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A BRIEF HISTORY OF HOUSE ARREST AND ELECTRONIC MONITORING*

J. Robert Lilly and Richard A. Ball**

Recent years have seen a dramatic explosion of interest in the development of what has been referred to traditionally as "house arrest." This term is often used loosely and it is probably preferable to refer to this correctional policy alternative as home confinement, a term that has the virtue of covering more specific practices such as home detention (in which the residence is used as a detention facility) and home incarceration (in which the residence replaces a jail or prison as a point of incarceration). The term "house arrest" tends to imply police action without much in the way of judicial process. Nevertheless, the term may be appropriate in a nontechnical sense in that it offers a means

* This article, in part, is drawn from the forthcoming book, R. BALL, R. HUFF & J.R. LILLY, HOUSE ARREST AND CORRECTIONAL POLICY: DOING TIME AT HOME (1987). The authors are grateful to A. Harold Lilly for information he provided on St. Paul the Apostle's "house arrest."


1. For example, when Kenton County, Kentucky, began its pilot project with home incarceration and electronic monitoring in 1985, it was the third such program in the United States. By December, 1986, there were at least 45 similar programs in the nation. The rapid interest in house arrest and electronic monitoring allowed Anthony Travisono, executive director of the American Corrections Association, to state that "1985 was the year that mentioning house arrest and electronic monitoring no longer raised eyebrows." Taylor-Weeks, Behavioral Electronics, 41 JERICO 3, 4 (May 1986).

The interest in manufacturing electronic monitoring equipment for criminals also experienced a rapid growth. When only a dozen states or local jurisdictions were using house arrest, no more than seven companies were manufacturing "electronic handcuffs." By December, 1986, more than a dozen companies were in competition for new clients. The manufacturer with the most clients in January 1987 was Corrections Services, Inc., West Palm Beach, Florida; it supplies nearly 50 percent of the nation's home incarceration and electronic monitoring sites with monitoring equipment. Orders for this type of equipment has also changed dramatically. While lease or purchase orders of 10-20 units for experimental purposes were still common in late 1986, orders for as many as 100-150 units, worth $300,000-$350,000, were also appearing. Report: Jail Costs Will Soar to $775 Million, Palm Beach News, Dec. 10, 1986, at B1. And by early 1987, prison overcrowding in Texas and Florida fueled manufacturers to speculate that orders for 1,000-3,000 units would soon occur.
of communicating the policy to the general public, a starting point in an effort to communicate more precisely the exact nature of this correctional alternative.

Home confinement has been both praised and damned. It has been praised as more humane and less "corrupting" than confinement in a correctional institution and promising as an economical alternative to building more jails and prisons. It has been condemned, or at least seriously questioned, because it seems to turn the home into a prison, setting a dangerous precedent and violating the sanctity of one's home as one's "castle," a last refuge from governmental intrusion. In this article, we examine the historical context in which "house arrest" has suddenly become so popular.

Until the mid-twentieth century, it could be said that European history had shown three fairly distinct periods in the punishment of offenders. This tradition was brought to North America. It is our contention that the past two decades have seen a major historical shift, with both Europe and North America moving into a fourth phase of what is now called correctional policy, and that the recent "house arrest" movement is part of this new phase. If we limited ourselves to the role of correctional technicians, it might be possible to ignore all this and merely proceed to the "practical" question of whether the policy "works" or "fails." But there is a larger obligation. At least some effort must be made to understand where we have been and where we may be going.

During the early Middle Ages, offenders were punished almost exclusively by undergoing voluntary penance through physical suffering or payment of fines. The acceptance of punishment often followed a confession to religious authorities such as a priest, with the offense defined as a sin and the penance as a symbolic repair for the wrongdoing. Such policy was consistent with the social conditions of the time. Reality itself was defined primarily in terms of religious conceptions of the sacred and profane. The population was stable, land was readily available, and laborers were needed. Aside from the nobility and the clergy, wealth was distributed rather evenly. Crimes tended to be the product of

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"the primitive stirrings of sexuality and hatred" rather than of economic motivation. A peasant had no need to steal from a neighbor what he could produce himself and there was little thought of excluding offenders from the community.

By the late Middle Ages, social conditions had changed considerably in Europe and the punishment of offenders had entered a second phase. The population had expanded significantly and available land had been settled. A quasi-capitalistic economic order had developed and so had a host of social problems familiar to us today, including unemployment, crowded living conditions, low wages, and new crime problems. Property crimes became more common as hordes of beggars, thieves, and "rabble" crowded within the cities. Religious authority was being supplanted by secular authority and fines were of little use because the poor had no money or possessions with which to pay. Traditional means of punishment gave way to new techniques as attention was directed toward the body of the offender. Public whippings, branding, mutilation, and execution became the nearly universal means of punishment as the most gruesome tortures were applied to the body.

Some cities gibbeted portions of the body on high posts outside the city walls forewarning what awaited evildoers should they violate the laws. Sometimes the physical remains would be soaked in tar so that they would last a long time as a warning to potential offenders. As late as the fifteenth century, England had only seventeen capital offenses, most of which were of a religious nature. By 1780, however, there were 350 capital crimes, most of which were for property offenses, some so seemingly trivial as burning a haystack. In place of religion, a "property-conscious oligarchy" had assumed power, defining reality and molding the criminal law in terms of its concerns.

The early signs of what was to become a third phase in the punishment of criminals can be found in the "houses of correc-

3. Id.
6. See E. Sutherland & D. Cressey, Criminology (1978) (quoting W. Andrews, Old-Time Punishments (1890)).
tion” that appeared in Calvinist Amsterdam in 1596, near the end of the Middle Ages. 9 Here the city burghers sought to introduce labor and religious instruction as a means of correcting offenders. This development was associated with an expansion of trade and the growth of new markets outside Europe at a time when the plague had decimated the population, creating a shortage of labor. Although physical cruelty continued as the most popular means of punishing offenders, a new “humanitarianism” had begun to appear, a “humanitarianism” that happened to be perfectly consistent with the “work ethic” appropriate to the new economic order being born. Central to this “work ethic,” which was to be a means of transforming rural peasants and urban rabble into a disciplined labor force of “willing workers,” was a preoccupation with the concepts of “discipline” and “time.”

The goal of developing disciplined labor was expressed in the name selected for the workhouses, *Tuchthuis*, which meant “house of discipline.” While the earlier “bridewells” in England had tended to be places where the urban poor could be locked up at hard and useless labor, the *Tuchthuis* was a clear example of the “specificity of bourgeois punishment.” The *Tuchthuis* was a specific reflection of the spreading of capitalist management throughout the entirety of social relationships, part of the general making of bourgeois human types whose work behavior would approximate the efficiency of machines. 10 To accomplish this, the body was treated less as an object upon which to inflict suffering than as a docile object that could be “subjected, used, transformed and improved.” 11 The body considered in this way was no longer the exclusive possession of an individual but a “thing” that belonged to those who could own it and “correct” it.

At the *Tuchthuis*, the body of the prisoner belonged to manufacturers and merchants usually associated with the weaving industry. These businessmen were in a position to exploit the labor of vagrants, beggars, and runaways while making of them willing workers. The combination of a focus upon “discipline” and “time” can be seen in the technique of assigning a specific task with a daily and weekly quota to be met. At the *Tuchthuis*,

11. Foucault, supra note 4, at 136.
the job was rasping dyewoods and it was this work that gave the facility its more famous designation as the Rasphaus.\textsuperscript{12} Prior to this point in European history, time had been conceptualized in terms of "season," "epochs," and other broad terms connoting temporal rhythms experienced by people as a whole.\textsuperscript{13} Now the new abstract, "clock time" served to disengage humans from the natural rhythms and force them into a new temporal matrix stressing precise dividing of temporal sequences into specific measurable units that could be "earned" or "wasted." each minute or hour the exact, quantifiable equivalent of any other.

Development of new markets overseas and exploitation of raw materials to be found there were major factors motivating the explorations of the fifteenth and sixteenth centuries. In England, it gradually became clear that control of North America depended upon the establishment and defense of permanent settlements. Despite the land grant policies and provisions for free transportation and employment for several years as an indentured servant, it was not so easy to persuade settlers to make such a move. Beginning in the late sixteenth century (1597), England authorized transportation to the colonies as an alternative sentence for convicted debtors, a policy deemed so successful in adding settlers that it was expanded in 1718 to include all criminals who had been sentenced to three or more years of imprisonment.\textsuperscript{14} Most European countries followed England's lead, France beginning transportation in earnest in 1791 and Russia embracing the policy on such a grand scale that being "sent to Siberia" became synonymous not only with penal transportation but with almost any form of social banishment.

The themes of discipline and scheduling were interwoven in transportation policy through imposition of forced labor on the convicts and setting of length of sentences, both of which were measurable. So much work had to be accomplished within a particular period of time; strict planning and control allowed for the carefully rationalized planning of economic ventures such as road building, forestry, or quarry work.\textsuperscript{15} Transportation con-

\textsuperscript{12} See Shank, Thorsten Sellin's Penology, in \textit{Punishment and Penal Discipline} 32 (1980).
\textsuperscript{13} See E. James, \textit{Seasonal Feasts and Festivals} (1961); and E. Zerubavel, \textit{Hidden Rhythms} (1981).
\textsuperscript{14} See L. Bowker, \textit{Corrections: The Science and the Art} (1982).
tinued in North America until the Revolution, when the colonists had learned to resent the convicts being sent into the colonies and had discovered that African slaves could be controlled and exploited more easily than English convicts. 16 England then shifted the direction of its transportation policy to Australia, where convicts could be placed in penal colonies or assigned to settlers for a period of as much as eight years before they became eligible for a "ticket of leave." The new definition of the punished body as an object—a commodity like any other that could be bought and sold, "disciplined," "corrected," and exploited for profit at the same time—is perhaps especially clear in the policy by which individuals could contract with European governments to transport convicts who could then be sold for periods of servitude ranging from three to fourteen years. 17 This application of private enterprise to the "solution" of correctional problems is as old as capitalism itself.

Transportation, however, was only an interlude in the historical development of European punitive policy toward offenders as it moved from a religious orientation expressed through notions of expiation through penance to a more secular orientation stressing the infliction of pain or death to the body and then to the concept of imprisonment in a tightly controlled environment designed to remake the offender into a disciplined laborer. And there was considerable overlap among the three basic phases, especially in the colonies of North America. Penal institutions existed in the colonies but they were uncommon for many years, partly because of lack of construction and maintenance funds and partly because the concept had not been fully accepted. Colonial policy was still heavily influenced by the religious orientation as expressed in Puritan codes in general and by the approach of the Pennsylvania Quakers in particular. 18 The first code of the New Haven colony states: "If any person within this Government shall by direct, express, impious or presumptuous ways, deny the true God and His attributes, he shall be put to death." 19 This code, drafted in 1642, as well as the Hemstead, Long Island, code of 1664, specified eleven capital offenses, including denying God, engaging in con-

16. See Bowker, supra note 14.
19. Id. at 44.
senting homosexual acts between males over fourteen years of age, and copulation with animals.

It is important to note that the Puritan codes tended to combine a preoccupation with religious offenses and a policy of inflicting corporal punishment or death on the offenders rather than adhering to the Catholic tradition of penance that had dominated during the first phase of penal policy in Europe. While denying God or engaging in especially sinful sexual practices brought the death penalty, lesser crimes such as fornication were punished by a combination of fines, corporal punishment, branding, and use of the pillory and stocks. 20 The tendency for increased harshness is also evident here, however, as the use of the death penalty was extended. By 1718, the Pennsylvania criminal code punished all felonies except larceny with death. The Quaker code of 1682 had included only one capital offense, premeditated murder, with the Quakers arguing that corporal punishment should be replaced with "the practice of imprisonment at hard labor." 21 But the British required loyalty oaths, which the Quakers refused to take. This led the British to refuse to recognize the Quaker code and an eventual compromise in which the Quakers accepted the "imposed" code of 1718 in return for the right of affirmation in lieu of a loyalty oath. The code of 1718 remained in effect until after the Revolution, when colonies entered the third phase of the penal policy described by Rusche 22 as characteristic of European history—the accent on imprisonment.

THE DEVELOPMENT OF IMPRISONMENT IN THE UNITED STATES

As indicated above, it is our contention that "house arrest," or home confinement as it is better termed, represents part of a fourth phase in the development of European-North American punitive policy. This fourth phase amounts to a reaction against the third phase—the widespread transition to incarceration of convicted criminals within the walls of penal institutions. Assessment of home confinement within the context of this fourth phase depends to some extent upon one's assessment of the

20. See generally id.
21. Id. at 190.
22. See Rusche, supra note 2.
history of the imprisonment phase to which it is considered an "alternative."

There are competing accounts of the forces behind the development of imprisonment in the United States, just as there are differing opinions as to whether the basic purpose of this policy was really reformation of the criminal, simply a different form of deterrence, merely a means of incapacitation for a period of time, or perhaps only another and somewhat more hypocritical technique of retribution in a society becoming uncomfortable with overt public torture in the form of corporal punishment and hanging.

The conventional explanation for the development of imprisonment in the United States focuses upon the humanitarian concerns of the Quakers, who argued against corporal punishment and wished to limit capital punishment in favor of imprisonment. Yet, they were appalled by the horrible conditions of the jails in colonial New England. According to this account, the Quakers placed Pennsylvania in the forefront of penology shortly after the Revolution with reforms that were a reaction against the British policies and a response to the writings of reformers such as Montesquieu, Voltaire, Diderot, Beccaria, Paine, and Bentham. This interpretation of events stresses the early reforms enacted at the Walnut Street Jail in Philadelphia, a chaotic "scene of promiscuous and unrestricted intercourse, and universal riot and debauchery." Prisoners did not labor nor were they given any form of instruction of "discipline." Conditions were so bad that some died of starvation. The Quakers reacted with the creation of a reform association named the Philadelphia Society for Alleviating the Miseries of Public Prisons.

Despite the prominence of the Quakers in the prison movement, much evidence suggests that the basic thrust behind the trend was quite similar to that which had given birth to the Tuchthuis two centuries earlier. Where we have described the Tuchthuis as one of the "early signs of what was to become a third phase in the punishment of criminals," this new phase was now to come into its own in the United States. As several students of the

24. See Barnes, supra note 18, and Bowker, supra note 14.
25. See Sutherland & Cressey, supra note 6, at 520 (quoting F. Gray, Prison Discipline in America (1848)).
change have pointed out, the "reforms" were a product of changing production relationships that had been set in motion in Europe and in the colonies before the Revolution. Some have argued that the "reforms" were actually importations of British policy rather than post-Revolutionary Quaker innovations. Jails had been established under British rule as early as 1635, although it is true that they were too small to hold many prisoners and poorly maintained. Workhouses ("bridewells") had been established by approximately 1655, almost exactly a century after their establishment in England. The major difference between Quaker preferences and British policy seems to have revolved around the question of prison labor. The Quakers advocated solitary confinement without labor as conducive to the moral regeneration of prisoners who would use the time to contemplate their wrongdoing and seek a more spiritual direction. The British policy stressed discipline through labor.

The Quaker position is most clearly exemplified by what came to be known as the Pennsylvania System, an approach that is best illustrated by the construction and operation of the Eastern State Penitentiary in Philadelphia, a model institution developed after the failure of the Western State Penitentiary that had been built in Pittsburgh in 1827. Here, the prisoners were kept in solitary confinement; an inmate could spend an entire sentence in a cell, seeing only prison officials and those who brought meals. British policy was more apparent in the so-called Auburn System, named after a different sort of practice being developed simultaneously at a new prison in Auburn, New York. Here, prisoners were allowed to congregate for industrial production in shops within the prison walls during the workday and were returned to their cells at night. The major defect of the Pennsylvania System lay in the severe physical and mental deterioration of prisoners who were forced to serve a lengthy sentences with virtually no human contact. The major defect of the Auburn System involved the combination of extremely hard work with a demand for total discipline and perfect obedience enforced by

27. See JOHNSON, supra note 15.
frequent corporal punishment, especially for violations of the rule of strict silence. 28

A look behind the scenes of the struggle for preeminence between the Pennsylvania System and the Auburn System can be very revealing. Before their intense involvement with conditions at the Walnut Street Jail and their later involvement with the construction of the Western State Penitentiary and then the “model” Eastern State Penitentiary, the Philadelphia Society for Alleviating the Miseries of Public Prisons, with the support of Benjamin Franklin, had called for a change in punishment policy that would require “hard labor, publicly and disgracefully imposed.” According to this plan, prisoners were to work on roads or other public works with shaved heads and special clothing identifying them as convicts. It was less than two years later that the same Society recommended to the Pennsylvania legislature that “punishment be more private or even solitary labor.”

The shift in punishment policy from penance or corporal/capital punishment of offenders to imprisonment has been described as a transition from a policy of “inclusion” dealing with offenders in the community to one of “exclusion” by which they were punished through incarceration outside the community. 29 Why the change in the position of the Society which had less than two years earlier recommended public labor? The problem was that the overt, public exploitation and degradation of the prisoners often generated fights and even riots on the part of the outraged family and friends of the offender. Such treatment was also reminiscent of the British practice of exploiting political prisoners, a practice that had greatly angered the colonists only a few years before. After the brief trial of “hard labor, publicly and disgracefully imposed,” it was apparently deemed more prudent to move toward a policy of exclusion that had the merit of putting a wall between the infliction of the punishment and the eyes of the community.

But given the Quaker position on hard labor, what explains the advocacy of “labor,” first “publicly” and then “more private,” by the Society? The apparent answer is that Quaker membership in the Society may have been outnumbered by

Episcopalian, who favored both solitary confinement and hard labor.\(^{30}\) That the later position taken by the Society was less a "Quaker" position than an "Episcopalian-British" position is suggested by various pamphlets circulated at the time, one of which states quite clearly that "exactly what was needed at home was to follow the English example."\(^{31}\) It is worth noting that the Pennsylvania legislature reacted to the recommendation for "more private or even solitary labor" by requesting more information and asking for assurances that the policy would produce both "willing labor" and turn a profit. Upon receipt of additional information and assurances, the legislature provided in 1789 that any felon convicted in Pennsylvania and sentenced to twelve months of hard labor might be sent to the Walnut Street Jail and appropriated 100 pounds per year for maintenance. Slightly more than a year later, the famous law implementing solitary confinement at hard labor was passed. This 1790 law had set the precedent by ordering separation of the sexes at the jail, construction of cell blocks, and imprisonment at hard labor for all so-called hardened criminals. By 1794, the law required that all offenders convicted in Pennsylvania had to be sent to the Walnut Street Jail, effectively transforming it from a local jail to a state prison. Within a few years, the Quakers had been removed from the governing board of the jail and had formed an opposition group that campaigned for solitary confinement without labor. Thus, even in Pennsylvania, the image of "reforms" sparked by humanitarian Quakers is somewhat deceptive. It would appear that the real struggle amounted in the long run to a question of whether or not the hard labor was to be performed in solitary confinement or in the officially silent company of other prisoners.

The Auburn System had several advantages in the eyes of the authorities. Perhaps its major advantage, however, was its more "modern" appearance. The system in use in Pennsylvania, whether the pure form of the Quaker-inspired Pennsylvania System of solitary confinement without labor or the modified system of solitary confinement with labor, seemed to many to be outmoded in comparison to the up-to-date Auburn System. The pure system of solitary confinement without labor appeared to be an expensive

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30. See Takagi, supra note 26.
31. See generally id.
coddling of prisoners. Even the modified system of solitary confinement with labor smacked more of the outdated practice of "cottage industry" rather than the efficient "factory system" in use at Auburn. Why not have the convicts work in modern "shops" in the company of fellow workers with the "contamination" of prison talk contained by careful management of prisoner time and disciplined silence. The sight of dozens of convicts moving in silence in these shops might call to mind the original Tuchthuis model of a "house of discipline" where human interaction was completely forbidden and machine-like labor was successfully employed to achieve the twin ends of correcting the offender and profiting the state.

The destructive effects of prison life, however, were apparent from the beginning. Nevertheless, the concept had such a powerful grip over the minds of the authorities and later the public that efforts at "reform" were largely confined to modifications in the nature of imprisonment itself rather than to possible abolition. In the late 1860s and 1870s, for example, "reformatories" were constructed for youthful offenders with the idea that the institution might create changes in offenders rather than waiting for them to change as a result of reaction to prison life. The notion of the indeterminate sentence appeared in New York in 1869 and was endorsed by the American Prison Conference of 1870, coming from England through the Irish System. Parole had already been introduced in the 1830s as a form of conditional release under the old "ticket to leave" philosophy and was gradually expanded with the creation of parole boards charged with determining whether inmates were ready for release at a particular point. None of these efforts at "reform" represented a major policy shift.

As Austin and Krisberg have noted, it is the common fate of new departures to be caught in the "dialectics of reform." They are offered by those seeking some fundamental change, but if accepted, they are applied in actual practice in accordance with the dictates of the old order as it has been structured traditionally. Thus, once imprisonment had become the new norm, attempts to introduce more "creative" practices through the

32. See J. Gillin, Criminology and Penology (1935).
"reformatories" tended to be stifled by the assumption that security, discipline, and hard work must be considered primary. The indeterminate sentence became a coercive tool by which inmates could be motivated to (1) avoid attempts to escape, (2) submit to the strict discipline with minimal complaint, and (3) labor hard and willingly, all in the hope of an earlier release date. Like the indeterminate sentence, parole also became something of a tool for the more efficient management of the prison rather than a fundamental shift in the nature of the policy of imprisonment. Parole boards proved to be very conservative, releasing few prisoners before the end of their maximum sentence.

By 1900, imprisonment was a firmly established policy with widespread support. The years between 1900 and 1935 saw a 140 percent increase in the prison population of the United States, something which was to happen again in more recent years. The result was overcrowding. Prisons were reported to be 11.7 percent over capacity in 1926 and 19.1 percent over capacity in 1927. In some states, the problem was much greater. North Carolina, for instance, reported its prison system at 135.2 percent above capacity in 1932, which meant that the institutions in that state held more than twice the number of inmates for which they had been constructed. Although some caution must be exercised here because of the different definitions of "capacity" used by different wardens, it is clear that prison overcrowding had become a significant problem despite the construction of many more institutions.

The reaction was quite different from that of recent years, which have also seen a rapid rise in the prison population and serious problems of overcrowding contributing to a vigorous search for an "alternative." The primary explanation is to be found in the fact that the adult institutions of the time were essentially self-sustaining industrial prisons, often actually earning a profit. But this was to change as the newly influential labor movement began to challenge such prisons on grounds of unfair competition based on virtually free labor from the convicts. A series of state-level modifications in prison labor practices was already under-

34. See H. Allen & C. Simonsen, Corrections in America (1986).
35. See F. Tannenbaum, Crime and Community (1938).
way when the United States Congress passed the Hawes-Cooper Act in 1929, which required that prison products be subject to the laws of any state to which they were shipped. In addition, later legislation, the Ashurst-Summers Act, essentially stopped interstate transportation of prison products.36

While these changes were advantageous to union labor, for prison inmates, these changes meant that prisons had become "monuments to idleness, monotony, frustration and repression," one consequence of which was a "waive of riots" in the years between 1929 and 1932 as had never before occurred in prisons in the United States.37 Altogether, there were more than 400 known prison uprisings between 1855 and 1955,38 but never had they been so common. While prison rioting subsided during World War II, it reemerged during the post-war years with more than 100 riots reported between 1950 and 1966 and likely many more that went unreported by prison administrators dependent upon legislative funding and an image of good order in their institutions.

**Phase Four: Alternatives to Incarceration**

By the 1960s, it had become clear that the policy of exclusion, which punished the offender by incarceration within a secure penal facility, was ill-conceived because such facilities were troubled by idleness, overcrowding, and inadequate financial support. Inmates began to organize, and in some cases to riot, in an effort to call attention to their grievances. Some changes were made as a result of state and federal legislative reforms and decisions handed down by the United States Supreme Court. It is important to realize that all this took place during a major civil rights movement. To a considerable extent, what was happening in jails and prisons was a reflection of what was happening in the larger society. Many state legislatures created new programs, including educational programs, work release, home furloughs, and other innovations, all of which required additional funds. The period of the 1960s and early 1970s witnessed an extension of prisoners’ rights. Incarceration became more and more expensive and more troublesome to administer.

36. See Allen & Simonsen, supra note 34.
37. Id. at 50.
38. Mitford, supra note 23, at 250 (quoting V. Fox, Violence Behind Bars (1959)).
Ironically, reported increases in crime rates throughout the United States in the late 1960s and early 1970s led to a proliferation of "get tough" laws with harsher and less flexible sentences. Parole boards became increasingly conservative, approving fewer and fewer paroles. The result of sending more offenders to jail or prison for longer periods of time while releasing fewer on the "other end" was predictable. Correctional institutions were subjected to severe overcrowding and tremendous social, legal, and economic pressures. From 1970 to 1979, the imprisonment rate increased an unprecedented 39 percent. This dramatic shift continued as the prison population in the United States jumped from 300,034 in 1977 to 463,866 in 1984. It is now over 530,000. In fact, three of every 100 adult males in the United States were under correctional supervision at the end of 1985. Altogether, nearly three million men and women were under some form of correctional supervision, either imprisonment, probation, or parole.

Those faced with this problem perceived essentially two solutions. If imprisonment was to remain basic policy, then more institutions had to be built and maintained. If not, then it would be necessary to seek "alternatives to incarceration" and perhaps to move into a fourth phase in the European-North American tradition of punishing offenders. As was often the case in the past, a new direction was taken without abandoning the old. Many correctional facilities were constructed. There were, for example, thirty-one more state prisons and one more federal prison in 1984 than in 1983 and President Reagan's proposed budget for 1988 allocates $65.4 million "to expand and repair the federal prison system, including $96.5 million to build two new medium-security prisons." But there are limits to the former policy: one new prison cell may cost more than $80,000 and the yearly cost of holding each inmate may exceed $15,000. In some cases, the costs are even higher. A Minnesota correctional institution has reported direct and indirect daily maintenance costs at $103 per

42. See Allen & Simonson, supra note 34.
inmate or a total of more than $36,000 per year, which is twice the amount it would have cost to send the inmate to Harvard.\textsuperscript{44} And other prison systems that have held down cost are faced with court orders to upgrade facilities and programs. Indeed, in some cases, the courts have assumed control of state prison systems to judicially implement the mandated improvements.

Despite the tendency to cling to and even to accelerate the old policy of exclusion of offenders in walled institutions, it seems clear that North America has entered a fourth phase of punitive policy, a phase that will lay heavy stress upon inclusion of the offender through what is usually termed “community-based corrections.” Of course, probation has been an “alternative” for many years, but probation has come under fire as amounting to mere “leniency” that neither punished nor rehabilitated offenders but simply ignored them if they stayed out of further trouble for a certain time.\textsuperscript{45} What was planned was nothing less than a “new justice”\textsuperscript{46} that would provide alternatives in the form of halfway houses, weekend incarceration, diversion programs, restitution, and community-service options, and a variety of other “community-based” strategies. Such alternatives have proved so

\textsuperscript{44} See B. Cory & S. Gettinger, Time to Build? The Realities of Prison Construction (1984).

