest protection being afforded media publications which are primarily informative, a lower level of protection for publications intended primarily as entertainment but with some informational value, and no constitutional protection for publications which are "merely exploitive." Id. at 1597-1602.

63. This is similar to the court's threshold determination of whether a statement is capable of a defamatory interpretation in traditional defamation cases. In a fiction-defamation case, if the court determines that a statement is incapable of being interpreted as an assertion of fact about the plaintiff, the statement is incapable of a defamatory interpretation and is therefore not defamatory as a matter of law. Similarly, if the court determines a statement is capable of a defamatory interpretation, i.e. could be interpreted as an assertion of fact about the plaintiff, whether it was so interpreted becomes a question of fact for the jury.

64. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1971).

Another distinction between fiction and satire is that the writer of fiction purports to be writing about imaginary characters, while the satirist fully intends his or her audience to identify the "target" of the commentary.
World," a fantastical comment on the Miss America Pageant through a description of the abnormal sexual exploits of one contestant\textsuperscript{65} must be afforded the same level of protection as classic works of Jonathan Swift.\textsuperscript{66} One court observed, after reviewing a satirical movie described as a "broad farce" on collegiate football in America, that "courts may not muffle expression by passing judgment on its skill or clumsiness, its sensitivity or coarseness; nor on whether it pains or pleases. It is enough that the work is a form of expression 'deserving of substantial freedom—both as entertainment and as a form of social and literary criticism.'"\textsuperscript{67}

Additionally, the nature of satire makes it unlikely that a reader or viewer will misunderstand the purpose of the work. By exaggeration or distortion, the satirist clearly indicates to his audience that the piece does not purport to be a statement of fact but is rather an expression of criticism or opinion, a means of reaching an abstract truth or idea. The case of \textit{University of Notre Dame du Lac v. Twentieth Century Fox}\textsuperscript{68} illustrates the

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\item \textsuperscript{65} Pring v. Penthouse, 695 F.2d 438 (10th Cir. 1982) cert. denied, ___ U.S. ___, 103 S. Ct. 312 (1983). The story was found to be protected despite the court's opinion that it was "a gross, unpleasant, distorted attempt to ridicule the Miss America contest and its contestants" and that it has "no redeeming features whatever." Yet,

[t]he First Amendment is not limited to ideas, statements or positions which are accepted; which are not outrageous; which are decent and proper; which are constructive or have some redeeming element. . . . Although a story may be repugnant in the extreme to the ordinary reader . . . the typical standards and doctrine of the First Amendment must nevertheless be applied.

\textit{Id.} at 443.

\item \textsuperscript{66} "To ask a satirist to be in good taste is like asking a love poet to be less personal. Is \textit{THE SATYRICON} in good taste? Is \textit{A MODEST PROPOSAL}? Swift recommends the stewing, roasting and fricasseeing of one-year-old children. . . . How nasty and vulgar that must have seemed. . . . Imagine how this went down in polite society: 'A child will make two dishes at an Entertainment for Friends; and when the Family dines alone, the fore or hind quarter will make a reasonable dish, and seasoned with a little Pepper or Salt will be very good boiled on the fourth Day, especially in Winter. . . .' Now that's considered Literature. It's called Swiftian. Back in 1729 it probably seemed, to a lot of Swift's contemporaries, bad taste and worse."

P. \textit{ROTH, READING MYSELF AND OTHERS} 47 (1975).

\item \textsuperscript{67} \textit{University of Notre Dame du Lac v. Twentieth Century Fox}, 22 A.D.2d 452, ___, 256 N.Y.S.2d 301, 305, aff'd, 15 N.Y.2d 940, 207 N.E.2d 508 (1965).

This is in keeping with the Supreme Court's statement in \textit{New York Times}, "[t]he Constitutional protection does not turn upon 'the truth, popularity or social utility of the ideas and beliefs which are offered.'" 376 U.S. at 271.

\item \textsuperscript{68} 22 A.D.2d 452, 256 N.Y.2d 301, aff'd, 15 N.Y.2d 940, 207 N.E.2d 508 (1965). The court was asked to enjoin the defendant from distributing a movie based on a claim of invasion of privacy stemming from the unauthorized use of the plaintiff college's name and image under the New York Civil Rights law. The court refused equitable relief, suggesting in-
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judicial recognition of this idea. The court reviewed the plot of a movie, which depicts collegiate football as having achieved such importance in America that it affects religious barriers and international relationships, and concluded that readers and viewers "know they are not seeing or reading about real Notre Dame happenings or actual Notre Dame characters . . . . 'Nobody is deceived. Nobody is confused' [citation omitted] . . . and plainly nobody was intended to be.'

In light of these two considerations, when a statement is found to be a statement of protected critical opinion or when it is apparent from the context that no reasonable reader could interpret the statement as an assertion of fact, the defendant should be relieved of the burden of litigation by a finding that the statement is not defamatory as a matter of law. This, in effect, is what has happened.

The case of Silberman v. Georges is an excellent example. The case involved a painting entitled "The Mugging of the Muse" which depicted three male figures wearing masks and holding knives above a young woman draped in red cloth. A winged cherub hovers above, and a fire hydrant is spurting blood-red liquid onto the street. The plaintiffs, two artists who had had a "falling out" with the defendant, brought suit claiming their faces appeared on the masks worn by two of the figures in the painting, and, therefore, that the painting depicted them as violent criminals. The jury agreed, rejecting the defendant's argument that the painting was an allegory, an expression of idea and not a statement of fact, and the testimony of several witnesses that they knew of no one who, after seeing the painting, thought the plaintiffs were violent criminals. The plaintiffs were awarded $5,000 compensatory and $25,000 punitive damages. On appeal, the court reversed, holding that the case should never have gone to the jury for two reasons: 1) The statement made by the pain-

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69. Id. at 303. Accord, Brooks v. Stone, 9 MEDIA L. REP. (BNA) 1823 (Ga. Cty. Ct. June 8, 1983) (an editorial reply to plaintiff's critical letter to the editor of a campus newspaper stating that the newspaper staff's "mothers were German shepherds" and their "fathers were camels" and subsequently implying that plaintiff was "a bitch" could not be construed as factual assertions but only understood as satirical expression and is protected statement of opinion).

70. Id. at 305. Accord, Brooks v. Stone, 9 MEDIA L. REP. (BNA) 1823 (Ga. Cty. Ct. June 8, 1983) (an editorial reply to plaintiff's critical letter to the editor of a campus newspaper stating that the newspaper staff's "mothers were German shepherds" and their "fathers were camels" and subsequently implying that plaintiff was "a bitch" could not be construed as factual assertions but only understood as satirical expression and is protected statement of opinion).

ting was one of "critical opinion, not an accusation of criminal conduct"\(^{72}\) and 2) the "fanciful nature" of the painting, underscored by the blood-spurting hydrant and hovering cherub, made it impossible for "any reasonable person" to understand the painting to be an accusation that the plaintiffs were, as a matter of fact, violent criminals.\(^{73}\)

The courts have refused, in these cases, to be sidetracked by the plaintiff's contentions that the statements in question were capable of an interpretation as defamatory statements of fact and therefore, the interpretation issue should be submitted to a jury. In *Myers v. Boston Magazine*\(^{74}\), the court dismissed the plaintiff's complaint, stressing that the statement must be analyzed in context. The plaintiff had claimed that a statement in a humorous "Best and Worst" article that he was the "only newscaster in town who is enrolled in a course for remedial speaking" could be read as a statement of fact. The court first recognized the general rule that the distinction between fact and opinion is a question of law if the statement is unambiguously one or the other, but when the statement could be "understood by the average reader in either sense, the issue must be left to the jury's determination."\(^{75}\)

The court concluded that, although when taken out of context the statement appeared to assert a matter of fact, the "court must consider all of the circumstances surrounding the statement, including the media by which [it] is disseminated, and the audience to which it is published. [citation omitted]"\(^{76}\) When the statement

\(^{72}\). Id. at 2648. The court concluded that the statement made was in the same category as the "rhetorical hyperbole" of *Greenbelt*. *See* supra text accompanying notes 14-18.

A great number of the decisions have relied on the *Greenbelt* "rhetorical hyperbole" concept to defeat the plaintiff's claim that the statement is actionable. *See* Pring v. Penthouse, 695 F.2d 438, 443 (10th Cir. 1982), cert. denied, ___ U.S. ___, 103 S. Ct. 3112 (1983) (story was "pure fantasy" and could not be defamatory as a matter of law); Loeb v. Glove Newspaper Co., 489 F. Supp. 481, 486 (D.C. Mass. 1980) ("the Supreme Court has unequivocally accorded 'rhetorical hyperbole' the same protection as editorial opinion expressed in less flamboyant language"); University of Notre Dame du Lac v. Twentieth Century Fox, 22 A.D.2d 452, 256 N.Y.S.2d 301, 305, aff'd, 15 N.Y.2d 940, 207 N.E.2d 508 (1965) (context makes statement "hyperbolic").

\(^{73}\). *Silberman*, 8 MEDIA L. REP. at 2648. *See also* Pring v. Penthouse, 695 F.2d 438 (10th Cir. 1982), cert. denied, ___ U.S. ___, 103 S. Ct. 3112 (1983) (passages could not reasonably be understood as describing actual facts about the plaintiff).

\(^{74}\). ___ Mass. ___, 403 N.E.2d 376 (1980).

\(^{75}\). Id. at ___, 403 N.E.2d at 375. The court remarked that this approach is "analogous to the allocation between judge and jury on the issue of whether a statement is defamatory."

\(^{76}\). Id. at ___, 403 N.E.2d at 379. The court noted that this view is consistent with the
was considered in context, the court concluded that a reader would not "reasonably understand" the statement to be an assertion of fact.\footnote{77} 

In two cases where courts have concluded that the statement in question was capable of an interpretation as a defamatory assertion of fact, the defendants nonetheless prevailed because the public figure plaintiffs failed to prove the defendant acted with actual malice, interpreted as intent to publish a false statement of fact. In \textit{Miskovsky v. Oklahoma Publishing},\footnote{78} a senatorial candidate brought suit over the publication of an editorial cartoon. The court assumed, \textit{arguendo}, that the cartoon could be interpreted as making an inaccurate statement of fact about the plaintiff, but held that the plaintiff failed to prove that the cartoonist or editor acted with intent to make a false statement of fact or with reckless disregard as to the possible interpretation of the cartoon as making a false statement of fact.\footnote{79} Similarly, in \textit{Miss America Pageant v. Penthouse},\footnote{80} the court reviewed the \textit{New York Times} actual malice standard and, citing Bindrim v. Mitchell as "instructive," concluded that it is "too simplistic in the case of a fictional or satirical work to question whether the author/publisher had the subjective intent to publish a falsity, since such works are not intended to convey truth."\footnote{81} The court instead considered whether the defendants had knowingly or recklessly published an article that they knew would be interpreted as making assertions of fact.\footnote{82} 

The cases where courts have found liability are reconcilable with the above holdings. In a 1904 case, \textit{Triggs v. Sun Publishing},\footnote{83} a professor of English was subjected to a series of extremely cruel attacks on his somewhat eccentric lifestyle and

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\footnote{77} Accord \textit{Loeb v. Globe Newspapers}, 489 F.Supp. 481, (D.C. Mass. 1980) (editorial cartoon labeled "Thoughts of Chairman Loeb" depicting publisher of competing newspaper with a cuckoo springing from his forehead and statements in editorial columns that Loeb "ran a newspaper by paranoids for paranoids" and had "never backed a presidential winner" could not possibly be understood by readers as assertions of fact). \textit{Id.} 595-96.

\footnote{78} \textit{Id.} at 1280 (D.N.J. 1981).

\footnote{79} \textit{Id.} at 1284 (emphasis in original).

\footnote{80} \textit{Id.} at 1287.

\footnote{81} \textit{Id.} at 1287.

\footnote{82} \textit{Id.} at 1287.

\footnote{83} 179 N.Y. 144, 71 N.E. 739 (1904).
habits. The articles contained many passages which could reasonably be interpreted as assertions of fact, and the court rejected the defense that the article was written in jest: "The principle is clear that a person shall not be allowed to murder another's reputation in jest . . . if a man in jest conveys a serious imputation, he jests at his peril." Although such an imposition of strict liability would be constitutionally impermissible after Gertz, 43 years later in 1967, an Ohio Court of Appeals relied on Triggs to affirm the trial court's finding of liability in Goudy v. Dayton Newspapers, Inc. In Goudy, like Triggs, the defendant asserted that the publication was not libelous because it was obviously written in jest. The article in question was a short page one item headlined "Do As I Say, Not As I Do" and reporting that the plaintiff, identified as an investment counselor who often advised his clients to avoid spending more than they earned, had filed for bankruptcy. The plaintiff, although employed by First National Credit Bureau, was a collection agent and was in no way involved with client counseling. The court, influenced by the fact that the newspaper had published humor for the sake of humor without regard to the fact that the article might contain false factual representations, held that jest is not a defense unless it is "perfectly manifest from the language employed that it could in no respect be regarded as an attack on the reputation or business of the person." Although a writer may no longer be subject to a "jest at his peril" standard it appears he had better jest with care.

The courts have been reaching appropriate conclusions in cases involving satire and humor. Recognizing that American society places a high value on free debate and creative expression of ideas and that satire is universally recognized as an effective means of expressing criticism and opinion, the courts have afforded such

84. Id. at 155, 71 N.E. at 743.
86. Id. at 211, 237 N.E.2d at 913, quoting Triggs, 179 N.Y. at 155, 71 N.E. at 743. Another case finding liability is Dall v. Time, Inc., 252 A.D. 636, 300 N.Y.S. 680 (1931). In Dall, defendant Time Magazine had published, in quotation marks at the beginning of a news story, a "news account" stating that the plaintiff, son-in-law of President Roosevelt, had shot himself in front of his estranged wife and Mrs. Roosevelt. Time defended the statement as a "journalistic device" to draw readers attention to the article immediately following which commented on the lack of news coverage in France of a similar incident involving the French prime minister's son-in-law. Noting evidence that a number of readers interpreted the story as an assertion of fact that the plaintiff had actually shot himself, the court stated "[i]f newspapers see fit to give their readers fiction as news, they do so at their own peril." Id. at ___, 300 N.Y.S. at 684.
expression a high degree of constitutional protection. It therefore follows, under New York Times, that there is a need to relieve defendants of the burden of litigation and that the courts should continue to grant summary judgment when the statements are found to be criticism or opinion or upon a finding that no reasonable person could interpret the statement as asserting a fact. In cases where the statement is capable of an interpretation as an assertion of fact, the right of a plaintiff to the protection of the law of defamation emerges to counterbalance the constitutional rights of the creator, but the courts should continue to recognize that liability must not be found without a showing of the appropriate degree of fault: public figures must prove actual malice by clear and convincing evidence; private figures must satisfy the applicable state law fault requirement. A lesser standard is constitutionally impermissible.

IV. FICTION

A wide variety of types of communication fall under the broad heading of fiction: The epic poems of Homer, Spiderman comic books, the television show "Dallas" and a short story in Harper's Bazaar Magazine all are forms of protected free speech. Because of the wide range of material which is thus included in the general label of fiction, it is difficult to make generalizations in an analysis of the purpose of the creator of fiction or the likelihood of reader misunderstanding. These differences inherent in the different types of fictional communication must be taken into account in this analysis and in any proposal of an appropriate standard of judicial review.

It is widely recognized that the majority of the creators of fiction endeavor to entertain their audiences, but they also are trying to communicate a message about life, an abstract truth or idea. As a means of communications of ideas, fiction must be protected by the first amendment. The Supreme Court has made clear that "[t]he line between the informing and the entertaining is too elusive . . . . What is one man's amusement, teaches another's doctrine." When a work is intended as fiction and is clearly understood as such, it can be and should be entitled to

87. See, supra text accompanying notes 36-41.
88. See, supra text accompanying note 43.
some level of constitutional protection under the principles of New York Times and its progeny.\textsuperscript{90}  

Yet it is undeniable that a creator of fiction can abuse the protection afforded by the first amendment. When an author/artist attempts to evade liability by "passing off" truth as fiction, the interest of free speech must give way to the individual's right to be protected from harm caused by defamatory statements understood to be "of and concerning" him. For this reason, it is appropriate to divide the cases involving defamation in fictional contexts into two further categories: (1) cases where a jury could find that the author/creator intended for a "thinly disguised" character to be identified by the reader/viewer as a "real person" and (2) cases where a "real person's" name is used accidentally.

It follows from this discussion that summary judgment, relieving the defendant of the burden of litigation, is appropriate in two situations. First, when the work is labeled as fiction and is so obviously fictional that no reasonable reader could understand it to be a reference to real events or people, the court should conclude that the statement is incapable of a defamatory interpretation and should render summary judgment in favor of the defendant. Second, summary judgment is also appropriate when the court concludes that, due to the dissimilarities between the fictional character and the "real person," a "reasonable reader" could not identify the character with the plaintiff. The great majority of cases are in accord with this idea.

A. Cases where defendant arguably intended to refer to the plaintiff

An author invariably bases his characters on people he has known. Proust once wrote, "[T]here is not a single invented character to whom [the author] could not give sixty names of people he has observed, of whom one poses for a grimace, another for an eye-glass, another for a particular movement of his arms."\textsuperscript{91} As the source of art is inevitably "real" life, the result is that an

\textsuperscript{90} See, supra text accompanying notes 50-52.  
\textsuperscript{91} L. Edel, The Modern Psychological Novel 115 (1964), quoting M. Proust, Remembrance of Things Past. See also Wilson, supra note 7, at 38-39, where Professor Wilson points out that Nathaniel Hawthorne's sister-in-law, Miss Peabody, is often identified as the model for Miss Birdseye in Henry James' The Bostonians and Count Robert de Montesquiou was the prototype for Proust's Baron de Charlus. Professor Wilson wonders if, had Miss Peabody and Montesquiou lived in today's "more litigious era," the "threat of costly
author or artist is peculiarly vulnerable to defamation suits. William Somerset Maugham commented on this problem in his book *The Summing Up*:

*So colossal is human egotism that people who have met an author are constantly on the lookout for portraits of themselves in his works and if they can persuade themselves that such and such a character is drawn from them they are bitterly affronted if it is drawn with any imperfections.*

Yet, there are cases where the defendant arguably has intended for the readers to identify the character with a real counterpart, and it is in these cases that the courts have found liability. A widely cited example is the 1920 case of *Corrigan v. Bobbs-Merrill*, involving the novel *God's Man*. The plaintiff, a New York magistrate, alleged that he was libeled through the portrayal of a character named "Corrigan" who was also a New York magistrate who sat in a court where the plaintiff often presided. Further damaging evidence included the fact that the author had recently appeared before the plaintiff in court, which tended to negate the author's contention that he did not know the plaintiff or intend to defame him. The court, evidently reluctant to infer an intent to defame yet believing that recovery was appropriate, held that the author's intent to defame was inconsequential: "It is not so much who was aimed at as who was hit."*94*

Litigation [would] . . . have silenced James and intimidated Proust to the detriment of society?"  
*92* W.S. MAUGHAM, THE SUMMING UP 133 (1938).  
*93* 228 N.Y. 58, 126 N.E. 260 (1920).  
*94* Id. at 63-4, 126 N.E. at 262. It is arguable that the case would be decided the same way even under modern constitutional standards. The plaintiff magistrate, although admittedly a public official, could argue that the author acted with reckless disregard in printing statements likely to be interpreted as false assertions of fact about his actual conduct in his courtroom. The finding of actual malice would, in such a case, rest on as firm a ground as did the finding in *Bindrim v. Mitchell*. See, supra text accompanying notes 31-33.