\textsuperscript{45} The recent emphasis on community corrections has generally received less attention than severe prison and jail overcrowding. “Whereas prison crowding is a matter of common knowledge and concern, relatively few people are aware that other sanctions—particularly probation and parole—are equally overburdened.” J. Petersilia, Community Supervision: Trends and Critical Issues, 31 Crime & Delinq. 339-47 (July 1985). According to Petersilia, the nation's prison population increased 48 percent of the last decade while the probation population grew 63 percent. \textit{Id.} at 339-40. The probation population continues to grow at a record-breaking pace while the prison population growth rate appears to be decreasing. For example, in 1983 the prison population growth rate decreased from 12 percent to six percent while the probation population grew 11 percent.

Ironically, as the role of probation and parole agencies increases, they have generally experienced budget cuts. In California, for instance, the probation population has increased 15 percent since 1975 while the number of probation officers decreased 20 percent. During the same time, California spent 30 percent more on criminal justice in general, but 10 percent less on probation. \textit{Id.} at 339. This trend combined with the imposition of sentencing reforms, which require judges to rely upon accurate and detailed research into offender's criminal histories provided by probation officers, means the role of probation officers will increasingly become important. \textit{Probation Said to Suffer from Gramm-Rudman Budget Cuts,} 17 Crim. Just. NewsL. 5 (June 2, 1986). Because of these developments, probation and parole officers are witnessing changes that are transforming their professional roles from “helping agents” to “agents of surveillance.”

popular in some circles that it can be claimed that "community corrections for the majority of offenders is the way of the future." 47

One of the most recent of these new "alternatives" is home confinement or "house arrest." It is probably best understood within the larger context of the movement in a fourth phase of punitive policy, a phase that relies upon inclusion of the offender within the community. "House arrest" is a particularly dramatic example of the extent to which inclusion may develop in that it appears to take "community corrections" to the limit by converting the most private of realms, the home, into a place that actually functions as a correctional facility. Some have questioned the trend toward community corrections as another move toward repression under the guise of "humanitarianism," as a policy that is having the effect of turning the "community" itself into one vast prison. 48 If this is true, then the movement toward "alternatives" is a continuation of the imprisonment phase of punitive policy rather than a new phase. This is a subject beyond the scope of the present article.

HOME CONFINEMENT

"House arrest" has a long history dating at least to St. Paul the Apostle, who is reported to have been placed under "house arrest" (custodia libera) in Rome at about the age of 60. 49 St. Paul's sentence lasted two years during which time he paid rent and earned his keep as a tent maker, thus avoiding becoming a ward of the church or state. While it would go far beyond the historical record to claim that St. Paul was the first person to pay for his keep under conditions of house arrest, it is interesting to note that many of today's "house arrest" programs expect their clients to pay supervision fees, restitution, and their living expenses. Galileo Galilei, the Florentine philosopher, physicist, and astronomer, also experienced "house arrest" after a "second condemnation" trial in Rome in 1633. After the trial, he returned to Florence and house arrest for the rest of his life. 50 More

47. ALLEN & SIMONSEN, supra note 34, at 63.
48. See COHEN, supra note 29.
49. St. Paul the Apostle, 9 NEW CATHOLIC ENCYCLOPEDIA 3-7 (1967).
recently, Czar Nicholas II of Russia and his family were kept under house arrest in 1917 until their deaths in 1918. This history is a cause for concern among some because of the traditional use of the practice as a means of silencing political dissent. South Africa, for example, has a long history of control through “banning” and societies found in Poland, South Korea, India, and the Soviet Union are known to employ “house arrest” primarily to deal with troublesome political dissenters. On the other hand, France introduced the concept of control judiciare in 1970 as a fairly straightforward form of pre-trial detention involving a provision that employed home confinement as an alternative for common offenders.\footnote{Gerety, A French Program to Reduce Pretrial Detention, 26 CRIME \\ & DELINQ. 22-34 (1980).} In 1975, Italy initiated a policy of affidamento in provo ai servizio sociale (trial custody), which may be described as a form of parole following a shock period of three months incarceration. Other European countries have also experimented with some manner of home confinement as a means of dealing with a variety of offenders. The traditional use of “house arrest” should not in itself become a rationale for rejecting it.

In the United States, “home detention” had been put in practice in St. Louis as early as 1971.\footnote{See H. Rubin, JUVENILE JUSTICE: POLICY, PRACTICE, AND LAW (1985).} By 1977, such programs for youth had been put in place in Washington, D.C.; Baltimore, Maryland; Newport News, Virginia; Panama City, Florida; St. Joseph-Benton Harbor, Michigan; San Jose, California;\footnote{See T. Young \\ & D. Pappenfort, NAT. INST. OF L. ENFORCEMENT \\ & CRIM. JUST., SECURE DETENTION OF JUVENILES AND ALTERNATIVES TO ITS USE (National Evaluation Program Summary Report, 1977).} Louisville, Kentucky;\footnote{See Bowker, supra note 14.} and Tuscaloosa County, Alabama.\footnote{J. Smyka \\ & W. Selke, The Impact of Home Detention: A Less Restrictive Alternative to the Detention of Juveniles, JUV. \\ & FAM. CT. J. 3-9 (May 1982).} These programs, developed first as a means of dealing with youthful offenders within a context of home and family, were in part a response to widespread concern that increasing numbers of juveniles were being unnecessarily and unjustly detained in detention facilities prior to adjudication. In view of these concerns and the traditional use of such practices as curfews in dealing with troublesome youth, home detention seemed an attractive alternative and it had the additional merit of economic appeal. These first home detention...
programs were in essence much like current forms of *intensive supervision*. They proceeded on the assumption that youth can be kept out of further trouble by assigning paraprofessionals to them who would personally contact a juvenile at least once a day and maintain daily telephone contact with parents and teachers.

The later movement toward home confinement of adult offenders was somewhat less the result of a desire to protect the offender from the "corrupting" and "stigmatizing" effects of institutional incarceration (although this was one major consideration in proposals for use of the practice with drunken drivers), than it was a consequence of jail and prison overcrowding and the perceived need for more careful supervision of offenders granted probation. In Florida, for example, the Correctional Reform Act of 1983 provided that confinement to one's residence was to be considered a diversionary alternative to incarceration and treated as an intermediate form of punishment that was more strict than simple probation but less harsh than jailing or imprisonment. While Florida now has the most ambitious home confinement program in the United States, at least thirty states were implementing some form of "house arrest" by 1986 and another dozen states were planning programs to be implemented within one year.

Home confinement as a policy for use with adult offenders began to draw more attention in 1983 with the delivery of two different papers on the subject, passage of the Correctional

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57. See Young & Pappenfort, supra note 53.


Reform Act, and the use of an "electronic bracelet" to monitor compliance with home confinement on the part of an offender in New Mexico. The latter was inspired by a New Mexico district court judge, who read a comic strip where "Spiderman" was being tracked by a transmitter fixed to his wrist. The judge approached an engineer, who designed a device consisting of an electronic bracelet approximately the size of a pack of cigarettes that emitted an electronic signal that was picked up by a receiver placed in a home telephone. This bracelet could be strapped to the ankle of an offender in such a way that if he or she moved more than approximately 150 feet from the home telephone, the transmission signal would be broken, alerting authorities that the offender had left the premises. Officials in New Mexico gave approval for trial use of the device and a research project funded by the National Institute of Justice eventually reported successful results with this "electronic monitoring."
The surge of interest in "home incarceration" of adults as an alternative to jailing or imprisonment has been closely associated with the development of this new technology. The policy began to receive more and more attention in academic circles, corrections literature, economic journals, criminal justice newsletters, national newspapers, local newspapers, and weekly news.


67. See, e.g., Computerized Cuffs Come of Age, 14 CRIM. JUST. NEWSL. 4 (Mar. 1, 1983);


69. The following list of newspaper articles during the past three years is offered for those who might wish to more closely examine press coverage of house arrest and electronic monitoring in the United States:


Newspaper coverage has increased approximately 30 percent between October 1986 and March 1987. Today, there is an average of one or more newspaper articles per day in the United States on house arrest and electronic monitoring.


71. See, e.g., High-Tech Leg Irons Put to the Test, ELECTRONICS WEEK 30 (Mar. 4, 1985).


73. See, e.g., 20/20: Prisoners in Their Own Home (ABC television broadcast, May 1, 1986).


76. The 11th Annual Institute of the American Parole and Probation Association, which was held Aug. 3-6, 1986, in Baltimore, Maryland, devoted two sessions to “Electronic Surveillance in Corrections: Is it Practical?” and “House Arrest: Does it Work? Is it Practical?” On Oct. 12-15, 1986, the 14th Annual National Conference on Pretrial Services was devoted exclusively to new approaches to pre-trial supervision and house arrest and electronic surveillance received much attention. And in November 1986, the National Institute of Corrections sponsored a two-day mini-conference in Washington, D.C., to examine “probation with conditions.” Electronic monitoring and house arrest again received detailed attention.

National Institute of Justice,\textsuperscript{78} which increased its funding of home incarceration and electronic monitoring projects.\textsuperscript{79} Reports indicate that one company manufacturing electronic monitoring equipment saw its “stock had just about quadrupled in price” two months after going public\textsuperscript{80} because of the perception of the “pioneering the development of a new industry”\textsuperscript{81} and increased funding of home incarceration and electronic monitoring projects.

Beginning March 3, 1986, the federal government approved an experimental program for the United States Bureau of Prisons, the Probation Service of the United States Courts, and the Parole Commission that would allow federal parolee’s release dates to be advanced sixty days on the condition that “he remain in his place of residence during a specified period of time each night.”\textsuperscript{82} Interest in home confinement had spread rapidly and the reception was generally very positive. In the words of national television personality Barbara Walters, “Isn’t it nice, finally, to be able to have a solution to something that seems sensible and that we should try to try more?”\textsuperscript{83} At the same time, however, concerns were being expressed here and there. It seemed to some one thing to “ground” juveniles in home detention with daily contact supervision and assistance combined with official contact with parents and teachers and another to treat adults “like children.” Some who questioned home incarceration of adults


\textsuperscript{79} In 1986, the National Institute of Justice funded four projects on electronic monitoring. Funds were awarded to the San Diego Association of Governments for “Electronic Surveillance of Work Furlough Inmates,” the Utah State Department of Corrections for “Validity and Reliability of Eight Types of Electronic Monitoring Equipment,” Indiana University Foundation for “Electronic Monitoring of Non-Violent Convicted Felons: An Experiment in Home Detention,” and Torborg Associates of Washington, D.C., for “Electronic Surveillance of Pre-Trial Releasees as a Jail Crowding Reduction Strategy: Evaluation of a Controlled Experiment in Indianapolis, Indiana.” Each project was funded under the Juvenile Justice and Delinquency Prevention Act of 1974. As far as we have been able to determine, the federal government has funded only one other completed project on electronic monitoring; it was a small and relatively insignificant evaluation study in Albuquerque, New Mexico.


\textsuperscript{81} See Brown, \textit{Re: Corrections Services, Inc.}, Research Report (1986).


\textsuperscript{83} See 20/20, supra note 73.
believed that they should be jailed or imprisoned rather than “coddled.” Others thought that turning a person’s home into a surrogate jail was perhaps the ultimate audacity of the political state. The electronic monitoring devices in particular conjured up visions of some Orwellian nightmare in which the state might extend total surveillance over its citizens.

Two developments have added to the growing concern over the potential future of the “house arrest” movement. The first is the shift in the political climate; the second is the proliferation of technology. One’s evaluation of the shift in the political climate during recent years is conditioned by one’s reading of the history of corrections as outlined earlier. To some, this has been in general a story of progress from brutal torture to imprisonment and, finally, to community-based alternatives to incarceration. To others, the history is one of good intentions that have tended to produce unanticipated, unfortunate consequences at every stage. To still others, the shifts in punitive policy described above really represent deep and very insidious trends toward total social discipline and the complete suppression of individuality under the guise of humanitarianism and progress. One’s evaluation of the political climate that has emerged in recent years and one’s views with respect to the newly powerful technology depend to some extent on the way past history is read.

Perhaps the best way to describe the recent “shift in the political climate” is to examine Packer’s work contrasting the


85. Here we are especially concerned with technology that assualts the more traditional physical boundaries of privacy and the implications for perceptions of privacy. Snooper: High Tech Makes it Easy for Uncle Sam to Spy on You, Cincinnati Post, Oct. 24, 1984, at 15A. Texas, for example, relies on machines in Galveston County to “patrol” for speeders. “The equipment photographs the car’s license plate and records the date, time and speed ... The motorist receives a violation notice in the mail.” Machines “Patrol” in Texas, N.Y. Times, Aug. 17, 1986, at 19. While many other examples of technological assaults on privacy are available, this example was selected because it is demonstrative of rational-technical reasoning that is often void of the “human touch.” In recent years, this form of thinking has sponsored a burst of interest in testing and “screening” of all sorts.

86. See Cohen, supra note 29.

two fundamentally different approaches to criminal justice, the due process model and the crime control model. The 1960s was a time of powerful movements in the area of civil rights and this was reflected in the policies of the legislative, executive, and judicial branches of the federal government. The “Warren Court,” as the United States Supreme Court under Chief Justice Earl Warren was usually called during those years, moved toward the due process model in a way that delighted some and outraged others. This approach stresses the rights of the accused and demands strict “due process” on the part of the government so as to protect the individual. The “Burger Court,” under Chief Justice Warren Burger during the 1970s and into the 1980s, tended to lean toward the crime control model, an approach that lays heavier stress on the “rights of society” and regards crime control as so important that greater state intervention is necessary.

The shift in the political climate that occurred in the late 1970s and continued into the 1980s appears to represent a backlash-reaction to the rapid changes of the 1960s. With this shift came a sharp move to the conservative political right that witnessed the election of Ronald Reagan to the Presidency and an increase in the number of conservative elected to both houses of the federal government. In terms of the present article, the most significant aspect of this shift is the way in which it may affect the nature of the legal and social boundaries between the public and private realms. This development seems to increasingly demand that behavior traditionally regarded as private be “accounted for” by some form of surveillance in the public realm.

Two of the most obvious examples involve the government’s interest in drugs and sex. In both cases it has been argued that these are “private matters” that tend, when criminalized, to amount to “victimless crimes” in which the “offender” may be using his or her body in a way that has been declared illegal by the state but is “hurting no one” or at least “no one else.” It is not our intention to argue for or against the morality of such activities. Nor do we take a position here with respect to whether the state ought to intervene in attempts to control them through application of the powers of the criminal justice system. Our

point is simply that this has in fact been the recent trend.

Consider further that in the early months of 1986, Congress affirmed an $11.7 billion budget cut, a reduction that amounted to cutting the budget of the United States Department of Justice by approximately 4.3 percent.90 During the early summer of 1986, the Department of Justice had to suspend jury trials because it did not have the funds to pay jurors the required $30 per diem.91 Yet shortly afterward, the federal government declared a new $250 million “war on drugs.”92 This “war” was to extend the

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90. Federal Judge Says Courts Cannot Absorb Gramm-Rudman, 17 CRIM. JUST. NEWSL. 5-6 (Apr. 1, 1986); Current Budget Cuts Maintained Despite Ruling on Deficit Law, 17 CRIM. JUST. NEWSL. 1-2 (July 15, 1986) [hereinafter referred to as Current Budget Cuts].

91. See Current Budget Cuts, supra note 90.

92. Trying to Say No, NEWSWEEK 14-19 (Aug. 11, 1986); Crack Down: Reagan Declares War on Drugs and Proposes Tests for Key Officials, 28 TIME 12-13 (Aug. 18, 1986) [hereinafter referred to as Crack Down]. It is not possible to offer a comprehensive analysis of the 1986 drug testing movement. Rather, we highlight certain of its more important features to illustrate the intensity of concern that this subject has generated. More important for this article is the fact that in 1986 home incarceration and electronic monitoring received a great deal more positive attention than at any other time and this attention was part of a socio-political climate that was conducive to accepting proposed solutions to problems that would otherwise probably have been rejected as morally, legally, and ethically offensive.

To illustrate, we should remember that in the first comprehensive national survey of drug abuse in three years, a federal report indicated that the use of virtually all illicit drugs except cocaine either remained stable or had declined. Use of Cocaine, But Not Other Drugs, Seem Rising, N.Y. Times, Sept. 29, 1986; Drug Use Held Mostly Stable or Lower, N.Y. Times, Oct., 10, 1986. Nevertheless, in a matter of weeks Congress wrote and passed anti-drug legislation financed by $1.7 billion dollars. Anatomy of an Issue: Drugs, the Evidence, the Reaction, N.Y. Times, Nov. 17, 1986. This development was preceded by extraordinary symbolic gestures by federal- and state-level politicians. For example, in early August, President Reagan, Vice President Bush, and nearly 80 senior White House employees were tested by urinalysis as part of the administration’s push for drug-free workplace despite the fact that no evidence was reported that indicated illicit drug usage was a problem for any of these employees. Bush, Staffers Follow Their Boss to Drug Test, Cincinnati Post, Aug. 11, 1986, at 3A. Shortly thereafter, the Justice Department seriously considered proposing a presidential order that would require narcotic testing for more than half of the nation’s civilian government employees. Drug Plan Seeks Mandatory Tests of U.S. Employees, N.Y. Times, Aug. 21, 1986. By September 9, 1986, the President’s Domestic Policy Council, presided over by U.S. Attorney General Edwin Meese, considered legislation and an executive order that would permit drug testing of federal employees. Plans to Require Drug Tests for U.S. Employees Studied, N.Y. Times, Sept. 9, 1986. In like spirit, the nation’s mayors planned a “domestic D-day in the war on drugs.” Mayors Plan Nationwide Day to Focus on Drug Problems, N.Y. Times, Sept. 8, 1986. However, the Reagan Administration’s interest in drug enforcement seems to have waned by January 1987, the time at which it proposed to eliminate five Justice Department Assistance grants in 1988, including drug enforcement grants, for a total savings of $354 million. Sources of Revenue and Savings in ’88, N.Y. Times, Jan. 6,
recent use of drug testing of employees in the world of business and athletics to federal employees despite the lack of any evidence that those to be tested had used illegal drugs or had committed any crime at all. And the announcement came after a five-month Congressional study that concluded that "urinalysis procedures are expensive, 'useless in most cases' and often inaccurate." The federal government was described as in a "frenzy" over drugs. Despite arguments that what employees do on their "private time" is their "own business" unless it affects job performance and that such testing replaces the due process assumption of innocence with a crime-control assumption of guilt until proven otherwise, a White House poll reported that "the public is more worried about drugs than about such matters as the federal budget deficit and arms control." The implication from this being that the "rights of society" override those of the individual in such cases.

With respect to sexual activity, the political shift is almost equally obvious. The early 1980s saw many efforts to overturn

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95. Crack Down, supra note 92, at 12.
96. There is little doubt that the sexual revolution of the 1960s and 1970s is over and in its place are attitudes, practices and concerns of the 1950s. See, e.g., Sex in the '80s: The
the Supreme Court decision in *Roe v. Wade*, which had struck down statutes limiting abortion. The decision in *Roe v. Wade* had rested to a considerable extent upon the Court's judgment that state interests were not compelling enough to justify such interference in the personal privacy of women as legislation in question had permitted. The more recent arguments contend that the interest of the state in maintaining public morality are more than sufficient to justify the criminalization of abortion. Similar arguments have been made as to the right of the state to restrict and monitor the activities of AIDS victims, the arguments here focuses upon the right of the government to restrict individual liberty in the interests of public protection.

Also in the summer of 1986 came a public outcry over a Supreme Court decision in *Bowers v. Hardwick*, a decision that upheld the sodomy law of Georgia. In this case, by the narrowest possible margin (5-4), the Court upheld a Georgia law that makes it a felony, punishable by twenty years in prison, for consenting adults to engage in oral or anal sexual relations. The case developed innocently enough when a police officer went to Hardwick's apartment to serve a warrant for carrying an open container of alcohol in a public place. The officer was ushered into the apartment by a guest and told that Hardwick could be found in his bedroom. There, the officer discovered Hardwick engaged in oral sex with another man and made an arrest. The case was not prosecuted but Hardwick himself challenged the arrest. In effect, the Court ruled that individuals under Georgia law had no right to engage in such acts even as consenting adults in a private bedroom, taking the position that the state had a legitimate right to restrict and control these activities as part of its responsibility for enforcing public morality even in private places.

*Revolution is Over*, *TIME* 74-78, 83 (Apr. 9, 1984). In fact, according to a Newsweek cover story, the "Playboy Party is Over" and an era of "Sex Busters," as coined by *Time* magazine, has arrived on the American scene. Examples of the new era abound, including Congressional opposition to the Braille editions of *Playboy* magazine that had been published monthly since 1970 under the National Library Service for the Blind and Physically Handicapped, a highly criticized $750,000 government-sponsored study of how children are portrayed in *Playboy*, *Penthouse*, and *Hustler*, increased reports of violence against homosexuals, a disputed Justice Department commission report on pornography that concluded "that most pornography sold in the United States is potentially harmful and can lead to violence," and the creation of a "special team of prosecutors to handle pornography cases."

98. 106 S. Ct. 2841 (1986).
To a considerable extent, concerns expressed over possible invasions of privacy, either by the government or by private agencies, had come about because of the enormously increased power of technology to penetrate the private realm. The federal Office of Technology Assessment99 has called for immediate federal legislation to control this technology, indicating that (1) the extent and use of electronic surveillance by the private sector is unknown, (2) the number of federal court-approved wiretaps and hidden microphone “bugs” was in 1984 (the last year surveyed) the highest ever, (3) about 25 percent of the federal agencies responding to the 1984 survey indicated some use of electronic surveillance, and (4) a number of federal agencies were relying heavily upon such technology with the FBI, for example, using nine different types of surveillance technology in 1984 with plans to implement eight additional types as soon as feasible. In addition to new techniques in data transmission, “beepers,” sensors, closed circuit telecommunications systems, satellite communication equipment, electronic mail, cellular telephone equipment, miniaturized cameras, optical devices, and a host of other surveillance devices, the Office of Technology Assessment100 identified at least 85 computerized record systems operated by federal agencies for purposes of law enforcement, investigative, and intelligence matters. These systems together include about 288 million records covering approximately 114 million citizens.

CONCLUSIONS: QUESTIONS AND RESERVATIONS

Our interest in the possibilities of home confinement as an alternative correctional policy was triggered in part by a search for some option to be used in lieu of institutionalization. We were aware that “house arrest” was nothing new and that some such practice had often been used informally, especially with juveniles, and part of our concern had to do with protecting the due process interest of the offender and providing clearer, formalized policy to protect public employees such as probation officers from charges of arbitrary and capricious behavior. The National Advisory

100. Id.
Commission on Criminal Justice Standards and Goals for Courts\textsuperscript{101} had made such concerns official, suggesting that a court-approved agreement be required whenever “diversion” involved actual deprivation of liberty as is the case with the “curfew” or “house arrest.” Our hope was for formal adoption through enabling legislation and careful evaluation of the policy through systematic research.

It is important to note that while home confinement has been adopted through the legislative process in certain instances, it has been more common to implement it through administrative or judicial fiat. This may pose a problem if only because the policy may be altered with every new administrator or judge. Legislation allows for a full, public debate. This in turn serves to legitimize the practice and to provide for greater consistency in its implementation. As for the “systematic research,” quantity is no substitute for quality. The evaluation research that has attempted to assess the effectiveness of home confinement has been troubled by many problems: a lack of random assignment of cases; the necessity of relying upon judges’ opinions as to whether, for example, they would have sentenced a given offender to jail had home incarceration not been available as an “alternative”; and a host of other difficulties which call into question its validity. This is the product of circumstances rather than the fault of the researchers, but the need for more systematic work is clear.

Beyond these issues are others more difficult to address. As Marx\textsuperscript{102} has shown in his analysis of the “ironies” of social control, “It would appear that modern society increasingly generates ironic outcomes, whether iatrogenic effects ... unintended consequences of new technologies ... or the familiar sociological examples found in prisons and mental hospitals or in the careers of urban renewal and various other efforts at social reform.” These “ironic outcomes” frequently mean that a “solution” to one problem creates one or more new problems that may be worse. To anticipate this sort of thing might be considered mere paranoia if it were not so clear that the tendency is built into the system, including the increasing complexity and interdependence of social


life and the increased effort at intervention based upon expansion of professionalism and expertise.\(^{103}\) This may be the case with "house arrest" and there is an obligation to confront the possibility.

Although home confinement is still insufficiently developed as a formal correctional policy to allow for any early predictions, some trends seem to give reason to wonder about the future. In our earliest work with "home incarceration," for example, we advocated the use of volunteers to assist with the monitoring of compliance.\(^{104}\) The practical reason for this was to reduce pressures on probation offices. More generally, however, the suggestion was argued in terms of our theoretical perspective, which seeks to facilitate the reconciliation of offender and community. Given monitoring by volunteers, the offender would be involved with representatives of the local community rather than with government officials and it was hoped that the use of volunteers would contribute to the increased involvement of the public in the systems of criminal and juvenile justice. Given what seemed to be both practical and theoretical advantages of the use of community volunteers to monitor compliance, it is important to consider the extent to which the actual implementation of this alternative has been accomplished through the much more expensive and much less communal option of electronic monitoring.

The fact is that new correctional policies are rarely carried out as originally envisioned. They tend to be caught in a common pattern involving a "dialectics of reform" in which the established agents of social control who operate the criminal and juvenile justice systems on a day-to-day basis accept certain "reforms" but only on their own terms.\(^{105}\) Despite our theoretical position stressing the reconciliation of offender and community, we were troubled from the beginning by evidence that suggested the "community" might actually resist such reconciliation.\(^{106}\) The eagerness to embrace electronic monitoring now suggests that those operating the criminal and juvenile justice systems may be more interested in maintaining tight, bureaucratic control over

\(^{103}\) Id.
\(^{104}\) See Austin & Krisberg, supra note 33.
\(^{105}\) See generally Ball & Lilly, supra note 60.
\(^{106}\) Greenberg, Problems in Community Corrections, 7 Issues in Criminology 1-10 (1975).
offenders than in opening supervision programs to the public. Of course, it must be admitted that the electronic monitoring is likely to be a more reliable system, more free from problems of "human error." Whether this is good or bad depends upon one's point of view.

The sociohistorical and social psychological problems here are quite complex. We cannot go as far as the National Advisory Commission on Criminal Justice Standards and Goals for Corrections\(^\text{107}\) in assuming that, "The humanitarian aspect of community-based corrections is obvious." The use of the home as a jail, prison, or detention facility may contribute to the further blurring of the old distinction between what is public and what is private. As Hylton\(^\text{108}\) has pointed out, the President's Commission\(^\text{109}\) recognized years ago that any such blurring of lines between institutional treatment and community treatment might affect the rights of offenders. To what extent may it also affect the very concept of individuality?

As we indicated earlier, one's interpretation of the trend toward increased use of "house arrest" will be conditioned by one's reading of the history of correctional policy. Is it essentially a history of progress? Is it better interpreted as a history of unintended consequences and unfortunate "ironies?" Or is it really a history of the extension of total control over the individual? If the pattern is one of "progress," then it may be reasonable to accept "house arrest" as a continuation of correctional policy into more progressive and "civilized" practices. If the pattern is one of good ideas going wrong or leading to unforeseen and unfortunate consequences, it becomes especially important that those implementing "house arrest" do so with special caution and change course quickly if things begin to go wrong. If it is more accurately interpreted as a pattern of historical extension of control over the individual, the danger that "house arrest" is part of a larger trend that may lead toward the extinction of individuality is very real.

\(^{107}\) STANDARDS REPORT, supra note 101, at 222.


\(^{109}\) See THE CHALLENGE OF CRIME IN A FREE SOCIETY, PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMIN. OF JUST. (1967).
DEINSTITUTIONAL INCAPACITATION:  
HOME DETENTION IN PRE-TRIAL AND  
POST-CONVICTION CONTEXTS

Fred L. Rush, Jr.*

American sentencing practices are essentially bipolar, widely utilizing two punishments: incarceration (jail and prison) and probation. Probation has become overused and structureless—more valuable as an alternative to incarceration than as a bona fide sanction. Yet, sentencing offenders to prison has not diminished in the wake of the increased use of probation.1 Both prison sentences and probation have proved unmanageable and unjust when applied across a broad range of criminal conduct. Between probation and imprisonment lies a vague area of confused programs collectively termed "alternatives." The desirability of these alternative sanctions is often bound to conceptions of prison or probation. But the efficacy of an "alternative" should be determined not with reference to other failing modes of punishment but rather in light of its own strengths and weaknesses.2

This article examines one such alternative sanction—home detention, which two federal courts3 and a growing number of state

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1. The "total" institutional setting of prison is distinguishable from the short jail sentence that may become a "demi-institution" with regard to the petty recidivist. See Smith, Will the Real Alternatives Please Stand Up?, 12 N.Y.U. REV. L. & SOC. CHANGE 171, 174-75 (1983-84) (New York City imposed 8,000 jail sentences of ninety days or less per year). "Incarceration," as used throughout this paper, refers to prison sentences. Also, it must be noted that prison, jail, or even probation should not be portrayed as monolithic. Indeed, the varying degrees of incapacitation, denial of privacy, and supervision run the gamut with respect to all of the above sanctions — so much so that it is difficult to know what we mean by, for instance, "being in prison."

2. Accord Harland & Harris, Developing and Implementing Alternatives to Incarceration: A Problem of Planned Change in Criminal Justice, 1984 U. ILL. L. REV. 319, 323-24 (1984): "[A]though almost any of the sentencing conditions … such as fines or community service, might be used as alternatives to incarceration, these can also be used as alternatives to probation, alternatives to each other, or alternatives to doing nothing."

courts have utilized. Home detention is, however, still in its infancy. Accordingly, this article focuses on gaining a rudimentary grasp on the potential of home detention to provide a meaningful alternative to prison and probation.

I. THE NEED FOR “ALTERNATIVE INCARCERATION” — POST TRIAL HOME DETENTION

A. Structuring Home Detention

Home detention involves part-time or full-time restriction in an


4. See, e.g., State v. Trigueros, No. 84-576CR (Fla. Cir. Ct. 1984); see also Krajick, Home Detention in the Computer Age, CORRECTIONS COMPENDIUM, Sept. 1985, at 6. The first structured implementation of home detention occurred in Albuquerque, New Mexico in 1983. Arizona, California, Illinois, Kentucky, Michigan, Oklahoma, Oregon, and Utah have also experimented with the sanction, although not nearly to the extent of the Florida courts.

Id. at 6; see also Ford & Schmidt, Electronically Monitored Home Confinement, NAT’L INST. JUST. REP., Nov. 1985, at 2-6. Utah is the only state that has authorized home detention by statute. See UTAH CODE ANN. § 77-18-1(b)(f) (Supp. 1986).

At the federal level, the Sentencing Reform Act of 1984 would almost certainly authorize home detention as a condition of probation. The act provides that a judge may order an offender to “reside at, or participate in the program of, a community corrections facility for all or part of the term of probation...” 18 U.S.C. § 3563(b)(12) (Supp. 1985). Partial prison confinement is also permissible under 18 U.S.C. § 3563(b)(11). Taken together with section 3563(b)(20), which allows the court to fashion “other conditions,” these provisions of the Act would encompass home detention. This view is further buttressed by Congress’ intent that “[t]he list [of probation conditions] is not exhaustive, and it is not intended at all to limit the court’s options...” S. Rep. No. 225, 98th Cong., 2nd Sess. 95, reprinted in 1984 U.S. CODE CONG. & AD. NEWS 3278 (emphasis added).

North Carolina is currently contemplating adopting home detention to ease prison overcrowding. The proposed system would handle between 200 and 750 nonviolent offenders with electronic monitors. See Charlotte Observer, Mar. 15, 1986, at 1, col. 2.

Broward County, Florida, has recently authorized $250,000 to establish a pilot post-trial program. Ft. Lauderdale News, Mar. 24, 1986, § 2, at 1, col. 1.

5. Home detention has its historical roots in partial confinement programs. Shock probation is initial confinement followed by a stringent probation program. See ABA STANDARDS FOR CRIMINAL JUSTICE SENTENCING ALTERNATIVES AND PROCEDURES § 18.2.4 (Supp. 1986). Such programs demonstrate the perceived need for alternative detention, although they continue to rely on incarceration.

Split sentences and periodic confinement programs have also been proposed. See, e.g., UNIFORM LAW COMMISSIONERS MODEL SENTENCING AND CORRECTIONS ACT § 3-504 (1979); MODEL PENAL CODE § 303.9(1) (Proposed Official Draft 1962). These proposals advocate part-time incarceration with some type of probation to run concurrently rather than consecutively as in partial confinement, with probationary restrictions.

Halfway houses are the only nonprison proposal to pre-date home detention. Detention in a halfway house is primarily used for rehabilitative aims (i.e., drug detoxification) although there has been a recent move toward using the halfway house to detain “low-risk” corporate offenders. See Beha, Halfway Houses in Adult Corrections: The Law, Practice, and
Detention can be ordered pending trial (pre-trial home detention) or as a sentence (post-trial home detention). This section will examine only post-trial detention imposed as a sanction on a convicted offender.

The number of confinement hours per day varies according to the offender's nonwork time. Normally, the offender is detained for all nonwork time. For the average worker this amounts to roughly fourteen to sixteen hours detention per day. Additionally, the court can grant time out of the house for religious observances, medical treatment, and family emergencies. There is no bar to ordering greater confinement, but to do so would impinge upon the ability to hold a full-time job. Thus, twenty-four hour detention is possible, but it would negate one of the strongest policy arguments for post-trial home detention—that it allows control over the offender while society benefits from the uninterrupted employment and family involvement of the detainee. Of course, balancing the interests in the particular case could dictate forbearing these benefits as a trade-off for increased detention time. As we shall see, however, arguments can be made that few benefits are realized by "total" (around-the-clock) home detention that would make it preferable to incarceration.

One attractive feature of home detention, nevertheless, is that detention time can be increased or decreased as the sentence progresses. A court can structure the term of detention in detention "phases." For instance, the sentencing judge could divide a six-month term into three two-month phases. In the first phase, detention time could be twenty hours per day. If the first phase is completed successfully, the second phase could require detention only by nonwork time. The third phase could provide greater freedom in the community but still requiring, perhaps, ten hours detention per day. Under this type of scheme, it might make sense to sentence an offender to total detention for one or even two phases. In such a case, not all the primary benefits of the sanction would be nullified over the entire term of the sentence. Again, the structure of any sentence of home detention will be dictated by the individual case.

Results, 11 CRIM. L. BULL. 434, 449-50 (1975). Criminal curfew orders also foreshadowed home detention, see infra note 16, as did juvenile home detention. See also S. KOBIRN & M. KLEIN, COMMUNITY TREATMENT OF JUVENILE OFFENDERS: THE DSO EXPERIMENTS (1983).

6. This is the common quality linking all sentences of house arrest up to January 15, 1986. See supra notes 3-4 for citations to pertinent cases.
The important point is that the court can tailor the amount of home detention to the needs of any offender—from full-time detention, approximating incarceration, to minimal detention analogous to curfew.

Usually, the home detention order restricts the offender to the interior of the house. The area of confinement does not normally include yards or other environs surrounding the dwelling. Thus far, judges have not attempted to restrict an offender to a particular wing or room of the home.

Enforcement of the detention order is based on one of two models. The first model resembles intensive supervision probation (ISP). Probation personnel or police officers make frequent spot visits and telephone calls during detention time to check on the offender. Maintaining direct and constant supervisor control requires a personnel system typical of a large-scale probation office. The demand on supervisor time is likely to be very high. Thus, as in ISPs, efficiency demands low supervisor case loads. This, in turn, will require either a large expenditure in funds to increase the size of the network of home detention supervision units or will necessitate greater selectivity in assigning the cases in small numbers so that they may be handled within the framework of a smaller system. I term this model of home detention the "human supervisory" model.

The second model of enforcement utilizes electronic surveillance technology to monitor the offender's nonwork location. Currently, the most widespread use of this technology is in the state corrections system of Florida. The Palm Beach County Sheriff's Office administers a program of twenty offenders with the aid of electronic monitors. The monitors are in the form of anklets or bracelets that send a signal every thirty-five seconds. There is a receiver located in the offender's house with a maximum range

7. See Krajick, supra note 4, at 6-7.
9. See id. at 6-7.
of 150 to 200 feet. When the offender leaves the range of the receiver, the receiver automatically uses the phone line to dial a computer located in the jail or police station. The computer is programmed to mask signals during work-time or when the offender has a pre-arranged excuse for not being at home. If the signal activates during the detention time, a police officer immediately telephones the offender’s home. If the detainee is not at home, a squad car can be dispatched. Typically, violation of home detention causes the offender to be ordered to be placed either temporarily in county jail or, for repeated violations, in prison for the remainder of his sentence.

The monitor cannot be removed by the offender with impunity because it cannot be reattached by any available means. Similarly, the receiver houses a “fail-safe” mechanism that automatically calls in a signal should it be unplugged from the wall. Thus, the electronic system is not easily defeated. Although the range of the signal is only a maximum of 200 feet, multiple units could cover a larger home floor plan. This would, of course, raise the monetary cost of supervision. Movable units might also afford greater coverage at a lesser cost. However, such a unit would have to be of restricted mobility—an extension cord device located at a center point in the home would allow at-home mobility without allowing an offender to transport the monitor with him outside the house. Such a cord would also need to have fail-safe capabilities.

Most probably, electronic monitoring is less expensive than a system utilizing human surveillance. The cost of a human

10. Some systems require an officer at the main computer 24 hours a day. The Project Pride operation in Palm Beach County, Florida, has the computer printout the record of signals and answers at night and officers are electronically notified of an absence. See Ford & Schmidt, supra note 4, at 5.


13. There is little doubt that electronic surveillance is less costly than incarceration. See Lilly, Ball & Lotz, Electronic Jail Revisited, 3 JUSTICE Q. 352, 354 (1986). Recent evidence suggests, however, that home detention by electronic surveillance is far more expensive than ordinary (i.e. minimal supervision) probation. Compare Petrasilia, Exploring the Option of House Arrest, FED. PROBATION, June 1986, at 50, 52 (routine probation costs vary between $300-$2,000 per probationer) with note 17 infra and accompanying text (electronic monitoring likely to cost between $3,000-$4,000 per detainee). This disparity is hardly startling, however, when one considers just how little supervision routine probation offers. See infra note 19.
surveillance program probably lies between that of a regular (minimal supervision) probation program and an ISP. Whereas ISP requires intermittent supervision throughout the entire day at different locations (i.e. home, work, etc.), home detention normally does not. Thus, human supervision will likely cost less than ISP. Of course, as the daily period of detention increases, or as home detention is combined with, say, employment supervision, costs will increase. Apart from the fact that the costs of electronic supervision are defrayed to a large extent by user fees,\textsuperscript{14} the electronic model's costs only vary to the extent of new units. This facilitates program planning and extension. The cost of a top-of-the-line electronic system (i.e., the "Supervisor" manufactured and distributed by Corrections Service, Inc.), capable of handling twenty offenders, is $44,400—which includes installation and training. The system is expandable to cover 200 offenders at the cost of additional transmitters alone. In Palm Beach County, costs are recouped by charging the offender a $63 per week user fee.\textsuperscript{15}

Because home detention is a nascent sanction, it is bound to raise some difficulties in implementation. Care must be taken not to over-rate or overapply home detention; frequently, when a new sanctioning idea emerges, the first impulse is to hail it as an elixir for all sentencing problems. To restrict this tendency, it is necessary to discuss some of the limitations of home detention.

1. \textit{The Quality of the Home}

Home detention is detention in a house, where variable characteristics of the house and home life will affect the quality of detention experienced by the offender. One factor that must be addressed is the size and comfort of the house. First, the size of the house will play a large role in the amount of severity felt by the detainee. In terms of movement alone, a large house will be much more

\textsuperscript{14} See, e.g., 1983 \textsc{Utah Op. Atty Gen.} 56 (authorizing imposition of costs on offenders under section 77-18-1(6)(f) of the Utah Code). It should also be noted that Georgia charges ISP probationers the equivalent of a user fee. See Conrad, \textit{The Penal Dilemma and Its Emerging Solution}, 31 \textsc{Crime & Delinq.} 411, 417 (1985).

\textsuperscript{15} The base cost of the successor to the "Supervisor" is now approximately $1,800. This unit, the "In-House Arrest Unit," is also manufactured and distributed by Corrections Services, Inc. Letter from Professor J. Robert Lilly, Dept. of Sociology, Northern Kentucky University, Nov. 19, 1986 (available from author). As is usual with new technologies, the cost of units will probably further decrease as the market for the devices stabilizes. See Friel & Vaughn, supra note 12, at 5.
DEINSTITUTIONAL INCAPACITATION

Desirable to an offender. An offender is less likely to perceive the house as "prison-like" due to the general freedom of movement from room to room. On the other hand, some residences will be very small. It is obvious that houses, or even apartments, can never be as deprivational as penitentiary cells, but the smaller the house, the harsher the conditions of detention. The offender experiences a restricted movement and, thus, a more shut-in and controlled environment. The reality of being "locked-up" is more forcefully felt. Akin to size variances are differences in general comfort. A penthouse is bound to be more comfortable than a small apartment. Again, the more elegant the surroundings, the less deprivational is confinement to quarters.

Differences in home size and comfort are only relevant to the extent that detention is used to fulfill retributive goals. If incapacitation only is sought, then these concerns fade in importance. As will be noted later, although home detention may prove defensible on retributive grounds, incapacitation is its primary objective. Perhaps the most that can be said is that the judge should weigh the equities of each housing situation. In very extreme cases, the poshness of the offender's home would militate toward use of a different sanction, perhaps a half-way house, shock probation or even prison.

2. Employment Supervision

Another area of concern is the relation of home detention to employment supervision. Of course, such supervision is not a necessary condition for home detention. Employment supervision would definitely increase the incapacitative, and possibly the deterrent, effect of the sanction; but should incapacitation in the workplace be a goal of home detention? Unless an offender's work requires him to remain at a prescribed work station or office or network of the same, electronic surveillance systems will be ineffective in the workplace. Even if electronic supervision is plausible, the employer might not want the device on the work premises. Consequently, in the majority of cases, human supervision would be mandated in the workplace.

Some types of work will have an inherent surveillance factor—jobs that involve a great degree of employer supervision. Still, the employer may not want the responsibility of acting as a supervisor for criminal justice purposes unless the offender has a long work history during which he has demonstrated a high degree of
responsibility. Even then the employer may resist. Thus, probation supervision will likely be necessary on the job. The amount of this supervision will vary with the nature of the job and of the offender. Heavy employer supervision will proportionally reduce the amount of probation supervision needed. Intensified supervision could be mandated in a job where the employee/offender enjoys great mobility. Generally, the worker in the field or the top executive will have less employer supervision. Only greater state intervention can assure attendance. Again, the greater the state supervision, the greater the monetary cost of the program.

While home detention entails substantial incapacitation in a dwelling, it does not follow that home detention is predicated on around-the-clock incapacitation. Home detention does not fail as a concept because intense supervision outside the prison is difficult. There will be some cases when workplace supervision is necessary—where home detention is to be utilized instead of prison. There will also be cases when home supervision alone is sufficient—where the sanction is to be used in place of probation. In the first case, supervision is for incapacitation's sake. In the second case, supervision fulfills retributive and deterrent goals. There will also be cases that fall between these extremes. There will always remain periods that cannot be supervised readily (to and from work in a vehicle, for instance). If it is necessary to supervise these times as well as employment and work time, a total noninstitutional incapacitation is posited. At this juncture, the difference between home detention with added nonhome supervision and prison incarceration fades. The offender who would merit such hyperintensive supervision is probably a candidate for jail or prison.

3. Minimal Home Detention and Curfews

Post-trial home detention can range from twenty-four hour detention to as little as a few hours per day. This latter type of home detention can be termed “minimal home detention.” This does not mean there are ameliorated restrictions while the offender is in the house, rather “minimal” refers only to the quantum of detention time. Minimal home detention is proper where there is a decreased need for stringent incapacitation. The court could impose detention time only amounting to, say, five hours a day during recreational time (time not spent at work and not during sleeping hours). This would provide maximal intrusion into the offender's “quality time” while still adhering to minimal detention time.
Minimal home detention can also function like the traditional curfew. Curfews are generally restricted to night hours; minimal home detention can be used in this manner, although it is by no means limited to these hours. If a particular case calls for detention during evening hours because the offender is more apt to commit a crime, then home detention can speak to this need without necessitating long hours of supervision.

Minimal home detention also allows a degree of freedom in the administration of home detention programs in general. First, although it will not affect the cost of electronic surveillance, part-time detention will improve the costs of human supervision programs—the less time supervised, the lower the expense. Second, part-time detention affords the administering agency enhanced creativity in constructing an overall home detention system. The agency can fruitfully utilize both models of enforcement. Courts could utilize electronic monitoring in extensive detention situations where it makes the most sense to outlay the initial capital for the technology. Human supervision could be used in minimal detention cases where manpower costs are not prohibitive.

Some critics might urge that minimal home detention amounts to little more than "grounding" a teenage child. But this objection misconstrues the real value of home detention—that it offers a sliding scale of incapacitation. Home detention can never be prison at home and failed expectations based upon this fact miss the critical mark. There may be cases where minimal detention is enough to incapacitate a particular offender. The strength of home detention is that it can range from very minimal to total detention. It is no shortcoming that home detention is not always as severe as its extreme uses will allow.

4. **Abuse of Emergency Excuses**

Care must be taken in granting leaves for emergencies. This should prove fairly easy to monitor. Release from home detention for medical purposes can be verified by a sworn medical statement executed by the attending physician. There is a chance for collusion, of course, but this is minimal. Courts can standardize leaves for religious observances. One day a week is sufficient for

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16. Curfews have been, and continue to be, part of a sentencing judge's repertoire when sanctioning individual offenders. See, e.g., Sentencing Reform Act of 1984, 18 U.S.C. §§ 3563 (b)(11), (12), (20) (Supp. 1985).
worship with extra time granted for religious holidays. It is possible that an offender may suddenly feel more religious and request multiple furloughs. The court can contain this by simply restricting the out-of-home passes and allowing for clerical visits to the home. This would, in all probability, quell any first amendment arguments against such restrictions.

Most problematic are passes for family emergencies. The tendency is to expand "emergency" to mean family get-togethers, graduations, and other nonemergency occasions. If judges allow too much leniency toward this "nickel and diming" the system, the incarcerative character of the home is lost. Although familial continuity is an important aspect of home detention, it does not follow that all of the pleasures of the family unit must remain unimpaired.

B. Omnibus Sentencing and the Need for Mediate Sanctions

The majority of convicted offenders in the United States receive nonincarcerative sentences: probation, fines, or conditional discharges. Probation, in its varied forms and degrees of supervision, is most heavily used, although fining is also finding wide practice in recent years.

It is hardly subject to debate that courts impose a large percentage of probation sentences with the spectre of prison in mind.

17. See Smith, supra note 1, at 172.
19. Probation had its genesis in the United States in the idea of recognizance, also known as the freedom bond. The first instance of such a bond issuing was in 1830 in the case of Commonwealth v. Chase, reported in REPORTS OF CRIMINAL CASES TRIED IN MUNICIPAL COURT OF THE CITY OF BOSTON BEFORE PETER OXENBRIDGE THATCHER, JUDGE OF THAT COURT FROM 1823-1843 267-70 (1845). After Chase, the Massachusetts legislature enacted a general law codifying recognizance as a sanction. Mass. Rev. Stat. ch. 143, § 9 (1836), reprinted in CORRECTIONS IN THE COMMUNITY 159 (1979). John Augustus then led the famous pamphlet crusade advocating probation as a humanitarian sanction. See generally J. AUGUSTUS, A REPORT OF THE LABORS OF JOHN AUGUSTUS, FOR THE LAST TEN YEARS, IN AID OF THE UNFORTUNATE (1st ed. 1852). Overuse of probation as a sanctioning strategy is attributable to two interrelated phenomena. First, probation is viewed as a response to prison problems. Second, the probation system, as it now stands in the majority of American jurisdictions, cannot structurally cope with what is necessary to make it a productive sanction. The typical probation sentence will be minimal in supervision. See generally C. L. CHUTE & M. BELL, CRIME, COURTS AND PROBATION 31-52 (1956). Updated evidence further points to a general lack of meaningful restrictions in most probation programs. See, e.g., Hard Times for Probation, But 'Intensive Supervision' Praised, CRIM. JUST. NEWSLETTER, Aug. 15, 1985, at 2. In point of fact, the use of probation is at such a fever pitch that while the prison population has increased in the period 1974-80 by 48%, the total number of probationers has
A sentencing judge will view probation primarily as a choice not to imprison rather than as a fitting sentence in itself. If preference for probation over imprisonment is based solely on a rejection of prison, probation retains little vitality of its own. It becomes an indiscriminate dumping ground for nonprison offenders, regardless of whether probation will afford the offender, the penal system, or society any benefit. Whenever persons are diverted into system increased during the same period from 573,000 to 1,552,000 or by 63%. Petersilia, Community Supervision: Trends and Critical Issues, 31 CRIMES & DELINQ. 339, 340-41 (1985).

There has been a focused movement toward more strenuous probation conditions in some jurisdictions. These programs, however, are costly to manage and are difficult to integrate into existing probation management systems. Indeed, it is this very awkwardness of implementation into existing probationary structures that may spell doom to a concerted effort at probation reform across the board. Intensive supervision probation programs (ISPs), while demonstrating effective probation implementation in cases where a high degree of supervision is called for, also point out the massive man-hour and social cost of such a program. See Conrad, The Penal Dilemma and Its Emerging Solution, 31 CRIME & DELINQ. 411, 416-18 (1985); see also Petersilia, supra at 344-47.

20. There are a number of reasons for this incestuous relationship between prison and probation. One articulated reason is the simple fact of prison overcrowding. Norman Carlson, director of federal prisons, has voiced the view pervasive among corrections officials that the overarching purpose of sentencing is to sentence criminals to prison terms and that America is not building prisons at the rate necessary to keep pace with this goal of punishment. The Constitution: That Delicate Balance, June 15, 1983 (aired on PBS Oct. 18, 1985, as moderated by Prof. Charles Nesson) (transcript available from the Media and Society Seminar, Columbia University School of Journalism) (remarks by Norman Carlson, director of federal prisons). The idea, however, that corrections officials singlemindedly advocate prison expansion oversimplifies the problems of day-to-day order that demand the constant attention of prison administrators. See Jacobs, The Politics of Prison Expansion, 12 N.Y.U. REV. L. & SOC. CHANGE 209 (1983-84).

The prison population in the United States at both the state and federal level has increased from 196,429 in 1970 to 353,167 (or 153/100,000 of general population) in 1982. See A. SCULL, DECARCERATION 176 (2nd ed. 1984). According to 1978 figures, if 60 square feet per prisoner was required to eliminate overcrowding, 87 state and federal prisons would have to displace 90 percent of their inmates. Penitentiaries in 1978 were operating at 171 percent of physical capacity. 1 NATIONAL INSTITUTE OF JUSTICE, AMERICAN PRISONS AND JAILS 67-69 (1980). For an excellent range of literature addressing the problems of prison overcrowding, see Colloquium: The Prison Overcrowding Crisis, 12 N.Y.U. REV. L. & SOC. CHANGE 1-349 (1983-84). Some commentators have urged greater judicial intervention to lessen the strain on prison populations by sentencing felons to probation. See, e.g., Finn, Judicial Responses to Prison Overcrowding, 67 JUDICATURE 318, 323 (1984); Gettler, The Prison Population Boom: Still No End in Sight, CORRECTIONS MAG., Sept. 1983, at 9.

Other alternative sentencing strategies such as fines, pleading to lesser included offenses to jail offenders in county facilities reserved for misdemeanor incarceration, or simply ignoring minor offenses have also been used to combat prison overcrowding. See A. SCULL, supra, at 45-46; cf. J. WILSON, THINKING ABOUT CRIME 159 (rev. ed. 1983) (regardless of how many nondangerous offenders are diverted to probation, more prisons must be built to deal with the rise in violent crime). This trend can hardly be considered principled decarceration guided by a forward-looking sanctioning rationale. It is merely a stop-gap measure for a problem having very little to do with probation theory. Accord J. WILSON, supra, at 159.
A (predicated on certain goals of punishment as applied to certain group of persons with whom the system is constructed to deal) merely because of deficiencies in system B, there is a failure of

A related factor is the deplorable conditions in many prisons. Whether viewed as growing out of an internalization of state power against the criminal or proceeding from humanitarian Quaker concern for repentance, the modern "total institution" is in many ways a protean nightmare. The historical debate on this point is lively. Conventional historiography attributes the rise of the total institution to social reformers, most notably Bentham in England and the Quakers in America. See, e.g., J. BENTHAM, PANOPTICON: OR THE INSPECTION HOUSE (London, Payne ed. 1791). Historical revisionists, however, view the movement from public capital and corporal punishment to institutional incarceration as an instrument of social control, emblematic of class conflict and state power brokering. See, e.g., D. ROTHMAN, THE DISCOVERY OF THE ASYLUM (1971); M. IGNATIEFF, A JUST MEASURE OF PAIN: THE PENITENTIARY IN THE INDUSTRIAL REVOLUTION (1978); M. FOUCAULT, SURVIELLER ET PUNIR (1975); but cf. Ignatieff, State, Civil Society, and Total Institutions: A Critique of Recent Social Histories of Punishment, 3 CRIME AND JUSTICE 153 (1981) (arguing that revisionism has overstated its case and that a middle ground between the traditional view and the interpretivist view must be attempted).

It is true that the past 20 years have witnessed great progress in prison reform, both through the efforts of scholarly commentary and through the initiatives of the prisoners' rights movement; however, it would not be stating the case too harshly to observe that the penitentiary experience is characterized by sometimes startling hardship. The prisoners' rights movement of the middle and late 1960s and early 1970s was, in the main, successful in securing some rights for prisoners, notwithstanding prior harsh interpretation under the Constitution. See, e.g., Johnson v. Avery, 393 U.S. 483 (1969) (right of inmate to law books and typewriter for pro se defense); Cooper v. Pate, 378 U.S. 546 (1964) (prisoner guaranteed right to access to religious publications under the first amendment); Nolan v. Fitzpatrick, 451 F.2d 545 (1st Cir. 1971) (upholding rights of prisoners to mail letters protesting prison conditions to the news media); Martinez v. Mancusi, 443 F.2d 921 (2d Cir. 1970), cert. denied, 401 U.S. 983 (1971) (prisoner stated a prima facie case under 42 U.S.C. § 1983 for denial of right to adequate medical care); Barnett v. Rodgers, 410 F.2d 995 (D.C. Cir. 1969) (remand to district court recognizing first amendment dietary right of a Black Muslim inmate); but see Tarlton v. Clark, 441 F.2d 384 (5th Cir. 1971), cert. denied, 403 U.S. 934 (1971) (no right to conjugal visitation); Payne v. Dist. of Columbia, 253 F.2d 867 (D.C. Cir. 1958) (same); United States ex rel. Pope v. Williams, 326 F. Supp. 279 (E.D. Pa. 1971) (repetitious prison work not actionable). For an in-depth treatment of the prisoners' rights movements, see J. JACOBS, NEW PERSPECTIVES ON PRISONS AND IMPRISONMENT 33-61 (1983).