Although the defendant could argue that the chapter "Justice a la Corrigan" was protected as an opinion of a public official's performance in his official capacity, some courts would hold that the statements in question would lose their protection if the opinion "implies the allegation of undisclosed defamatory facts as the basis of the opinion," **Restatement (Second) of Torts**, § 566 (1977). See, e.g., *Loeb v. Globe Newspaper Co.*, 489 F. Supp. 481, 485 (D.C. Mass. 1980) ("the law provides no remedies to those public figures who befall the low opinions of critics so long as critics avoid the knowing or reckless misstatements of fact"); *Myers v. Boston Magazine Co.*, ____ Mass. ____ 403 N.E.2d 376 (1980) (first amendment protects critics so long as the opinion is based on assumed, non-defamatory facts).

The defendant could also argue that the case would fall within the "alternative" holding of *New York Times* that impersonal criticism of the government is insufficient basis for recovery in a libel action by a governmental official unless he can show the statements
This theory, that courts at least subconsciously consider the probability that the reference to the plaintiff was intentional, sheds some light on the leading case in the field of "accidental" references, E. Hulton and Co. v. Jones. While the court apparently accepted the defendant's assertion that the unusual name of "Artemus Jones" was accidentally chosen for the name of a fictitious character in a newspaper item, the court quite likely considered that the real Artemus Jones was well known throughout the area and that the defendant had previously published articles written by the plaintiff and concluded that the defendant was sufficiently culpable to render a verdict for the plaintiff appropriate.

In a more recent case, Geisler v. Petrocelli, the court reversed the trial court's dismissal of the plaintiff's complaint for failing to adequately aver that the descriptions of a character in the novel Match Set were "of and concerning" her. The appellate court emphasized that as the character and the plaintiff had the same name and physical description, and since the plaintiff and the author had worked in the same office less than six months before he wrote the novel, the issue of whether a "reasonable reader" would "rationally suspect that the protagonist is, in fact, the plaintiff" should have been submitted to the jury.

In this analysis, Bindrim v. Mitchell is a puzzling case. In Bindrim v. Mitchell, the court reversed a summary judgment for the defendant author, the plaintiff's brother. The court held that resemblances—both the plaintiff and the character were the eldest of thirteen children in families where the third, fourth, and eighth children were girls; both were the same age in 1938, the date of the novel's setting; and both were part of families with clergyman fathers which traveled throughout Europe performing—would permit a jury to reasonably find that the character was a portrayal of the plaintiff.

But cf. Springer v. Viking Press, 8 MEDIA L. REV. (BNA) 2613 (N.Y. App. Div. Dec. 9, 1982) where the court held that "superficial similarities" such as a common first name and similar physical attributes were insufficient to support a cause of action in light of the significant dissimilarities (totally different lifestyles and occupations) and despite the defendant's admission to the plaintiff that he had "loosely patterned" the relationship between the character and the novel's hero on their terminated relationship.

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96. 616 F.2d 636 (2d Cir. 1980).
97. Id. at 639. In accord is Fetler v. Houghton Mifflin Co., 364 F.2d 650 (2nd Cir. 1966), where the court reversed a summary judgment for the defendant author, the plaintiff's brother. The court held that resemblances—both the plaintiff and the character were the eldest of thirteen children in families where the third, fourth, and eighth children were girls; both were the same age in 1938, the date of the novel's setting; and both were part of families with clergyman fathers which traveled throughout Europe performing—would permit a jury to reasonably find that the character was a portrayal of the plaintiff. Id. at 651.
drim, the court permitted the jury to find that the description of the fictional doctor was "of and concerning" the plaintiff, despite the author's sincere attempt to disguise the character by giving him a name and physical description drastically different from that of the plaintiff. 99 One possible explanation is that the court was influenced by the fact that the plaintiff, afraid that the defendant would include a description of a nude encounter session in a novel, had allowed the defendant to attend only after she had signed a contract stating that she would not "in any manner disclose... what has transpired." 100 Regardless, Bindrim has been strongly criticized both by commentators 101 and other courts 102 and, as of this writing, it does not appear the case will be widely followed.

B. Cases where the reference to the plaintiff is accidental

No court has imposed liability when the reference to the plaintiff is through the accidental or coincidental use of his name. Courts have recognized that, if liability were imposed for accidental references, it would impose a great burden on authors, publishers and producers. As one court pointed out, "if an author used a name which was possessed by no one, it would be pure accident." 103 This recognition has resulted in a refusal to impose liability despite incredibly coincidental similarities. In Clare v. Farrell, 104 a Minneapolis reporter brought suit against the author of a book Bernard Clare which detailed the hopes, thoughts, frustrations and "sordid experiences" of a young, would-be author in New York City. Despite the fact that the character and the plaintiff shared the same name and occupation, the court stressed that the story was intended to be fictional and the name was selected at random. 105 In "accidental reference" cases, the courts have stressed that no "sensible person" or "normal adult" could understand the fictional account to be a reference to the plaintiff in light

99. See, supra text accompanying note 25.
100. 92 Cal. App. 3d at ___, 155 Cal. Rptr. at 33.
101. See, e.g., Wilson, supra note 7, at 27-28; Franklin & Trager, supra note 7, at 212.
105. Id. at 277.
of the fictional nature of the work, a disclaimer that the names used were fictional, dissimilarities between the character and the plaintiff, or a combination of the above factors.

Some courts have gone as far as suggesting that, in particular situations, an author may have a duty to check readily available reference lists to determine if an identification between a character and a real person is probable. Judge Kupferman, in his concurrence in Salomone v. MacMillan Publishing, indicated that he would find the failure to make such a search sufficient to constitute reckless disregard of the statement's falsity, satisfying the New York Times actual malice requirement. In Salomone, the defendants published a parody of a 1955 book of cartoons, Eloise, ...
about a fictional six-year-old girl who lived in New York's Plaza Hotel. In the parody, Eloise returns to the Plaza Hotel as a 26-year-old woman and makes reference to a character in the original cartoons, Mr. Salomone, by writing "Mr. Salomone was a child molestor" on a mirror. The court noted that the defendants were "shocked" to learn that Mr. Salomone was a real person, who was manager of the Plaza Hotel at the time of the original book and was an executive vice president of Hilton Hotels when the parody was published. The complaint was dismissed because the plaintiff was unable to prove actual damages, which under New York law could not consist of mental anguish without proof of actual injury to reputation, but Judge Kupferman noted that the failure to discover the existence of the real Mr. Salomone was a reckless disregard of potential falsity since the defendants could have "easily verified" if there was a man of that name at the hotel.111

To summarize, the importance of fiction as a means of communication of ideas mandates that it receive a measure of protection under the first amendment and the principles of the New York Times line of cases. In light of this, summary judgment is appropriate, to save the defendant the expense and burden of litigation, when the court determines that no reasonable reader could understand a characterization to refer to a "real person." In cases where such reference is possible, it becomes a jury question as to whether a reasonable reader would identify the character with the plaintiff. The first amendment requires a finding of fault, but the standard of liability may depend on the classification of the plaintiff. In cases with public figure or public official plaintiffs, liability should not be imposed unless the jury finds that the defendant acted with actual malice, with knowledge that the character would be recognized as the plaintiff, or in reckless disregard of that probability. Private figure plaintiffs would be

111. Id. at ___, 429 N.Y.S.2d at 443 (Kupferman, J., concurring).

Had the defendant in Allen v. Gordon merely checked a Manhattan phone book, she would have discovered Dr. Allen's name and prevented the expense and trouble involved in a lawsuit.

Discovering potential problems may not, however, always be possible by even an in-depth search. In Clare v. Farrell, the court noted that a search by a "trained reference worker" of all the records in the New York Public Library, including the card catalog, the Library of Congress catalog, the Reader's Guide, the International Index to Periodicals, the Public Affairs Information Service, and the Catholic Periodical Index failed to find any reference to a writer or journalist named Bernard Clare. 70 F. Supp. 276, 279 (D. Minn. 1947).
guided by the appropriate state standards, but at the least would have to establish that the defendant negligently failed to adequately disguise the character.

In cases involving accidental references, a court may choose, in certain cases, to impose a duty to check readily available reference material to determine the likelihood that a character may detrimentally be identified with a person bearing the same name and occupation and hold that the failure to so check may result in a finding of negligence and, therefore, liability.

V. "Fictionalizations"

"Fictionalizations"—books, stories or movies based on actual historical or newsworthy events—is a special classification of fiction. Fictionalizations are similar to fiction in that they deserve protection because they serve to inform and entertain, but their special characteristics also require them to be distinguished from fiction in general. Because fictionalizations are promoted as being based on actual events and because an interpretation of truthfulness is inherent in the form of presentation, readers and viewers are more apt to conclude that all of the portrayal—accuracies as well as inaccuracies—is an assertion of fact about real people and occurrences. In Paramount Theaters v. Simpson,112 the court noted that "[s]emi-fictional portrayal of a real life event is fraught with the possibility that the public, or at least that segment of the public that knows the plaintiff, will believe that the presentation refers to the plaintiff."113

Because of the increased chance that readers and viewers will interpret inaccuracies in a fictionalization as assertions of fact, the courts have carefully considered plaintiffs' claims in these cases. Several courts have placed great emphasis on the fictional nature of the publication and have held that, when the work is obviously fiction and there are significant dissimilarities between the event or character as described and that which actually occurred, liability can be denied without submitting issues of identification to the jury.114 When there is at least a possibility that the events

113. Id. at ___, 126 S.E.2d at 881.
114. Middlebrooks v. Curtis Publishing, 413 F.2d 141 (4th Cir. 1969) (District Court's finding that no reader could reasonably understand that the character was intended to be the plaintiff upheld in light of the fact that short story was "obviously fiction" and was labeled as such, and the dissimilarities between the plaintiff and the character); Wheeler v. Dell
and descriptions could be interpreted as descriptions of actual occurrences, the general rule has been that the issue of identification becomes a jury question. 115 When there is a determination that identification is reasonable and likely, and that the interpretation of the fictionalization will damage the plaintiff's reputation in the eyes of at least a segment of society, liability follows. 116

The probability that untruthful portions of a "fictionalized" story will be misinterpreted as assertions of fact about a particular plaintiff makes this cautious approach appropriate. The nature of such publication also moves fictionalizations away from the defamation cases involving "pure" fiction or satire and closer to the realm of traditional defamation cases, those involving statements which purport to be true but which the plaintiff claims are false and defamatory. Courts have properly, therefore, handled fictionalization cases in the same manner as traditional defamation cases: granting summary judgment only upon a find-


116. See, e.g., Kelly v. Loew's, 76 F. Supp. 473 (D. Mass. 1948). The plaintiff, Robert Kelly, brought suit over the movie "They Were Expendable," in which John Wayne played the character Rusty Ryan, an undisciplined, aggressive Naval officer who was resistant to orders. The court found the Ryan character to be a "thinly disguised" version of Kelly, as the movie was based on a book which used Kelly's actual name and was a "substantially accurate report of actual events" surrounding World War II. The book, however, portrayed Kelly as a man of "courage" and "self-restraint." Id. at 475.

Since the motion picture stated it was based on the book, and since the book used Kelly's real name, the court concluded that it was reasonable to believe that viewers would think Ryan was like Kelly. And even though the portrayal in the movie would probably not damage Kelly's reputation in the eyes of the general public, the court concluded that an award of $3,000 damages was reasonable to compensate Kelly for any damage caused to his reputation since the evidence showed several naval officers viewed the movie and might conclude that Kelly actually was undisciplined and resistant to orders.
ing that the statement involved is incapable of a defamatory meaning and leaving issues of identification and defamatory interpretation to the trier of fact.  

VI. CONCLUSION

The number of cases tried in the past several years indicates a trend toward increasing recourse to the courts to try claims of defamation in the context of fiction or satire. The importance of the expression of ideas, promotion of creativity, and the difficulty of determining when a particular communication ceases to be informative and becomes solely entertainment indicate that authors and artists must be protected from frivolous or unfounded lawsuits. Yet, this interest must be balanced with the individual's right not to be defamed.

Traditional standards and tests cannot easily be applied to defamation in these non-traditional contexts. The difficulty with applying traditional tests of identification, defamatory content and fault as required by New York Times and Gertz has led to a body of case law which lacks consistency in terms of expressed rationale and analysis. In Gertz, the Supreme Court stated that "broad rules of application" are necessary to avoid the "unpredictable results and uncertain expectations" caused by a case-by-case approach. In the area of fiction-defamation, the courts and the parties suffer the adverse effects of having no such "broad rules of application."

The courts should recognize that, each time they undertake to decide a fiction-defamation case, they are involved in a delicate balancing process. The rights of the plaintiff must be weighed against the first amendment rights of the defendant-creators. The propriety of relieving the defendant from the burden of litigation can be analyzed by a consideration of two factors:

1) The proper level of constitutional protection for the communication involved—is it intended to make a statement about a "higher truth," thereby qualifying it for the highest degree of first amendment protection, or is its only purpose to exploit its subject?

2) Would the average, reasonable reader/viewer understand the

117. See, supra text accompanying notes 114-15.
statement to be one of fiction or opinion, or as an assertion of fact about a "real" person?

Such an analysis may not produce more logical results—the great majority of cases appear to have been decided in a logical fashion with a proper and justifiable finding or denial of liability—but it would ensure a more logical body of case law. A statement of the standard of review is necessary not only to give guidance to the trial courts, but also to the people most directly affected—the creators, producers and publishers of American fiction and humor.

JAN KIPP KREUTZER
THE NEW OHIO DRUNK DRIVING LAW:
ITS PROBLEMS AND ITS EFFECTIVENESS

INTRODUCTION

Alcohol is the largest single contributor to highway traffic deaths. The statistics are staggering: drunk driving is responsible for the loss of 26,000 lives each year—one-half of all United States’ traffic fatalities.

It should not be surprising that a direct correlation exists between a driver’s blood alcohol content [BAC] and the likelihood of an automobile accident. The probability of a highway crash increases exponentially with a driver’s BAC: a driver whose BAC reaches 0.15% is twenty-five times more likely than a sober driver to cause a traffic accident. What may be surprising is that a significant proportion of traffic offenders are alcoholics. Additionally, alcoholics are four times more likely to die in an automobile accident than non-alcoholics of the same age and sex.

These statistics indicate the magnitude of the drunk driving problem and the potential for serious harm to persons and property when an intoxicated individual gets behind the wheel of an automobile, especially when the driver is a chronic drinker or alcoholic.

In 1983, the Ohio General Assembly attempted to deal with this problem by amending its laws governing drunk driving. The new amended sections became effective on March 16, 1983. This comment will examine the new law in the context of the drunk driving problem and in relationship to the old legislation and will analyze its projected deterrence of drunk driving and its practical and constitutional problems.

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1. Christianity Today, March 5, 1982 at 50.
5. Alcohol and Highway Safety Report, supra, note 2.
6. COUNTERMEASURES, supra, note 4 at 34.
I. BACKGROUND

A. American Societal Attitudes

Although alcohol-related highway deaths are so prevalent, there is, unfortunately, no corresponding societal sanction to act as a deterrent to drinking and driving. Many studies indicate that a substantial amount of drinking, especially heavy drinking, occurs at places distant from the drinker's home, yet most people depend upon their own automobiles as transportation when they are drinking. The custom of drinking and driving is ingrained in American societal patterns. More significantly, very little moral stigma is attached to drinking, even heavy drinking.

Statistics indicate that younger drivers are less concerned than older drivers about driving after drinking. This may account for the conclusion by some that teen-age drunk drivers are a major cause of traffic fatalities.

Despite this long-standing custom of drinking and driving, there is some indication that the attitude of acceptance may be slowly changing. In addition to the proliferation of legislation dealing with traffic enforcement, many drunk driving awareness groups have sprung up around the country. One example of these groups is Mothers Against Drunk Drivers [MADD], whose efforts include county task forces, alcohol awareness programs, counseling help, and court monitoring to determine which judges are excessively lenient.

In sum, the structure of American society does not effectively discourage drinking in conjunction with driving. Although there is an indication of a changing awareness of alcohol-related traffic incidents, these changes are painfully slow; Americans have a long way to go before alcohol awareness has some impact upon fatality statistics.

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8. Id. at 188.
9. Id. at 174. Mr. Little commented that "[t]hese data suggest an increasing level of concern about the significance of the danger of drinking after driving with increasing age as well as a decreasing likelihood of passively accepting a felt dangerous situation."
10. Id. at 174-75.
11. A 1979 Dept. of Trans. survey shows that alcohol traffic enforcement legislation has been adopted in all American jurisdictions. See DETERRENCE, supra note 3, at 81.
12. "Battling Drunk Drivers", supra, note 1, at 51.
B. The Historical Context: The Scandinavian Model

Most modern American legislation dealing with the drunk driving problem is based on the "Scandinavian Model", first developed in Norway and Sweden. In 1936, the Norwegian Parliament radically transformed its drunk driving laws to conform to a temperance movement in that country. The legislation of 1936 eliminated the need to prove that a driver was "under the influence" of alcohol by defining the crime as driving with a BAC of 50 or more milligrams per 100 milliliters of blood. Sweden developed a similar BAC standard for drinking and driving in 1941, establishing two levels of per se violations, with corresponding degrees of punishment. Both countries provided penalties of fine and imprisonment—Sweden's law called for imprisonment for the more serious offense, heavy fines for the lessor offense, and license revocation if the BAC level was 0.08% (American notation) or greater; the Norwegian penalties included both imprisonment and license suspension.

The Scandinavian model was adopted in various countries around the world, including Great Britain which adopted the Road Safety Act of 1967. The most notable provisions of that legislation include a definition of the offense of drunk driving as having a BAC which exceeds the limit of 0.08% (American notation), and a provision permitting the police to demand a breath screening test. The penalties for violations, however, were not increased.