Of course, confinement in any prison is a tremendous punishment in itself. In varying degrees, depending on the particular institution, prisons limit physical movement. Restrictions on ordinary freedoms do not end with strictures on movement. Policies of sexual deprivation increase the social isolation of the prisoner, perhaps also aggravating prison violence. This aspect of prison can only be justified, if at all, on a retributive theory of justice, since incapacitative, deterrent and certainly rehabilitative policies are not forwarded by institutional sexual deprivation. See Jacobs & Steele, Sexual Deprivation and Penal Policy, 62 CORNELL L. REV. 289, 293-96, 298-302 (1977). Mississippi has been an innovator in allowing for conjugal visits, in certain cases, to ameliorate the harshness of heterosexual deprivation. See Hopper, The Conjugal Visit at Mississippi State Penitentiary, 53 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 340 (1962). Although advocated by scholars, conjugal visitation has not been afforded constitutional protection by the courts.

Prison can also be a psychologically brutal experience of immeasurable proportion. Smaller freedoms such as choice of food, toilet privacy, prisoner association, and visitations are strictly regulated or disposed of altogether. Note, Punishing the Innocent: Unconstitutional
systems. In this way, probation and incarceration are inexorably linked in American penology.

We can chart a severity spectrum for sanctions, merely as a rough aid to conceptualize omnibus sanctioning, in Table 1, below:21

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<th>A</th>
<th>B</th>
<th>C</th>
<th>D</th>
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<tbody>
<tr>
<td>0</td>
<td>increased severity --&gt;</td>
<td>suspended probation incarceration capital punishment</td>
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<td>Area of Mediate Sanctioning</td>
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TABLE 1
The problem is that courts are sentencing all persons falling between points B and C inclusive to either B or C. Further, courts channel some persons falling beyond point C to B, due to problems endemic to C.

Restrictions on Prison Marriage and Visitation, 60 N.Y.U. L. Rev. 275 (1985). These hardships alone probably would not cause a blind rush to probation as a depository for persons otherwise candidates for prison. But these restrictions are not as sensational as the more prominent deprivations of penitentiary life—sexual deprivation, as set forth above, and violence.

Prison violence is axiomatic in the total institution. It occurs between guards and the prisoners and, more frequently, between prisoners themselves. Violence between guards and prisoners is a fairly rare phenomenon now, although the use of brutal coercion techniques did not cease until the late 1960s. Coercive techniques included, but were not limited to, wiring a prisoner's genitalia to an electrical generator (the infamous "Tucker Telephone"), beatings administered by a telephone book so as to leave no bruises, and handcuffing to overhead pipes during sleeping periods. See generally T. Murton & J. Hyams, Inside Prison, U.S.A. (1969); J. Mitford, Kind and Unusual Punishment 41-42 (1971); Hirschkop & Milleman, The Prison Life of Leroy Jones, in Prisons, Protest, and Politics 55-59 (1972).

More troublesome is prisoner versus prisoner violence that takes many different forms. Sexual battery, including homosexual rape, is epidemic—utilized by prisoners as a tool of social dominance as well as a focused vent for anger. Theft, assault and battery, maiming and homicide pervade large-scale prisons. The incidence of prison violence is so high that its prevention becomes an overriding concern of corrections officials. See C. Silberman, Criminal Violence, Criminal Justice 512 (1978). Even minor transgressions (minor, that is, as viewed by mainstream society) can trigger a tremendously violent response.

Combined with the problem of overcrowding, which may exacerbate prison violence, safety conditions in prison subculture cause the normal judge to turn to "alternatives." The problem here is not the turning—it is quite probably the case that too many people are sentenced to prison terms—the problem is what it is being turned to. The probation system is an unworthy recipient of a good number of "diverted" would-be prisoners. See supra note 19 and text. This subverts not only probation policy but also general punishment goals. These diversions are not limited to placement ab initio into probation programs. It also takes the form of accelerated parole. See Citizens' Inquiry on Parole and Criminal Justice, Inc., Prison Without Walls: Report on New York Parole 178-182 (1975).

21. This table is similar in form to the graph of latent variable modes of sentencing as set out in Klepper, Nagin & Tierney, Discrimination in the Criminal Justice System.
It is necessary to develop a coherent package of mediate sanctions to extricate the present system from the grips of omnibus sanctioning. A “mediate sanction” is a sanction positioned between probation and incarceration in terms of overall severity (excluding short jail terms). Combating omnibus sentencing entails developing mediate sanctions that conform to stated goals for criminal punishment.22 As Glueck stated, “[t]he sentencing judge of the future must be a social physician.”23 If this physician is to operate successfully, we must provide him with the various surgical instruments necessary to meet the vagaries of criminal sentencing. This necessitates adopting a flexible array of sanctions.

At first blush, it might seem that determinate sentencing and the idea of tailored sanctions are diametrically opposed. This is not necessarily true. A system of sentencing is no less determinate when it allows for individualized sanctions so long as all similarly situated persons are treated the same. This is not to say that there will be identical factual situations attending identical offenders. This could never be the case due to the literally infinite variables in every sentencing situation. Indeed, a “perfect fit” criterion is contrary to the very notion of objective sentencing. Determinate sentencing presupposes variance in particular cases in its mandate for a set of fixed sentencing principles.24 The more detailed the sentencing calculus, the more likely that individual cases will be nondiscriminatory.25 Mediate sanctions must be brought to bear so that they may enrich this calculus. However, it would be a mistake to apply a single mediate sanction across a broad range

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22. “Goals of punishment” throughout this paper means the classical four-part policy behind sanctions:
   
   (1) deterrence (including both specific and general deterrence)
   (2) incapacitation
   (3) rehabilitation
   (4) retribution (just desert)

   In addition, retribution can be subdivided into concepts of vengeance (lex talionis) and just desert (a representation of social condemnation of the criminal act as reflected by the severity of the punishment). See M. Frankel, Criminal Sentences 106 (1972). There may also be a notion of societal reparation inherent in both the ideas of retribution and rehabilitation.


25. See M. Frankel, supra note 22, at 113-114.
of sentencing situations. This would erect yet another omnibus sanctioning program that would quite likely prove vulnerable to the same criticism that are levied at probation and incarceration.

The catalogue of mediate sanctions is large and diverse. It includes intensive supervision probation (ISP), reconciliation programs, fining, community service, restitution, shock probation, part-time jailing, half-way houses, and, now, home detention. Each of these sanctions is best applied to a different set of offenders and none can be applied indiscriminately. Nevertheless, the possibility of drawing from a number of these sanctions in a given situation and arriving at a multifaceted sentence, tailored to the particular case, presents itself quite readily. Why then do sentencing judges hesitate to adopt mediate sanctioning?

Herbert Hoelter of the National Center on Institutions and Alternatives has suggested that, putting aside any perceived shortcomings related to the other three goals of sentencing, it is necessary to convince judges that alternatives are *punitive.* This points to a central problem in American penal policy concerning perceptions of the severity of a sanction. We seem to be mesmerized by prison and its heightened degree of incapacitation. We have formulated a strange equation—that punitive value is coextensive with incapacitation in prison. Therefore, we are reluctant to countenance potential for severity in other sanctions. Home detention, if set out in a principled form, can satisfy sentencing judges' concerns for punitive mediate sanctions.

II. BENEFITS OF POST-TRIAL HOME DETENTION AS A MEDIATE SANCTION

To evaluate home detention's potential as a mediate sanction, it is necessary to discuss the extent to which it fulfills the goals


27. It should be noted that the severity of a sanction that is to be quantified not only relates to punishment *qua* punishment (i.e., desert and vengeance) retribution but also to deterrence. Under the classical model of deterrence, the more severe the punishment the greater the impact on the general population and the individual himself, causing both to be less likely to commit a like criminal act in the future. “The term *Deterrence* is used ... restrictively, applying only to cases where a threat causes individuals who would have committed the threatened behavior to refrain from doing so.” F. ZIMRING & G. HAWKINS,
of criminal sanctioning. Following this analysis, I will investigate adapting home detention to the existing mediate sentencing structure to achieve optimal tailoring of sentences.

A. Post-Trial Home Detention and the Goals of Punishment

1. Deterrence

Eighteenth century social reformers first articulated deterrence as a limiting principle on retribution. Both Beccaria and Bentham embraced the notion that a sanction should be no more nor less severe than necessary to cause the punished or another potential felon not to commit a like criminal act. There are two forms of deterrence: specific and general. Specific deterrence is the effect of a penalty on those to whom it is applied. General deterrence refers to a punishment's effect on others. The existence and magnitude of this effect is difficult to demonstrate empirically for several reasons.

First, in order to validate a deterrent effect, one must engage in predictive analysis. At a base level, this has the general effect of attenuating causal connections that might be easier to measure given temporal proximity. Second, a sanction cannot have a consistent deterrent effect unless there is some degree of identity between the offender sentenced and the others to be deterred. The same identity relation must exist between the quality of the offender's criminal act and the hypothetical criminal act that is to be deterred. Any deviation in value causes a deviation in the magnitude of deterrent effect. Perhaps this says little more than what we all know — that deterrence is measured in mathematical probabilities based on empirical data. But the literature is far from unanimous on the deterrent effect of any punishment in any field of criminal law. There is little agreement on the proper mathematical methodology used to measure a general deterrent
effect. Statistics may be fatally flawed due to variables completely out of the statistician's control.

Second, general deterrence theory presupposes a deterrable potential offender — a person both capable and willing to act rationally. Clearly, not every felon committing a particular crime will prove deterrable. Nevertheless, one can safely assume that some classes of offenders (i.e., thieves) will prove more deterrable than other classes of offenders (i.e., depraved heart murderers) as a general rule. This supposition depends on the quality and quantity of the sanction used to punish the particular crime as well as individual predispositions.

Third, one must identify the aspect of a particular punishment that causes the desired deterrent effect. Two such aspects are the severity of the punishment (qualitative aspect) and the frequency with which it is applied to the proper object (quantitative aspect). The nexus between the qualitative and quantitative aspects of a penal sanction is impossible to determine precisely. Current opinion seems to indicate a greater role in deterrence for the quantitative element of a sanction. In light of this cursory discussion of deterrence theory, we can turn to the possible deterrent value of home detention.

The deterrent impact of home detention, while as difficult to measure as the deterrent value of any sanction, may well be greater than that of ordinary probation. Given the multitude of problems associated with any claim for deterrence, this statement is fairly

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32. Zimring and Hawkins limit their definition of "deterrence" to eliminate the nondeterrable future felon. See ZIMRING & HAWKINS, supra note 27, at 72-74. They also make no distinction between specific and general deterrence, the former being indistinguishable from rehabilitation.


34. Id.
conjectural. Nevertheless, viewed from an offender's standpoint, home detention is more onerous than ordinary probation. The deterrent effect of any sanction will vary according to the restrictive aspects of the sanction. While home detention is certainly not as severe as imprisonment, it constitutes a significant restriction of freedom. Assuming that courts will employ an ISP structure in the out-of-home periods, which would, of course, make the program more expensive, the supervision factor is quite heavy. Nevertheless, it is far less than what exists at most prisons.

It would be panglossian to maintain that home detention will be a meaningful deterrent to "serious" crimes against the person. Nevertheless, a plausible deterrent value may be argued for with regard to less serious crimes of the person, economic crimes, and crimes not based on willful intent (i.e., involuntary manslaughter). Moreover, the sentencing judge can easily combine home detention with other mediate sanctions such as community service, fines, ISP, restitution, or reconciliation programs. This facilitates a cumulative deterrent effect, although each of the named sanctions might not, standing by itself, possess a high deterrent value.

2. Incapacitation

Incapacitation concerns itself with effectively protecting society from an individual's further criminal acts. Paradigmatically, this is achieved by imprisonment. Incapacitation of this sort may also have a gratuitous deterrent effect since incapacitation is usually unpleasant and unwelcome. Some commentators argue that an incapacitative effect is a good deal easier to calculate than a deterrent effect:

There are fewer problems in inferring the existence of effects from incapacitation than in establishing the deterrent effects of criminal sanctions. As long as the offenders who are imprisoned would have continued to commit crimes if they had remained free, there is a

35. For an interesting expose of employment and work supervision programs outside the scope of an ISP structure, see Smith, supra note 1, at 192-194. Although Smith points out that, as they now stand, work programs do not provide enough supervision to be truly incapacitative, it is noted that electronic surveillance might improve the intensity of supervision. Id. at 193.

36. This does not protect society from the offender's violence against co-inmates in prison. For a description of the incidence and quality of prison violence, see generally supra note 20.

37. See generally supra notes 29-34 (general discussion of deterrent theory).
direct incapacitative effect: that is, the number of crimes at any time is reduced by the crimes avoided through the imprisonment of some criminals. The magnitude of that incapacitative effect is directly related to the rate at which an individual offender commits crime.

Again, the inquiry into incapacitative effect is predictive in nature. The incapacitative effect will depend on two variables. First, one must presume that an offender will commit other crimes at the same or at a greater rate than in the past. This is a complex matter that requires intricate probability determination. Second, multiple offenders commit many crimes. Therefore, incarcerating one felon will not necessarily stop the criminal behavior since multiple offenders not in prison will continue to commit the crime.

The danger of overprediction is manifest.

Home detention has an acceptable potential for incapacitation. Naturally, incapacitative effect is enhanced by electronic surveillance. Regardless of the time spent by a probation officer,

38. DETERRENCE AND INCAPACITATION, supra note 29, at 65.

39. This factor is quite significant. Recent data indicate that 36 percent of all reported crimes are committed by multiple offenders. Additionally, 68 percent of all offenders commit crimes with the aid of others with criminal involvement. See Reiss, Understanding Changes in Crime Rates (1977) (unpublished paper available through Yale University, Dept. of Sociology), quoted in DETERRENCE AND INCAPACITATION, supra note 29, at 65 n.63.


It is important to note that our predictions can fail in two ways and that we have developed an extremely useful technique to conceal the more troublesome failures from ourselves. First, the two paths to failure. Let us suppose that we have to predict future violence to the person from among 100 convicted criminals, and let me invent figures that are far superior to any we can now achieve in practice. Assume that of the 100, we select 30 as likely future violent criminals. Despite our prediction of danger, all one hundred are either released or left at large. Their subsequent careers are then followed, and with hypothetical precision we know the results. Of the 30 we predicted as dangerous, 20 did commit serious crimes of violence and 10 did not. Of the 70 we declared to be relative safe, five did commit crimes of physical violence and 65 did not.

... One might claim, "We had 80% success in our prediction, successfully preselecting 20 out of the 25 who later committed serious crimes of violence." Not bad. Of course, we failed to select five out of the 100 who later proved to be dangerous, but that seems a minor failure compared with the twenty serious crimes we could have prevented. Note, however, that we also failed in another way. We selected 10 as dangerous — as likely to commit crimes of violence — but they did not. Had we imprisoned the 30 that we predicted as dangerous, in 10 cases we would have failed in our prediction by needlessly detaining them. Put more succinctly, we made 20 true positive predictions of violence and ten false positive predictions.

Id. at 66-67.
an ISP/home detention system cannot equal the electronic monitor's small margin of error. Combined with out-of-home supervision at the workplace or during times of alternate mediate sanctioning (i.e., community service), the court could fashion a total incapacitative system.

A natural response to this argument is that although the monitor will signal when the offender has violated the home detention order, the offender is still on the street free to commit further crimes. This cannot be denied — home detention is not a sanction suitable for violent offenders. Obviously, no electronic system can restrain an offender initially. Nevertheless, the incapacitative effect of home detention should prove efficacious for nonviolent offenders, quite probably preventing further criminal behavior. Even if there is a repeat episode, the impact on societal safety would probably be negligible due to the minimally violent nature of the offender's prior crime.

In a very important respect, we have become desensitized to nonprison incapacitative programs because we view imprisonment as the defining criterion for incapacitation. It must be remembered that prison itself is not a perfect incapacitator; inmates can injure guards or one another. Granted, total incapacitation is not the hallmark of home detention. The question to be asked is: should it be? The clear answer is no. So long as courts limit the application of the sanction to offenders who do not pose a significant threat of physical harm to society, a less than maximal incapacitative effect is tolerable. The incapacitative aspects of home detention tangentially increase deterrence by threatening physical restriction and partial or around-the-clock supervision — electronic or otherwise. There is also an ancillary retributive effect inherent in substantial incapacitation because most people view isolation from the mainstream of society as virtually synonymous with punishment.

3. Retribution

Retribution theory arguably has two elements: vengeance and

41. Statistics on recidivism from Palm Beach County, Florida, indicate that over a sample of 87 monitored offenders there was a three percent repeat rate while parolees without monitors had a seven percent rate. Telephone interview with Lt. Gene Garcia, Palm Beach County Florida Sheriff's Office (Mar. 18, 1986).

42. See generally supra note 18 for a discussion of privation and violence in prisons.

43. H.L.A. Hart makes this distinction in the following fashion: "Of course, the distinc-
just desert.\textsuperscript{43} Vengeance is a subjective, quasi-psychological fulfillment that is sated when a certain punishment has been imposed upon an offender. Supporters of retribution as the preeminent sanctioning goal have taken pains to eliminate vengeance from an ordered concept of retribution — stating that vengeance, as it is arbitrary, has no place in a retributive structure.\textsuperscript{44} Vengeance is not necessarily coextensive with \textit{lex talionis}. What is required of a punishment is not \textit{quid pro quo} (the Biblical eye-for-an-eye),\textsuperscript{45} but rather a sanction keyed to the severity of the crime.\textsuperscript{46}

The second element of retributive theory is the concept of just desert.\textsuperscript{47} A sanction should reflect the harmful nature of the offender's act in its severity: no more and no less. Overly severe punishment brutalizes society by an unjust overapplication of the
state's power to punish. On the other hand, any punishment not severe enough fails to instill respect for the criminal law — it deprecates the gravity of the offense. This notion is partly based on a neo-Kantian characterization of society as an equilibrium of individual freedom and restricted will. Just desert is presently the prevalent element of retributive theory, all but replacing the primitive notion of societal vengeance.

Home detention can provide a significant retributive effect. Compared to disposition in a typical probation system, the incarcerative aspect of home detention heightens its retributive effect. The stigma associated with the electronic device is fairly burdensome when the device must be worn outside the clothing due to its construction. Some devices are cosmetically concealed under clothing. Yet, even when the device is not seen by the public, the conscious reminder of its presence discounts for a lack of societal opprobrium.

(to whatever extent possible) the exact quantum of the sanction. See N. Morris, Madness and the Criminal Law 146-52 (1982); N. Morris, supra note 44, at 66-76 (1976) (desert and deterrence theory seen as mutually exclusive as guiding principles for fixing punishment).


49. See A. von Hirsch, supra note 44, at 46-47. Norval Morris has termed the equilibritive ideal in just desert as “parsimony," defined as “[the least restrictive punitive sanction necessary to achieve defined social purposes.....” N. Morris, supra note 40, at 60.

50. See generally I. Kant, Rechtslehre (Bonn ed. 1912). References to this idea are sprinkled throughout the moral works of Kant and are particularly prominent in later sections of the Critique of Practical Reason. Much philosophical debate in the area of desert stems from either an acceptance or rejection of the Kantian position. See Morris, Persons and Punishment, 52 Monist 475 (1968); Armstrong, The Retributivist Hits Back, 70 Mind 471 (1961); Mundle, Punishment and Desert, Phil. Q. 216 (1954); see also J. Feinberg, Doing and Deserving (1970); Klenig, The Concept of Desert, 8 Am. Phil. Q. 71 (1971).

The Hegelian position in support of retribution derives from a view that punishment is the right of the criminal to be honored as a rational being. See G.W.F. Hegel, Philosophies des Rechts 65-66 (J. Lasson ed. 1921); see also Murphy, Marxism and Retribution, 2 Phil. & Pub. Affairs 218 (1973) (tracing the Hegelian idea through Marx and neo-Marxist antecedents). Cf. Plato, Gorgias 474, where punishment is characterized as a benefit suffered by a “patient” of justice.

51. This coincided with the re-emergence of retribution as the most important goal of criminal sentencing. The American Law Institute recognizes desert as a legitimate sentencing goal but not as pre-eminent among the other goals. See Model Penal Code § 7.01 (1ce) (Proposed Official Draft 1962). In fashioning the Sentencing Reform Act of 1984, Congress incorporated its strong approval of just desert into the primary section governing federal sentencing policy. Sentencing Reform Act of 1984, 18 U.S.C. § 3553 (a)(2)(A) (Supp. 1985). There is evidence that the construction of § 3553 (a)(2) is meant to order the importance of the respective goals of punishment — placing retribution at the top of the list. See S. Rep. No. 225, 98th Cong., 2d Sess. 37, reprinted in 1984 U.S. Code Cong. & Ad. News 3220.

52. Some devices may be so bulky that they cannot be effectively hidden. In such a case, social stigmatization may occur. Marvin Trigueros, serving nine months home detention
There is also a fair chance that added supervision at the place of employment will increase the retributive effect.

To put the issue in a slightly different form, since just desert depends on the relation of the severity of a sanction with the perceived gravity of the offense, the real inquiry is: how grave an offense can be punished by home detention without trivializing the gravity of the crime committed? Given its restrictive nature that can extend to twenty-four hour detention time, along with its ease of joinder with other mediate sanctions, home detention clearly provides enough retributive potential to be utilized with a fairly broad class of serious property offenders and other low-to moderate-risk felons.  

4. Rehabilitation

The "rehabilitative ideal" has come under sharp criticism in recent years. This is due to the poor track record of rehabilitative programs in institutional settings. Gaylin and Rothman have

on an aggravated assault charge, states: "It's punishment, that's for sure ... [i]t's a weird feeling to have people staring at this thing on your leg." Quoted in Krajick, supra note 4, at 7. In Utah, the devices are worn around the neck, possibly heightening stigma by public display. Id. at 8.

53. Current application of home detention is limited to these low- to moderate-risk felonies. In Murphy, the defendant was convicted of insurance fraud and a RICO offense. The sentence was five years probation and two years home detention. United States v. Murphy, No. 85-847, slip op. at 7 (E.D.N.Y. Sept. 23, 1985). Under pertinent federal statutes, the court could have sentenced the defendant to fifty years imprisonment and up to $56,000 in fines. The situation in Wayte was not much different. The defendant was convicted of violating selective service registration requirements by failing to timely register. Wayte was sentenced to six months home detention. United States v. Wayte, No. CR-85-671, slip op. at 9 (C.D. Cal. Sept. 10, 1985). Florida's experience is more illustrative of the range of possible offenses that could be sanctioned under home detention. The offenses run from check forging to burglary and arson. The only per se exclusions from the program are cases of drug trafficking, sexual offenses, and murder. See Krajick, supra note 4, at 7. The program in Clackamas County, Oregon, includes both misdemeanor and felony offenders with no specific exclusions. See Ford & Schmidt, supra note 4, at 4-6. In Ann Arbor, Michigan, persons convicted of assault (or crimes involving greater bodily injury) or narcotic offenses are excluded as are persons who have a prior history of flight from other nonprison programs. Id. The Kenton County, Kentucky, pilot program is extremely restricted. It is only open to misdemeanor offenders or those persons who pose a minimal risk to society. Id. Under the Sentencing Reform Act of 1984, persons who commit crimes punishable by 20 years imprisonment are automatically excluded from probation and hence from consideration for home detention under federal law. 18 U.S.C. §§ 3559 (a)(1)(A)-(B), 3561 (a)(1) (Supp. 1985).

Only two states regulate the length of terms of home detention. Project Pride, which operates the program in Palm Beach County, Florida, calculates detention terms at a ratio
justifiably criticized the rehabilitative model, as implemented during the 1960s and early 1970s, as a psychiatric model that "abounded with internal inconsistencies which inevitably offered opportunities for exploitation — that were, just as inevitably, accepted." The major exploitation, derived from the characterization of the criminal as a patient, was something that one would think would be abhorrent to liberal sensibilities. That is, rehabilitation provided justification for imprisonment under the guise of "treatment."

The fact that the "rehabilitative ideal" has come into disrepute does not condemn rehabilitation as an aim of sanctioning. The "rehabilitative ideal" was a mode of thought that embraced rehabilitation as a Weltanschauung. The role of rehabilitation was envisioned as grand in dimension. Treatment was viewed as the major goal of sentencing. This does not have to be the case. Home detention provides a useful vehicle for rehabilitating the offender outside the oppressive institutional setting while still affording more environmental control than a traditional probation program.

Home detention, unlike imprisonment, does not remove the offender wholesale from the daily social intercourse. Although not particularly rehabilitative in itself, this nonremoval from society provides a more receptive canvas for rehabilitation and reintegration than the acculturation offered by a large prison. A by-product of this nonremoval may be a lessening of the difficulties that attend reintegration of the offender after release from prison. As has been mentioned previously, courts can combine home detention with other mediate sanctions, some of which have more prominent rehabilitative aspects. Also, home detention does not entail three to four days per each prison day that the offender would have been sentenced to absent home detention. Ford & Schmidt, supra note 4, at 3. The Ann Arbor program severely limits the term to a maximum of 90 days. Ford & Schmidt, supra note 4, at 5. At the federal level, if home detention is authorized as a condition of probation, the term would be limited to five years. 18 U.S.C. §§ 3561 (b)(1)-(3) (Supp. 1985); see also Ford & Schmidt, supra note 4.


55. Gaylin & Rothman, supra note 54, at xxxiii; see also E. Van den Haag, supra note 44, at 187-88 (rehabilitation inexorably leads to involuntary "correction").

56. Criminal/victim reconciliation programs are one possible additive sanction with rehabilitative aspects. See M. Umbreit, Crime and Reconciliation 99-106 (1985) (description of the VORP face-to-face reconciliation program). Community service programs, if properly supervised, can have a rehabilitative effect. For an account of such a program, see Smith, supra note 1, at 179-89. Restitution programs where the offender works off his damage
tirely interrupt the offender's connections with employment and his family.\textsuperscript{57} This fact might also aid in the offender's receptivity to rehabilitation. Thus, while home detention in itself can only be said to offer a more viable background for rehabilitation than either prison or probation, it arguably facilitates rehabilitation through adaptability with more intrinsically rehabilitative mediate sanctions — sanctions which, although high in potential rehabilitative value, probably could not stand on their own as readily as home detention due to lack of retributive, incapacitative, and deterrent effects.

B. Some Possible Legal Objections to Post-Trial Home Detention

Apart from objections already treated — i.e., that home detention may prove to be too little punishment in some situations — there may be concerns that home detention presents an Orwellian potential for abuse.\textsuperscript{58}

to the victim may also prove helpful. Naturally, counseling is also available outside the trappings of the total institute.

57. This discontinuity between prison and post-incarcerative life has great social costs. If the offender was employed or employable prior to prison incarceration, society has lost that individual's work capacity and wage earning ability for the prescribed time of sentence. In some cases, this may be a cost that society must bear if incarceration is mandated under other goals for punishment. If the offender has a family that is dependent on his wage earning, then society will pay the price for incarceration — not only for cell space for the prisoner but also for social welfare programs to aid the prisoner's family. The private business sector will also suffer if the offender had outstanding loans or mortgages that will, in all likelihood, be foreclosed.