The deterrent effect of the Scandinavian Model is dubious. One researcher has concluded, based on statistical analysis, that there is no scientifically valid evidence of the deterrent effectiveness of these laws in Norway and Sweden. The data for Great Britain is slightly more encouraging, in that the Road Safety Act of 1967 did have an immediate deterrent effect on drinking and driving, although that initial effect disappeared within the period of a few years. This result flies in the face of what is known as the "Scan-
dinavian myth”—a widespread belief that such an approach is an effective deterrent to drunk driving. By 1979, some form of the Scandinavian Model had been adopted throughout the United States, with per se violations of driving while intoxicated existing in at least thirteen states, and mandatory prison sentences for the first offense in twelve states. In addition, the Uniform Vehicle Code, designed by the National Committee on Uniform Traffic Laws, contains an example of the Scandinavian influence on American drunk driving legislation. Section 11-902a makes driving with a BAC of .10% or more a per se violation, chemical testing is mandatory, and refusal to submit to a test automatically results in license suspension. Finally, the code provides for mandatory jail sentences for the first and subsequent convictions of per se violations.

C. The Former Ohio Legislation

Prior to the 1983 amendments, the primary Ohio statute dealing

25. DETERRENCE, supra note 3, at 81.
with the offense of driving while intoxicated[90] [DWI] did not specifically define DWI with regard to a particular BAC. Instead, a driver's BAC at the time of the incident was admissible as evidence of guilt. The legislature set forth guidelines for determining what weight should be given to the BAC evidence. Under § 4511.19(A) of the Ohio Revised Code, a BAC registering between 0.05% and 0.10% raised no presumption that the driver was intoxicated or not intoxicated, but consisted of only one factor to be weighed with "other competent evidence in determining the guilt or innocence of the defendant." If the driver's BAC registered more than 0.10%, it created a presumption that the driver was intoxicated. Finally, if the driver's BAC registered less than 0.05%, it created a presumption that the driver was not "under the influence of alcohol." 

The Ohio Supreme Court held, in State v. Myers, that this presumption of intoxication could be rebutted, and that the jury must be charged to that effect. The court found that the presumption was rebuttable because the "defendant may present evidence that a chemical test result does not necessarily prove that he was under the influence of alcohol, though his test result was above 0.15%." 

Another problem with the Ohio law was that while making DWI an offense, the language of § 4511.99 did not explicitly define the meaning of "driving under the influence of alcohol." This seemed to give trial courts considerable problems with jury instructions. In State v. Jennings, the trial court instructed the jury that "[u]nder the influence of intoxicating liquor means exactly what it says, and that some intoxicating liquor must have been drunk by

31. § 4511.19 states that
"(I)n any criminal prosecution for a violation of this section, or ordinance of any municipality relating to driving a vehicle while under the influence of alcohol, the court may admit evidence on the concentration of alcohol in the defendant's blood at the time of the alleged violation as shown by a chemical analysis. . . ."
34. OHIO REV. CODE ANN. § 4511.19(B) (Baldwin 1975) (amended 1983).
36. 26 Ohio St. 2d 190, 271 N.E.2d 245 (1971).
37. Id. at 194, 271 N.E.2d at 248.
38. Id. at 201, 271 N.E.2d at 252 (emphasis in original).
the person, the amount being immaterial but the effect of which causes some influence on that person.

The Ohio Court of Appeals reversed the conviction, holding that this instruction was incomplete and prejudicially erroneous.

In Toledo v. Starks, the trial court gave a similar definition of under the influence of alcohol: "[S]ome alcohol must have been drunk by the person, the amount being immaterial, but the effect of which caused some influence on that person at the time and place in the affidavit." The Court of Appeals reversed, stating that it is "[t]he condition in which a person finds himself after having consumed some intoxicating beverage in such quantity that its effect on him adversely affects his actions, reactions, conduct, movement or mental processes or impairs his reactions to an appreciable degree, thereby lessening his ability to operate a motor vehicle."

Finally, in State v. Hardy, the Ohio Supreme Court threw out a jury instruction virtually identical to those given in State v. Jennings and Toledo v. Starks, on the ground that it was misleading because it contained both erroneous and non-erroneous statements. The court found error in the instruction because it charged the jury that the alcohol consumed by the defendant must only have caused some kind of influence on him. Because "some influence" included a host of irrelevant effects on the driver such as small alterations in the defendant's heart rate, breathing rate, perspiration and salivation, it ignored the necessary prerequisite that the "influence effect some deprivation of clearness of intellect and control which one could otherwise possess."

Other problems were caused by § 4511.191, which provided for the administration of chemical tests to determine the alcoholic content of an arrestee's blood, breath or urine. Subsection (A) created an implied consent to the test "by person who operates a

40. Id. at 457, 176 N.E.2d at 307.
41. Id. at 457-8, 176 N.E.2d at 307.
42. 25 Ohio App. 2d 162, 267 N.E.2d 824 (1971).
43. Id. at 164, 267 N.E.2d at 826.
44. Id. at 166, 267 N.E. 2d at 827.
45. 28 Ohio St. 2d 89, 276 N.E.2d 247 (1971).
48. 28 Ohio St. 2d at 90, 276 N.E.2d at 250.
49. Id. at 91-92, 276 N.E.2d at 250.
motor vehicle upon the public highways of [the] state . . . ." The test could be administered at the direction of a police officer having reasonable grounds to believe the individual was driving under the influence of alcohol. "Reasonable grounds" was determined

from the totality of all the facts and circumstances, including the person's actions immediately prior to his driving the motor vehicle; during the period of time he was driving including, but not limited to, the manner in which he was driving; and immediately after he discontinued driving, including his activities immediately after getting out of the motor vehicle. 

Section 4511.191 outlined the procedure to be followed in any case where the driver refused to submit to a chemical analysis test. He was to be advised, in writing, of the consequences of his refusal; no test was to be given, and the arresting police officer was to forward to the registrar of motor vehicles a sworn statement that: (1) he had reasonable grounds to believe the driver had been driving under the influence of alcohol; (2) the driver refused to submit to a chemical test; and (3) the driver was advised of the consequences of his refusal. Upon receipt of this statement, the statute directed the registrar to suspend the driver's license permit or non-resident operating privilege for six months. After this suspension, the registrar was required to immediately notify the individual in writing.

The statute also provided for an appeal of the suspension through the municipal or county courts by petitioning the court for a hearing on the suspension. However, the hearing was limited in scope to determining: (1) if the arresting officer had reasonable grounds to believe the person had been driving under the influence of alcohol; (2) whether the person was arrested; (3) whether the person refused to submit to a chemical test; and (4) whether he was advised of the consequences of his refusal. If the court found error in the suspension, it was not to be imposed.
Finally, penalties for a violation of the preceding code sections were set forth in § 4511.99. Subsection (A) provided a mandatory three-day imprisonment for a violation of § 4511.19 in addition to any license suspension imposed. This section was strictly enforced by the Ohio Supreme Court in *State ex rel Maraites v. Gorman*, in which Jessie L. Bolan was convicted in the Hamilton County Municipal Court of violating § 4511.19, but the trial judge suspended the mandatory jail sentence, and instead imposed only a fine and a 180-day driving suspension. An assistant city solicitor for Cincinnati then sought a writ of mandamus from the Court of Appeals for Hamilton County to require the trial judge to set aside the imposed penalties and to resentence Ms. Bolan, alleging that any individual convicted under § 4511.19 must be jailed for at least three days. The Court of Appeals granted the writ and the case was appealed. The Ohio Supreme Court affirmed the judgment, stating that

The intent of the General Assembly . . . is unmistakably clear: A person convicted of driving while under the influence of alcohol or drugs must serve at least three days in jail. A mandatory maximum jail sentence for such an offence is one of the General Assembly's responses to what many experts consider a leading cause of traffic accidents.

The above illustrates a few of the serious problems with the former Ohio drunk driving legislation. The trial courts were confused as to exactly what "driving while intoxicated" meant, and frequently suspended jail terms for first time offenders. Furthermore, some confusion seemed to exist as to what weight should be given to the various presumptions of intoxication.

II. THE NEW OHIO LAW

The new Ohio legislation is a comprehensive amendment of those sections of the Ohio Revised Code dealing with traffic offenses. While a major portion of the bill as passed contains amendments of the statutes governing vehicular homicide and reckless driving, this comment will deal only with those portions of the

58. 42 Ohio St. 2d 175, 326 N.E.2d 868 (1975).
59. Id.
60. Id. at 176, 326 N.E.2d at 870.
61. Amended Substitute Senate Bill 432 (eff. 3-16-83) contains amendments to §§ 2903.06, 2903.07, 2951.02, 2967.31, 3720.06, 4507.16, 4507.38, 4507.39, 4507.99 and 4509.31 of the Ohio
bill which amend code sections governing driving while under the influence of alcohol or drugs.

The preamble to the bill contains various purposes, which include precluding courts from suspending mandatory terms of imprisonment for drunk driving offenses. The bill also seeks to toughen the penalties for a DWI conviction. Additionally, the bill includes some new additions to the statutory scheme such as a per se guilty BAC level. Finally, the legislation provides for pre-trial suspension of drivers' licenses, permits and operating privileges under certain conditions and driver intervention programs in lieu of jail terms for a first offense. An examination of the amended sections of the Ohio Revised Code reveals some significant changes in §§ 4511.19, 4511.191, and 4511.99, discussed above.

A. Section 4511.19

In addition to the offense of driving "under the influence of alcohol or drugs," § 4511.19 now includes a prohibition against driving with a BAC of 0.10%, or 0.14% gms. per one hundred milliliters of urine. Violating this provision constitutes a per se offense. Moreover, the former presumption of non-intoxication for BAC's less than 0.10% have been eliminated. Instead, if the defendant's concentration of alcohol is less than 0.10% of his blood, or 0.14% grams per ml. of his urine, this fact "may be considered with other competent evidence in determining the guilt or innocence of the defendant" in a DWI criminal prosecution.

B. Section 4511.191

The provisions of § 4511.191 governing implied consent to a chemical test and the consequences of refusing the test basically remain the same. One significant change, however, is that, upon the driver's refusal to submit to the test and with the proper
police affidavits, the registrar of motor vehicles is to suspend the arrestee's license, permit or operating privileges for one year, rather than the six months provided for in the old legislation.\textsuperscript{67} The new scheme also provides that a person whose license has been suspended may petition the court for occupational driving privileges, alleging that the suspension "would seriously affect the person's ability to continue his employment."\textsuperscript{68} If the court grants the occupational driving privileges, it may impose any conditions it considers reasonable to limit the individual's use of a motor vehicle.\textsuperscript{69}

The individual whose license, permit or non-resident operating privileges have been suspended may, under both versions of this section, petition a county or municipal court alleging error in the suspension. The issues to be addressed at the hearing, however, have been changed by the new statute. In addition to those issues listed under the former § 4511.191(F), the new section provides that the petitioner may address two new issues: whether the chemical test was analyzed according to board-certified methods; and whether his employment "is of such a nature that his ability to continue in the employment would be seriously affected if the suspension otherwise required under this section is imposed."\textsuperscript{70} This hearing is not required, however, unless demanded by the petitioner.

The most startling new addition to § 4511.191 is a provision calling for the officer's immediate physical seizure of the driver's license, permit or non-resident license (to be forwarded to the court) if the driver refuses to submit to a chemical analysis of his breath or urine or if he submits to a test and the results show a BAC of 0.10% or higher, or 0.14 grams/ml. of urine.\textsuperscript{71}

\textbf{C. Section 4511.99}

Section 4511.99 now provides specific jail terms and fines for each violation of the drunk-driving law. For the first offense, the individual is to receive three consecutive days in jail and at least a

\textsuperscript{67} Ohio Rev. Code Ann. § 4511.191(D) eff. 3-16-83 (Supp. 1983) (amended 1983).
\textsuperscript{68} Ohio Rev. Code Ann. § 4511.191(G)(6) eff. 3-16-83 (Supp. 1983) (amended 1983).
\textsuperscript{70} Ohio Rev. Code Ann. § 4511.191(F) (amended 1983).
$150 fine. A second-time offender is to receive ten consecutive days in jail and at least a $150 fine. Finally, for subsequent offenses, the offender is to receive thirty consecutive days' imprisonment and at least a $150 fine. Subsection (A)(5) prohibits any court from suspending any of the above terms of imprisonment. The remainder of the former § 4511.99 is left intact, but the legislature has added a new section, 4511.991, which defines three consecutive days as seventy-two consecutive hours.

III. ANALYSIS

As with most pieces of legislation, the new Ohio Drunk Driving Law has some problems which need to be resolved. These problems can be divided into three broad categories: (1) achieving effective deterrence; (2) practical problems; and (3) constitutional problems.

A. The Probable Deterrence Effect of the New Legislation

Ohio's new law is based on the Scandinavian Model, like most other American jurisdictions. As mentioned above, the deterrent effect of this model has not been proven in either the Scandinavian countries or Great Britain, which also adopted the Model. In Great Britain, the law resulted only in a short period of deterrence. Accordingly, the deterrent effect in the United States is also likely to be ineffective on a long-range basis. To effectively reduce the incidence of drinking and driving, the new legislation must have several effects on the public. First, there must be a basic public knowledge and understanding of the law. Yet many sources indicate that a large portion of the public does not possess

77. See, infra notes 73-106.
78. See, infra notes 106-19.
79. See, infra notes 120-135.
80. See, supra notes 13-29 and accompanying text.
81. See, supra note 21 and accompanying text.
82. See, supra notes 22-3 and accompanying text.
83. Id.
an adequate knowledge or understanding of laws governing drunk
driving. 84 On the other hand, the new Ohio law continues to
receive widespread newspaper and radio coverage 85 which, along
with the proliferation of alcohol awareness groups, 86 indicates an
increased public awareness of the drinking driving problem and of
legislative efforts to alleviate it.

A second essential element of deterrence is public acceptance of
the social values implicit in the enactment of drunk driving laws. 87
The effective enforcement of any law depends in part upon the
assistance of the public by sharing the values the law incor-
porates. 88 There is an increasing awareness of the problems of
drinking/driving, but other social values, such as using one’s
automobile as transportation while enjoying the pleasurable
behavior of drinking, may prove more popular. 89 Information col-
clected in one survey suggests that only sixty-seven percent of
those questioned who admitted to sometimes driving after drink-
ing had been restrained from doing so, for one reason or another. 90
Moreover, when asked “Have you ever driven after drinking
against your own or anyone else’s judgment?”, twenty-four per
cent of all those answering, and thirty-nine percent of those
teensagers answering replied in the affirmative. 91 The custom of
drinking and driving is pervasive in the American social struc-
ture. 92 Until this custom is either significantly reduced or
eradicated entirely, the deterrent effect of the Scandinavian
Model is likely to be trivial.

Third, for deterrence to be effective, there must be a belief on
the part of drinking drivers that detection and punishment will

Highway Traffic Safety Administration, Alcohol Safety Countermeasures Program 2, 9-10
(1971). One study indicates that teenagers, generally, thought themselves better informed
about DWI legislation than any other group surveyed; yet they proved to know less than
every other group but one. Little, A Theory and Empirical Study of What Deters Drinking
85. See, e.g., Drunk-Driving Law May Require Change, Cincinnati Enquirer, March 13,
1983, at D1, Col. 1, which contains a concise outline of the major changes made by the new
law.
86. See, supra note 12, and accompanying text.
87. Cramton, supra note 84, at 997-98.
88. Id.
89. Id.
90. Little, supra note 7, at 175.
91. Id. at 180.
92. See, supra notes 7-12, and accompanying text.
follow violations of the law. Unfortunately, the majority of drunk drivers are not detected. First, detection resulting in the arrest of a drunk driver is difficult for the police officer, as many persons may not display the behavior usually associated with intoxication, and therefore the only accurate method of determining the concentration of alcohol in the individual’s blood, breath, or urine is by chemical analysis.

Moreover, several factors are implicit in the arrest process. A police officer, after stopping a suspicious driver, will decide to arrest the individual “based mainly upon his belief in the lack of ability of the person to operate his car safely.” Secondly, placing a drunk driver under custody is not a palatable job. Third, the arresting officer may have to appear at any resulting trial even if it occurs on his day off, and even if it occurs many weeks or months after the arrest. Consequently, many marginally intoxicated drivers are not arrested.

The problem of effective detection is not alleviated by the present legislation. Section 4511.191 retains the language providing that a chemical test of an individual’s blood, breath or urine are to be administered “at the direction of a police officer having reasonable grounds to believe the person to have been driving ... under the influence of alcohol.” Accordingly, those factors mentioned above—probability of non-detection, unpleasantness of arrests, and the inconvenience of trials—will continue to have a negative impact on the police officer’s decision to arrest. Additionally, those marginally drunk drivers who do not display visible signs of intoxication may not supply the police officer with reasonable grounds upon which to stop the vehicle or administer a chemical test.

A fourth factor is that effective deterrence assumes that an in-

93. Cramton, supra note 84, at 998. “(T)hose innovations confined to manipulation of the severity of the legal punishment, without a concomitant change in its certainty, produce no effect on the apparent incidence of drinking and driving or its aftermath in crashes.” Deterrence, supra note 3, at 91.
94. Countermeasures, supra note 4, at 83.
95. Id.
96. Id. at 84.
97. Little, supra note 7, at 185.
98. Id.
99. Id.
individual makes a conscious, rational choice. However, alcohol causes a progressive impairment of sensory, perceptual, motor and mental skills. More significantly, the alcohol user is vulnerable to losses of judgment and psychological perception. Consequently, drinkers, especially heavy drinkers, do not rationally weigh the consequences of their actions. Perhaps there is no deterrent method which could adequately deal with those offenders who are not really capable of an adequate choice between drinking and driving and drinking and not driving. In any event, however, this characteristic of effective deterrence is not achieved by the present legislation.

A fifth element of effective deterrence is the certainty of punishment for violations of drinking/driving laws. The present statutory scheme deals fairly adequately with this element. The problems of instructing juries as to the meaning of "driving while intoxicated" discussed above illustrate the significant burden placed on juries to sift through the evidence produced at a DWI prosecution. This burden is eliminated, in part, by the new legislation. Since § 4511.19(2)(4) adds the new offenses of driving a motor vehicle with "a concentration of 0.10% or more by weight of alcohol in [the driver's] blood, a concentration of 0.10 gram or more by weight of alcohol per 210 liters of his breath," and "a concentration of .14 gm. or more by weight of alcohol per 100 ml. of his urine," those defendants whose chemical tests resulted in the prescribed limits are not only "driving while intoxicated," but are _per se_ violating the law. This eliminates the need for a jury to speculate on the meaning of "driving under the influence" of alcohol. If the chemical test is adequately proven, the jury should return a verdict of guilty. Thus, there is less doubt that a defendant whose test reaches those limits will be convicted.

Concomitantly, the _per se_ violation levels of bodily alcohol content decrease the burden on the prosecution to prove the elements needed for a conviction. One element—"driving under the influence of alcohol"—is omitted from the prosecution's burden of proof.