Additionally, employment after incarceration involves extremely low wages. This fact, along with a very human impulse on the part of the parolee to try to compensate quickly for the money and economic status lost while in prison, may aggravate the recidivism rate. This is especially true with theft crimes. See D. GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM 221-223, 225 (Abr. ed. 1969); D. STANLEY, PRISONERS AMONG US: THE PROBLEM OF PAROLE 149-63 (1976).

Further, the shock of moving in and out of vastly different social systems (prison versus nonprison society) is often a very difficult transition. Prisoner/parolees with families are, in some cases, the most fortunate since they have a nucleus of persons to return to. This assumes that the prisoner’s spouse has not sought a divorce or moved the family elsewhere. Parents most often afford the parolee his first out-of-prison home. Pre-prison friends are unlikely benefactors due to migration, shunning, and the fact that many parolee's pre-prison acquaintances have also been incarcerated. See D. GLASER, supra at 249-253, 255-258.

58. Steven Forester, the executive director of the Florida Division of the American Civil Liberties Union, has stated that “[w]hen technology is put in the hands of the state and legitimized, there is always potential for abuse.” Quoted in Krajick, supra note 4, at 6. George Gardner, executive director of the North Carolina Civil Liberties Union, has been more outspoken: “This is right out of '1984'... or 'Brave New World'... It is a deplorable, fascist invasion of humanity.” Quoted in Watauga, N.C., Democrat, Mar. 10, 1986, at 20A,
The electronic monitoring of probationers has been criticized as an impermissible intrusion on privacy under the fourth and fourteenth amendments. United States v. Katz would certainly permit electronic monitoring of probationers or home detainees. Conviction of a criminal offense clearly negates any reasonable expectation of privacy applicable to electronic surveillance. Probation has always been considered a legal privilege and not a right. Although certain fourth amendment restraints are applicable to the state in administering probation, the government has a considerable security interest that is difficult to overcome. In the related area of parolee privacy, little judicial scrutiny has been afforded to spot-home visits. Warrantless searches of parolees' homes have been upheld numerous times. Deference to prison intrusions is even greater.

col. 1. This concern seems a bit overreactive. The devices only transmit the fact of being at home — not what the offender is doing or thinking.


60. There have also been objections lodged against electronic monitoring based on the penumbra right to privacy and the eighth amendment's proscription against cruel and unusual punishments. See supra note 8, at 416-18; del Carmen & Vaughn, Legal Issues in the Use of Electronic Surveillance in Probation, Fed. Probation, June 1986, at 60, 61-62. The privacy argument analogizes wearing an electronic monitor to a status crime, which is prohibited under Robinson v. California, 370 U.S. 660 (1962). The eighth amendment argument is even less substantial — hardly more than a bald assertion of impropriety.

Even assuming these arguments have some substance, much of their force is mooted by the uniform practice of all courts (except those in Utah where home detention is authorized by statute) of allowing the offender to choose between home detention and an alternative punishment — usually imprisonment. As long as there is a voluntary and knowing waiver of the right to alternative disposition, there should be no problem. Nevertheless, some have urged that, in the face of a prison term, no waiver can be voluntary. But surely these are makeweight arguments. What does it mean to "waive" a right to prison? Where is the coercion? How can the law force a person to do what he is already legally obligated to do?

Not surprisingly, there has been only one reported case where an offender has chosen incarceration over home detention. Telephone interview with Lt. Gene Garcia, Palm Beach County Florida Sheriff's Office (Mar. 18, 1986) (cocktail waitress who chose to spend 10 days in jail rather than wear an ankle monitor for 30-40 days that would be visible at work).


63. See United States v. Hearst, 563 F.2d 1331, 1345-46 n.11 (9th Cir. 1977); Malone v. United States 502 F.2d 554 (9th Cir. 1974), cert. denied, 419 U.S. 1124 (1975); Springer v. United States, 148 F.2d 411 (9th Cir. 1945); but cf. De Lancie v. Super. Ct., 31 Cal. 3d 865, 647 P.2d 142, 183 Cal. Rptr. 866 (1982).


65. See, e.g., United States v. Rea, 678 F.2d 382 (2d Cir. 1982); Latta v. Fitzharris, 521
It is difficult to see why the need for supervision in home detention that resembles both probation and incarceration would not provide the state with an even greater security interest than was the case with nonincarcertative sanctions such as parole and probation. The vast majority of courts have already shown a willingness to allow great leeway to corrections officials in implementing electronic monitoring systems.

III. PRE-TRIAL HOME DETENTION

As we have already seen, if employed judiciously within prescribed limits, home detention is promising as a criminal sanction. Home detention may also prove useful in the pre-trial disposition of accused felons. Presently, courts either release alleged offenders on bail or detain them prior to trial — because they cannot meet bail, pose a significant risk of flight, or are thought to be dangerous to society. Pre-trial detention is normally incarceration in a local jail that, although theoretically limited in duration by constitutional and statutory notions of due process and speedy trial, can in fact last for quite a long time. Release on bail involves many potential restrictions, varying in degree from release on one's own recognizance to strict conditions approaching those found in ISPs. These stringent limitations on liberty may be deemed necessary because of the potential for flight. Indeed, a plausible argument can be made that the potential for flight is greater in the pre-trial context than in post-trial programs such as probation and parole.

In the federal system, the Bail Reform Act of 1984\textsuperscript{66} enlarged the scope of pre-trial detention to include accused offenders who quite probably would have been subject to bail with strict conditions under prior law.\textsuperscript{67} Before discussing possible uses for pre-trial home detention, it is necessary to briefly explicate the provisions of the Act.

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\item \textsuperscript{67} The constitutionality of the Act has not yet been directly challenged. However, a similar provision in the District of Columbia, (D. C. CODE § 23-1322 (1973)), was upheld against fifth and eighth amendment attack. United States v. Edwards, 431 A.2d 1321 (D.C. 1981); see also Schall v. Martin, 104 S. Ct. 2403 (1984); see generallyNote, The Eighth Amendment and the Right to Bail: Historical Perspectives, 82 COLUM. L. REV. 328 (1982) (excellent historical overview of the excessive bail clause).
\end{itemize}
\end{footnotesize}
A. Release and Detention Under the Bail Reform Act

There are three categories of pre-trial disposition available to an alleged offender under the Act: unconditional release on bail, conditional release on bail, and detention without bail. Additionally, detention will follow if the defendant is unable to make bail or if an arrestee violates conditions on bail.

Unconditional release is authorized for those who neither present a danger to society nor are "bad risks" for flight. Beyond these requirements, the defendant must also be classified as such a good risk that no conditions on bail are needed to assure his appearance at trial. Release on a defendant's own recognizance is within the discretion of the magistrate or trial judge. Most such cases involve first-time offenders charged with lesser economic crimes, crimes against property, or crimes not involving physical harm. Additionally, the defendant must normally demonstrate good community standing, current employment, and a long-standing current residence.

Conditional release involves one or more restrictions on the freedom of the accused. These restrictions range in severity from travel prohibitions to incarceration during nonwork time. The judge has many options that he can exercise to control less than optimal risk bailees. Thus, the conditions provided in section 3242(c)(2) of the Act make it possible to grant bail to offenders widely divergent in terms of risk. Most bail orders contain some sort of condition; normally, the conditions are de minimus because there is a tendency to detain in a case where there is a tangible likelihood of flight — even though a network of conditions on bail might achieve sufficient disincentive toward flight. This is probably due to a cautious attitude on the part of judges when faced with even the slightest risk of flight.

The third possible disposition under the Act is a no-bail detention order. There are two bases that will support a detention order:

69. Id. at § 3142(c)(2)(D).
70. Id. at § 3142(c)(2)(M).
71. These conditions, and particularly the more severe among them, would be upheld under the eighth amendment as were counterpart sections in the 1966 Bail Reform Act. See United States v. Smith, 444 F.2d 61 (8th Cir.), cert. denied, 405 U.S. 977 (1971); United States v. Cook, 442 F.2d 723 (D.C. Cir. 1970).
substantial risk that the defendant will not appear for trial\(^{73}\) and
danger to the community engendered by the accused's release.\(^{74}\)
Detention predicated on risk of flight usually requires a showing
of prior flight on the instant offense or flight associated with prior
bail orders on other offenses. However, there is a trend toward
favoring detention, as stated above, where stringent conditional
bail might also be appropriate. Preventive detention, however, is
based entirely on a public safety rationale. Under section 3142(f)(1)
of the Act, four types of offenses raise a rebuttable presumption
of dangerousness: any violent crime,\(^{75}\) a crime punishable by a max-
imum sentence of life imprisonment or execution,\(^{76}\) any offense in-
volving trafficking or producing illicit drugs where the maximum
penalty exceeds ten years imprisonment,\(^{77}\) and any felony, if the
accused has been convicted of two or more prior felonies.\(^{78}\) These
provisions significantly increase the permissible use of pre-trial
incarceration over that provided for in the 1966 Act.\(^{79}\) Practically
speaking, it is nearly impossible to rebut the presumption.\(^{80}\) This,
in turn, impacts on the demand for corrections space since most
offenders initially classed as detainable will remain in jail.

Home detention combats this problem by eliminating over-
crowding problems due to increased pre-trial detention while allow-
ing for both a large degree of supervision over the accused and
the noninterruption of her economic ties to the community and
social ties to the family. The jail population would consist of only
preventative detainees and a small number of significant flight
risks. This ameliorating effect is extremely important in the pre-
trial context since there has been no adjudication of guilt. Any

\(^{73}\) Id. at § 3142(e)(2).
\(^{74}\) Id. at § 3142(e)(3).
\(^{75}\) Id. at § 3142(f)(1)(A).
\(^{76}\) Id. at § 3142(f)(1)(B).
\(^{77}\) Id. at § 3142(f)(1)(C).
\(^{78}\) Id. at § 3142(f)(1)(D).
\(^{79}\) See id. § 3146(a) (1976). For a discussion of the relative merits and demerits of the
preventive detention model written prior to the adoption of the 1984 Act, see Hickey, Preven-
tive Detention and the Crime of Being Dangerous, 58 GEO. L.J. 287 (1969) (analyzing the
District of Columbia preventive detention statute); Comment, Pretrial Detention in the District
of Columbia: A Common Law Approach, 62 J. CRIM. L.C. & P.S. 194 (1971) (same); Com-
ment, Constitutional Limitations on the Conditions of Pretrial Detention, 79 YALE L.J. 941
\(^{80}\) See W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 12.1(a), at 794-95 (1985).
disassociation that might be accepted in the name of punitive goals at the post-trial stage cannot be justified as such prior to conviction.

B. Home Detention and Conditional Release

It is quite obvious that home detention will not be a suitable substitute for preventive detention. Real or not, perceived dangerousness cannot be adequately checked by either model of home detention. Conversely, defendants who need only minimal supervision are inappropriate candidates since there is no requirement for the substantial incapacitative effect that home detention can provide.81 The salutary aspects of pre-trial home detention are best seen in situations of moderate to severe conditional release.

1. The Statutory Framework

There is ample language in the Bail Reform Act supporting release to a home detention program. The Act provides for several separate conditions on bail that, taken collectively, can impliedly authorize pre-trial home detention. The statute permits restrictions on travel, place of abode, and personal associations.82 Periodic reporting to law enforcement officers or agencies can be required.83 A magistrate can impose a curfew.84 The court can also order bailees confined in jail during hours not spent working.85 Moreover, the Act contains an escape clause that authorizes any other condition reasonably necessary to assure appearance.86 Taken together with the individual conditions mentioned above, this clause would almost certainly support a pre-trial home detention order.

2. Contours of Pre-Trial Home Detention

The absence of punitive concerns at the pre-trial stage eliminates some of the initial misgivings that might attend home detention as a sanction. There is no need to consider deterrent, retributive, or rehabilitative goals. Thus, size and comfort of the dwelling, for instance, should not enter into the decision to detain a bailee in

81. We need focus only on the incapacitative aspects of home detention here since pre-trial use involves no sentencing goals.
83. Id. at § 3142(c)(2)(F).
84. Id. at § 3142(c)(2)(G).
85. Id. at § 3142(c)(2)(M).
86. Id. at § 3142(c)(2)(N).
her home. The only consideration would be how much surveillance is necessary to counteract the predicted threat of flight.

Certainly, as was the case with post-trial applications, pre-trial home detention cannot offer the degree of incapacitation that jail does. In cases of imminent flight, home detention would fail as an incapacitator. It would quite likely be an invitation to flight. Nevertheless, both the human supervision and the electronic surveillance model of home detention promote increased control over the accused's movement. The quantum of control is definitely greater than that afforded by any single condition under section 3142(c)(2) of the Act (and quite probably more than any combination of factors). It is reasonable to project that many borderline moderate/serious flight problems now committed to incarceration could be channeled instead into home detention. The particulars of such a home detention program would vary; around-the-clock or all nonwork time programs would provide the maximal incapacitative effect. There would be no need to scale down the actual detention time, as was argued for in connection with post-trial detention, since incapacitation is the only aim of pre-trial detention.

Even granting that home detention can provide an alternative to incarceration in proper cases, the question still remains as to why home detention should be preferred over pre-trial incarceration. Let us take up first the contention that pre-trial home detention is no improvement on jailing defendants pending trial.

One answer to this criticism is that, as much as possible, an accused's life should remain undisturbed since there has not been a conviction that would be a predicate for restraints on freedom. To state it somewhat differently, the least restrictive alternative should be adopted when dealing with pre-trial detention. Home detention facilitates this retention of normalcy. It allows the detainee to continue employment uninterrupted and does not sever family ties. Society receives the benefit of the continued fulfillment by the defendant of his financial obligations along with the economic benefit of not paying for the cost of incarceration.

Some may argue that the time spent in pre-trial detention is so short in comparison to the length of sentences that these policy reasons supporting home detention in general are specious in the pre-trial context. First, it is not at all clear that the time period is so short. Speedy trial rules do expedite trial somewhat. The sixth amendment, however, does not establish a fixed period after
which a trial is mandated. Rather, the Supreme Court has adopted a balancing approach to determine permissible delay.\(^8\) In some cases, this allows for a great deal of elapsed time between arrest (or formal charge) and trial.\(^8\) Statutory speedy trial, on the other hand, does require an indictment within thirty days and a trial within seventy days of the first judicial appearance.\(^9\) At first blush, this would seem to strictly limit the pre-trial detention time; yet there are a multitude of delays expressly exempted by the statute\(^9\) and not all are for investigative difficulties.\(^9\) Even if the time between arrest and trial conforms to statutory requirements, this time can be very long.

Second, regardless of the length of time detained and the economic and social costs and benefits, there is an additional interest in minimizing, to the greatest extent possible, public scorn toward a person still clothed in presumptive innocence.\(^8\) Unlike other social costs and benefits, the value of destigmatization is not dependent on a particular time frame. Jail results in stigma, plain and simple. While this is sometimes necessary where outweighed by the need for incarceration, reducing pre-trial criminalization should remain a priority.

Courts can employ home detention in the pre-trial setting with a good prognosis for success.\(^9\) It provides a method of intensive

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87. Barker v. Wingo, 407 U.S. 514 (1972). The Court in Barker specifically declined to engage in line drawing, favoring instead an approach that weighs four factors to determine compliance with the sixth amendment: the length of the delay, the reason advanced by the government for the delay, whether the defendant asserted the right to a speedy trial, and the extent to which the defendant was prejudiced by the delay. Id. at 520-21.

88. In Barker, for instance, sixteen continuances had been granted and five trials (two nullified by hung juries and one by admission of inadmissible evidence) had been held before the defendant was convicted—three-and-one-half years from indictment to first verdict. The Court found no violation. 407 U.S. at 515-16. Indeed, the Court has routinely affirmed long delays in the name of prosecutorial certainty. See, e.g., United States v. Lovasco, 431 U.S. 783 (1977).


90. Id. § 3161(h); see also Frase, The Speedy Trial Act of 1974, 43 U. Chi. L. Rev. 667 (1976).


92. This is not to be confused with the contention that the presumption of innocence should limit the denial of liberty of pre-trial detainees. The Supreme Court dismissed this argument in Bell v. Wolfish, 441 U.S. 520 (1979). Due process controls such matters and a balancing test of governmental interests versus individual freedoms is utilized. Id. at 527.

93. Thus far, only informal in-house surveys of countywide programs have been compiled. A grant proposal to the National Science Foundation has been filed by Drs. Harjit Sandhu and Richard Dodder of the Oklahoma State University Department of Sociology to study the Oklahoma home detention system. The feasibility study indicates that compilation and
supervision that, while not displacing traditional pre-trial incarceration for egregious cases, can make inroads into borderline cases and provide an alternative to the present choice between conditional bail and jail.

IV. CONCLUSION

At the present time, American penal policy is fixated on the use of two widely disparate sanctions — probation and incarceration. Probation is tantamount to suspending a sentence, given the lack of supervisory control in most probation programs. The American use of imprisonment confers two evils. First, prison "conditions" (in the broadest sense of that term) are abhorrent due to misplacement of otherwise divertable offenders, overcrowding, and rampant violence. Second, the harshness inherent in imprisonment can cause courts either to ignore mediate sanctions or relegate them to the status of mere "alternatives," typically lacking true sanctioning integrity.

Post-trial home detention is a mediate sanction that has a potential for ameliorating this sentencing conundrum. Analyzed under the classic four-part scheme for the goals of punishment — deterrence, incapacitation, retribution and rehabilitation — home detention proves an effective sanction for offenders who might otherwise be imprisoned. Home detention is an effective sanction for crimes of low to moderate severity, even including certain "moderate" crimes of violence requiring a more forceful response than probation can provide. Home detention programs are also easier and cheaper to administer than intensive supervision probation programs or prisons.

This is not to say that home detention is a panacea for the ills of the American criminal sentencing structure. Indeed, answers to all sanctioning problems are not to be found in one form of punishment but rather in the creative development of new approaches. Home detention is one such approach.
Home detention also has promising pre-trial applications, allowing a magistrate to release on bail many who would otherwise be subject to pre-trial incarceration. Although pre-trial home detention will not, and should not, supplant incarceration where the arrestee poses a significant danger to society, it adds to the arsenal of conditions available to the judge to assure appearance at trial without the use of prison.

Further data will have to be collected and evaluated before a more detailed appraisal of home detention can be attempted. At this juncture, however, it can be stated with some assurance that home detention will be beneficial as both a pre-trial alternative to incarceration and a post-trial sentencing option.
A KENTUCKY STUDY OF WILL PROVISIONS: IMPLICATIONS FOR INTESTATE SUCCESSION LAW

Frederick R. Schneider*

Every jurisdiction in the United States permits its residents to execute a will to provide for the distribution of property after death. However, many people die without leaving a valid will. Many, perhaps most, of those who die without leaving a valid will do leave property that passes to some survivor(s). My interest in the distribution of such estates is long standing, beginning some twenty years ago in law practice where I handled the estates of many intestates and was able to observe the impact of intestacy on the survivors. The more immediate impetus for this study was a comparison of various aspects of Kentucky law with certain provisions of the Uniform Probate Code and Model Probate Code. Though the Model Probate Code seems to have had little impact on state law, the Uniform Probate Code has had a significant impact on state law. The Uniform Probate Code has been adopted, either as promulgated or substantially so, in fourteen states, and has had an influence on legislation in Kentucky and other states in which the Code itself has not been enacted.

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1. For example, Professor Dunham reported that about 60 percent of the estates studied were intestate. Dunham, The Method, Process and Frequency of Wealth Transmissions at Death, 30 U. Chi. L. Rev. 241, 248 (1963) [hereinafter cited as Dunham, The Chicago Study]. The Kentucky study reported in this article did not undertake to determine the frequency of intestacy. See infra text and accompanying notes 19-22. However, a review of part of the data collected gives a strong indication that more than one-half of the estates opened in Kentucky are for decedents who die intestate.


3. The Model Probate Code was part of a joint "report of a committee of the Probate Division of the American Bar Association ... [and] of a research project carried on by the University of Michigan Law School." MICHIGAN LEGAL STUDIES, PROBLEMS IN PROBATE LAW INCLUDING A MODEL PROBATE CODE (1946).


This article addresses the provisions for intestate distribution of property in cases of intestacy. Based on findings of the Kentucky Study reported in this paper, various changes in Kentucky law will be recommended. These changes would improve the law and better implement social policy. The recommendations made in the area of general intestacy provisions would better carry out the apparent desires of Kentucky residents as disclosed by the Kentucky Study. It is my hope that this article will stimulate discussion and ultimately result in legislative action.

I. PRIOR STUDIES

A number of earlier studies in the United States have examined the distribution preferences of those who die, especially those who die leaving a valid will. In most of the reports of these studies, it is customary to briefly summarize the methodology of earlier studies as an introduction to discussion of the methodology of the study then to be reported.

Prior studies have utilized several data gathering techniques. The most widely used technique is examination of court records.7 Using this technique, it is rather easy to sample a large number of wills and determine how testators give property to which people. By collating the data thus obtained, comparison of the testator's preferences with the statutory plan of distribution for those who die without leaving valid wills can be easily accomplished. Routinely, some significant differences are found, especially in the share given to a surviving spouse. In such cases, as will be shown later, most testators give all, or substantially all, of their property to their surviving spouse; they do not give the surviving spouse one-half or one-third of the probate estate as does the intestate succession law in most jurisdictions.

Some researchers questioned the validity of the probate file examination technique; they hypothesized that the data thus

7. This technique was used in the earliest studies. See, e.g., Ward and Beuscher, The Inheritance Process in Wisconsin, 1950 Wis. L. Rev. 393 [hereinafter cited as Ward and Beuscher, The Wisconsin Study]; Browder, Recent Patterns of Testate Succession in the United States and England, 67 Mich. L. Rev. 1303 (1969) [hereinafter cited as Browder, The Michigan Study]; and Dunham, The Chicago Study, supra note 1, at 241. This technique was also used in most of the later studies, either alone or supplemented by other techniques. See, e.g., M. Sussman, J. Cates and D. Smith, The Family and Inheritance (1970) [hereinafter cited as The Cleveland Study].
obtained was not representative of the general population. A major study conducted in Cuyahoga County, Ohio, utilized several data gathering techniques. Data was obtained from a random sampling of probate files. The researchers also interviewed beneficiaries named in the wills studied and many of those who would have inherited under the then Ohio intestacy law if there had been no will. The researchers sought to determine both the survivors' satisfaction with the disposition made by the respective testators and also the property disposition desired by these survivors. The reported findings show substantial agreement with the preferences found by the studies that examined only probate files or wills.

Other researchers have utilized the technique of telephone surveys. This was first used in a New Jersey study and then in an Illinois study, where the hypothetical questions were the sole basis of gathering data. In a study sponsored by the American Bar Foundation, telephone surveys were conducted in five states by a national marketing company. One hundred fifty people were interviewed in each state. The researchers concluded, following study of all the data and comparison with the data of prior studies, that the technique of gathering data from probate files and wills produced valid information about decedents' preferences for distribution of their property after death.

II. THE KENTUCKY STUDY

As the foregoing discussion shows, the earlier studies utilized several data-gathering methods, including examination of the contents of probate files, interviews of survivors, and telephone interview techniques. Because the more time-consuming and ex-

8. The Cleveland Study, supra note 7, at 44-45.
12. The states in which the telephone surveys were conducted are Alabama, California, Massachusetts, Ohio, and Texas.
pensive techniques of interviewing and telephone survey validated the results obtained by probate-file examination, the probate-file examination technique was selected for the Kentucky study. It proved comparatively easy to gather data from a large number of probate files.

Nine Kentucky counties were selected for study. The counties were selected to give a representation to various considerations that might affect a person's thoughts about distribution of property at death, including samples of urban and rural population, wealthier and poorer areas of the state. The selected counties also to provide a geographic diversity to reflect differences in economic conditions, cultural backgrounds, and possible regional preferences. This study surveyed more wills than all but one of the prior studies.

The intent was to survey fifty wills in each Kentucky county. A total of 449 wills were actually surveyed. The method used was to survey the first fifty wills filed for probate beginning January 1, 1981, in each county. In several of the less populous counties, the sample included some wills filed in 1982. No differences in distribution patterns were observed that could be traced to any of the criteria used to select the counties. This leads to the conclusion that Kentuckians, in general, have similar views.

14. Id.
15. The Kentucky counties studied were Caldwell, Carter, Casey, Davies, Fayette, Harlan, Kenton, Logan, and Shelby counties.
16. Ward and Beuscher, The Wisconsin Study, supra note 7, at 393 (Ward and Beuscher examined 415 probate files for persons who died in Dane County, Wisconsin, in 1929, 1934, 1939, 1941, and 1945. Files of those who died testate and intestate were included. Joint tenancy terminations and other procedures were also included in their study); Dunham, The Chicago Study, supra note 1, at 241 (Professor Dunham examined 97 probate files opened in 1953 and 73 files opened in 1957, all in Cook County, Illinois); Browder, The Michigan Study, supra note 7, at 1304 (Browder examined 187 files opened in Washtenaw County, Michigan, all opened in 1963); The Cleveland Study, supra note 7, at 45 (Sussman, Cates, and Smith examined 659 files, selected at random, in Cuyahoga County, Ohio, opened between November 1964 and August 1965); Price, The Transmission of Wealth in a Community Property Jurisdiction, 50 WASH. L. REV. 277, 286 (1975) (In his study, Professor Price examined 82 estate files and collected data on other persons in King's County, Washington); Comment, The New Jersey Study, supra note 9, at 278 (The students who conducted the New Jersey Study examined 53 wills); Comment, A Comparison of Iowans, Dispositive Preferences With Selected Provisions of the Iowa and Uniform Probate Codes, 63 IOWA L. REV. 1041, 1052 (1978) (hereinafter cited as Comment, The Iowa Study) (In this Contemporary Study Project, students examined 150 testate and 150 intestate estate files).
17. Only 49 wills were sampled in Caldwell County.
concerning how their property ought to be distributed at death. The findings of this study are reported in the discussion that follows the general summary of intestacy provisions.

III. GENERAL INTESTACY PROVISIONS

A. Introduction

In every jurisdiction, provision is made for the distribution of property owned by a person who dies without leaving a valid will. In Kentucky, this law is set forth in the Kentucky Revised Statutes in parts of Chapter 392, titled Dower and Curtesy, and Chapter 391, titled Descent and Distribution. These statutes follow a general plan of distribution that has been in effect in Kentucky for many years. No legislative history exists that would reveal to us the specific policies sought to be implemented by these provisions.

Intestate succession laws should be designed to serve the needs of the citizens of the state. Obviously, these needs can only be addressed in a rather general fashion. Certain typical survivorship patterns form the basis for the rules adopted. Less typical survivorship patterns may not be dealt with in a fashion deemed wholly appropriate. Unless considerable complexity is introduced into intestate succession laws, these less common situations must be handled with the rules developed for the more common situations.

The fashioning of intestate succession laws is a somewhat complex matter. We must deal with various, often opposing, considerations. In a very real sense, the intestate succession laws serve as a statutory will substitute; the decedent's property is distributed in accord with the provisions of the intestate succession laws unless the decedent leaves a valid will. Thus, some writers

18. In each instance, the information gathered from the will filed for probate pertained to distribution only. Information concerning estate size and relationship of survivors was obtained from each file. No other information was gathered.
21. In the case of partial intestacy, only a portion of a decedent's estate is distributed pursuant to the intestate succession laws.
believe that the intestate succession laws should follow the desires of those who die testate. These writers measure the desired patterns of property disposition by the study of wills filed for probate, seeking to find commonly used patterns of property disposition.

Others have identified specific societal goals or policies that the intestate succession laws ought to fulfill. One group of writers suggest that four societal goals are fulfilled by these laws: "(1) to protect the financially dependent family; (2) to avoid complicating property titles and excessive subdivision of property; (3) to promote and encourage the nuclear family; and (4) to encourage the accumulation of property by individuals." It has been suggested that if a spouse or dependent child survive the decedent, provision should be made to prevent them from becoming wards of the state. It has also been suggested that the intestate succession laws ought to efficiently distribute the decedent's property to the survivors. To implement some of these considerations, a flexible scheme could be utilized. Instead, a rather rigid scheme exists in all jurisdictions of the United States.

It should be noted that existing intestate succession laws have little effect on the poor because their property is usually given to survivors or preferred creditors by means of one or more exemptions or allowances or because of liens against property. Further, those persons who possess more than an ordinary amount of wealth often die leaving a valid will. Thus, intestate succession laws normally apply to those with smaller, modest estates, usually with not more than $120,000 of assets. The Uniform

26. Id.
27. In a rigid system, the judge must distribute the intestate's property in strict compliance with the intestate succession laws. There is no discretion to vary the shares based on specific needs or other factors. There have been suggestions for a more flexible system. See, e.g., Note, Family Maintenance: An Inheritance Scheme for the Living, 8 Rut.-Cam. L.J. 673, 686-691 (1977); Gaubatz, Notes Toward a Truly Modern Wills Act, U. Miami L. Rev. 497, 557-560 (1977).
28. See, e.g., Fratcher, Succession Legislation, supra note 22, at 1047.
29. Id.
Probate Code's intestate succession provisions are aimed at these modest estates.\textsuperscript{30} Even so, these provisions were written to apply to any decedent who dies without leaving a valid will.\textsuperscript{31}

\textbf{B. Present Kentucky Law}

As stated above, two Chapters of the Kentucky Revised Statutes — Chapter 392, Dower and Curtesy, and Chapter 391, Descent and Distribution — combine to determine the distribution of the real and personal property of a decedent who dies without leaving a valid will. The surviving spouse of such a decedent will receive an estate in fee in one-half of the surplus real estate owed by the decedent at death together with an absolute estate in one-half of the personal property owned by the decedent at death.\textsuperscript{32} This is called "Dower."\textsuperscript{33} The surviving spouse will receive no additional property from the decedent unless the decedent is not survived by any issue, or by either parent, or by any sibling or issue of a sibling.\textsuperscript{34} Subject to this Dower right, the property of a decedent who dies without leaving a valid will descends first to the decedent's children or their descendants,\textsuperscript{35} and if there are no persons in that class, to the parents in equal shares, or to the surviving parent, if there are any,\textsuperscript{36} and if neither parent survives the decedent, then to the decedent's siblings or their issue;\textsuperscript{37} and only if there are none of these persons surviving the decedent will the surviving spouse inherit the remainder of the decedent's property.\textsuperscript{38} If neither the surviving spouse nor any of these persons survive the decedent, then the decedent's property is divided into two parts, one to the paternal kindred and one to the maternal kindred,\textsuperscript{39} and each

\begin{itemize}
\item \textsuperscript{30} "A principle purpose ... is to provide suitable rules and procedures for the person of modest means who relies on the estate plan provided by law." \textsc{Unif. Probate Code} art. 2, part 1, general comment, 8 U.L.A. 56 (1983).
\item \textsuperscript{31} \textsc{Id.}
\item \textsuperscript{32} \textsc{Ky. Rev. Stat. Ann.} § 392.020 (Baldwin 1978). The surviving spouse — or if there is no surviving spouse, the children — of an intestate decedent are also entitled to exempt property of $7,500. \textsc{Ky. Rev. Stat. Ann.} § 391.030(1)(C) (Baldwin 1986).
\item \textsuperscript{33} \textsc{Ky. Rev. Stat. Ann.} § 392.010 (Baldwin 1978).
\item \textsuperscript{34} \textsc{Ky. Rev. Stat. Ann.} § 392.010 (Baldwin 1978) and § 391.030(1) (Supp. 1986).
\item \textsuperscript{35} \textsc{Ky. Rev. Stat. Ann.} § 391.010(1) (Baldwin 1978) and § 391.030(1) (Supp. 1986).
\item \textsuperscript{36} \textsc{Ky. Rev. Stat. Ann.} § 391.010(2) (Baldwin 1978) and § 391.030(1) (Supp. 1986).
\item \textsuperscript{37} \textsc{Ky. Rev. Stat. Ann.} § 391.010(3) (Baldwin 1978) and § 391.030(1) (Supp. 1986).
\item \textsuperscript{38} \textsc{Ky. Rev. Stat. Ann.} § 391.010(4) (Baldwin 1978) and § 391.030(1) (Supp. 1986).
\item \textsuperscript{39} \textsc{Ky. Rev. Stat. Ann.} § 391.010(5) (Baldwin 1978) and § 391.030(1) (Supp. 1986).
\end{itemize}
part is divided as follows: equally to the grandparents or to the survivor of them; 40 and if no grandparent survives the decedent on that side of the family, then to the decedent’s uncles and aunts in equal shares, and to their descendents per stirpes; 41 and if none of these survive the decedent, then to the decedent’s great-grandparents on that side of the family, or to the survivor of them, in equal shares, in the same manner described for grandparents; 42 and if there are no great-grandparents surviving, then to the brothers and sisters of the great-grandparents, and to their descendents per stirpes; 43 and if there be no such persons, “and so on in other cases without end, passing to the nearest lineal ancestors and their descendents; 44 and if there be no such relative of the parents of the decedents father or mother, then all to the relatives of the other;” 45 and if there are no relatives of either the father or the mother, then to the relatives of the surviving spouse “as if he or she had survived the decedent and had died entitled to the estate.” 46 As can be seen, the scheme goes to great lengths to avoid escheat to the state.

IV. DISTRIBUTION OF PROPERTY BY WILL

A. Decedent Survived by Spouse

The probate files examined in the Kentucky Study show that the decedent was survived by a spouse in more than one-half of the instances in which a will was filed for probate. Of the 449 files examined, the spouse survived the decedent in 241 cases (55.9 percent). These findings are consistent with the findings of prior studies. It would seem, therefore, that one of the most important functions of the intestate succession law is to make adequate provision for a surviving spouse.

Under Kentucky law, the surviving spouse of a decedent who did not leave a valid will is given an estate in fee in one-half of the surplus real estate owned by the decedent at death, together with an absolute estate in one-half of the personal property owned

44. Id.
46. Id.
by the decedent at death. The surviving spouse will not inherit any other property from the decedent’s estate unless the decedent was not survived by any issue, either parent, any siblings, or issue of siblings.

Comparing statutory intestate distribution with the pattern established by decedents who died leaving a valid will reveals a striking difference. As noted above, in 241 cases the decedent was survived by a spouse. In addition, there were thirty-eight cases in which the decedent was not survived by a spouse but where the decedent’s will made provision for the spouse to account for the possibility that the spouse would have survived. Thus, we have 279 wills to examine to determine the pattern of distribution used by Kentucky testators to provide for a surviving spouse.

A substantial majority of these testators, 229 out of 279, left their entire estate to their surviving spouse. This means that 81.8 percent of these testators gave their entire estate to the surviving spouse. These testators left estates of various sizes.

<table>
<thead>
<tr>
<th>value of estate</th>
<th>number of decedents</th>
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</thead>
<tbody>
<tr>
<td>(in dollars)</td>
<td></td>
</tr>
<tr>
<td>not shown in file</td>
<td>11</td>
</tr>
<tr>
<td>0 - 4,999</td>
<td>50</td>
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<tr>
<td>5,000 - 9,999</td>
<td>25</td>
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<tr>
<td>10,000 - 24,999</td>
<td>58</td>
</tr>
<tr>
<td>25,000 - 49,999</td>
<td>38</td>
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<td>over 100,000</td>
<td>15</td>
</tr>
<tr>
<td></td>
<td>229</td>
</tr>
</tbody>
</table>

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49. The probate files examined in this study sometimes contained incomplete information about the family members who survived the decedent or else contained information suspected of being incomplete. The most frequent problem was the failure to list all of the heirs on the petition. Often, the discrepancy became apparent only when looking at the distribution shown in the file — if one was contained in the file. Because of this, no comparisons were made of decedents survived only by a spouse, decedents survived by a spouse and by issue, decedents survived only by issue, or other similar comparisons.

50. In the other two cases, virtually all of the decedent’s property was given to the surviving spouse. In one case, $500 of a $98,000 estate was given to a church, with the remainder to the spouse. In the other, $16,000 of a $268,000 estate was given to a church, and the remainder to the surviving spouse.
The prior studies led to the expectation that a substantial majority of Kentucky testators who were married would leave all or most of their estates to their surviving spouses. Professor Dunham found, "An examination of the 22 testate estates where the deceased was survived by spouse and children shows that 100 percent left all of the property to the surviving spouse contrary to the intestacy laws." One finding of the New Jersey study was quite similar to the findings of the Kentucky Study: "Thirty-one out of the fifty-three wills were written when the testators had spouses and children. Eighty percent of these testators gave their entire estates to their spouses." The finding was also similar to another part of the New Jersey Study: "Sample participants [in the telephone survey] overwhelmingly allocated all or most of a $10,000 estate to the surviving spouse; eighty-two percent of the sample gave the spouse either the entire estate or some percentage greater than New Jersey [law] does." The Bar Foundation Study concluded that "regardless of the family status, length of time married, or wealth, the majority of the respondents want to leave their entire estates to the spouse."

One might conclude, therefore, that it would be advisable to change the Kentucky provisions that govern the share of an estate given to the surviving spouse when the decedent dies without leaving a valid will. It has frequently been stated or assumed that the intestacy statute should reflect the desires of those who die leaving a valid will. While there is some appeal to this proposition, the matter must be placed in context and examined carefully, along with competing propositions. Indeed, even those who assert that the intestacy laws should conform to the desires of decedents who leave valid wills deviate from that proposition by taking other ideas into consideration.

If we accept this framework for further consideration, we can safely posit as a starting point that a substantial majority of Kentucky decedents (four out of five), including those decedents

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52. Comment, *The New Jersey Study*, supra note 9, at 278.
53. *Id.* at 273.
who die leaving a valid will and those who plan for a surviving spouse, agree that the surviving spouse should receive the entire estate. This group, according to the files sampled, were representative of those who died in Kentucky leaving a valid will, both geographically and in the value of the estate left at death.

Other survivors need to be considered. Was the decedent also survived by children or issue? By parents? By siblings? Perhaps surprisingly, the prior studies are in agreement that the desire to give the entire estate to the surviving spouse is not changed if the decedent is also survived by children, parents, or by others. In my own law practice experience, I found this to be true. I suspect that virtually every attorney who drafts wills has the same experience. The substantial majority of testators who are married want to leave all of their estate to their surviving spouse.

In the Cleveland Study, survivors were questioned to determine if a redistribution of the estate occurred after the estate had been closed. In the 360 testate cases studied, a redistribution was made by the survivor or survivors who did inherit in fifty of the cases. By way of contrast, where the decedent died intestate and the property was distributed according to the intestacy rules, a redistribution occurred in fifty percent of the 147 cases studied. This shows a significant difference in perception of fairness between the distribution plan provided by a testator's will and that provided by the intestacy statute. Where the decedent died intestate survived by a spouse and issue, the distribution provided for by the intestate succession laws was altered by the survivors in eighty-one percent of the cases. One common redistribution was to give the surviving spouse fee simple title to the family house. In many cases, the survivors reported to the researchers that they felt the distributions were fair; this perception was shared both by spouses and by the issue. Thus, significant feeling is shared among these people that coincides with the pattern of testate decedents who have spouses: adequate provision must be made for the surviving spouse and the share given by the intestacy rules is not adequate.

57. The Cleveland Study, supra note 7, at 122.
58. Id. at 125.
59. Id. at 126.
60. Id. at 127.
61. Id.
It is appropriate to look at data from prior studies that show the kinds of people more likely to die intestate than testate. It has been suggested that age and wealth are the two most important factors bearing on the decision to make or not make a will. The Uniform Probate Code was drafted with a view that the intestate provisions should be geared toward the less wealthy, younger decedent. Professor Mulder put it well when he wrote, "the will studies indicate that those who typically die intestate are the young, those who have accumulated only modest possessions, and those of rather low occupational status."

The studies have consistently shown age to be a factor. Many reasons have been given for this. Younger people tend to have less wealth. They tend to have no families or small families. It is likely that if a young married person dies, the spouse will survive. It is also likely that all the decedent's children will survive. There may be fewer children with more children planned or expected in the future. All these are age-related factors that tend to discourage people from making a will, or at least, do not encourage them to make a will.

Clearly, as one acquires wealth, there is an increased need to be concerned with what will happen to that wealth at death. The studies consistently show wealth increases the likelihood of testacy. As one increases in age, the prospect of death becomes more real. As friends and relatives die, one must face the fact of mortality. The studies consistently show that older people are more likely to have a will than younger people.

One additional factor causes us to pause. Some decedents die during or after a second or third marriage. The data collected in the Kentucky Study did not reveal these cases. Data in some of the earlier studies did find such cases. The findings are somewhat in conflict. The Illinois Study found that where the decedent was survived by a spouse and a minor child of a prior marriage, a small majority of respondents still wanted their surviving spouse

64. Mulder, Intestate Succession, supra note 52, at 311.
66. E.g., Comment, The Iowa Study, supra note 16, at 1076.
67. Id.
to take all the property.\textsuperscript{68} The Iowa Study, however, found that less than one-third of its respondents would give all of the estate to the surviving spouse.\textsuperscript{69}

Surely, a testator faces a real dilemma in this situation. The surviving spouse has an obvious call on the testator's property, and normally a need for the property as well, yet the testator would normally want his issue to share in the estate at some point. The studies are in agreement that when a testator gives all of the estate to the surviving spouse, the usual pattern is for the surviving spouse to give his or her estate to their children.\textsuperscript{70} Thus, in the long term, there is no disinheriting of the children; rather, their enjoyment is postponed. Where the surviving spouse is not the other parent of the testator's children, there is some doubt that the surviving spouse will in fact leave his or her property to the testator's children at some future point. There may be suspicion that the surviving spouse will later divert some or all of the testator's property to his or her family, or even to a new spouse acquired after the testator dies.\textsuperscript{71} The Cleveland Study found some remarriage situations where the first marriage had terminated by divorce and the children were alienated from the testator after the divorce.\textsuperscript{72} This alienation is be an important factor in a testator's decision of how to divide the property. The Cleveland Study also found those cases in which a testator willed property to both the new spouse and children of a prior marriage tended to be larger estates and cases where the later marriage was of short duration.\textsuperscript{73}

In actuality, however, comparatively little data is available with respect to the multiple marriage cases.\textsuperscript{74} The possible cases and situations are many. A second marriage late in life following a long first marriage with adult children creates far different problems and equities than a second marriage early in life in which the decedent leaves minor children when he dies. A second marriage following a divorce may create different equities than

\textsuperscript{68.} Fellows and Snapp, \textit{The Illinois Study}, supra note 10, at 729.
\textsuperscript{69.} Comment, \textit{The Iowa Study}, supra note 16, at 1094.
\textsuperscript{70.} "The will studies provide no evidence that surviving spouses disinherit their children." Fellows and Rau, \textit{The Bar Foundation Study}, supra note 11, at 355.
\textsuperscript{71.} \textit{See, e.g.}, Comment, \textit{The Iowa Study}, supra note 16, at 1094.
\textsuperscript{72.} \textit{The Cleveland Study}, supra note 7, at 93.
\textsuperscript{73.} \textit{Id.} at 91.
\textsuperscript{74.} Fellows and Rau, \textit{The Bar Foundation Study}, supra note 11, at 365.
a second marriage following the death of the first spouse. Yet, an intestacy statute must deal with all the cases in a relatively simple fashion.

The Uniform Probate Code provides one simple solution. If a surviving spouse is not the natural parent of all of the decedent's children or issue, she/he takes a smaller share than the surviving spouse who is the natural parent of all of the decedent's children or issue. 75 Kentucky's solution is even simpler: no distinction is made and the surviving spouse takes the same share regardless of whether issue of the decedent's prior marriage survive. 76

If one important reason to give property to a surviving spouse of an intestate is to provide for the surviving spouse's needs, then the Kentucky solution is correct. The needs of the surviving spouse are usually the same regardless of whether the decedent left issue of a prior marriage. Even the hard case in which the decedent left minor children of a prior marriage that ended in divorce and the other parent has custody does not call for special treatment. Ordinarily, the decedent would have been paying child support. However, unless the divorce decree provides otherwise, the decedent's obligation to provide support terminates at death — just as does the support obligation of a parent who has custody of minor children. The surviving spouse is still the surviving spouse and will have to go on living. Careful planning in the divorce proceeding will provide some means of care for minor children of the prior marriage, often by life insurance. Thus, the minor children should not be viewed as having a special call on the decedent's property.

While all of this is important, we need to recognize that none of these factors is absolute. The earlier studies found that some older people who have significant wealth died intestate. 77 A statute can be aimed at particular groups of the population, but it must be recognized that others will die intestate as well and the intestacy provisions should be drafted in such a way that no special burden is placed on a particular group of people to provide for another group.

As we look at what provisions might be appropriate for a surviving spouse, all these considerations must be kept in mind.

76. KY. REV. STAT. ANN. § 392.020 (Baldwin 1978).
77. E.g., Dunham, The Chicago Study, supra note 1, at 250.
The Kentucky statutes are based on an historically accepted approach — a fractional share of the decedent's estate is given to the surviving spouse. Most statutes adopted in recent years proceed on a different approach — the surviving spouse is given the first portion of the estate distributed, expressed as a dollar amount, and then given a fractional share of the remainder. Most commonly, the surviving spouse receives the first $50,000 of the estate and one-half of the remainder if the other survivors are issue of the decedent. At least two states have recently adopted legislation that gives the surviving spouse the entire estate in such circumstances. The data gathered in this study, combined with the results of the prior studies, suggest the share of the surviving spouse should be increased; the question to be answered is whether it should be increased to the whole estate? Another question to be asked is why should property be left to anyone other than the surviving spouse? The principal reason to leave property to a surviving spouse would be to provide for his or her care and maintenance. A younger surviving spouse who is also a parent of the decedent's minor children should be able to provide for the care and needs of that family without the need for a guardianship for each minor child. Parents generally care for their children; indeed, the law requires that this be done. The intestacy statute should facilitate care of the surviving children.

Historically, the law has provided each child of the decedent with a fractional share of the decedent's estate. Indeed, it was not all that long ago in Kentucky that the surviving spouse's "Dower" share in real estate was a life estate, not a fee interest in a fractional share. Legislation in other states has progressed to a new point. The modern approach, as stated above, gives the surviving spouse the first share of the estate in fee. If the purpose is to allow the surviving spouse to provide for the family, the

81. The change from a life estate to a fee interest in real estate was made by the Kentucky General Assembly in 1956. Act of Feb. 27, 1956, ch. 117 Ky. Acts 238.
$50,000 amount, originally suggested by the Chicago Study and commonly adopted in legislation, is inadequate. Inflation and the increase in the cost of living since 1963 necessitate at least doubling that amount.

B. Provisions for Children and Other Issue

Following provisions for a surviving spouse, the intestate law provisions for children and other issue are of prime importance. The Kentucky intestacy rules provide that the share not going to a surviving spouse shall go to children or other issue who survive the decedent. This agrees with the law of many other jurisdictions and the Uniform Probate Code.

The Kentucky Study revealed that many Kentucky testators provide for their children or issue in their wills. Of the 241 persons who died and were survived by a spouse, 167 provided for alternative takers in the event that they might die without being survived by their spouse. In all, 144 of these decedents provided that all, or substantially all, of their estate be given to their children equally or to their issue in a manner that followed the intestacy law. Of those who provided for their spouse by will but where the spouse did not survive the decedent, twenty-seven persons provided that all or substantially all of their property be given to their children equally or to their issue in a manner that followed the intestacy law.

82. Dunham, The Chicago Study, supra note 1, at 262.
83. One could look to the inheritance tax provisions as a guideline to what might be provided to the surviving spouse. Until recently, section 140.080 of the Kentucky Revised Statutes provided that the first $50,000 going to a surviving spouse was exempt from the inheritance tax. During the 1985 Special Session, the Kentucky General Assembly amended that statute to provide for an unlimited exemption. Act of July 29, 1985, ch. 6. 12. 1985 Ky. Acts 12. This, of course, follows the unlimited marital deduction allowed by the Federal Estate Tax. 26 U.S.C. § 2056. However, taxes are revenue-raising provisions and there is no correlation between exemptions or deductions in the tax context and the needs of surviving spouses in the context of intestacy laws.
85. See, e.g., ILL. ANN. STAT., ch. 110 1/2, para. 2-1(a)-(b) (Smith-Hurd Supp. 1986); Wis. STAT. ANN. § 852.01(1)(b) (West 1971).
In 101 other cases, the decedent was survived by children or issue but was neither survived by a spouse nor had made provision for a surviving spouse in his will. In fifty-three of these cases, the decedent provided that all or substantially all of the property be given to his children equally. In twenty-one other cases, the property was divided among the children but not equally. Within this last group, many arrangements were made, including disinheriting one of several children, small gifts to one or more and the remainder to one or more children, and all of the estate to one child. A few cases were found in which the testator disinherited all of the children in favor of others. The reasons for unequal treatment were not set forth in the wills, but we may surmise that they are varied.

Altogether, 224 Kentucky decedents made provisions giving all, or substantially all, of their property to their children equally or to their issue in a manner consistent with the intestate succession law. These testators left estates of various sizes.

**WILL GIVES ALL OR SUBSTANTIALLY ALL TO CHILDREN OR ISSUE CONSISTENT WITH INTESTATE LAW**

<table>
<thead>
<tr>
<th>value of estate (in dollars)</th>
<th>number of decedents</th>
</tr>
</thead>
<tbody>
<tr>
<td>not shown in files</td>
<td>8</td>
</tr>
<tr>
<td>0- 4,999</td>
<td>37</td>
</tr>
<tr>
<td>5,000-9,999</td>
<td>21</td>
</tr>
<tr>
<td>10,000-24,999</td>
<td>56</td>
</tr>
<tr>
<td>25,000-49,999</td>
<td>49</td>
</tr>
<tr>
<td>50,000-99,999</td>
<td>35</td>
</tr>
<tr>
<td>over 100,000</td>
<td>18</td>
</tr>
<tr>
<td></td>
<td>224</td>
</tr>
</tbody>
</table>

The prior studies had also found a substantial number of cases in which the decedent had deviated from the intestate distribution of equal treatment. For instance, Professor Dunham found:

In the 1957 sample, when the deceased was survived by children alone, 6 of the 8 wills, or 75 percent, avoided the equality of distribution prescribed by the intestate succession laws. In 1953, 18 of the 22 estates, or 66.6 percent, avoided the equality principle of the intestate succession laws.... [T]he model form is that of varying the shares of the children so that they do not share equally
rather than giving property to persons other than the children.\textsuperscript{87}

On the other hand, the Cleveland Study found a larger share (57 percent) of the decedents treating their children equally.\textsuperscript{88} Even so, almost half of these decedents did not treat their children equally.

American law has always provided equal treatment for living children of an intestate and for some kind of equal treatment by representation when one or more children of a decedent do not survive the decedent but their issue do. It would be impossible for a statute to account for every decedent's desires about how to vary the shares of surviving children or issue. If one child takes care of a parent for many years and the other children have not helped in any way or have contributed very little, it is natural for the parent to want to reward the child who has been faithful. Indeed, in some cases it is the threat of disinheritance that many motivate a child to be faithful. Yet, we find that in some such cases the parent nevertheless chooses to make a will giving his property to his children in equal shares.

It would be possible to draft a statute that gave the Probate Court discretion to hear and decide a petition for an unequal distribution in cases where the decedent is survived by children or other issue and one or more of them seek to have an unequal distribution. Probate Courts are local and many judges have different ideas and reasoning processes. Without centralization, widely differing results would occur, depending upon which judge heard the particular case.

In the United States, no precedent has been established for a flexible system. Indeed, strong policy reasons seem to argue against implementing such a system. When a decedent does not leave a valid will, it is impossible to accurately determine just what the decedent intended as to the distribution of his property. Perhaps the decedent knew full well that by dying without a will would cause the property to be divided equally among the children or issue by representation and intended this to happen. Perhaps the decedent did not know what would happen to his property at death or had a mistaken idea of the distribution provided by statute. Perhaps the decedent didn't care who would

\textsuperscript{87} Dunham, \textit{The Chicago Study}, supra note 1, at 254.
\textsuperscript{88} The Cleveland Study, supra note 7, at 98.
take his property. How can we tell? We cannot, of course.

Equal treatment of children and issue avoids the difficult task of trying to make an unequal distribution among the survivors. Pitting one child against another in competition for a larger share of the parent's estate will certainly reduce or destroy family harmony. Death of a parent or grandparent is a substantial loss in itself. Loss of the love and friendship of siblings and other relatives is an unnecessary additional complication. Furthermore, in cases where the survivors agree that some different distribution should be made, Kentucky law already allows this upon agreement of the parties. Thus, there is no policy reason to allow a statutory mechanism for routine determinations of unequal distributions.

The basic premises upon which the existing law is based remain. Equality is the historical precedent. Within that equality, several operative policies are expressed and carried out. First of all, living issue take to the exclusion of their own issue. Thus, a living child will inherit from his parent, but the child's own children will not inherit from their grandparent. But if the decedent's child predeceased the decedent, then the grandchildren will inherit from their grandparent. Second, if a decedent leaves surviving children, those children will each take an equal share of the decedent's estate. Further, when a decedent is survived by both living children and children of deceased children, both the living children and the children of the deceased children will inherit. As a corollary, the children of the living children do not inherit. If a decedent desires a different distribution, simple provisions in a will easily carry out that desire.

But when all the children of the decedent predecease the decedent and the decedent is survived by grandchildren or other issue, there is disagreement as to how the initial division of the property should be made. Kentucky follows a per stirpes method

89. See, e.g., Brakefield v. Baldwin, 249 Ky. 106, 60 S.W.2d 376 (1933). For such an agreement to be valid, all the parties must be legally competent.

90. "The rule that a living ancestor excludes his lineal descendants makes good sense from a public policy viewpoint. It reduces the number of claimants to property and thereby eliminates excessive subdivision of property and complicated titles. In addition, it reduces the likelihood that minors will be recipients of property and the concomitant administration difficulties of appointing a guardian of the estate." Fellows and Rau, The Bar Foundation Study, supra note 11, at 373.
of division and distribution. The initial division is made at the generation closest to the decedent — the children — regardless of the fact that all the children predeceased the decedent. The grandchildren then take their parent’s shares by representation. Suppose, for instance, that the decedent had three children, all of whom predeceased her. Each child left children who survived the decedent. In Kentucky, the initial division of the property would be into three equal shares because there had been three children and each left issue who survived the decedent. If the first child had left two children who survived the decedent, each would take one-half of the one-third allocated to the decedent’s child, their parent. If the second child had left four children who survived the decedent, the one-third allocated to the decedent’s child would be divided into four parts, one for each of these four grandchildren. If the third child left three children who survived the decedent, the one-third allocated to the decedent’s child would be divided into three parts, one for each of these grandchildren.