Finally, the certainty of punishment is supported by the amend-

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101. Cramton, _supra_ note 84, at 998.
102. AMERICAN MEDICAL ASSN. COMM. ON MEDICO-LEGAL PROBLEMS, ALCOHOL AND THE IMPAIRED DRIVER 2 (1968); Cramton, _supra_ note 84, at 995.
103. Cramton, _supra_ note 84, at 995.
104. DETERRENCE, _supra_ note 3, at 91.
ed § 4511.99(A) which requires specific sentences of fine and imprisonment for violators and § 4511.99(A)(5) which prohibits any court from suspending the three, ten or thirty consecutive days imprisonment provided under subsection (A). Thus, those individuals convicted of violating the drunk driving law will, without fail, receive at least a jail term as punishment. This may be the most forceful portion of the statutory scheme. The common denominator of jail sentences for all those convicted will probably be viewed as strong medicine. One survey indicates that the penalty for drunk driving which is viewed with the most distaste is a short jail term. 105

Unfortunately, there is another side to mandatory jail sentences and fines. A mandatory sanction is not likely to deter the problem drinker or alcoholic, 106 yet alcoholism is known to be a major factor in highway fatalities. 107 Studies have concluded that the alcoholic driver is not deterred by license revocation or incarceration. 108 The chronic drinker is frequently a persistent violator of drunk-driving laws. Since these individuals are arrested, jailed, released, arrested again, etc., they are caught in what is termed as the "revolving jail door syndrome." 109 One study prepared for the U.S. Department of Transportation suggests, as an effective countermeasure, that police organizations actively support alcoholic treatment programs of medical and social welfare agencies of the community. The study further recommends that police agencies develop methods of processing drunk drivers with chronic drinking problems to health treatment facilities. 110

The new Ohio legislation does not satisfactorily provide for the treatment of chronic drinkers who drive. Although the new statute provides stiff punishment such as jail sentences, fines and

105. Little, supra note 7, at 179.
107. Little, supra note 7, at 187. See also Alcohol and Highway Safety, a Report Of The Congress From The Secretary Of Transportation, U.S. Dept. Of Transportation, August, 1968.
108. COUNTERMEASURES, supra note 4, at 66. See also Note, 55 Mandatory Jail Sentences: An Effective Solution to the Drunk Driver Crisis? WASH. L. REV. 677, n.6 (1980).
109. Id. This situation was recognized by Prof. Little who states that "jailing is the usual treatment of Alcoholics arrested by the police and has resulted in the so-called revolving jail door syndrome that alleviates the dangers of alcoholic drivers only during periods of their incarceration." Little, supra note 7, at 191.
110. COUNTERMEASURES, supra note 4, at 66-7.
license suspensions\textsuperscript{111} for continued violations, it does not provide for the treatment of the alcoholic problems which is so typical of repeat DWI violators. Furthermore, the senate bill introducing the law stated, as one of its purposes, “to establish driver intervention programs in lieu of jail for persons convicted of driving while intoxicated on first offense,”\textsuperscript{112} but neither the bill nor the succeeding statutes mentions any driver programs for persistent offenders who may have chronic drinking problems. The provisions of the statutory scheme for license suspension or revocation and jail terms may keep chronic drinkers off the streets temporarily, but will not reach the deeper problem of long-range treatment for the alcoholic driver.

Thus, although the new Ohio law is likely to have a significant effect upon social drinkers, teens, and occasional heavy drinkers because of the stiffer fines and penalties, the law will not be an effective deterrent for the problem drinker or alcoholic.

\textbf{B. Practical Problems of the New Legislation}

In addition to the questionable deterrent effect of the new legislation, there are numerous operational problems to be overcome. First, the mandatory jail sentence provision, as a more severe penalty, can be expected to result in a greater number of contested trials and appeals, leading to overloaded court dockets.\textsuperscript{113} Second, the mandatory jail sentence will create a larger number of prisoners, which will, in turn, compound the problem of presently overcrowded jails.\textsuperscript{114} Third, operations in administering the new law are likely to be costly and time-consuming. There are several pertinent items of added expense: police personnel and testing equipment to apprehend drivers; prison facilities and jail personnel; appointed legal representation for indigents; and pre-trial administrative personnel.\textsuperscript{115} The administration of drunk driv-

\textsuperscript{111} Ohio Rev. Code Ann § 4511.99(A) (amended 1983).
\textsuperscript{113} In states with similar mandatory jail terms for DUI offenses, the experience has been that there has been a noticeable increase in jury trials, de novo trials and appeals, placing a burden upon the court system. Note, 55 Wash. L. Rev. 677, 689 (1980). See also Waller, Drinking and Highway Safety, in Drinking 117, 131 (J. Ewing & B. Rouse, eds. 1970).
\textsuperscript{114} Rahtz, Drunk-Driving Law May Require Change, Cincinnati Enquirer, March 13, 1983 at D1, col. 1.
\textsuperscript{115} Little, Administration of Justice in Drunk Driving Cases, 58 A.B.A.J. 950, 951 (1972).
ing laws can also be time-consuming. One survey of the enforcement of the drunk driving law in Vermont indicates that, on the average, it takes sixty-six days to process a defendant from the date of the offense to the date of final disposition. Professor Little suggests that a solution to this problem would be to “[F]orce the surrender of the offender's driver's license to the arraigning magistrate after a hearing to determine whether the arresting officer had reasonable cause for making the arrest . . . . This procedure would pressure offenders to seek early disposition of their cases.” Section 4511.191 implements this type of procedure in the form of pre-trial seizure of arrestee's license. Hence, if Professor Little's analysis is correct, the new Ohio law should facilitate the prompt disposition of drunk driving cases.

One of the most serious practical problems is that as the new statutory scheme sets forth specific sentencing procedures and prohibits the suspension of sentences, very little latitude is left to the trial judge to tailor punishments to the particular offender. Consequently, the trial judge has no choice but to sentence the convicted problem drinker or alcoholic to a specific jail term, fine, or license suspension provided by statute; he is not free to fashion a treatment program in coordination with health and social agencies.

C. Constitutional Problems

The immensity of the subject of the constitutionality of the new Ohio law precludes a full and detailed analysis but the subject must be approached at least in a brief discussion of several major points.

The major constitutional obstacle which the new law must hurdle is the due process requirement of the fourteenth amendment. The Ohio provision for pre-trial license suspension

116. Id.
117. Id. at 953.
118. OHIO REV. CODE ANN § 4511.99(a) (amended 1983).
120. The fourteenth amendment states in pertinent part as follows:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST., amend. XIV.
in certain situations\textsuperscript{121} must afford individuals procedural due process of law. The Due Process Clause protects certain rights and privileges of individuals from infringement by state action or by anyone acting under state authority. Just exactly where an individual's right or privilege to retain his driver's license fits into this scheme depends upon the circumstances of each case, and the particular statutory scheme at issue.

In 1971, the United States Supreme Court decided \textit{Bell v. Burson},\textsuperscript{122} which dealt with the very issue of the protection of drivers' licenses from state infringement. In that case, the state threatened to suspend the petitioner's license under Georgia's Motor Vehicle Safety Responsibility Act,\textsuperscript{123} which provided that the driver's license of an uninsured motorist involved in an accident would be suspended, without consideration of fault or responsibility for the accident, unless he posted a security for the amount of damages claimed by an aggrieved party. The petitioner had attempted, at several levels of litigation, to introduce evidence that he was not at fault. However, the Georgia Court of Appeals rejected this proffer since it was not provided for under the statutory scheme.\textsuperscript{124}

The Supreme Court noted that after a driver's license is issued its possession may become essential to individuals in the pursuit of their livelihood. Accordingly, the suspension of such a license "involves state action that adjudicates important interests of the licenses. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment."\textsuperscript{125} The Court reached this conclusion by applying the basic principle that the Constitution restrains state power from terminating an entitlement "whether the entitlement is denominated a 'right' or a 'privilege'."\textsuperscript{126} The most powerful impact of the decision, however, is revealed later in the opinion. The Court held, ultimately, that "[i]t is fundamental that except in emergency situations... due process requires that when a state seeks to terminate an interest such as that here involved, it must afford 'notice and opportunity for a hearing appropriate to the

\textsuperscript{121} \textit{OHIO REV. CODE ANN.} § 4511.191(E) (amended 1983).
\textsuperscript{122} 402 U.S. 535 (1971).
\textsuperscript{123} \textit{GA. CODE ANN.} § 92A-601 et seq. (1958).
\textsuperscript{124} 402 U.S. at 538.
\textsuperscript{125} \textit{Id.} at 539 (citations omitted).
\textsuperscript{126} \textit{Id.} (citations omitted).
nature of the case' before the termination becomes effective." 127

Taken literally, the pronouncement in *Bell v. Burson* would seem to mandate that before a state may suspend a driving privilege, it must afford the individual notice and an opportunity for a hearing appropriate to the nature of the case. However, the new § 4511.191 provides for suspension of licenses without a hearing if a DWI arrestee refuses a chemical test or if his chemical test results in a bodily alcohol content above the prescribed limits.

The constitutionality of license suspension for refusal to yield to a chemical test has already been upheld in the courts of Ohio. 128 However, the issue whether an individual's license may be suspended when his test results are within the proscribed limits has yet to be decided since the current legislation is so new. 129

The status of a driver's license, as defined by the Ohio courts, is clear. A driver's license is not a right, but only a privilege. 129 Furthermore, the Ohio Court of Appeals for Ashland County held in *State v. Newkirk* 131 that "any appropriate means adopted (to ensure competence and care on the part of licensees) does not deny to a person subject to its provisions any constitutional rights under the Constitution of the United State or the State of Ohio." 130 The court did not, however, detail what was meant by "appropriate means." Whether a pre-trial seizure of the DWI arrestee's license would be an appropriate means to guarantee driver's competence and the safety of the roads is questionable. It probably would not comply with the *Bell v. Burson* rule requiring notice and opportunity for a hearing before the seizure of a license. Of course, in *Bell v. Burson*, the statutory scheme required the suspension of licenses before any determination of guilt or innocence. Under the new Ohio scheme, a bodily alcohol content above the required limits gives rise to per se guilt, so that the only pertinent determination to be subsequently made is whether

127. *Id.* at 542 (original emphasis)(citations omitted).
129. This issue has recently come before the courts. Five Franklin County individuals filed suit on April 13, 1983 in Federal District Court challenging the state's right to suspend licenses of DWI arrestees before a determination of their guilt or innocence has been made. *See* The Cincinnati Enquirer, April 16, 1983, at C3, col. 1.
131. 21 Ohio App. 2d 160 (1968).
132. *Id.* at 165.
the chemical analysis was conducted properly. Consequently, it is
doubtful whether this final determination is weighty enough to
create constitutional restraint on the seizure of the individual's
license.
Moreover, three other important considerations enter the
analysis. The state has an important interest in protecting the
safety of the public from drunken drivers. If the arrestee's alcohol
content has reached or passed the \textit{per se} limit, he may be a real
menace to the safety of Ohio roadways if he is permitted to drive.
Second, the statutory scheme provides for notice and an oppor-
tunity for a prompt hearing within twenty days after a suspension
of a driver's license.\textsuperscript{133} Thus, the individual has an opportunity to
contest the suspension. Finally, the statutory scheme provides
that a court may grant an individual occupational driving
privileges upon proper proof,\textsuperscript{134} and also provides a defense for
driving under suspension in an emergency situation.\textsuperscript{135} Conse-
quently, the seizure or suspension of an individual's license may
not create a deprivation which warrants strict constitutional pro-
tection.
In conclusion, the structure of the new Ohio legislation is such
that pre-trial seizure of a driver's license may satisfy the re-
quirements of the United States Constitution.

CONCLUSION

The new Ohio drunk driving legislation is a response to the alar-
mingly high rate of traffic accidents and fatalities caused by intox-
icated drivers and to the ease and swiftness with which drunk
drivers are permitted to get back on the highways. The new law is
obviously intended to reduce the burden on prosecutors so that
punishment for driving while intoxicated will be more certain, and
to stiffen the punishments for convicted drunk drivers.
Although the legislation may not have as great a deterrent ef-
fect as is needed, and although it contains inherent practical and
procedural problems, the very promulgation of the scheme indi-
cates a growing awareness of the extent of the drinking/driving
problem. Furthermore, it indicates a changing societal attitude

\textsuperscript{133} \textit{Ohio Rev. Code Ann.} § 4511.191(F) (amended 1983).
\textsuperscript{135} \textit{Ohio Rev. Code Ann.} § 4507.39(B) (amended 1983).
toward the operation of vehicles in conjunction with drinking. This change of attitude may very well be the impetus which brings about the success of the new legislative scheme.

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NOTES


INTRODUCTION

United States v. Security Industrial Bank\(^1\) involved the consolidation of seven appeals from the Bankruptcy Court for the Districts of Kansas and Colorado.\(^2\) “In each case one of the appellees had loaned the debtor money and obtained and perfected a lien on the debtor’s household furnishings and appliances before the Bankruptcy Reform Act of 1978 was enacted on November 6, 1978.”\(^3\) Each of the debtors instituted bankruptcy proceedings after the effective date of the Reform Act of 1978, which was October 1, 1979.\(^4\)

Section 522(f) of the Bankruptcy Reform Act of 1978 permits individual debtors in bankruptcy proceedings to avoid liens on certain property.\(^5\) When the debtor avoids a lien pursuant to § 522(f), the lien is avoided only to the extent of the exemption allowed by §§ 522(b)\(^6\) and 522(d).\(^7\) The Court noted that “[i]ncluded within the

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1. 103 S.Ct. 407 (1982).
3. 103 S.Ct. at 409.
6. Section 522(b) provides in relevant part as follows:
   “[A]n individual debtor may exempt from property of the estate . . . (1)—‘property that is specified under subsection (d) of this section’. . . .”
7. Section 522(d) provides:
   (d) The following property may be exempted under subsection (b)(1) of this section:
   . . .
   (3) The debtor’s interest, not to exceed $200 in value in any particular item, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family or household use of the debtor or a dependent of the debtor.
   (4) The debtor’s aggregate interest, not to exceed $500 in value, in jewelry
personal property subject to the appellee's liens were household items that are exempt from the property included within the debtor's estates by virtue of subsections (b) and (d) of 522." The debtors claimed these exemptions in their bankruptcy proceedings and sought to avoid the liens under § 522(f)(2). Section 522(f) provides:

Notwithstanding any waiver of exemptions, the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is . . . (2) a nonpossessory, nonpurchase-money security interest in any . . . (A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor (B) implements, professional books, or tools, of the trade of the debtor or of a dependent of the debtor; or (C) professionally prescribed health aids for the debtor or a dependent of the debtor.

In the Bankruptcy Court the lienholders, appellees here, "asserted that the avoidance of the . . . liens would result in the deprivation of a valuable and substantive property right without due process of law as mandated by the Fifth Amendment." Because of the constitutional issue presented by this case, the Government was permitted to intervene and defend § 522(f) of the Reform Act.

In two of the seven consolidated cases, the bankruptcy judge held that Congress did not intend for § 522(f) to apply to security interests which came into being before the November 6, 1978, en-

held primarily for the personal, family, or household use of the debtor or the dependent of the debtor.
(6) The debtor's aggregate interest, not to exceed $750 in value, in any implements, professional books, or tools, of the trade of the debtor or the trade of the dependent of the debtor.
(9) Professionally prescribed health aids for the debtor or a dependent of the debtor . . . .

8. 103 S.Ct. at 409 (footnote omitted).
11. Id. at 630, n.1.
actment date of the Reform Act. The judge, therefore, did not allow the liens to be avoided under § 522(f)(2).

In the other five cases, the bankruptcy judges held that Congress did intend that in cases filed after October 1, 1979 § 522(f)(2) would apply to security interests which came into being before the November 6, 1978, enactment date of the Reform Act. The bankruptcy judges further held, however, that such retroactive application of the statute was unconstitutional, since it deprived the lienholders of their substantive property rights without the due process of law.

The seven cases were consolidated by the Tenth Circuit Court of Appeals in the case of Rodrock v. Security Industrial Bank. The court determined that Congress did intend for § 522(f)(2) to apply to security interests which were vested prior to the effective date of the Reform Act. Furthermore, the court stated that "Congress may not under the bankruptcy power completely take for the benefit of a debtor rights in specific property previously acquired by a creditor." Having made these findings, the court affirmed the Bankruptcy Court decisions holding § 522(f) to be unconstitutional when applied to pre-existing liens.

The United States Government appealed the Court of Appeals' decision, and the Supreme Court, realizing the confusion as to the application of § 522(f), sought to decide the issue and to determine: (1) whether the retroactive application of § 522(f) violates the Due Process clause of the fifth amendment; and (2) whether Congress intended § 522(f) to have retroactive effect. Writing for a six-member majority in Security Bank, Justice Rehnquist stated "there is substantial doubt whether the retroactive destruction of the appellee's liens in these cases comports with the Fifth Amendment." However, the Court did not decide the constitutional issue, but rather "address[ed] it only to determine whether the attack on the retrospective application of the statute raises substantial enough constitutional doubts to warrant the employ-

13. Id.
14. 642 F.2d 1193 (10th Cir. 1981).
15. Id. at 1196.
16. Id. at 1198.
17. 103 S.Ct. at 412.
ment of the canon of statutory construction. . ." the "cardinal principle that [the] Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided." Finding "substantial doubt" as to the constitutionality of § 522(f), the Court sought to construe the statute in a manner which would avoid the constitutional question.

The Court based its decision on the Congressional intent underlying the Reform Act. The Court held "in the absence of a clear expression of Congress' intent to apply Section 522(f)(2) to property rights established before the enactment date, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the takings clause." Accordingly, the debtors' complaints, seeking to avoid the creditors' nonpossessory, nonpurchase money security interests, were dismissed.

I. LEGISLATIVE INTENT AND SIGNIFICANT CASE LAW

The Court's decision to hear United States v. Security Industrial Bank was important, as three circuit courts of appeals had decided the issue with differing results. The Seventh Circuit and the Third Circuit had determined that Congress had intended § 522(f) to apply to pre-enactment liens and that avoiding liens under § 522(f) did not violate the fifth amendment. However, as discussed previously, the Tenth Circuit, while holding that Congress intended § 522(f) to apply to pre-enactment liens, had ruled that to apply the provisions to such liens was a violation of the fifth amendment.

In addition, there were numerous Bankruptcy Court decisions dealing with the application of § 522(f). Many reported cases hold the lien avoidance provision of § 522(f) unconstitutional as applied to security interests which vested prior to the enactment date of

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18. 103 S.Ct. at 410.
22. In re Ashe, 669 F.2d 105 (3rd Cir. 1982).
23. "[N]or shall any person ... be deprived of ... property, without due process of law; nor shall private property be taken for public use, without just compensation."
U.S. Const., amend. V.
the Bankruptcy Reform Act on November 6, 1978,\textsuperscript{25} and there are just as many cases holding § 522(f) to be constitutional as applied to security interests created prior to November 6, 1978.\textsuperscript{26} A discussion of some of these decisions will be helpful in analyzing the Supreme Court’s decision in Security Bank, especially because many of these decisions not only dealt with the Congressional intent concerning § 522(f), but also with the constitutional issue.

This note will discuss the Congressional intent behind the Bankruptcy Reform Act of 1978, specifically § 522(f), and whether retroactive application of § 522(f) violates the Due Process Clause of the fifth amendment. Courts, in their analyses of the fifth amendment issue, weighed the three elements of the fifth amendment: (1) whether § 522(f) involves a taking of private property for public purposes without just compensation; (2) whether retroactive application of § 522(f) involves a deprivation of property without due process; and (3) whether § 522(f) violates substantive due process.\textsuperscript{27} Of these three elements, this note will deal only with the taking clause of the fifth amendment, since this issue has received the most discussion in relation to the constitutionality of § 522(f).

\section*{A. Legislative History}

Article 1, § 8, clause 4 of the United States Constitution authorizes Congress to pass laws concerning the subject of bankruptcy. Consistent with this authorization, Congress enacted 11 U.S.C. § 522(f) "to protect the debtor’s exemptions, his discharge, and thus his fresh start by permitting him to avoid certain liens on ex-

\textsuperscript{25} In re Parker, 10 Bankr. 562 (M.D. Ala. 1981); In re Groves, 9 Bankr. 775 (D. Colo. 1981); In re Hammer, 9 Bankr. 343 (N.D. Iowa 1981); In re Bibb, 10 Bankr. 40 (E.D. Mich. 1981); In re Lovett, 11 Bankr. 123 (W.D. Mo. 1981); In re Baker, 11 Bankr. 125 (W.D. Mo. 1981); In re Carroll, 11 Bankr. 45 (E.D.N.Y. 1981); In re Sams, 9 Bankr. 479 (N.D. Ohio 1981); In re Bailey, 10 Bankr. 567 (E.D. Tenn. 1981); In re Felmey, 9 Bankr. 331 (E.D. Va. 1981); In re Williams, 8 Bankr. 562 (E.D. Wash. 1981); In re Schutzke, 8 Bankr. 12 (D. Kan. 1980); In re Oldham, 7 Bankr. 124 (D.N.M. 1980); In re Pierce, 4 Bankr. 671 (W.D. Okla. 1980); In re Hawley, 4 Bankr. 147 (D. Or. 1980).

\textsuperscript{26} In re Campbell, 8 Bankr. 425 (S.D. Ohio 1981); In re Rutherford, 4 Bankr. 571 (S.D. Ohio 1981); In re Paden, 10 Bankr. 206 (E.D. Pa. 1981); In re Stump, 8 Bankr. 516 (D. S.D. 1981); In re Pillow, 8 Bankr. 404 (D. Utah 1981); In re Joyner, 7 Bankr. 596 (M.D. Ga. 1980); In re Middleton, 7 Bankr. 3 (N.D. Ga. 1980); In re Primm, 6 Bankr. 142 (D. Kan. 1980); In re Baker, 5 Bankr. 397 (W.D. Mo. 1980); In re Curry, 5 Bankr. 282 (N.D. Ohio 1980); In re Ambrose, 4 Bankr. 395 (N.D. Ohio 1980); In re Fisher, 6 Bankr. 206 (N.D. Ohio 1980); In re Goodrich, 7 Bankr. 590 (S.D. Ohio 1980); In re Augustine, 7 Bankr. 565 (W.D. Pa. 1980); In re Brown, 7 Bankr. 264 (N.D. Tex. 1980); In re Sweeney, 7 Bankr. 814 (E.D. Wis. 1980).

\textsuperscript{27} In re Pillow, 8 Bankr. 404 (D. Utah 1981).
empt property." The legislative history of the Code reveals that assuring the debtor a fresh start was not the only consideration underlying this provision. Congress was convinced that the types of nonpossessory, nonpurchase-money security interests made avoidable by § 522(f)(2) were principally instruments of creditor abuse, rather than legitimate credit-facilitating devices. The purpose of § 522(f) of the Reform Act was stated in a House of Representatives Report:

The bill gives the debtor certain rights not available under current law with respect to exempt property. The debtor may void any judicial line on exempt property, and any nonpurchase money security interest in certain exempt property such as household goods. The first right allows the debtor to undo the actions of creditors that bring legal action against the debtor shortly before bankruptcy. Bankruptcy exists to provide relief for an overburdened debtor.

If a creditor beats the debtor into court, the debtor is nevertheless entitled to his exemptions. The second right will be of more significance for the average consumer debtor. Frequently, creditors lending money to a consumer debtor take a security interest in all of the debtor's belongings and obtain a waiver by the debtor of his exemptions. In most of these cases, the debtor is unaware of the consequences of the forms he signs. The creditor's experience provides him with a substantial advantage. If the debtor encounters financial difficulty, creditors often use threats of repossession of all the debtor's household goods as a means of obtaining payment.

In fact, were the creditor to carry through on this threat and foreclose on the property, he would receive little, for household goods have little resale value. They are far more valuable to the creditor in the debtor's hands, for they provide a credible basis for the threat, because the replacement costs of the goods are generally high. The creditors rarely repossess, and debtors, ignorant of the creditor's true intentions, are coerced into payments they simply cannot afford to make.

The exemption provision allows the debtor, after bankruptcy has

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been filed, and creditor collection techniques have been stayed, to undo the consequences of a contract of adhesion, signed in ignorance, by permitting the invalidation of nonpurchase money security interests in household goods. Such security interests have too often been used by over-reaching creditors. The bill eliminates any unfair advantage creditors have.\textsuperscript{30}

In order to "promote the dual purposes" of giving the debtor a fresh start and preventing creditor "abuse", Congress granted the bankruptcy debtor the § 522(f) lien avoidance power.

\textbf{B. Congressional Intent}

While there have been a number of Bankruptcy Court decisions discussing the Congressional intent as to the application of § 522(f), there have been only three circuit court of appeals decisions on the issue and all three determined that Congress intended for § 522(f) of the Reform Act to apply to pre-enactment liens.

In \textit{Rodrock v. Security Industrial Bank}\textsuperscript{31} the Tenth Circuit Court of Appeals resolved the issue in the following manner. October 1, 1979 was both the effective date of the Reform Act and the date the old Bankruptcy Act was repealed. "So if, in a bankruptcy case filed on or after October 1, 1979, the Reform Act does not apply to creditor's interests which came into existence prior to October 1, 1979, then there would be no bankruptcy law governing the particular matter at hand."\textsuperscript{32} The court stated, "[w]e cannot believe that Congress intended such a statutory 'gap'."\textsuperscript{33} The court thus concluded that Congress intended for the Reform Act of 1978 to be given retroactive effect.

The Seventh Circuit Court of Appeals in \textit{Matter of Gifford}\textsuperscript{34} also determined that Congress intended for § 522(f) to apply to pre-enactment liens. The court noted that § 522(f) was enacted as part of the Bankruptcy Reform Act of 1978.\textsuperscript{35} While "[s]ection 522(f) does not state when it . . . is to apply",\textsuperscript{36} § 402(a) of Title IV of the

\textsuperscript{31} 642 F.2d 1193 (10th Cir. 1981).
\textsuperscript{32} Id. at 1196 (emphasis in original).
\textsuperscript{33} Id.
\textsuperscript{34} 688 F.2d 447 (7th Cir. 1982).
\textsuperscript{35} Id. at 450.
\textsuperscript{36} Id.
Act states that "except as otherwise provided in [Title IV], this Act shall take effect on October 1, 1979." The court determined that "because Title IV provides no exceptions for § 522(f), that section must apply to cases filed on or after the effective date of October 1, 1979." The creditors in Gifford presented an argument concerning Congressional intent which prior decisions had not addressed. "The preliminary draft of the transition provisions stated that the new Bankruptcy Act 'shall apply in all cases or proceedings instituted after its effective date, regardless of the date of occurrence of any of the operative facts determining legal rights, duties or liabilities hereunder.'" However, the final version of the Reform Act did not contain this language. The creditors in Gifford argued that this language was deleted because of the testimony of William Plumb before the House Subcommittee. Mr. Plumb had testified that such an application of the Reform Act would be an "improper impairment of vested property rights." The creditors took this deletion to mean Congress had intended to "preserve security interests that attached prior to enactment."

The Gifford court, however, did not agree. The court pointed out that Mr. Plumb was only one of many witnesses who had testified before the subcommittee and that there was no indication that Congress deleted the language because they feared its unconstitutionality.

In In re Ashe the Third Circuit Court of Appeals did not discuss the Congressional intent behind § 522(f). The section was applied to a pre-enactment lien and the creditor claimed the section was unconstitutional when applied retroactively. The case was decided on that issue and the court had no occasion to address the Congressional intent issue.

38. 688 F.2d at 450.
40. Id. at 451. (citing Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 Before the House Subcommittee on Civil and Constitutional Rights, 94th Cong., 1st Sess. 2034, 2066-67 (1976)).
41. 688 F.2d at 451.
42. Id.
43. Id.
44. 669 F.2d 105 (3rd Cir. 1982).
45. Id.
Many Bankruptcy Court decisions have held that Congress intended for § 522(f) to apply to pre-enactment liens. The vast majority of these cases relied on the rationale of either Rodrock or Gifford. One decision, however, relied on an additional argument. In Curry v. Associates Financial Services, the court noted that “[u]nless otherwise provided, October 1, 1979 is the effective date of the Reform Act.” Sections 402(b) to 402(e) make specific reference to “provisions of the Reform Act that take effect on some other date.” Section 422(f) was not “designated for an effective date other than October 1, 1979. Thus it is explicit in the statutory scheme of the Reform Act that any bankruptcy proceeding commenced after the effective date is governed by the substantive provisions of the Reform Act.” The court held, “[t]his construction is further supported by the Reform Act’s saving clause, which requires that a case commenced under the former Act shall proceed and the substantive rights of the party shall be determined under the law that would be applicable if the Reform Act had not been enacted.” The court stated that “the negative implication of the savings clause is that a case commenced after the repeal of the former Act must be governed by the substantive provisions under the Reform Act.”

While the courts which have held § 522(f) applicable to pre-enactment liens have followed one or a combination of the arguments previously discussed, Bankruptcy Courts which have refused to apply § 522(f) to pre-enactment liens have basically relied on the same argument followed by the Supreme Court in Security Bank.

In Matter of Malpeli the Bankruptcy Court was asked to avoid certain nonpossessory, nonpurchase money security interests in certain household and personal goods of the debtor. The creditors opposed this request, claiming that § 522(f) should not be given retroactive application. The court agreed, stating “the principle is too well established to need the citation of authorities that no law will be construed to act retroactively unless its language im-

46. See supra note 26.
47. 11 Bankr. 716 (N.D. Ohio 1981).
48. Id. at 721 (citing Pub. L. No. 95-598, Title IV, § 402(a), 92 Stat. 2682 (1978)).
49. Id. (citing Pub. L. No. 95-598, Title IV, § 402(b)-(e), 92 Stat. 2682 (1978)).
50. 11 Bankr. at 722.
51. Id.
52. Id.
53. 7 Bankr. 508 (N.D. Ill. 1980).
peratively requires such a construction."54 The court was not "convinced that the language of Section 522(f) 'imperatively requires' a retroactive application, nor does Section 522(f)'s 'express language' compel such a construction."55 By finding that § 522(f) should be given only prospective application, the court was not faced with the constitutional question.

C. Takings Analysis

Courts have repeatedly noted that the Takings Clause of the fifth amendment must be satisfied in bankruptcy proceedings. "The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment."56 "The taking clause of the Fifth Amendment imposes a distinct substantive standard—just compensation—when private property is diverted to public uses, even when the diversion takes place in the course of a bankruptcy proceeding."57 All three circuit courts of appeals decisions discussed the takings clause in their analyses of the constitutionality of § 522(f). Two of the cases, In re Ashe and Gifford, held that the application of Section 522(f) did not result in the taking of private property for public use without just compensation.

The Gifford court undertook its analysis of the takings issue by referring to the 1978 case of Penn Central Transportation Co. v. New York City.58 "There is no 'set formula for determining when justice and fairness requires that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons'.59 However, the Gifford court identified several factors which the Supreme Court had identified as having particular significance.60 The two most significant of these factors are "'[1] the economic impact of the regulation, its interference with reasonable investment backed expectations and [2] the character of the governmental action...'.61 The Gifford court then set out to apply these two fac-

54. Id. at 510 (quoting Auffm' ordt v. Rasin, 102 U.S. 620, 622 (1880)).
55. Id. at 510.
57. In re Ashe, 669 F.2d 150, 110, (1982) and cases cited therein.
60. 688 F.2d at 455.
61. Id. at 456. (quoting Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979)).
tors to the creditors' proposed property interest in the debtors' property.

In its analysis of the first factor the court stated, "the 'investment backed expectations' interfered with are less than substantial." The creditors' "nonpossessory, nonpurchase-money security interest is far from 'property' of the same importance as the farm mortgages taken in Louisville Joint Stock Land Bank v. Radford or the materialmen's liens on ships taken in Armstrong v. United States." The liens in Radford and Armstrong were of greater importance because they "attach[ed] to property of the debtor that [had] directly benefited from the loan or work done." "[I]f the underlying debt is unpaid the creditor has a direct property interest in the objects that were purchased or created with the loaned capital or effort."

The same is not true of the nonpossessory, nonpurchase-money security interest in household goods held by the creditors in Gifford. The creditors' expectations reside in the threat of foreclosure rather than actual foreclosure on the goods. This is true because, as several bankruptcy courts have pointed out:

(1) there is no direct relationship between the value of the household goods taken as collateral for the consumer loan and the amount of the loan as exists [, for example,] in a mortgage of real estate; (2) the value of the household goods is often nominal whereas realty has a measurable value comparable to the amount of the loan secured; and (3) the lender making small consumer loans, unlike a mortgagee, does not view a security interest in household goods as a potential substitute for the debt. . . . [T]hese courts have concluded that, since the household goods given as security have little or no actual monetary value to the creditor, whatever property interest the creditor has in the collateral does not rise to the level of a mortgagee's property rights in realty.

The creditors argued that the monetary value of the collateral

62. 688 F.2d at 456.
63. 688 F.2d at 456 (citing Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1934) and Armstrong v. United States, 364 U.S. 40 (1959)).
64. 688 F.2d at 456.
65. Id.
66. Id.
67. Id. (quoting Matter of Ward, 14 BANKR. 549 (S.D. Ga. 1981) and cases summarized therein)).
was irrelevant. If the interest amounted to "property", the Government was required to pay just compensation. The debtors, on the other hand, argued that the liens were "merely an incident to a contractual right to repayment of a debt."\(^{68}\) The difference between contract and property rights is that the federal government may freely impair contract rights, but before a person's property rights may be taken he must be justly compensated.\(^{69}\) The *Gifford* court determined that "[t]he 'property interest' that [the creditors] assert here is that [they] should be allowed to continue threatening to take possession of the household goods as a means of inducing the [debtors] to repay the [money borrowed]."\(^{70}\) However, the creditors' property interest can be no greater than the "actual market value of the household goods."\(^{71}\) "There would be no justice in compensating [the creditors] based on some extortion value of the security interest."\(^{72}\) The court noted that even if § 522(f) did effect a taking, the most the creditors could have anticipated recovering was the value of the collateral. Since the value of the collateral was insignificant, the creditors' "'reasonable investment backed expectations' were insignificant also."\(^{73}\)

Not only is the creditors' "reasonable investment backed expectation" insignificant but the "impact of Section 522(f) upon the creditor's lien is insubstantial."\(^{74}\)

First, Section 522(f) allows avoidance of a lien only to the extent that the debtor has an exemption under Section 522(b), here for up to $200 per item. The lien is not avoidable beyond that amount, and accordingly Section 522(f) only minimally affects a creditor whose investment-backed expectations reside in truly valuable collateral. Second, Section 522(f) does not apply until there is a bankruptcy, by which time the creditor's expectations of repayment are surely at a minimum.

... Finally, Congress has not entirely destroyed [the creditor's] expectation of repayment but instead has substituted for it the rights of an unsecured creditor, which need not be equal in value to the expectations allegedly taken. ... Together these elements indicate

\(^{68}\) *Id.* 688 F.2d at 457.

\(^{69}\) *Id.*

\(^{70}\) *Id.*

\(^{71}\) *Id.*

\(^{72}\) 688 F.2d at 458.

\(^{73}\) *Id.*

\(^{74}\) 688 F.2d at 459.
that Section 522(f) is a *de minimis* interference that does not rise to the level of a taking under the Fifth Amendment.75

Having determined that the creditors' "reasonable investment backed expectation" was insignificant, the court turned its attention to the "character of the governmental action". The court noted that "Section 522(f) is a dual adjustment of benefits and burdens between the debtor and his creditors, and among a narrow class of secured creditors and the debtor's general creditors."76 Such a fair reordering of creditor's claims should be "immune to a takings challenge."77

Also, the court held that § 522(f) does not apply to lenders who have possession of collateral and, therefore, the government action is not of the nature of a physical taking. "Common sense suggests a distinction between interfering with a limited class of Uniform Commercial Code remedies for nonpayment of debt by a bankruptcy and such governmental actions as bolting television equipment onto the roof of a building, allowing the public to use a formerly private pond, or ousting a tenant from his leasehold."78 The latter impairments are physical invasions of private property, while application of § 522(f) amounts only to an "impairment of an abstract incident to a contract right."79 The court determined that the concept of property has not become so liberal as to make "property interests merely photocopied onto the backside of consumer loan agreements" indistinguishable from "property interests that are manifested by possession and transferred by delivery."80

The court concluded its discussion of the takings analysis by pointing out that § 522(f) does not take property for public use.81 Section 522(f) merely adjusts private benefits and burdens pursuant to the bankruptcy power. Thus application of § 522(f) is distinguishable from most cases involving the Takings Clause of the fifth amendment.

75. *Id.*
76. *Id.*
77. *Id.* (citing Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 161 (1971)).
79. 688 F.2d at 459-60.
80. *Id.* at 460.
81. *Id.*
The other court of appeals case holding that application of § 522(f) did not violate the Takings Clause of the fifth amendment, *In re Ashe*, 82 involved the attempted avoidance of a judicial lien under § 522(f)(1) of the Reform Act of 1978. The lien had come into effect before the enactment date of the Reform Act, therefore the creditors opposed avoidance of the lien on constitutional grounds. The court initiated its discussion by stating, "[t]he taking clause of the Fifth Amendment imposes a distinct substantive standard—just compensation—when private property is diverted to public use, even when the diversion takes place in the course of a bankruptcy proceeding." 83 That substantive standard, however, has nothing to do "with legislation which, while it affects the existence or value of a property right, does not devote the property to public use." 84 Likewise, "[o]nly if a taking for public use is found does the just compensation standing apply." 85

*In re Ashe* held that § 522(f) was clearly an "economic regulation rather than a taking for public use." 86 "If the exemption works a taking, it is a taking for the private use of the Debtors, not for the general use of the public or the particular use of a governmental agency." 87 Having found no taking for public use, the court stated that for substantive due process purposes such legislation should be measured by a rational basis analysis. 88 The court, relying on *United States v. Carolene Products Co.*, 89 determined that Section 522(f) was a rational resolution of the competing interests of debtors seeking rehabilitation and creditors seeking payment.