A majority of the jurisdictions in the United States follow a different method of making the initial division in this situation. While many also call their method per stirpes, in reality they follow a per capita method. In these jurisdictions, the number of shares for the initial division is decided by the number of


92. We could diagram this as follows:

```
    Decedent
     /     \
    /      \
   /       \
Child A   Child B   Child C
     (Initial division at this generation)
        /     \
       /      \
      /        \
GC1  GC2  GC3  GC4  GC5  GC6  GC7  GC8  GC9
```

In Kentucky, the initial division is made among the children. Grandchildren take a part of their parent’s share by representation. Thus, GC1 and GC2 each receive one-sixth of the decedent’s estate; GC3, GC4, GC5, and GC6 each receive one-twelfth of the decedent’s estate, and GC7, GC8, and GC9 each receive one-ninth of the decedent’s estate.

93. See, e.g., OHIO REV. CODE ANN. § 2105.06(A)-(C) (Anderson 1976); PA. CONS. STAT. ANN. § 2104(1)-(2) (Purdon Supp. 1986).

94. Classification between per stirpes and per capita is often difficult. See Fellows and Rau, The Bar Foundation Study, supra note 11, at 377-380; see also Page, Descent Per Stirpes and Per Capita, 1946 Wis. L. Rev. 3 (for a historical perspective of per stirpes and per capita distribution).
living persons in that generation plus the number of deceased persons who leave issue who survive the decedent.\textsuperscript{95} The generation in which the initial division is made is always the closest generation in which there are living people.\textsuperscript{96} A generation in which all the people had predeceased the decedent is disregarded in making the initial division. In the example above, the generation of children would be disregarded. The initial division would be made at the grandchild generation; the number of shares would depend upon the number of living grandchildren plus the number of grandchildren who predeceased the decedent but left issue who survived the decedent. Each would receive an equal share.\textsuperscript{97}

A second issue arises. How is representation to be effected? In the \textit{per stirpes} system, once the initial division is made, those who take in succeeding generations are determined in the same manner. That is, we follow straight down the family tree, dividing at each generation until we reach the takers of the decedent's estate. Each state that follows the \textit{per stirpes} system uses \textit{per stirpes} representation.\textsuperscript{98} Many states which use the \textit{per capita} method for the initial division use \textit{per stirpes} representation. Some states use other methods of representation. The Uniform Probate Code, adopted in some fourteen states, uses its own system.\textsuperscript{99}

\begin{table}[h]
\begin{tabular}{|c|c|c|c|c|c|c|c|c|}
\hline
Decedent & Child A & Child B & Child C \\
\hline
GI & GC1 & GC2 & GI & GC3 & GC4 & GI & GC5 & GC6 & GI & GC7 & GC8 & GI & GC9 \\
\hline
\end{tabular}
\caption{Diagram of \textit{per stirpes} representation.}
\end{table}

96. \textit{Id.}
97. A \textit{per capita} division of the decedent's estate would be diagramed as follows:

\begin{table}[h]
\begin{tabular}{|c|c|c|c|c|c|c|c|c|c|}
\hline
Decedent & Child A & Child B & Child C \\
\hline
GI & GC1 & GC2 & GI & GC3 & GC4 & GI & GC5 & GC6 & GI & GC7 & GC8 & GI & GC9 \\
\hline
\end{tabular}
\caption{Diagram of \textit{per capita} division.}
\end{table}

The initial division would be made at the grandchildren's generation. Each grandchild would receive a one-ninth share of the decedent's estate.

98. Fellows and Snapp, \textit{The Illinois Study, supra} note 10, at 739.
99. \textit{Unif. Probate Code} § 2-106 provides:

\text{If representation is called for by this Code, the estate is divided into as many shares as there are surviving heirs in the nearest degree of kinship and deceased persons in the same degree who left issue who survive the decedent, each surviving heir in the nearest degree receiving one share and the share of each deceased person in the same degree being divided among his issue in the same manner.}

\textbf{But see Waggoner, A Proposed Alternative to the Uniform Probate Code's System for}
North Carolina follows a per capita system of representation.\textsuperscript{100}

From a strict policy standpoint, we might say that one method is just as good — or bad — as the other. Each is relatively neutral. However, the prior studies that interviewed living persons found a strong preference for using the method that divided first at a generation containing living persons, preferring the per capita method over the per stirpes method.\textsuperscript{101} The Uniform Probate Code also uses the per capita method in this circumstance.\textsuperscript{102}

All this suggests a need to reappraise the method used to determine the initial division of property in Kentucky intestacy cases. The Kentucky Study provides no information that would help make such a reappraisal. However, given the level of correlation between other data collected in the Kentucky Study with the data collected in the earlier studies, there is little reason to suspect that Kentucky residents would have opinions significantly different from the respondents of the earlier studies.

My own opinion is that the per capita method should be used for making the initial division of an estate in Kentucky. If any child survived the decedent, the division of property would be made at that generation and the issue of any predeceased child would take that person’s share by representation, as is now the case. The difference occurs when there is a missing generation. If no children of the decedent survived but grandchildren did survive, the first division would be made among the grandchildren. I believe that most grandparents would want their grandchildren treated equally in such a situation.

C. Provisions for Parents

The Kentucky Study found only one will that made specific provision for parents. In that case, the decedent was survived by no spouse or issue but the parents both survived. The will

\textsuperscript{100} N.C. GEN. STAT. §§ 29-15 and 29-16 (1984).

\textsuperscript{101} See Fellows and Snapp, The Illinois Study, supra note 10, at 741 (The Illinois Study found that 95 percent of the respondents favored the per capita method to determine the initial division); Comment, The Iowa Study, supra note 16, at 1111 (The Iowa Study found that 87 percent favored the per capita method); and Fellows and Rau, The Bar Foundation Study, supra note 11, at 384 (The Bar Foundation Study found that 94.5 percent of the respondents favored the per capita method).

\textsuperscript{102} UNIF. PROBATE CODE § 2-103(1), 8 U.L.A. 60 (1983).
left the whole estate, roughly $75,000 in value, to the mother.

It appears there were several cases where the decedents were survived by spouse or issue as well as one or both parents. In all of these cases, no provision was made for any gift to the parent(s).

The prior studies also turned up few cases in this category. The Iowa Study found it common to give all the property to the spouse where the decedent was survived by a spouse and parents. The Bar Foundation study found that a substantial majority of its respondents favored giving the entire estate to the surviving spouse where the spouse and a parent survived the decedent.

The intestate succession laws of a majority of the United States jurisdictions give all the property of a decedent to the parents in this situation; siblings are allowed to share in the decedent's property in a minority of the jurisdictions. The Uniform Probate Code follows the majority position; where the decedent is survived by parents and siblings, the parents take all. The siblings take nothing unless both parents predecease the decedent.

In general, the prior studies and the Kentucky Study have generated insufficient data to determine how most decedents wish to handle this situation. Therefore, policy must be used to shape the intestate succession laws. If the decedent is survived by a spouse or by issue, it would seem the law ought to provide that the spouse inherit all the decedent's property. The spouse likely needs the property for living expenses. The decedent and the spouse have formed a family of orientation, breaking away from their parents' families to establish their own family.

The Bar Foundation Study suggests that where the decedent dies not survived by a spouse or by issue, the parents should inherit everything:

If a decedent dies young, unmarried, and childless, any accumulated wealth is unlikely to have been earned but instead is likely to

103. Since a parent would not inherit by intestacy in such a case, the parent(s) are not normally listed as survivors; neither are they entitled to notice of the proceedings.
106. Id. at 342.
108. Id. at § 2-103(30).
have come almost exclusively from parents or grandparents. Therefore, if the individual dies before there has been time to enjoy these gifts, fairness would seem to require that the property be returned to these ancestors or, if they predeceased the young decedent, to the heirs of these ancestors. Even if the decedent's wealth were not derived from ancestors, the young decedent may feel a responsibility to repay parents for support provided during youth. If a person dies at an older age, parents (and grandparents, if still living) will [likely] be elderly and, therefore, may be economically dependent upon the decedent.110

Where the decedent is survived by parents and a spouse, Professor Mulder believes that the spouse should inherit at least a substantial portion of the decedent's estate.111 The little data provided by the prior studies supports this view.112

D. Provisions for Siblings and Their Issue

The Kentucky Study found forty-three cases where the decedent was not survived by a spouse, issue, or parents, but was survived by siblings. Of these cases, sixteen of the decedents gave their property to their siblings in equal shares while twenty-eight of the decedents gave their property to a named person, often giving little or nothing to their siblings. Even more striking are the alternate provisions — or lack of alternate provisions113 — to cover the possibility of one or more of the siblings predeceasing the decedent. Five of these decedents gave the estate to the remaining siblings with nothing to the issue of dead siblings. Only one decedent gave anything to issue of deceased siblings while nine gave the lapsed share to named persons, and six included charitable gifts.

As in the prior situations, these decedents also had estates of various sizes.

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113. Twenty-two of the 43 wills made no alternate provisions.
The prior studies had led me to expect results of this nature. "Under these circumstances, the claims of blood or marriage are understandably much diluted by considerations of particular personal associations."114 Professor Dunham found that "89 percent of the wills, where there were surviving brothers and sisters, avoided the equality of distribution of the intestate succession laws."115 Professor Dunham also found that this was a situation where it was likely that gifts to charities would be made.116 The New Jersey Study also found charitable gifts in this situation.117 Professor Browder noted: "As might be expected, when neither spouse nor issue survived, testators dispersed their estates among a great variety of beneficiaries."118

On the other hand, no one can anticipate the variety of wishes of those decedents who die in this situation. No statute can provide that these various wishes be carried out. Thus, the intestate succession laws provide that the property of an intestate decedent who dies without leaving a spouse, issue, or parents surviving will be distributed to the decedent’s brothers and sisters in equal shares.

The intestate succession law gives the share of a predeceased sibling to the issue of that person. The Kentucky Study found ten cases where the decedent was survived only by nephews and nieces, the children of siblings. Only two of those decedents gave their property to the nephews and nieces in equal shares. Five of

116. Id.
these decedents gave their property to named persons while three gave some of their property to named persons and the remainder to the nephews and nieces. None of these decedents made wills that contained alternative gifts to provide for the eventuality that one or more of the named takers would predecease the testator.

Although the sample is small, the size of estates is strikingly larger than those decedents who died leaving relatives more closely related.

WILLS WHERE DECEDENTS SURVIVED BY NIECES AND NEPHEWS ONLY

<table>
<thead>
<tr>
<th>Value of Estate (in dollars)</th>
<th>Number of Decedents</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-4,999</td>
<td>0</td>
</tr>
<tr>
<td>5,000-9,999</td>
<td>1</td>
</tr>
<tr>
<td>10,000-24,999</td>
<td>0</td>
</tr>
<tr>
<td>25,000-49,999</td>
<td>4</td>
</tr>
<tr>
<td>50,000-99,999</td>
<td>1</td>
</tr>
<tr>
<td>Over 100,000</td>
<td>4</td>
</tr>
</tbody>
</table>

The intestate succession law must continue to provide that the property of a decedent who dies leaving issue of siblings as the nearest relatives will take equally. No statute can anticipate the different desires of such decedents.

**E. Decedent Survived by Grandparents and Their Issue**

The Kentucky Study found no cases where the decedent was survived by grandparents or by uncles or aunts. However, two cases were found in which the decedents were survived by first cousins. In each case, the wills left all the property to named persons, not to the cousins. In each will, no alternate provisions were made. Each estate was of substance; one was about $50,000 and the other about $69,000.

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119. The reader should note that the size of the estates left by most of these decedents is larger than the estates of those decedents who left survivors who were more closely related. This is a characteristic found in the remaining groups, all of whom died leaving more remotely related survivors. Perhaps it is easier to accumulate property if one has no close relatives.
The intestate succession law would have given each of these decedents' estates to the cousins. The law cannot anticipate any of the desires that led to the two wills giving all the property to named persons. However, the fact that named persons were preferred to the blood relatives is of interest. These questions arise: How far out should the intestate succession laws reach to find takers of a decedent's property? To what extent should we go to avoid escheat? These questions are not easily answered.

F. Decedent NotSurvived by Spouse, Issue, Parents, Issue of Parents, Grandparents, or Issue of Grandparents

The Kentucky Study found six decedents who died leaving no spouse, no issue, no parent, no issue of parents, and no grandparents or issue of grandparents. Thus, if these decedents had died intestate, so-called laughing heirs would have inherited their property if they could prove their relationship and that they were the closest living relation to the decedent.\footnote{120}

Of the six decedents found in this category by the Kentucky Study, none left property to their laughing heirs. Instead, five gave their estate to named persons and one gave the entire estate to charity. Four made no provisions for alternate takers while two made provisions for named persons to take their estate in the event one or more of the preferred takers predeceased them. In common with the last few categories, these decedents tended to leave estates of larger value. Two left estates of about $60,000 while one left an estate of about $267,000.

The prior studies reported findings consistent with those of the Kentucky Study. As stated by Professor Dunham: "In the estates in which the survivor is more distant than brothers and sisters and their descendants, none of the estates conformed to the statute of distribution and almost all permitted strangers and others to take a substantial portion of the estate."\footnote{121} However, the Cleveland Study reported: "When the nearest kin are collateral, there was no pattern followed by a majority of testators. The intestate pattern predominated, but it did not command the majority."\footnote{122} The Iowa Study and the New Jersey

\footnote{121. Dunham, The Chicago Study, supra note 1, at 255.}
\footnote{122. The Cleveland Study, supra note 7, at 103.}
Study also reported a large percentage of decedents deviating from the intestate succession law standard.\textsuperscript{123}

On the other hand, as noted several times above, the intestate succession law cannot provide other than some equal division of property in these situations unless there is escheat to the state. The New Jersey Study reported that sixteen percent of the persons interviewed favored escheat in these cases.\textsuperscript{124}

Professor Dunham was noncommittal:

A final question that emerges from this study concerns the statutory treatment of relatives more distant than brothers and sisters. Where there is no will, is there any justification for preferring these more distant relatives to the state or county by an escheat? It would appear here that decedents in this category are [more] likely to have a will when they want to provide for deserving friends and charities, and in other cases they simply do not care what happens to their property.\textsuperscript{125}

Others have also argued in favor of disinheriting so-called laughing heirs. With families often scattered about, living in many different states miles apart, it is unusual that a decedent would be acquainted with relatives more distantly related than first cousins and first cousins once removed.\textsuperscript{126} Professor Mulder believed that escheat to the state was no less desirable than distribution to laughing heirs.\textsuperscript{127} The Cleveland Study reported that distant heirs often felt uncomfortable in taking intestate property in such situations.\textsuperscript{128} The Iowa Study commented upon the expense of locating such distant heirs.\textsuperscript{129}

The Uniform Probate Code provides for inheritance by relatives as remotely related as grandparents and issue of grandparents.\textsuperscript{130} If there are no persons who are this closely related, the Uniform Probate Code provides for escheat to the state.\textsuperscript{131} Many

\textsuperscript{123} Comment, The Iowa Study, supra note 16, at 1119; and Comment, The New Jersey Study, supra note 9, at 276.

\textsuperscript{124} Comment, The New Jersey Study, supra note 9, at 276.

\textsuperscript{125} Dunham, The Chicago Study, supra note 1, at 263.

\textsuperscript{126} In legal circles, first cousins once removed are children of first cousins. Some families call these children second cousins.

\textsuperscript{127} Mulder, Intestate Succession, supra note 55, at 320.

\textsuperscript{128} The Cleveland Study, supra note 7, at 114-45.

\textsuperscript{129} Comment, The Iowa Study, supra note 16, at 1119.

\textsuperscript{130} UNIF. PROBATE CODE § 2-103(4), 8 U.L.A. 60 (1983).

\textsuperscript{131} UNIF. PROBATE CODE § 2-105, 8 U.L.A. 65 (1983).
modern statutes also provide for escheat to the state in this situation.\textsuperscript{132}

V. Recommendations

Three areas of concern emerge from the Kentucky Study and from the discussion in this article. First, what should be the share of a surviving spouse? Secondly, should remote collaterals be allowed to inherit in intestacy cases? Finally, should the initial division of property where takers take by representation be \textit{per stirpes} or \textit{per capita}? Each of these questions will be discussed in order.

A. Share of Surviving Spouse

Modern statutes give the surviving spouse a larger share of the estate of intestates than does present Kentucky law. The Kentucky Study found that four out of five Kentucky testators provided that their surviving spouse should receive all of their estate. The prior studies reached essentially the same findings.\textsuperscript{133}

However, the drafters of the Uniform Probate Code, following much study and debate, decided that the surviving spouse should not receive all of an intestate's estate. Instead, they provided that if the intestate was survived by issue of the same spouse or no issue but by parents, then the surviving spouse would inherit the first $50,000 of the decedent's estate plus one-half of the balance of the estate.\textsuperscript{134} If there were issue of a prior spouse and those issue survived the decedent, then the surviving spouse would inherit one-half of the estate.\textsuperscript{135} Parents of the decedent would not inherit if a spouse survived.\textsuperscript{136}

The Kentucky statute should be amended to increase the size of the surviving spouse's share. In line with the most recent legislation, the surviving spouse should receive all of the intestate's

\textsuperscript{132} E.g., IND. CODE ANN. §§ 29-1-218(6-201) (Burns 1972); MICH. COMP. LAWS ANN. § 700.106(e) (West 1980); PA. CONS. STAT. ANN. § 2103(6) (Purdon Supp. 1986); TENN. CODE ANN. § 31-2-104(b) (1984).
\textsuperscript{133} See, e.g., Dunham, \textit{The Chicago Study}, supra note 1, at 252; Comment, \textit{The New Jersey Study}, supra note 9, at 278; and Fellows and Rau, \textit{The Bar Foundation Study}, supra note 11, at 354.
\textsuperscript{135} Id. at 2-102(4).
\textsuperscript{136} Id. at 2-102(1).
estate. In the event the legislature believes that this is not warranted, then the surviving spouse should receive the first $100,000 of the intestate’s estate.

B. Inheritance by Collaterals

The Kentucky Study found that no testator gave property to so-called laughing heirs. The prior studies found many testators also giving their property to named persons. There seems no justification for giving property to persons the decedent is unlikely to ever have met. Thus, inheritance in cases of intestacy should be limited to those who are no more remotely related to the decedent than grandparents and issue of grandparents. If no relatives are living in that class, then the decedent’s property should escheat to the state.

C. Taking by Representation

Earlier, I suggested that the initial division of property by those who take by representation should be per capita rather than per stirpes representation. While there would be no difference in the division of property in most situations, there would be a difference where a generation is missing between the decedent and the first generation with living takers. In these situations, the prior studies reveal that those interviewed preferred the per capita method as compared to the per stirpes method. My belief is that most decedents would prefer the initial division to be into equal shares where the persons in the generation of the initial division are all equally related.

We should keep in mind that these recommendations are for changes in the intestate succession laws. Any decedent who wanted property divided in a different fashion may execute a valid will and direct the division as desired. If these recommen-

138. The $50,000 figure first suggested by Professor Dunham in The Chicago Study and later adopted by the Uniform Probate Code is much too small an amount at present.
139. See Comment, The Iowa Study, supra note 16, at 1119; and The Cleveland Study, supra note 7, at 138-40.
140. See supra note 9 and accompanying text.
dations are followed, the apparent preferences of Kentuckians will be implemented.
IMPEACHING THE MERITS: RULE 609(a)(1) AND CIVIL PLAINTIFFS

R. Michael Smith*

Federal Rule of Evidence 609(a) states that:

For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudicial effect to the defendant.

This rule, on its face, allows prior felony convictions to be used to impeach a witness. Under the earlier common-law rule, criminal defendants sometimes were afraid to take the witness stand on their own behalf. If the prosecutor could vilify the defendant through use of prior convictions, ostensibly to impeach, then the defendant would lose far more than mere credibility and prosecutors would have an unfair advantage. Because criminal defendants were sometimes placed in the difficult dilemma of whether to testify or keep silent because of the possible prejudicial effect of their prior felonies, Rule 609(a)(1) gave special protection to the defendant.

It is often true in civil cases that the plaintiff cannot avoid testifying as a witness. In some situations the plaintiff must tell his story because no other witness is available. Or the defendant may, under Rule 611(c), call the plaintiff as a witness and interrogate

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2. See infra notes 10-16 and accompanying text.
4. The protection afforded the defendant by 609(a)(1) does not reach to 609(a)(2). It is a near unanimous understanding that crimen falsi are more probative than prejudicial and are admitted in criminal as well as civil cases. See United States v. Kiendra, 663 F.2d 349 (1st Cir. 1982); but cf. Note, The Interaction of Rules 609(a)(2) and 403 of the Federal Rules of Evidence: Can Evidence of a Prior Conviction Which Falls Within the Ambit of Rule 609(a)(2) Be Excluded By Rule 403? 50 U. Cin. L. Rev. 380 (1981) [hereinafter cited as "Note, Interaction"].
5. See infra notes 96-100 and accompanying text.
6. Fed. R. Evid. 611(c) provides: "When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be leading questions."
by means of leading questions. While on the stand, a plaintiff may be questioned about any matter that reflects on his credibility. Of special concern to civil plaintiffs is the use of their prior criminal convictions admitted ostensibly for impeachment purposes but, in actuality, intended to have an effect on the merits of the case or the damage award.

Rule 403 was designed to guard against the admission of evidence that creates prejudice in the fact-finder. Generally, prejudicial evidence leads a "jury to unintentionally commit an inferential error ... [to wrongly infer] that evidence is probative of an alleged fact or event." Prejudicial evidence is often believed to "cause the jury to regard the [person against whom offered] as a bad person ... and to conclude that he should be punished." The jury also may "be less willing to listen to the ... evidence or have fewer scruples about making a wrong decision." Furthermore, it is not the conclusion that one is a "bad person" that is prejudicial. Such conclusion may be entirely correct. Instead, problems arise when the members of the jury are presented with evidence suggesting a conclusion, which "leads them to draw inferences concerning ... likely conduct that [is] not reasonable or [is] believed with an unreasonable degree of certainty."

It is often asserted that the impact of unduly prejudicial testimony could be minimized by means of a cautionary jury instruction, which would require the jury to limit the use of the evidence to the credibility issue alone. "One need not take a definite stand on the question of the general effectiveness of cautionary instructions in order to denigrate the effectiveness of cau-

7. Id.
8. FED. R. EVID. 611(b) provides: "Cross examination should be limited to the subject matter of the direct examination and matters affecting the creditility of the witness."
10. FED. R. EVID. 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice ... ."
12. Id. at 506.
14. Id.
15. See Gold, supra note 11, at 525.
16. Id.
tionary instructions in the prejudice-rule situation."18 Certainly, the mere admission by the court that the evidence has a prejudicial impact, which the use of cautionary instructions implies, "raises heightened suspicion" about the use of that evidence.19 Those courts that use cautionary instructions "as talismans for the solution of any possible prejudicial problems... are effecting a repeal of the prejudice rule."20 They invariably fall victim to the "prejudicial impact" of evidence of prior felony convictions.21 This is not to say that evidence of felonies is not sometimes quite valuable in determining witness credibility.22 However, as the possibility of inflammatory impact increases, the corresponding effectiveness of cautionary instructions surely decreases.23

Impeachment of a civil plaintiff by means of his prior criminal convictions creates a risk that the plaintiff's entire case will be tainted.24 If unfair prejudice is allowed to develop at trial, the merits of the complaint will fall on ears made deaf and/or the request for compensation will be as seed cast upon stoney ground. Accordingly, it must be considered whether a judge in a civil case has discretion to apply Rule 403 balancing to exclude, for impeachment purposes, evidence of a plaintiff's prior felony convictions25 or whether a judge is required under Rule 609(a)(1) to automatically admit prior felony convictions for every witness who is not a criminal defendant.26

I. LEGISLATIVE HISTORY OF FED. EVID. R. 609 (a)

A. Conflicting Claims

Any attempt to concretely determine the legislative intent underlying the passage of Rule 609(a) will be frustrated by the

18. See id.
19. Id.
20. Id. at 249-50.
21. Id. at 528.
23. See Dolan, supra note 17, at 249.
24. See Gold, supra note 11, at 524.
25. This comment will not discuss the uses of criminal convictions that are crimen falsi (Rule 609(a)(2)) or the use of criminal convictions under 404(b) or cases in which character is at issue as in a defamation suit.
26. See Diggs v. Lyons, 741 F.2d 577 (3d Cir. 1984), cert. denied, ___ U.S. ___ , 105 S. Ct. 2157 (1985). See also, e.g., Linskey v. Hecker, 753 F.2d 199 (1st Cir. 1985); Christmas v. Sanders, 759 F.2d 1284 (7th Cir. 1985); Jones v. Collier, 762 F.2d 71 (8th Cir. 1985); Howard
existent "confusing cacophony" of pronouncements and opinions surrounding the Rule's enactment.\textsuperscript{27} No less than eight versions of this rule were considered.\textsuperscript{28} After debates and discussions spanning seven years,\textsuperscript{29} the rule was referred to a joint House-Senate Conference Committee.\textsuperscript{30} Ultimately, the version of Rule 609(a) that emerged from the Conference Committee was the result of a compromise within the legislature.\textsuperscript{31} In the following cases, the determination of how to apply the rule was based partly or wholly on a rendering of Congressional intent. As will be made apparent, the confusion in the federal legislature has translated itself into conflicting views among the federal courts.

In \textit{Tussel v. Witco Chemical Corp.},\textsuperscript{32} a plaintiff truck driver filed a negligence suit for damages against a chemical company.\textsuperscript{33} The claim arose when the plaintiff delivered a truck loaded with carboic acid to the defendant's processing plant.\textsuperscript{34} While unloading the truck, a conveyer hose ruptured, causing the truck driver to be sprayed with acid.\textsuperscript{35} Prior to trial, plaintiff filed a motion \textit{in limine} "seeking an order prohibiting Witco from attacking [plaintiff's] credibility by way of cross-examination regarding his guilty plea ... to ... conspiracy to import a controlled substance."\textsuperscript{36}

The district court granted plaintiff's motion to suppress the prior convictions.\textsuperscript{37} After determining that all \textit{crimen falsi} (crimes involving deception or falseness) are mandatorily admitted under Rule 609(a)(2),\textsuperscript{38} the court concluded that the prior felonies at issue were not \textit{crimen falsi}.\textsuperscript{39} However, it was reasoned that evidence of these crimes may have been "admissible for impeachment pur-

\begin{itemize}
\item \textit{v. Gonzales}, 658 F.2d 352 (5th Cir. 1981). These cases demonstrate clear conflict among the circuits.
\item 27. See Note, \textit{Federal Rules of Evidence, 609(a) and 408—Witnesses—Impeachment by Prior Criminal Conviction}, 22 Duq. L. Rev. 535, 542 (1984) [hereinafter cited as "Note, Impeachment"].
\item 29. See Note, \textit{Impeachment}, supra note 27, at 541-42.
\item 30. Id. at 542.
\item 31. Id.
\item 33. Id.
\item 34. Id. at 980.
\item 35. Id.
\item 36. Id.
\item 37. Id. at 985.
\item 38. Id. at 980.
\item 39. Id. at 981-82.
\end{itemize}
poses under the provisions of Rule 609(a)(1)." After further
analysis, the court stated that:

Because we believe the intended focus of this rule to be avoidance
of prejudice to criminal defendants, we are not convinced that the
language of Rule 609(a)(1) and its legislative history mandate a
mechanical and restrictive result when the party facing potential
prejudice is one other than a criminal defendant. This is particu-
larly true in civil cases ... where questions regarding the plaintiff's
prior criminal conviction possess the likelihood of being tangential
if not clearly irrelevant.