*Rodrock v. Security Industrial Bank*, 90 was the third court of appeals decision to discuss § 522(f) as a taking without just compensation. The *Rodrock* court based its decision on the Supreme Court decision in *Louisville Joint Stock Land Bank v. Radford* 91

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82. 669 F.2d 105 (3rd Cir. 1982).
83. *Id.* at 110 (citing Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974); New Haven Inclusion Cases, 399 U.S. 392 (1970); *In re* Penn Central Trans. Co., 494 F.2d 270, 278-79 (3rd Cir. 1974)).
84. 688 F.2d at 110.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. 304 U.S. 144 (1938).
90. 642 F.2d 1193 (10th Cir. 1981).
91. 295 U.S. 555 (1934).
which involved an amendment to the Bankruptcy Act by the Frazier-Lemke Act.\textsuperscript{92} The Act provided that a farmer who had failed to obtain the consents requisite to a composition under § 75\textsuperscript{93} of the Bankruptcy Act, may, upon being adjudged a bankrupt, acquire certain options in respect to his mortgaged property allowing him to retain ownership and enjoyment of his farm while taking from the mortgagee rights he had in the property as collateral. Additionally, the Act applied only to liens existing prior to the effective date of the Act.\textsuperscript{94}

Justice Brandeis, speaking for the \textit{Radford} Court, declared that "the Frazier-Lemke Act as applied has taken from the [creditor] without compensation, and given to Radford, rights in specific property which are of substantial value."\textsuperscript{95} The \textit{Rodrock} court found this language to be controlling. "In the instant cases, the creditors acquired rights in specific property prior to the enactment of the Reform Act, and, under \textit{Radford}, these vested rights cannot be taken from the creditor for the benefit of the debtor."\textsuperscript{96} The court further recognized that while Congress, under its bankruptcy power, may discharge a debtor's contractual obligations, it could not by virtue of the fifth amendment, take a creditor's property interest without just compensation.\textsuperscript{97} The court, having determined that the creditors' liens represented interests in property, held that avoidance of such liens was a violation of the fifth amendment.

D. "GAP" Period Liens

The Supreme Court case of \textit{Security Bank} and the three circuit court of appeals decisions, discussed above, dealt with pre-enactment liens—liens which came into effect before the Reform Act was signed into law on November 6, 1978. The Reform Act necessarily applies to liens arising after the effective date of the Reform Act, October 1, 1979. The period between November 6, 1978 and October 1, 1979 has commonly been referred to as the "gap" period, and liens arising during this period have met opposition

\textsuperscript{92} Frazier-Lemke Act, ch. 869, 48 Stat. 1289 (1934).
\textsuperscript{93} Bankruptcy Act, ch. 204, 47 Stat. 1470 (1933).
\textsuperscript{94} 295 U.S. at 576.
\textsuperscript{95} \textit{Id.} at 601.
\textsuperscript{96} 642 F.2d at 1197.
\textsuperscript{97} \textit{Id.}
when debtors have sought to avoid them under § 522(f). In Security Bank, the Supreme Court stated, "[b]ecause all of the liens at issue in this case were established before the enactment date we have no occasion to consider whether §522(f)(2) should be applied to liens established after Congress passed the Act, but before it became effective." Security Bank, therefore, does not prohibit the avoidance of liens which came into effect during the "gap" period.

A few Bankruptcy Courts have held that application of § 522(f) to "gap" period liens violates the fifth amendment but, a vast majority of Bankruptcy Courts have held that no violation occurs when liens which came into effect during the "gap" period are avoided. While there have been many Bankruptcy Court decisions discussing the application of § 522(f) to "gap" period liens, there has been only one Court of Appeals decision on the issue.

In In re Webber the two debtors had borrowed money from the creditor, Credithrift. Each debtor executed a note and signed a security agreement giving the creditor a nonpossessory, nonpurchase-money security interest in their household furnishings, goods and appliances. "The parties stipulated that each lien . . . arose after November 6, 1978 and before October 1, 1979." Subsequent to October 1, 1979, both debtors filed petitions in bankruptcy and sought to avoid the creditor's liens pursuant to § 522(f) and, as could be expected, the creditor opposed the avoidance of the liens on constitutional grounds. The Bankruptcy Court concluded that "[S]ection 522(f) [was] constitutional in so far as it applies to liens arising between November 6, 1978 and October 1,

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98. 103 S.Ct. at 414 n.11.
100. In re Fennell, 9 BANKR. 18 (E.D. Mich. 1981); In re McClaffin, 11 BANKR. 355 (N.D. Ill. 1981); In re Cohn, 11 BANKR. 611 (D. Mass. 1981); In re Teske, 9 BANKR. 18 (E.D. Mich. 1981); In re Pommerer, 10 BANKR. 935 (D. Minn. 1981); In re Baker, 11 BANKR. 125 (W.D. Mo. 1981); In re Wells, 7 BANKR. 875 (D. Colo. 1980); In re Seltzer, 7 BANKR. 80 (D. Colo. 1980); In re Beck, 4 BANKR. 661 (C.D. Ill. 1980); In re Primm, 6 BANKR. 142 (D. Kan. 1980); In re Steinart, 4 BANKR. 354 (W.D. La. 1980); In re Bradford, 6 BANKR. 741 (D. Nev. 1980); In re Rutherford, 4 BANKR. 510 (S.D. Ohio 1980); In re Webber, 7 BANKR. 580 (D. Or. 1980); In re Head, 4 BANKR. 521 (D. Tenn. 1980); In re Sweeney, 7 BANKR. 814 (E.D. Wis. 1980).
101. In re Webber, 674 F.2d 796 (9th Cir. 1982).
102. Id.
103. Id. at 799.
104. Id.
The creditor appealed both cases and the two were consolidated for hearing before the Ninth Circuit Court of Appeals.

One justice concluded in *In re Webber* that § 522(f) may constitutionally be "applied to a lien created after the statute was enacted but before it became effective." The court noted that "[w]hile *Radford* may . . . be controlling as to property rights which vested prior to the enactment of new bankruptcy legislation, we conclude that it is inapplicable to the issue considered here." This language was reinforced by the words of Justice Brandeis who stated, "that while the bankruptcy legislation considered in *Radford* was unconstitutional, '[t]he power over property pledged as security after the date of the Act may be greater than over property pledged before.'" The court also placed great weight on the fact that after the enactment date of the Act, the creditors were on notice of the provisions of the Act. The court concluded accordingly that "[w]hen Credithrift made the loans in July, 1979, it should have been fully aware that the exemption provisions of §522 would become effective on October 1, 1979, and that any bankruptcy filed subsequent to that date could result in an avoidance of their liens on the exempt property."

II. THE COURT'S REASONING

Given the uncertainty surrounding both the circuit court of appeals decisions and the Bankruptcy Court decisions, it became necessary for the Supreme Court to ascertain the Congressional intent and constitutionality of § 522(f).

In *Security Bank* the Court addressed the constitutional question "only to determine whether . . . the statute rais[ed] substantial enough constitutional doubts to warrant the employment of [one of] the canons of statutory construction." The "cardinal principle that the Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional questions may be avoided." The Court agreed that "§522(f)(2) [was] a

105. *Id.*
106. *Id.* at 804 (Schroeder, J., concurring).
107. *Id.* at 803.
108. *Id.* at 803 (citing *Radford*, 295 U.S. at 589) (emphasis added by *Webber* Court).
109. *Id.* at 804.
110. 103 S.Ct. at 410.
111. *Id.* at 412.
rational exercise of Congress' authority under Article 1, Section 8, clause 4, and that this authority [had] been regularly construed to authorize the retrospective impairment of contractual obligations."112 The court noted, however, that this power could not be used to "defeat traditional property interests. . . . The bankruptcy power is subject to the Fifth Amendment's prohibition against taking private property without compensation."113 Therefore, "however rational the exercise of the bankruptcy power may be, that inquiry is quite separate from the question whether the enactment takes property within the prohibition of the Fifth Amendment."114

The Court initiated its takings analysis with a discussion of the property interests at stake. It noted that the governmental action resulted in a total destruction of the secured parties' rights in the property.115 The government, representing the debtors, argued that the nonpossessory, nonpurchase-money security interest held by the creditors was "insubstantial" and, therefore, should not be given fifth amendment protection. The Court, rejecting the government's argument, stated that while "[t]he 'bundle of rights' which accrues to a secured party is obviously smaller than that which accrues to an owner in fee simple, . . . the government cites no cases supporting the proposition that differences such as these relegate the secured party's interest to something less than property."116

The Court agreed with the Tenth Circuit's discussion of the Radford decision, which dealt with the application of the Frazier-Lemke Act allowing a debtor to purchase his mortgaged property for less than its fair market value. The Frazier-Lemke Act applied only to mortgages in effect at the time the Act was enacted. The Radford Court "held the statute was void because it effected 'a taking of substantive rights in specific property acquired by the [mortgagee] prior to its enactment."117 Justice Brandeis, writing for the Radford majority, stated, "[i]f the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be

112. Id. at 410.
113. Id. (citing Radford, 295 U.S. at 589).
114. Id. at 410.
115. Id. at 411.
116. Id. (footnote omitted).
117. Id. at 411 (citing Radford, 295 U.S. at 590).
had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public."

The Security Bank Court also placed great weight on the case of Armstrong v. United States. In Armstrong a contractor agreed to build boats for the Navy. Materialmen delivered certain materials to the contractor, obtaining liens on the vessels under state law. The contractor defaulted and, as provided by contract, the contractor transferred title and possession of all completed and uncompleted work to the Government. Since it was impossible for the materialmen to enforce their liens, they brought suit claiming that the Government action resulted in a taking of property without just compensation. The Armstrong Court held, "[t]he total destruction by the government of all compensable value of these liens, which constitute compensable property, has every possible element of a Fifth Amendment 'taking' and is not a mere 'consequential incidence' of a valid regulatory measure." In Security Bank, the Government attempted to distinguish its case from Armstrong on the ground that Armstrong involved a physical "taking" of property for governmental use, while in Security Bank the "government . . . simply imposed a general economic regulation which in effect transfers the property interest from a private creditor to a private debtor." The Court recognized the distinction, but announced, "the takings analysis is not necessarily limited to outright acquisitions by the government for itself."

The Government's argument which carried the most weight with the Court concerned the actual value of the creditor's collateral. The Government argued that the creditor's interest was not deserving of fifth amendment protection since the "creditors . . . view[ed] the principal value of their security as a lever to negotiate for reaffirmation of the debt rather than as a vehicle for foreclosure . . . ." The Court agreed that this argument had some merit, but noted that it ran counter to the state's characterization of this type of interest as property and based on the state's defini-

118. 295 U.S. at 602 (quoted in Security Bank, 103 Ct. at 412).
120. Id. at 48. (quoted in Security Bank, 103 S.Ct. at 412).
121. 103 S.Ct. at 412.
122. Id.
123. Id.
tion of property, refused to accept the Government's argument.\textsuperscript{124}

While the Court did not specifically state that \textsection\ 522(f) violated the Takings Clause of the fifth amendment, the Court stated "that there is substantial doubt whether the retroactive destruction of the [creditor's] liens in these cases comports with the Fifth Amendment."\textsuperscript{125} Having met the "substantial doubt" criteria the Court set out to determine "whether a construction of the statute [was] fairly possible by which the constitutional question may be avoided."\textsuperscript{126} The Court of Appeals' determination that \textsection\ 522(f) was intended to apply retroactively to pre-enactment liens was found erroneous. The Court of Appeals had reasoned that if \textsection\ 522(f) did not apply to liens which came into existence before the enactment date, there would be no bankruptcy law covering such liens.\textsuperscript{127} The Supreme Court did not agree, pointing out that "Congress might have intended that provisions that destroy previously vested property rights apply only to interests that came into effect after the enactment date."\textsuperscript{128} This did not, however, prevent the remainder of the Reform Act from applying to pre-enactment liens. Therefore, while the Reform Act was to apply to all cases commenced after October 1, 1979, that did not necessarily mean that \textsection\ 522(f) had to apply in those cases involving pre-enactment liens.

In discussing the general principle that statutes apply only prospectively, the Court stated

\textit{\textsuperscript{124} Id.\textsuperscript{125} Id.\textsuperscript{126} Id.\textsuperscript{127} Id.\textsuperscript{128} 103 S.Ct. at 413.\textsuperscript{129} Id. (quoting Union Pacific R. Co. v. Laramie Stock Yards Co., 231 U.S. 190, 199 (1913)) (citations omitted).\textsuperscript{130} 232 U.S. 637 (1914).}
conditional sales contracts.” The Act had the effect of taking property interests which were in effect before the enactment date of the Act. The Court refused to “infer retroactivity absent an explicitly ‘expressed intent of Congress.’” In light of this principle, the legislative history of the 1978 Act suggests that Congress may not have intended that §522(f) operate to destroy pre-enactment property rights.

The Court’s final consideration was an argument which had been rejected by the Seventh Circuit in the case of In re Gifford. The Court pointed out that “[a]n early version of the 1978 Act contained an explicit requirement that all its provisions ‘shall apply in all cases or proceedings instituted after its effective date, regardless of occurrence of any of the operative facts determining legal rights, duties or liabilities hereunder.’” The Court noted that it was brought to Congress’ attention that this language could result in an unconstitutional taking. Whether or not the language was deleted because of the constitutional question, Congress eliminated the language from the final draft of the Act. The Court felt this was “some evidence that [Congress] did not intend to depart from the usual principle of construction.” The Court concluded by stating, “in the absence of a clear expression of Congress’ intent to apply §522(f)(2) to property rights established before the enactment date, we decline to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the takings clause.”

While the decision in Security Bank resulted in all nine Justices finding for the secured creditors, three Justices based their decisions on other grounds. Justice Blackmun, writing the concurring opinion, criticized the majority for so “quickly purs[ing] the route [it took] in order to avoid any constitutional issue.” Blackmun wrote, “[w]here we writing on a ‘clean slate’... I would not pursue, in this case, that principle of construction-preference,
for I think that the case would deserve consideration in greater depth.” 139 The concurrence would have found it necessary to reach the constitutional questions because nothing in the Reform Act showed even the slightest hint of only a prospective application. 140

Having reached the constitutional question, the concurring Justices would find in favor of the debtors and apply § 522(f) to pre-enactment liens because

the exemptions in question are limited as to kinds of property and as to values; because the amount loaned has little or no relationship to the value of the property; because these asserted lien interests come close to being contracts of adhesion; because repossession by small loan companies in this kind of situation are rare; because the purpose of the statute is salutary and is to give the debtor a fresh start with a minimum for necessities; because there has been creditor abuse; because Congress merely has adjusted priorities, and has not taken for the Government’s use or for public use; because the exemption provisions in question affect the remedy and not the debt; because the security interest seems to have little direct value and weight in its own right and appears useful mainly as a convenient tool with which to threaten the debtor to reaffirm the underlying obligation; and because the statute is essentially economic regulation and insubstantial at that. 141

Blackmun, however, pointed out, “we are not writing on a clean slate.” 142 He felt that Holt v. Henley 143 was “precisely in point and, unless the Court [chose] to overrule it, [it] must control the present case.” 144 In Holt the creditor installed a sprinkler system on the property of the debtor. The parties signed an agreement stating that the creditor was to remain the owner of the system until it was paid for. The creditor also had the right to enter and remove the system should the debtor default. Subsequent to this agreement the debtor mortgaged his property, the mortgage including the sprinkler system. In 1910 Congress enacted § 47a(2) 145 of the Bankruptcy Act which gave the trustee in bankruptcy the rights of a lien creditor. After the enactment of this new bankruptcy provision the debtor filed for bankruptcy. The

139. Id.
140. Id.
141. Id.
142. Id.
143. 232 U.S. 637 (1914).
144. 103 S.Ct. at 415.
creditor attempted to enforce his agreement by removing the system, but the subsequent mortgagees also claimed it. "Justice Holmes, writing for a unanimous Court, observed that before the amendment 'Holt had a better title than the trustees would have got' and that the Court was of the opinion 'that the Act should not be construed to impair it.'" 146

The concurrence observed that the Holt decision "also involved a pre-existing agreement, a subsequent change in the then Bankruptcy Act, and the Court's preservation of the pre-existing right." 147 Blackmun stated, "I see no way to distinguish that case from this one, and I would affirm the judgment of the Court of Appeals simply on the compelling authority of Holt v. Henley." 148

III. ANALYSIS

As the concurrence in Security Bank pointed out, the majority "greet[ed] with obvious relief the possibility of construing the Act as being only prospective in its operation." 149 Had the Court considered in greater depth the case law following Radford, it would have found a near total erosion of the Radford holding.

In Radford, the Frazier-Lemke Act was found to constitute a taking without just compensation of five property interests of the creditor in the debtor's mortgaged property:

1. The right to retain the lien until the indebtedness thereby secured is paid;
2. The right to realize upon the security by a judicial public sale;
3. The right to determine when such sale shall be held, subject only to the discretion of the court;
4. The right to protect its interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale or by taking the property itself and;
5. The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt. 150

146. 103 S.Ct. at 416 (citing Holt, 232 U.S. at 639).
147. Id.
148. Id.
149. Id. at 415.
150. 295 U.S. at 594-595.
Cases following Radford have dismembered the property interests that the Radford Court held were deserving of fifth amendment protection. Section 75(s) of the Frazier-Lemke Act, which was found to be unconstitutional in Radford, was amended on August 28, 1935, only four months after the decision in Radford. The new Act was said to preserve three of the five property rights set forth in Radford and was upheld as constitutional in Wright v. Vinton Branch of the Mountain Trust Bank of Roanoke. 151

The first right in Radford was "[t]he right to retain the lien until the indebtedness thereby secured is paid." 152 The Radford Court, stated that this meant until "the debt was paid in full." 153 While this right was preserved in Vinton Branch, it has subsequently been vastly eroded. In Adair v. Bank of America Assn. 154 this right was discounted when the Court allowed sale of crops free from a chattel mortgage despite an outstanding obligation. Following the Adair decision, it was further eroded by the Court in Wright v. Union Central Ins. Co. 155 when mortgagors were allowed the right to purchase their mortgaged property at an appraised value, despite a mortgage which exceeded the appraised value by nearly $10,000. The Union Central Court stated "[t]here is no constitutional claim of the creditor to more than that." 156 Therefore, it is clear that the right to retain the lien, until the debt is paid in full, no longer retains the fifth amendment protection granted in Radford.

The second right in Radford was "[t]he right to realize upon the security by a judicial public sale." 157 The first part of this right, the right to realize upon the security, was destroyed when the Court in Vinton Branch stated that a bankruptcy court may direct "that the property be sold free of encumbrances and the rights of all lien holders be transferred to the proceeds of the sale." 158 The second part of the right refers to a judicial public sale, and was held not to be required in Union Central when the Court held constitutional a provision which allowed the mortgagor to redeem the

151. 300 U.S. 440 (1937).
152. 295 U.S. at 594.
153. Id. at 579.
154. 303 U.S. 350 (1938).
155. 311 U.S. 273 (1940).
156. Id. at 278.
157. 295 U.S. at 594.
158. 300 U.S. at 470.
property by paying the appraised value. The Court stated that "[o]nly in case the debtor failed to redeem within a reasonable time would the court be authorized to order a public sale."\textsuperscript{159} Clearly, then, the mortgagee has no fifth amendment right to a judicial public sale of the property.

The third right in \textit{Radford} was "[t]he right to determine when such sale shall be held...\textquotedblright\textsuperscript{160} In \textit{Vinton Branch} the Court upheld the new Section of the Frazier-Lemke Act which gave the mortgagor the right to a three-year stay of his proceeding.\textsuperscript{161} The stay in effect prevented the creditor from bringing about foreclosure proceedings and a subsequent sale. In addition, because of the demise of the creditor's right to realize upon the collateral, the second \textit{Radford} right, the creditor's right to determine when a sale should be held is virtually meaningless.

The fourth right in \textit{Radford} was "[t]he right to protect its interest in the property by bidding at [the] sale...\textsuperscript{162} The \textit{Union Central} Court allowed the mortgagee the right to bid at a sale only if the mortgagor failed to redeem the property by paying the appraised value.\textsuperscript{163} The \textit{Vinton Branch} Court noted that the new Frazier-Lemke Act did not provide the mortgagee with the right to bid at the sale, but that Congress intended the mortgagee to have such a right.\textsuperscript{164} Obviously, the Court read only select Congressional Reports. A 1935 Senate Report stated, "it is not unconstitutional to limit or prohibit the mortgagee from bidding at an auction sale. In fact, the mortgagee is generally prohibited from bidding at his own sale, unless that right is given to him by statute or contract."\textsuperscript{165} Therefore, had the \textit{Vinton Branch} Court relied on this Senate Report it could just as easily have determined that Congress had not intended for the mortgagee to have the right to bid at a sale of the property.

The fifth right in \textit{Radford} was "[t]he right to control meanwhile the property during the period of default...\textsuperscript{166} Section 75(s) of the new Act of 1935 provided for the mortgagor to retain control

\textsuperscript{159} 311 U.S. at 281.
\textsuperscript{160} 295 U.S. at 594.
\textsuperscript{161} 300 U.S. at 460.
\textsuperscript{162} 295 U.S. at 594.
\textsuperscript{163} 311 U.S. at 281-82.
\textsuperscript{164} 300 U.S. at 459.
\textsuperscript{166} 295 U.S. at 595.
of the property during a moritorium of three years. The Vinton Branch Court upheld the new provision, reassuring mortgagees that the period of time could be shortened should the mortgagor default on his obligations during the three year period. Subsequently, in Union Central, the Court went a step further by allowing the mortgagor to retain possession, even after a default during the three year period, if the mortgagor would purchase the property for its appraised value.

Thus, each of the five rights esteemed in Radford have been impaired to such an extent that they no longer enjoy fifth amendment protection. Therefore, the Radford case could not be controlling in the Security Bank case. One commentator has remarked that, "[w]hen one compares the provisions struck down in Radford with those upheld in [Vinton Branch], the substantive similarities and merely formal differences are transparent." This leads to the conclusion that Vinton Branch in all reality overruled Radford.

The Court in Security Bank also relied heavily on Armstrong. The Court rejected the government's argument that Armstrong should be distinguished because it involved a taking for government use. The Armstrong case may be further distinguished on the ground that it involved a physical taking, the uncompleted boats, whereas, in the Security Bank case the benefits and burdens were merely shifted from debtors to creditors. A third distinction is the fact that the liens in the Armstrong case were purchase money security interests, whereas the liens in Security Bank were neither purchase money nor possessory in nature. Clearly, the Court had ample reason to rule that Armstrong should have no weight in its determination of the Security Bank case.

The Security Bank Court also failed to use the taking analysis discussed by the Seventh Circuit in Gifford. As recently as 1979, in Kaiser Aetna v. United States, the Supreme Court stated that when faced with a taking question factors which should be considered are "the economic impact of the regulation, its inter-

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167. 300 U.S. at 465-70.
168. 311 U.S. at 380-81.
170. 103 S.Ct. at 412.
ference with reasonable investment backed expectations and the
caracter of the governmental action. . . ." The Gifford court
carefully analyzed the two factors and concluded that the
creditor's interest did not warrant fifth amendment protection.
Certainly, the creditor's investment-backed expectations are less
than substantial. First, the creditor has no direct interest in the
collateral since his security interest is neither possessory nor pur-
chase money in nature. Second, the collateral in these cases is
virtually worthless to the creditors. Third, the creditors expec-
tations reside in the threat of foreclosure rather than actual fore-
closure on the goods. Fourth, the maximum that the creditors
could recover would be the value of the collateral, which is insig-
nificant at best. Finally as the value of the collateral is insignifi-
cant, the creditor's investment-backed expectations are also insig-
nificant.

The Gifford court then discussed the "character of the govern-
mental action." First, the government action does not amount to a
physical invasion since the creditor's interests are only nonposses-
sory, nonpurchase-money security interests. Second, the statute
merely impairs an abstract incident to a contract right. Third,
the statute does not take property for governmental or public use,
but merely shifts benefits and burdens from debtors to creditors.
Finally, the statute is limited to only nonpossessory, nonpurchase money security interests.

Given the insignificance of the creditor's expectations and the
limited nature of the governmental action, the Gifford court held
that the application of § 522(f) to pre-enactment liens did not amout to a taking of property without just compensation. Had
the Security Bank Court analyzed the case under the factors set
forth in Kaiser Aetna it would have been evident that § 522(f) did
not constitute a taking in violation of the fifth amendment. Justice
Blackmun, writing for the concurrence in Security Bank, stated he
would have found for the debtors if not for the precedent set by

172. Id. at 175.
173. 688 F.2d at 456 (quoting Matter of Ward, 14 BANKR. 549 (S.D. Ga. 1981)).
174. Id.
175. Id.
176. Id. at 458.
177. Id.
178. Id. at 459.
179. Id.
180. Id. at 460.
Holt v. Henley. The concurrence stated, "[w]e see no way to distinguish [Holt] from [Security Bank]." There is, however, a very obvious distinction between Holt and Security Bank. Holt involved a purchase money security interest in a sprinkler system. The creditor, by contract, retained an ownership interest in the sprinkler system until it was paid for. The creditor's interest in Security Bank was of a different nature. In Security Bank the creditor had no ownership interest in the property and only a non-purchase money security interest. Clearly, the creditor in Holt had a much greater right to retain his interest in the property than the creditor in Security Bank.

As Justice Blackmun pointed out, the majority in Security Bank "greet[ed] with obvious relief the possibility of construing the Act as being only prospective in its operation." To guarantee this result the Court appeared to disregard evidence of Congressional intent which pointed to a retrospective application. The Court stated that "[n]o bankruptcy law shall be construed to eliminate property rights which existed before the law was enacted in the absence of an explicit command from Congress." However, the Court failed to recognize that Congress did give just such a command. Section 402(a) of Title IV of the Reform Act specifically stated that "except as otherwise provided in [Title IV], this Act shall take effect on October 1, 1979." Title IV provided that some sections were to take effect at a time other than on October 1, 1979, but made no exceptions for § 522(f). The Security Bank Court pointed out that Congress was informed that there might be some constitutional problems involving the "impairment of vested property rights." Given this information, if Congress had been concerned with the constitutional question, it most assuredly would have provided a different effective date for § 522(f).

As the Bankruptcy Court pointed out in Curry, "this construction is further supported by the Reform Act's savings clause, which requires that a case commenced under the former Act shall proceed and the substantive rights of the parties shall be determined under the law that would be applicable if the Reform Act had not been enacted." Had Congress intended for liens arising

181. 103 S.Ct. at 416.
182. 103 S.Ct. at 415.
183. 103 S.Ct. at 414.
184. 688 F.2d at 450.
185. 11 BANKR. at 722.
before the enactment of the Reform Act to be governed by the old
Bankruptcy Act or no provision at all, it would have been very
simple for Congress to impose a requirement such as the savings
clause which would apply to pre-enactment liens. Congress, how-
ever, did not do so; it chose instead to have § 522(f) take effect on
October 1, 1979.

CONCLUSION

It is obvious, and the concurrence agrees, that the majority
reached their decision concerning Congressional intent because it
wished to avoid the constitutional question. While it may be ad-
vantageous to avoid a constitutional question in some cases, this
case does not appear to be one of those instances. By avoiding
the constitutional issue, the Court left many questions unanswered.

First, did Congress intend for § 522(f) to apply to “gap” period
liens? Second, does application of § 522(f) to “gap” period liens vi-
olate the fifth amendment? Third, does the application of § 522(f)
amount to a taking of property without just compensation when
applied to post-effective date liens? Fourth, which of the property
rights esteemed in Radford, if any, still enjoy fifth amendment
protection? And finally, what factors are to be taken into consider-
ation when determining whether an interest represents property
deserving of protection under the Takings Clause of the fifth
amendment?

The Court stated “we decline to construe the Act in a manner
that could in turn call upon the Court to resolve difficult and sen-
sitive questions arising out of the guarantees of the takings
clause.”186 It would appear to be more reasonable and advan-
tageous, however, to resolve the difficult and sensitive questions
presented by Security Bank than to merely put them off until the
question resurfaces. And it will surely resurface in the near
future, given the differing Bankruptcy Court decisions concerning
“gap” period liens.

In Security Bank the Court had the opportunity to not only
answer the questions surrounding the application of § 522(f), but
to determine where the line should be drawn between contract
and property rights. Nonpossessor, nonpurchase money security

(1977)) (footnote omitted).
interests such as those in Security Bank are on the border between contract rights and property rights. When the determination of a case could answer such an important question, the Court should not avoid the question simply because it is difficult and sensitive.

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CRIMINAL LAW—MURDER—INTENTIONAL KILLING OF VIABLE FETUS NOT MURDER—Hollis v. Commonwealth, 652 S.W.2d 61 (Ky. 1983).

INTRODUCTION

On the night of July 5, 1981, Robert Lee Hollis visited his estranged wife, Barbara, who was about seven months pregnant, at the home of her parents in Monticello, Kentucky, and allegedly told her that he did not want her to have the child. Hollis was accused of attacking his wife and shoving his hand up her vagina, causing the uterus to split and forcing the fetus outside the uterus into the abdomen.¹ Hollis was indicted in the Wayne Circuit Court for murder² on the basis that he wantonly engaged in conduct which caused the death of the unborn child of Barbara Hollis, with the intent to cause its death. He was also indicted for first degree assault upon Barbara Hollis. Dr. Larry Nunemaker, who performed the surgery necessary to remove the dead fetus from the mother's abdomen, stated in his deposition that the fetus weighed two pounds and was between twenty-eight and thirty weeks old. In Nunemaker's opinion, the fetus was viable in the sense that it would have lived, even though premature, if the delivery had been normal.³

Through his counsel, Hollis filed a motion to dismiss the indictment charging him with murder of the fetus on grounds that an unborn child is not a "person" as contemplated by the criminal homicide statute. Wayne Circuit Court Judge Leonard E. Wilson dismissed the murder indictment, holding that an unborn child is not a "person" under the murder statute.⁴ Judge Wilson also relied on the landmark decision of Roe v. Wade⁵ in finding that a fetus is not entitled to protection as a person under the fourteenth amendment of the United States Constitution.⁶

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². "A person is guilty of criminal homicide when he causes the death of another human being. . . ." KY. REV. STAT. § 507.010 (1975). "(1) A person is guilty of murder when: . . . (b) Under circumstances manifesting extreme indifference to human life, he wantonly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person." KY. REV. STAT. § 507.020(1)(b) (1975).
³. 29 K.L.S. 6, at 8 (Ky. Ct. May 21, 1982).
The Commonwealth, in appealing from the order of dismissal of the indictment, contended that it was a factual question whether or not the fetus of Barbara Hollis was a human being and that the jury should have the right to decide the question of guilt or innocence on the murder charge. The Kentucky Court of Appeals agreed with the Commonwealth that the question of whether or not the fetus was a living human being at the time of the alleged homicide was a proper subject of adversary litigation. The court of appeals, in holding that a viable fetus is a "person" within the contemplation of the murder statute, reversed the decision of the Wayne Circuit Court and remanded the case back to Judge Wilson for trial. The Kentucky Supreme Court, however, granted appellant's motion for discretionary review of the decision and considered whether a person who forcibly kills a viable fetus may be charged with criminal homicide under KRS § 507.020. The supreme court reversed the court of appeals decision and affirmed the dismissal of the indictment by the trial court, rejecting the Commonwealth's contention that Roe v. Wade was authority for the proposition that a viable fetus should be considered a "person" whose life is entitled to constitutional protection. The court suggested that proper prosecution lies under the criminal abortion statutes rather than the statutes related to criminal homicide. This note argues that because no evidence supports a legislative intent that the abortion statutes apply to the killing of a viable fetus without the mother's consent, and because the supreme court correctly held that a viable fetus is not a "person" within the contemplation of the criminal homicide statutes, the Kentucky General Assembly needs to enact legislation to prevent the possibility that such deplorable conduct may go unpunished.

I. BACKGROUND

In the thirteenth century, English common law reflected the Roman canon law of the time which held that one who caused an abortion by striking or poisoning a pregnant woman committed

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7. 29 K.L.S. 6 at 8.
8. Id. at 8.
11. 652 S.W.2d at 62.
12. Id. at 64.
homicide, if the fetus was "formed" or "animated." Between the thirteenth and seventeenth centuries, English common law developed the view that the killing of an unborn child was not homicide. The crime of homicide required the killing of one human being by another; causing the death of an unborn child was not regarded as homicide because the fetus was not considered a "person" before its birth. This seventeenth century English view was reported by Coke:

If a woman be quick with childe, and by a potion or otherwise killeth it in her wombe, or if a man beat her, whereby the childe dyeth in her body, and she is delivered of a dead childe, this is a great misprision, and no murder; but if the childe be born alive and dyeth of the potion, battery, or other cause, this is murder; for in law it is accounted a reasonable creature, in rerum natura, when it is born alive.

Coke's requirement that an infant be born alive was followed in the eighteenth century by Blackstone, who wrote that although the killing of a quickened fetus was homicide under the ancient law, the "modern law" viewed the act merely as a "heinous misdemeanor." The common law view of the status of the fetus was influenced by the "philosophical, theological, and medical conceptions of the period."

As indicated by both Coke and Blackstone, causing the death of an unborn fetus before "quickening" was not an offense. If a quickened fetus was killed, the offense was a "mispriison" or "misdemeanor." A modern review of the common law precedents cited by Coke, however, contradicts the suggestion that post-quickening abortion was ever actually established as an indictable offense at common law. The "quickening" distinction was preserved in England's first criminal abortion statute in 1803.

14. Id. at 420.
15. 3 E. Coke, Institutes, *50.
16. 1 W. Blackstone, Commentaries *129-130.
18. "Quickening" is "the first recognizable movements of the fetus, appearing usually from the sixteenth to the eighteenth weeks of pregnancy." Dorland's Illustrated Medical Encyclopedia 1299 (1974).
19. 410 U.S. at 135-36.
20. Id. at 136 (citing Lord Ellenborough's Act, 43 Geo. 3, c.58 (1803)).
The Act made abortion of a quickened fetus a capital crime, but it provided a lesser penalty for abortion before quickening. The distinction disappeared, however, along with the death penalty in 1837 and did not re-appear in subsequent abortion legislation.21

Against this background, several infanticide prosecutions against unwed mothers occurred in England in the mid-nineteenth century. At issue in each case was the determination of whether or not the infant had been born alive. The law required proof of live birth before a conviction of homicide could be returned by the jury.22

In 1832, the court in *Rex v. Poulton*23 held that a conviction of homicide was not possible unless the subject of the homicide was alive: “that the whole body is brought into the world; and it is not sufficient that the child respires in the process of the birth.”24

One year later in *Rex v. Enoch*25 the court used as the criterion for live birth the establishment of “an independent circulation in the child.”26 In the following year the court held in *Rex v. Brain*27 that the infant need not have breathed to be considered born alive, since “many children are born alive and yet do not breathe for some time after their birth.”28

By 1834, then, the English law required for live birth an independent circulation, but proof of breathing was not essential. *Regina v. Trilloe*29 provided further elucidation of the requirements of independent circulation. The case involved a mother who had strangled her infant after it had been fully produced from her body but before the umbilical cord had been severed. The court held that the infant could possess an “independent circulation” necessary for live birth even with the umbilical cord attached.30

These four cases summarize the development of the common law doctrine during the first half of the nineteenth century, and

21. Id.
24. Id. at 998.
26. Id.
28. Id.
30. Id.
they reflect the difficulty of establishing live birth. Although evidence of breathing was not considered to be necessary, independent circulation was determined to be indicative of live birth. Severance of the umbilical cord was not necessary for independent circulation, but other determinative factors of "independent circulation" remained vague due to the limited development of medical and scientific measurement. In cases involving illegitimacy, the births were usually surrounded by secrecy, increasing the difficulty of obtaining testimony to establish whether or not the infant was born alive. Because of the difficulty in formulating criteria for "independent circulation", and due to public sentiment against imposing capital punishment against unwed mothers, the Infanticide Acts of 1922 and 1938 were enacted. These statutes provided that a mother who killed her child under twelve months of age was to be punished for manslaughter rather than murder, if at the time of the crime the mother was suffering from a mental disturbance as the result of giving birth. The effect of the statutes was to make the question of live birth generally irrelevant, for the courts "now had available the compromise charge of manslaughter for which no proof of live birth was thought to be necessary."

The English common law rule requiring proof of live birth for a homicide conviction in the death of an infant was the American majority view by 1850. The problems surrounding the proof of live birth plagued the American courts just as they did in the early English courts. Although some of the cases have gone to "ridiculous lengths" the rules have not been abandoned in the modern common law of America. In People v. Greer, the court pointed out the incongruous results possible under the rule: "If the fetus survives long enough to be born and take a single

32. Id. at 107.
33. Id. at 107-08 (citation omitted).
34. Id. at 108.
36. See generally Meldman, supra note 31, at 108-12, which collects and discusses attempts of the American courts to define "independent circulation."
38. 79 Ill. 2d 103, 402 N.E.2d 203 (1980).
breath, the defendant committed homicide. If, however, the fetus expires during birth, or just before, homicide has not occurred. 39

In People v. Chavez, 40 however, the California Court of Appeals did reject the "born alive" requirement of the common law. In Chavez, the mother accused of murdering her newborn infant was the only witness to the childbirth, and her testimony was inconclusive on the question of whether the infant was alive at the conclusion of the birth process. Medical testimony indicated that the fetus was alive during the birth process but could have expired before the process was completed, prior to a complete separation of child and mother. 41 The court held that a viable fetus in the birth process was a "[h]uman being within the contemplation of the homicide statutes, whether or not the process has been completed." 42 To hold otherwise, the court said, would be a "mere fiction." 43 The California Supreme Court in Keeler v. Superior Court of Amador County 44 limited Chavez by stating that the case did not hold that "a fetus, however viable, which is not 'in the process of being born' is nevertheless 'a human being' in the law of homicide." 45

Some states have avoided the difficulty of proof of live birth by enacting legislation "[e]xpressly including a fetus within the definition of victims of homicide, or by passing a separate feticide statute." 46 New York began the movement in 1830 by enacting a statute punishing feticide as manslaughter and a companion section prohibiting abortion. 47 At least five other states followed New York and enacted similar legislation between 1830 and 1850. 48 In more recent years, several states have passed legislation proscribing feticide. 49 In the absence of such a legislative enactment, however, no court of last resort in this country has held that the

39. Id. at 111, 402 N.E.2d at 207.
41. Id. at ____, 176 P.2d at 93.
42. Id. at ____, 176 P.2d at 94.
43. Id. at ____, 176 P.2d at 95.
44. 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970).
45. Id. at 637, 470 P.2d at 629, 87 Cal. Rptr. at 493.
46. 79 Ill. 2d at 111, 402 N.E.2d at 207.
47. 2 Cal. 3d at 627-28, 470 P.2d at 621-22, 87 Cal. Rptr. at 485-86 (citing N.Y. REV. STAT. pt. IV, ch. 1, tit. 2 §§ 8-9 (1829)).
48. Id. at 628, 470 P.2d at 622, 87 Cal. Rptr. at 486.
49. See, e.g., CAL. PENAL CODE § 187 (Deering 1971); MICH. COMP. LAWS ANN. § 750.322 (1968).
killing of a fetus is murder unless the fetus is born alive and then expires.\textsuperscript{50}

Kentucky adopted the approach of the old English doctrine requiring proof of live birth as a necessary element of infanticide in \textit{Jackson v. Commonwealth}.\textsuperscript{51} In \textit{Jackson}, the mother allegedly strangled her infant immediately after its birth. In the opinion of the medical expert, the autopsy revealed that the child had breathed after it was born and died as a result of strangulation.\textsuperscript{52} The court set forth the requirement for conviction:

\begin{quote}
[In order to establish the \textit{corpus delecti} . . . it must also be established that the child was born alive. In the absence of proof that the child had ever breathed or was alive at birth a conviction can not be sustained. It is necessary for the Commonwealth to prove affirmatively, not only that the child had breathed, because that might occur during birth, but that it had had a complete and separate existence of its own after birth. Being born means that the whole body is brought into the world. . . . But if a child is fully brought forth from the body of its mother, and is killed while still connected by the umbilical cord, it is murder.\textsuperscript{53}]
\end{quote}

The law in Kentucky as established by the \textit{Jackson} court required live birth of an infant before a conviction could stand for murder of the infant. At that time, however, Kentucky also had an infanticide statute under which the defendant Jackson could have been prosecuted; under that statute it was not material whether the infant was born alive.\textsuperscript{54} Although \textit{Jackson} was decided in 1936, no other reported Kentucky cases before \textit{Hollis v. Commonwealth}\textsuperscript{55} have addressed the issue of whether the forcible killing of a viable fetus could result in a murder conviction.

However, another line of Kentucky cases has declared a fetus as

\begin{itemize}
\item \textsuperscript{50} 79 Ill. 2d at 111, 402 N.E.2d at 207.
\item \textsuperscript{51} 265 Ky. 295, 96 S.W.2d 1014 (1936).
\item \textsuperscript{52} \textit{Id.} at 297, 96 S.W.2d at 1015.
\item \textsuperscript{53} \textit{Id.} at 296, 96 S.W.2d at 1014 (quoting \textsc{J. Roberson, Roberson's New Kentucky Criminal Law and Procedure} 563 (2d ed. 1927)).
\item \textsuperscript{54} Concealing birth or destroying bastard child.—If any woman be delivered of any issue of her body, which, being born alive, would be a bastard, shall endeavor privately, by drowning or secretly burying the same, or in any other way, directly or indirectly, to conceal the birth thereof, so that it may not be known whether it was born alive or not, she shall be confined in the penitentiary not less than one nor more than five years. \textsc{Carroll's Ky. Stat. Ann.} § 1220 (Baldwin 1936).
\item \textsuperscript{55} 652 S.W.2d 61 (Ky. 1983).
\end{itemize}
a "person" for the purpose of wrongful death and injury actions. In *Mitchell v. Couch*, an expectant mother in the last stage of pregnancy was injured in an automobile accident. Two days later she delivered a stillborn baby; the mother herself then died. The issue before the court was whether an action could be maintained in Kentucky "for the wrongful death of an infant arising out of prenatal injuries." The court relied on § 241 of the Kentucky Constitution which allows for the recovery of damages "[w]henever the death of a person shall result from an injury inflicted by negligence or wrongful act . . ." and on § 411.130 of Kentucky Revised Statutes which carries out the purpose of § 241. The court noted a trend toward allowing a wrongful death action for viable unborn children and concluded: "The most cogent reason, we believe, for holding that a viable unborn child is an entity within the meaning of the general word 'person' is because, biologically speaking, such a child is, in fact, a presently existing person, a living human being." Accordingly, the court held that a right of recovery for wrongful death arises under the statute when a viable infant dies as a result of injuries negligently inflicted upon its pregnant mother.

In *Orange v. State Farm Mutual Auto. Ins. Co.*, the court considered whether a viable fetus was a "person" and "member of a family" for purposes of coverage under an automobile liability insurance policy. Relying on *Mitchell*, the court found that "[o]nce the stage of viability is reached the fetus is regarded as a legal 'person' with a separate existence of its own" for the purposes of a tort involving injury. Subsequent to *Mitchell* and *Orange*, other Kentucky cases have allowed an action for the wrongful death of an unborn viable fetus, accepting as settled law that a right to recovery exists.

56. 285 S.W.2d 901 (Ky. 1955).
57. Id. at 903.
58. Ky Const. § 241 (emphasis added).
60. 285 S.W.2d at 903.
61. Id. at 905.
62. Id. at 906.
64. 44 S.W.2d 650, 651 (Ky. 1969).
65. See, e.g., House v. Kellerman, 519 S.W.2d 380 (Ky. 1975) (damages to estate of unborn child allowed); Rice v. Rizk, 453 S.W.2d 732 (Ky. 1970) (measure of damages is the loss of the infant's power to earn money).
II. THE COURT'S REASONING

The Kentucky Supreme Court, in *Hollis v. Commonwealth*, began its analysis by noting that its decision was limited to the issue of whether "a person who kills a viable fetus, at this time and under the statutes of this state, can be charged with 'Criminal Homicide' as set out in Chapter 507 of the Kentucky Revised Statutes?" The court explicitly did not consider the larger question of "WHEN DOES LIFE BEGIN?"

The court approached the criminal homicide issue by addressing three questions: 1) what is included in the common law definition of murder; 2) what is the impact of United States Supreme Court decisions on the issue; and 3) what is included within the word "person" under "recognized rules of statutory construction?"

In considering the historical definition of murder, the court acknowledged the common law requirement of proof of live birth for a homicide conviction. In Kentucky, the court observed, this principle is recognized in *Jackson v. Commonwealth*, where the issue was whether there was sufficient evidence to establish live birth of the infant. The supreme court rejected the contention of the Commonwealth that the status of the viable fetus has evolved in the "eyes of society" and the "law as expressed by the United States Supreme Court" to that of a "person." Acknowledging that the argument had some instinctive appeal, the court nevertheless concluded that the proposition "cannot stand up to the rule of law which both guides and restrain our hand." No other state, the court reasoned, has allowed a prosecution for murder absent proof that the infant was born alive.

Secondly, the court examined the impact of the United States Supreme Court decision of *Roe v. Wade* on the status of the viable fetus. The Commonwealth contended in *Hollis* that under...
the holding of *Roe*, the viable fetus acquired the status of a victim of criminal homicide. The court found such a proposition untenable, explaining that *Roe* does not require the viable fetus to be considered as a "person," much less as a victim of murder.\(^\text{77}\) The holding of *Roe*, the court continued, is that "a woman's decision whether or not to terminate pregnancy is protected by the Due Process Clause of the Fourteenth Amendment, to such extent that the state has no 'compelling' interest permitting it to make abortion unlawful until the third trimester of pregnancy. . . ."\(^\text{78}\) Further, *Roe* allows the states to regulate the manner in which abortions are performed beginning in the second trimester and to proscribe abortion after viability, subject to exception when the life or health of the mother is involved.\(^\text{79}\) To declare that Kentucky is exercising its right to regulate abortion through § 507.020 of the murder statute, the court concluded, is "totally inconsistent with any rational interpretation of that statute."\(^\text{80}\)

The court initiated its analysis of the question of statutory construction of "person" as used in § 507.020 with the observation that, because "person" is not defined anywhere in the statute, "it should be interpreted in conformity with the law regarding criminal homicide as it existed at the time when the statute was passed."\(^\text{81}\) That law, the court continued, as set forth in *Jackson v. Commonwealth*, required proof of live birth.\(^\text{82}\) The court rejected the argument that the law at the time of passage of § 507.020 allowed criminal liability for causing the death of a viable fetus. Although the decision of *Mitchell v. Couch*\(^\text{83}\) allowed a civil action for the death of a viable fetus, the court concluded that it would be "fundamental error" to create such a crime based on case law rather than a statute where "criminal sanctions are supposed to flow from the Kentucky Penal Code rather than evolving out of court decisions. . . ."\(^\text{84}\)

Because the Commentary to the Kentucky Penal Code makes repeated references to the Model Penal Code of the American Law Institute, the court examined the Commentary to the Model Penal Code.
Code and found that the language, suggested that the common law requirement of live birth remains in effect unless a statute expressly indicates a contrary intent. The court reasoned that because the Kentucky Penal Code evidenced no intent to change the common law definition of "person" the court itself was without the power to expand the class to include the viable fetus as a victim.

Next, the court considered inherent problems of uncertainty that would arise if it held that a viable fetus could be considered a victim of homicide. Unless "some objective legal standard for deciding if the accused knew he was terminating the life of a viable fetus" was established, the court determined that the decision would be void for vagueness. Citing Colautti v. Franklin, in which the United States Supreme Court found unconstitutionally vague a Pennsylvania statute requiring a person performing an abortion to take steps to preserve the life of any fetus that was viable, the court commented that a decision finding a viable fetus to be a person would have profound effects upon physicians performing abortions.

Applying the rule of statutory construction that "the specific statute controls a more general statute," the court next determined that the Kentucky abortion statutes would apply to the defendant's alleged conduct rather than the more general homicide statutes. The court found the following abortion sections relevant: 1) § 311.720(1), which defines abortion as "the use of any means whatsoever to terminate the pregnancy of a woman known to be pregnant with intent to cause fetal death;" 2) § 311.720(5), defining a fetus as "a human being from fertilization until birth;" 3) § 311.750, which provides that "no person other than a licensed physician should perform an abortion," with an exception for the first trimester of pregnancy; and 4) § 311.990(14), providing a penalty of ten to twenty years' imprisonment for violation of § 311.750.
Because Kentucky case law mandates that specific legislation controls a more general statute, the court found "the conclusion ... inescapable that the legislature intended conduct directed to cause the unlawful abortion of a fetus, viable or not, to be punished under the abortion statutes." The court summarily disposed of the argument that the abortion statutes are applicable only where the pregnant woman consents, observing that nowhere in the statutes is it suggested that consent is a necessary element of abortion. Likewise, the court found invalid the contention that the doctrine of merger prevented Hollis from being prosecuted for both abortion and first degree assault, relying on Commonwealth v. Allen, where a husband, accused of forcibly causing his wife's miscarriage, was found to be subject to prosecution under the abortion statute in effect at that time.

III. Analysis

The Kentucky Supreme Court properly reversed the extension of § 507.020 by the court of appeals to include the unborn child as a victim of homicide because such an inclusion of the viable fetus within the meaning of "person" was improper. Although the appellate court had relied on Mitchell v. Couch and its progeny, which allowed civil action for the wrongful death of the viable fetus, realistically, there is an obvious difference between allowing the parents to recover monetary damages for the loss of an anticipated child and convicting a defendant under the criminal homicide statute. The supreme court rightly refused to make the step from civil liability to criminal prosecution and instead relied upon the precedent established in Jackson v. Commonwealth, requiring proof of live birth for the murder prosecution.

The supreme court also correctly determined under accepted rules of statutory construction that "person" could not be extended to include the unborn child. "Person" is defined for the purposes of the Penal Code in § 500.080(12) of Kentucky Revised

94. 652 S.W.2d at 64-5 (citing City of Bowling Green v. Board of Education, 443 S.W.2d 243, 247 (Ky. 1980)).
95. 652 S.W.2d at 65.
96. Id.
97. Id.
98. 191 Ky. 624, 231 S.W. 41 (1921).
99. 285 S.W.2d 901.
100. 265 Ky. 295, 96 S.W.2d 1014.
Statutes to mean "human being, and where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or a governmental authority." Nothing in the language of the statutes or the accompanying notes reflects an intent of the legislature to extend the meaning of "human being" or "person" to include the unborn. No other state has extended a homicide statute to cover the fetus absent a specific legislative directive.

Also, the court properly rejected the Commonwealth's contention that Roe v. Wade gives the viable fetus constitutional protection as a person; that argument was specifically rejected in Roe v. Wade: "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." Further, the court's consideration of the constitutional problems of vagueness if it had found the viable fetus to be a person were accurate in light of Colautti v. Franklin.

However, the court's analysis of the application of Kentucky's abortion legislation is flawed. Having determined that the homicide statutes are not applicable, the court nevertheless speculated that if it had held otherwise, the abortion statutes rather than the murder statutes would apply because "the specific shall prevail over the general." First, the court relied on an inappropriate abortion statute. Hollis' alleged conduct occurred in 1981; the definition of abortion in § 311.720(1) cited by the court did not become effective until July 15, 1982. The law in effect at the time Hollis allegedly attacked his wife defined abortion as "an act, procedure, device or prescription administered or prescribed for a pregnant woman by any person ... producing the premature expulsion of the fetus..." However, the court's error does not affect its holding that a viable fetus is not a person for the purposes of § 507.020. Its discussion of the applicability of the abortion statutes is inaccurate for other reasons.

103. 410 U.S. 113.
104. Id. at 158-59.
105. 439 U.S. 379.
106. 652 S.W.2d at 65 (quoting City of Bowling Green v. Board of Educ., 443 S.W.2d 243, 247 (Ky. 1969)).
107. On July 6, 1983, the Kentucky Supreme Court denied a petition for rehearing of Hollis requested because of this error; the court modified the opinion on its face.
tion legislation was based on the hypothetical argument that a finding of the viable fetus as a "person" would require application of the rule that the specific statute would apply rather than the general homicide statute.\footnote{109}

Although the court concluded that "the legislature intended conduct directed to cause the unlawful abortion of a fetus, viable or not, to be punished under the abortion statutes,"\footnote{110} it is not altogether clear that the legislature did intend for prosecution under the abortion statute when the mother does not consent to the abortion. Because the abortion legislation and accompanying notes are silent on the question of lack of consent, the court assumed that the statutes cover both the situation where the consent is not given by the mother and where the consent given does not comply with statutory requirements.\footnote{111} The court failed to consider that the abortion legislation falls under Title XXVI, Occupations and Professions, of Kentucky Revised Statutes, and the resulting implication that the statute is intended to apply to physicians. As Justice Wintersheimer commented in his dissent:

The facts of this case do not fit within the abortion statute. The actions of the father did not actually produce the premature expulsion of the unborn child. The child was not expelled; it was surgically removed after being killed by its father. None of the other elements generally associated with abortion are present here. There was no consent by the pregnant woman, much less the written informed consent required by the law. Here no physician or hospital was involved. . . .\footnote{112}

However, if Hollis should not be prosecuted under the abortion statute, as this note suggests, and he cannot be prosecuted under the murder statute, under the holding of the supreme court, prosecution would lie only for first degree assault on the mother, with the result that the intentional killing of the viable fetus would go unpunished. The Kentucky General Assembly must enact legislation to prevent such a possibility. Several state appellate courts have held that a fetus is not a person within the contemplation of

\footnote{109} 652 S.W.2d at 65.
\footnote{110} Id.
\footnote{112} 652 S.W.2d at 67 (Wintersheimer, J., dissenting). Note that Justice Wintersheimer properly relied on the 1974 abortion statute although the majority erroneously cited the 1982 statute.
a homicide statute and have called upon their respective state legislatures to make the intentional killing of the viable fetus analogous to murder. 113 The ramifications of such an action, however, are undesirable; any reckless conduct resulting in the death of the fetus would come within the scope of reckless homicide legislation, with the result that one causing the death of a viable fetus in an auto accident, for example, could be both criminally and civilly liable. 114 Because the intentional killing of the unborn is usually an attack directed against the pregnant woman, 115 an alternative for the General Assembly would be to enact legislation enhancing the criminal penalty for first degree assault in the situation where the defendant was aware that the victim was pregnant at the time of the attack. 116 Such legislation would shift the focus of the crime away from the determination of viability to the defendant's knowledge of the victim's pregnancy, a question the jury can more easily comprehend.

CONCLUSION

The Kentucky Supreme Court correctly reversed the appellate court's construction of KRS § 507.020 to include the viable fetus within the meaning of "person". Such an interpretation was not supported by precedent, by the language of the statute, or by any evidence of legislative intent. The supreme court's suggestion that proper prosecution lies under the state abortion statutes is questionable; the defendant's alleged act did not comply with the statutory definition of abortion and the abortion legislation does not expressly include abortion performed without the mother's consent. The Kentucky General Assembly should enact legislation to prevent the possibility that the intentional killing of a viable fetus may be punished only as first degree assault against the pregnant woman.

MARGARET A. MILLER

113. See, e.g., State v. Larsen, 578 P.2d 1280 (Utah 1978); People v. Greer, 79 Ill. 2d 103, 402 N.E.2d 203 (1980).
114. Brief of Amicus Curiae American Civil Liberties Union Foundation at 17, Hollis v. Commonwealth, 652 S.W.2d 61 (Ky. 1983).
115. Id. at 19.
116. Id. at 20-21.