Various observations were made concerning the legislative
history of Rule 609(a), all of which supported the court's ability
to exercise discretion and deny admission of the evidence. The Con-
ference Committee Report was considered to reveal an implied
grant of judicial discretion to exclude prejudicial prior felony con-
victions. The court pointed out that there was no use of com-
mand language "regarding the admissibility of convictions other
than those in the nature of crimen falsi." Also, the Conference
Report was believed to have allowed that "judicial discretion
granted with respect to the admissibility of other prior convictions
is not applicable to those involving dishonesty or false statement.

While admitting that this may be nothing more than a reference
to the judicial discretion permitted in criminal cases for criminal
defendants, the court rejected any "overly restrictive view of a
trial court's discretion to exclude evidence of a prior felony con-
viction."

The above analysis was specifically attacked in a recent Note.
It was pointed out that the common-law rule, prior to the enact-
ment of Rule 609(a), allowed all witnesses in all trials to be im-
peached by prior felony convictions and no judicial discretion could
be used to exclude such evidence. Furthermore, it was asserted
that Congress intended to create special protection only for criminal

40. Id. at 982.
41. Id. at 983.
Cong. & Ad. News 7051 [hereinafter cited as CONF. REP.].
43. Tussel, 555 F. Supp. at 983.
44. Id.
45. Id. quoting CONF. REP., supra note 42, at 7103.
46. Tussel, 555 F. Supp. at 983.
47. See Note, Impeachment, supra note 27.
48. Id. at 540.
defendants by enactment of Rule 609(a)(1). The implied conclusion is that Congress meant to leave intact the remainder of the common-law rule and that now every witness except criminal defendants may be impeached through evidence of all prior felony convictions.

The Note also referred to debates held in the House of Representatives concerning Rule 609(a). Representative Hogan was quoted for the belief that Rule 609(a)(1) should be applied "in civil cases as well as criminal cases to all witnesses." (Emphasis added.) Great import was attached to the fact that this assertion went uncontradicted. Also quoted was Representative Wiggins who suggested "that civil and criminal areas be handled by different Rules...." Impliedly, the lack of support for this proposition excluded it from consideration as "the" intent of Congress.

Further attacks on Tussel's legislative-intent analysis are found in Diggs v. Lyons, which arose from alleged violations of a prisoner's civil rights. The plaintiff claimed that prison guards used excessive force to prevent his escape. On appeal, he claimed error in the trial court's decision to allow the use of his prior criminal convictions to impeach him on cross examination. The trial judge relied on Rule 609(a)(1) as authority for the decision to admit the prior felonies.

The appellate court determined that both parts of Rule 609(a) were "fully mandatory and left no area of discretion to the trial judge." Although the court asserted as the basis of its decision both "the plain meaning of [Rule 609(a)'] language and the legislative history," it is obvious that the greater reliance was upon the court's perceptions of the legislative history. The court first noted that the general common-law rule prior to Rule 609(a)

49. Id. at 543.
50. Id. at 544 (quoting 120 Cong. Rec. H2379 (daily ed. Feb. 6, 1974) (statement of Rep. Hogan)).
51. Id.
52. Id. (statement of Rep. Wiggins).
53. 541 F.2d 577 (3d Cir. 1984). This case is especially powerful because the Third Circuit includes the Western District of Pennsylvania, which decided Tussel.
54. Diggs, 741 F.2d at 578.
55. Id.
56. Id.
57. Id.
58. Id. at 579.
59. Id. at 582.
was to allow introduction of all felony convictions to impeach without regard for the nature or grade of the offense or the kind of witness against whom such evidence could be utilized.60

Next, the legislative history was interpreted. The statements of Representatives Hogan and Wiggins61 were specifically relied upon for the propositions previously set forth.62 Representative Dennis' floor statement was also mentioned.63 Allegedly, he determined that Rule 609(a)(1) applied to "any witness," not merely criminal defendants.64 Representative Lott also was quoted: "I think it is essential to recognize that this is a rule that would have application in both civil and criminal cases."65 All of the quotations from the Congressional Record are interpreted to mean that those persons believed Rule 609(a)(1), as it finally would be adopted, applied to all witnesses in civil and criminal cases except the criminal defendant.66

B. Analysis of the House Debates

1. Statements of Representative Hogan

Representative Hogan opposed the version of Rule 609(a) proposed by the House Judiciary Committee.67 That version permitted impeachment of witnesses by prior conviction only "if the crimes involved dishonesty or false statement."68 It did not allow impeachment by any other prior felonies69 and, under it, the present Rule 609(a)(1) would not exist. Representative Hogan proposed an amendment to this Committee's draft that would allow impeachment, not only by means of crimen falsi, but also by the use of all other felony convictions.70 This amendment was defeated by almost a five-to-one margin, which irresistibly implies that the House wanted to limit impeachment of all witnesses in all proceedings to that evidence

60. Id. at 579.
61. See supra notes 50-53 and accompanying text.
62. Diggs, 741 F.2d at 581.
63. See id.
64. Id. (quoting 120 CONG. REC. H2379 (daily ed. Feb. 6, 1974) (statement of Rep. Dennis)).
65. Id. (statement of Rep. Lott).
66. Diggs, 741 F.2d at 581-82.
68. Id.
69. Id.
70. Id. at H2375-76.
which directly related to the issue of credibility.\textsuperscript{71} The final House version was the one submitted by the Judiciary Committee, opposed by Representative Hogan and which allowed impeachment by \textit{crimen falsi}.	extsuperscript{72} These facts thoroughly undermine any reliance on Representative Hogan's views as a basis for determination of the attitude of the House with respect to Rule 609(a)(1). Clearly, the House saw no need for the existence of 609(a)(1) and would have limited the use of evidence of prior criminal convictions.

Furthermore, Representative Hogan, whose "formulation adopt[ed] the prevailing prosecutorial view,"\textsuperscript{73} was more than a little squeamish about the application of his proposed rule to the government's prosecution witnesses.\textsuperscript{74} He conceded that it would be "unwise to limit the information that can go to a jury about the criminal record of [prosecution] witnesses."\textsuperscript{75} However, he believed, or perhaps hoped, that "one should not equate the admissibility of such evidence with a destruction of the witness' credibility."\textsuperscript{76} He went on to conclude that felonies other than \textit{crimen falsi} should be used by juries to determine the "moral worth" of a witness' testimony.\textsuperscript{77} Such hair splitting is of little use in light of the observed fact that, for all practical purposes, there is no distinction between testimony having no moral worth and testimony with no credibility. Thus, even the proponent of a "no discretion to exclude" view was ambivalent as to the full and logical application of his version of the Rule.

Finally, the full text of Representative Hogan's often quoted statement\textsuperscript{78} demonstrates that he could \textit{not} have been referring to Rule 609(a):

\begin{quote}
The gentleman brought out a strong argument which I mentioned. This applies in civil cases as well as criminal cases to all witnesses, and in most prosecutions the prosecution of necessity is using in many instances convicted felons, and the defendant in those cases in no way can impeach the credibility of those witnesses who are testifying against him. . . .\textsuperscript{79}
\end{quote}

\begin{tabular}{ll}
\textsuperscript{71} & \textit{Id.} at H2381 (statement of the Chairman). \\
\textsuperscript{72} & \textit{Diggs}, 741 F.2d at 580. \\
\textsuperscript{73} & 120 CONG. REC. H2380 (daily ed. Feb. 6, 1974) (statement of Rep. Hogan). \\
\textsuperscript{74} & \textit{Id.} at 2376. \\
\textsuperscript{75} & \textit{Id.} \\
\textsuperscript{76} & \textit{Id.} \\
\textsuperscript{77} & \textit{Id.} \\
\textsuperscript{78} & \textit{See Note, supra note 27, at 544 (quoting 129 CONG. REC. H2379 (daily ed. Feb. 6, 1974) (statement of Reps. Hogan and Dennis)). See also Diggs, 741 F.2d at 581.} \\
\end{tabular}
The "strong argument" mentioned above was the problem discussed by Representative Brasco that immediately preceded Representative Hogan's comments. Representative Brasco was troubled that the Judiciary Committee version did not account for the prosecution witness who, having agreed to testify so as to avoid a long jail term, might then deny the existence of any quid pro quo when testifying for the prosecution. The only conceivable method of demonstrating the existence of the agreement and hence the witness' motivation would be to elicit the prior conviction on cross-examination. Congressmen Brasco and Hogan believed this could not be done under a version of Rule 609(a) that allowed only impeachment by prior felonies that were crimen falsi.

The issue of impeachment of motive by prior felony does indeed occur "in civil cases as well as criminal cases to all witnesses." As Ms. Holtzman, Representative from New York, pointed out to both gentlemen, Rule 404(b) says that evidence of other crimes can be used ... to prove motive or bias of a witness. Therefore in the case Mr. Brasco posed, a witness could be attacked by proof of prior convictions for his motive or for bias." In their context, Representative Hogan's statements hardly stand for the proposition that Rule 609(a)(1) was intended to be applicable to civil as well as criminal cases. Instead, he discovered a particular problem demonstrably existent in both civil and criminal cases.

2. Statements of Representative Dennis

Representative Dennis rose in opposition to the Hogan amendment. He vigorously defended the Judiciary Committee's version. In particular, he urged adoption of the version of Rule 609(a) permitting impeachments by evidence of crimen falsi only. Again, the surrounding text of the quoted material is illuminating.

80. Id. at H2378 (statement of Rep. Brasco).
81. Id.
82. Id.
83. Id. at 2378-79 (statements of Reps. Brasco and Hogan).
84. FED. R. EVID. 404(b) provides: "Evidence of other crimes ... may ... be admissible ... as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."
86. Id. at H2377 (statement of Rep. Dennis).
87. See id.
88. Id. at H2376.
89. See supra note 64 and accompanying text.
Mr. Dennis. So all we have done in the Committee is to write a rule of reason and fairness. I would like to point out to you that it [the rule] does not apply only to a man who is a defendant in a criminal case, but it applies to any witness.\textsuperscript{90}

The rule considered so broadly applicable was obviously the Committee version, i.e., the \textit{crimen falsi} only version.\textsuperscript{91} As previously mentioned,\textsuperscript{92} the weight of judicial authority calls for the mandatory admission of all \textit{crimen falsi} to impeach the credibility of any witness and is embodied in Rule 609(a)(2). Representative Dennis' comments above did not relate to the application of Rule 609(a)(1).

3. \textit{Statements of Representative Wiggins}

Representative Wiggins is quoted as suggesting that impeachment in civil and criminal trials should be handled differently. The perception that Rule 609(a)(1) as adopted does not provide for a different rule for witnesses in civil trials is taken to indicate a rejection of Representative Wiggins' proposal.\textsuperscript{93} From this, it is asserted that the House actively rejected any form of Rule 609(a)(1) that would apply in civil cases differently than in criminal cases. However, the context of Representative Wiggins statements supports neither the accuracy of the above observations nor the conclusions regarding the ultimate intent underlying the adoption of Rule 609(a) as written by the Conference Committee.

Representative Wiggins also rose in opposition to the Hogan amendment.\textsuperscript{94} He observed that "we are dealing with a complex problem and are trying to fashion a single rule adequate to take care of the problem."\textsuperscript{95} He said that there was a "possibility of inequity" that would result from "trying to do too much in one sentence."\textsuperscript{96} His strongest concern was for criminal defendants.\textsuperscript{97} Accordingly, he stated:

But let us not underestimate for one moment the prejudicial impact of permitting an inquiry into unrelated prior crimes by a man who is a party defendant in a criminal trial.

\textsuperscript{90} 120 CONG. REC. H2377 (daily ed. Feb. 6, 1974) (statement of Rep. Dennis).
\textsuperscript{91} Id.
\textsuperscript{92} See supra note 4.
\textsuperscript{93} See supra note 64 and accompanying text.
\textsuperscript{94} See supra note 52 and accompanying text.
\textsuperscript{96} Id.
\textsuperscript{97} Id.
RULE 609(a)(1)

There is serious doubt... that it is possible for a man to receive a fair trial if the jury knows he has committed, for example, the crime of child molesting. I think it is almost impossible for that man to receive a fair trial under these circumstances. It is so bad... that the admission of evidence of unrelated crimes when the defendant himself is on the stand, borders on a denial of due process... 98

After the above statements, Representative Wiggins urged "separating out the criminal problem from the civil problem...."99 While the House did not act on his proposal, the Conference Committee did adopt it. The resulting Rule 609(a)(1) established different treatment for criminal defendants. A court must determine "that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant...."100 Consequently, the statements by Representative Wiggins were not rejected, and do not support an across the board admission of all criminal convictions to impeach civil as well as criminal witnesses.

4. Statements of Representative Lott

The seemingly strong affirmation by Representative Lott101 was also removed from its legislative context. His comments, viewed in context, support the view that Rule 609(a)(1) does not require mandatory admission of prior felonies in civil cases. Representative Lott rose in support of the Hogan amendment just before the vote was taken.102 He stated that "the character of a witness is material circumstantial evidence on the question of the veracity... of the witness.... Prior criminal conduct... is relevant evidence of such character."103 He then stated:

In a case where there is an unusual danger that the admission of the evidence of the prior convictions would unfairly prejudice the defendant on the merits of the case, a remedy is provided by the general provisions of Rule 401 [sic] which states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury....

98. Id.
99. Id.
100. FED. R. EVID. 609(a)(1); see also supra notes 1-5 and accompanying text.
101. See supra note 65 and accompanying text.
102. Id. at H2381.
103. Id.
I think it is essential to recognize that this is a rule that would have application in both civil and criminal cases and which would apply not only to witnesses for the defense, but witnesses for the plaintiff or the prosecution as well. 104 Representative Lott's comments clearly refer to the quoted evidentiary Rule 403. His statements make the most sense when viewed as an attempt to ameliorate the perceived harsh impact of the Hogan proposal admitting all prior felonies. Consequently, it is Rule 403 that would apply so broadly, hopefully relieving the Hogan version of its onus and making it more palatable. The statement by Representative Lott has an additional significance to this inquiry. His use of Rule 403 indicates his belief that judicial discretion to exclude prejudicial prior convictions would exist no matter which version of Rule 609(a) ultimately emerged. That no one disagreed with this assertion implies its general acceptance by the legislators. It is therefore most clear that the House debates do not support the contention that the legislature intended to apply Rule 609(a)(1) to civil as well as criminal trials. 105 Nor can these debates prove that Rule 609(a)(1) is "fully mandatory" with "no area of discretion" for the trial court. 106 The single derivable conclusion is that those on all sides of the Rule 609(a)-House debate felt that there was some area where judicial discretion to exclude a non-crimen falsi prior felony would be a necessary component of the rule. 107

C. Analysis of the Senate Debate

The court in Diggs v. Lyons 108 attempted to use the Senate version of Rule 609(a) to come full circle to the original Advisory Committee draft, 109 which was a version intended to admit all prior felonies to impeach all witnesses. 110 The final draft of Rule 609(a) as submitted to the Conference Committee by the Senate was precisely the same as the Advisory Committee version. 111 In the

104. Id.
105. See supra notes 58-60 and accompanying text.
106. Id.
107. See supra notes 73-77, 80-89, 97-99, 104, and accompanying text.
108. Diggs, 741 F.2d at 577.
109. Id. at 580.
110. Id.
111. Id.
court's view, the resulting compromise rule merely affected a slight change from the common-law rule embodied in the Senate version. The common-law rule clearly applied to all witnesses, as the Senate debaters also agreed. It was reasoned that because words that implied reliance upon the common-law rule seemed to predominate in the final version of Rule 609(a), therefore the use of prior felony convictions should be allowed for impeachment of all witnesses except the specifically excluded criminal defendants, for whom special treatment was provided.

However, the Senate did not speak with one voice on this issue. It required two ballots to pass the McClellan amendment, a version of Rule 609(a) that applied the common-law view. Further, the final vote approving the amendment was thirty-eight to thirty-three with twenty-nine Senators not present. The Senate Judiciary Committee and its version were represented by Senator Hart, who opposed the McClellan amendment. He pointed out that both the Uniform Rules of Evidence and the Model Code of Evidence had limited the use of prior crimes impeachment evidence to crimen falsi only.

Senator Burdick stated: "This is not all black and white. We just cannot say that we should use all prior behavior or no prior behavior ... It seems to me that the solution here ... is to leave it to the sound discretion of the trial judge." Senator Biden complained that under the McClellan amendment, "if you have once committed a crime, you have lost your virginity forever, you have lost your credibility forever...." The issue of the prior criminal record of criminal defendants, however, filled most of the discussion. It is fair to say the Senate debate was preoccupied with the dilemma of the criminal defendant.

112. Id.
113. Id. at 579.
115. Diggs, 741 F.2d at 581.
117. Id.
118. Id.
119. Id. at S37077 (statement of Sen. Hart).
120. Id.
121. Id. at S37079 (statement of Sen. Burdick).
122. Id. at S37082 (statement of Sen. Biden).
123. See id. at S37077-83.
D. The Compromise: Analysis of the Conference Committee Report

The Conference Committee Report was the result of a compromise. The Committee was not formed to consider one rule only but to resolve all the differences between the House and Senate versions of all the Federal Rules of Evidence. It may be assumed that trade-offs occurred, i.e., a House version of one rule for a Senate version of another rule. The resulting Conference Committee Report merely provided a post hoc rationalization for what was done. Nor could there be any later, effective check since the rules were proffered to both Congressional bodies with the understanding that the compromises arrived at should not be upset and that the rules were to be passed en masse, as one body of law.

When urging passage of the final compromise bill, Senator McClellan admitted that "[n]either side [House and Senate] ... got all they [sic] wanted." Representatives Hogan and Dennis called Rule 609(a) "one of the most controversial aspects of the bill...." Representative Hungate, chairman of the Conference Committee, declared that "[t]he conference rule 609(a) strikes a middle ground between the two versions, but a ground as close or closer to the House version than to the Senate's." This is at variance with the Conference Committee Report that claims to have adopted the Senate version. All of the Congressional comments on the Conference Report clearly referred to the narrow circumstances of the criminal trial. Finally, even the Conference Report expressed itself in terms of the criminal trial, and the use of the term "non-defendant witness" is tied to this context.

While the language of the final Rule 609(a)(1) included the larger
part of both Congressional versions, it was the assumptions underlying both versions that were the subject of compromise. It appears likely that those who voted to accept the compromise version read into it their own concerns, exemptions, and interpretations. As the previous analysis indicates, many and vast differences were discussed in both the House and the Senate on specific provisions of individual rules. The need for a body of evidentiary rules was viewed as "an idea whose time [had] definitely come," whether or not there was agreement on all the specifics. It was only the whole "codification of the Federal Rules of Evidence" where full agreement was found.

While it is apparent that Rule 609(a)(1) was the product of compromise, it cannot be denied that a large body of support existed in both the House and Senate for a version of the rule that would allow judicial discretion to exclude evidence of prior crimes, not crimen falsi, when the effect of their use would create too much unfair prejudice. Furthermore, both the House and Senate fully agreed that where a rule was subject to disagreement in the legislature, then the Congressional purpose provisions should override and such rule should be so interpreted as "to secure fairness in administration." Consequently, it cannot be doubted that the common-law rule of no judicial discretion to exclude prior crimes evidence in civil trials was seriously undermined. It is entirely reasonable to view the enactment of Rule 609(a)(1) as separate and independent of the pre-existing common-law rule. It can certainly be said that where the unwritten common-law rule conflicts with the trial court's need to "secure fairness," then the common-law rule cannot prevail.

II. THE LANGUAGE OF RULE 609(a)(1)

A. Different Views

Holding that the language of Rule 609(a) precludes any application of Rule 403 balancing, the court in Diggs said:

137. Id.
138. Id. at H40891 (statement of Rep. Hungate).
140. See id.
141. See Fed. R. Evid. 102 and 611(a).
142. Both the House and Senate proponents of the compromise bill affirmed Rule 102 by quoting it just prior to passage of the bill. See 120 Cong. Rec. S40069 (daily ed. Dec.
This language was thoroughly threshed out in the Congress and we are satisfied that it was the congressional intent that except in cases of possible prejudice to the defendant judges were to have no more discretion in admitting evidence of felony convictions than evidence of crimen falsi and that no distinction in this regard could be made between civil and criminal cases.\(^{143}\)

The court specifically refused\(^{144}\) to follow either *Czajka v. Hickman*\(^{145}\) or *Shows v. M/V Red Eagle*.\(^{146}\) Further, the court relied\(^{147}\) on *United States v. Wong*.\(^{148}\) The language therein indicated that Rule 403 could not override a specific rule such as 609(a)(2).\(^{149}\)

There are several problems with this part of the court’s argument. *Wong* was a criminal case.\(^{150}\) Rule 609(a) was admittedly designed to operate in the criminal trial context and would therefore preclude the application of Rule 403.\(^{151}\) However, the *Diggs* case was a civil trial.\(^{152}\) Additionally, *Wong* stands for the application of 609(a)(2) *crimen falsi*, not (a)(1) felonies.\(^{153}\) It is admitted that *crimen falsi* are always admissible.\(^{154}\) The *Diggs* analysis regarding Rule 609(a)(1) and its application is, at best, an opinion without substantiation. Thus, the analytical basis of *Diggs v. Lyons* does not support its opinion, which created “a split among [the] circuits by holding, for the first time, that in civil cases admission of prior felony convictions for the impeachment of any witness is mandatory.”\(^{155}\)

The other civil case that held prior criminal convictions must be admitted under Rule 609(a)(1) was *Garnett v. Kepner*.\(^{156}\) In that case, a female prison inmate filed a civil rights action against, among others, the former work-detail chief at a state prison. The plaintiff...
was pregnant and defendant Kepner admitted he had sexual relations with her. Plaintiff claimed that she was a virgin prior to incarceration and that defendant used coercion.\textsuperscript{157} The issue of coercion made witness credibility crucial to the case.\textsuperscript{158}

The trial court had used Rule 403 balancing to exclude the plaintiff's prior convictions as unduly prejudicial.\textsuperscript{159} In granting defendant a new trial,\textsuperscript{160} the district court held that the "general provisions [of Rule 403] must yield to more specific provisions [of Rule 609(a)(1)]."\textsuperscript{161} The court relied upon a brief legislative history analysis and two criminal cases, all of which were quite similar to the analysis found in Diggs v. Lyons.

It is clear from the language used that the district court was more disappointed with the outcome of the trial court's Rule 403 balancing than with its decision to apply Rule 403. The court noted "[p]laintiff's youth and her subdued appearance in court," that she "was extensively impeached by prior sworn testimony," and that the jury was convinced of her story because they were not made aware of her prior convictions.\textsuperscript{162}—"two counts of murder in the second degree, burglary, arson, recklessly endangering another person, risking and causing a catastrophe."\textsuperscript{163}

The court admitted that it could not grant a new trial for mere error in discretion to admit or exclude evidence that was apparently the only error chargeable.\textsuperscript{164} However, the court found the trial court's error to affect the substantial rights of the parties and, accordingly, a new trial was granted.\textsuperscript{165} It is therefore likely that the court was quite moved by the plaintiff's prior convictions.\textsuperscript{166}

In Tussel v. Witco Chemical Corp., the court set forth justifications for a contrary view.\textsuperscript{167} Reliance was placed on the language of Rule 609(a)(1) as a means of excluding its use in civil trials.\textsuperscript{168} The court reasoned that because the rule specifically mentions

\textsuperscript{157} See id.
\textsuperscript{158} See id.
\textsuperscript{159} Id. at 248-49.
\textsuperscript{160} Id. at 245, n. 1.
\textsuperscript{161} Id. at 244.
\textsuperscript{162} Id. at 245.
\textsuperscript{163} Id. at 244.
\textsuperscript{164} Id. at 245.
\textsuperscript{165} See id.
\textsuperscript{166} See supra notes 17-13 and accompanying text.
\textsuperscript{167} Tussel, 555 F. Supp. at 983.
\textsuperscript{168} Id. at 982-83.
defendants, Rule 609(a)(1) provides heightened protection only to criminal defendants. Such specific protection was believed to embody a narrow rule of evidence having no application to circumstances unnamed within the Rule, such as civil litigants. Consequently, the narrow Rule 609(a)(1) is an exception, when applicable, to the more general Rule 403. The court also noted the general commands of Rules 102 and 611:

That the Federal Rules of Evidence shall be construed in a manner which secures a fair administration of justice and that a court shall control the interrogation of witnesses in a manner which both effectively ascertains the truth and protects the witnesses from harassment or undue embarrassment.

Finally, "the more specific Rule 403" and the judicial balancing thereby required were considered. It was found "that the potential for prejudicing the plaintiff's case by introduction...of his conviction...[was] demonstrably greater than the potential probative value of such evidence." Hence, Rule 403 precluded introduction of the prior felony and Rule 609(a)(1) was determined to be inapplicable.

Other courts have also held that Rule 609(a)(1) does not preclude Rule 403 balancing. The Fifth Circuit Court of Appeals in Shows v. M/V Red Eagle declared that Rule 403 "is a rule of exclusion that cuts across the rules of evidence." The court refused to consider whether Rule 609(a)(1) applied in civil cases. It was sufficient that Rule 403 "also requires an exclusion of the evidence." In Czajka v. Hickman, the Eighth Circuit likewise refused to resolve the issue whether 609(a)(1) "was intended to protect only criminal defendants and not civil litigants." The court concluded that error had occurred because no Rule 403 balancing was applied in the decision below to admit the plaintiff's prior conviction. However, because the plaintiff had already been impeached

169. Id. at 984.
170. See id.
171. Id. at 984.
172. Id.; see also supra notes 10-16 and accompanying text.
174. 695 F.2d 114 (5th Cir. 1983).
175. Id. at 118.
176. See id. at 119.
177. 703 F.2d 317 (8th Cir. 1983).
178. Id. at 319.
in other ways, the error was not considered to be prejudicial.\textsuperscript{179}

\textit{Moore v. Volkswagenwerk}\textsuperscript{180} stated that "Rule 403 applies to any situation unless another rule absolutely bars certain evidence or sets up a decision-making procedure that preempts any 403 weighing."\textsuperscript{181} While noting that Rule 609(a)(2) excluded application of Rule 403, the court said that "Rule 609(a)(1) is inapplicable"\textsuperscript{182} and then applied Rule 403 balancing.

\textbf{B. Saltzburg \& Redden: Mistaken Reliance?}

All of the above cases that allow Rule 403 balancing to exclude prior criminal convictions cite, as authority for their actions, the Federal Rules of Evidence Manual by Saltzburg and Redden.\textsuperscript{183} That section of the manual states:

\begin{quote}
[I]f Rule 609(a)(1) does not cover use of all convictions and prejudice to all parties, nothing in this Rule explicitly states that it overrides other Rules . . . and no good reason appears to allow the government or civil litigants to be unfairly prejudiced. Hence, Rule 403 may be available to protect parties other than criminal defendants from unfair impeachment . . . . In our view the special protection of Rule 609(a)(1) against use of prior convictions . . . was intended to protect only criminal defendants, whereas the general notion [of Rule 403] . . . was intended to reach . . . all parties. . . .\textsuperscript{184} (emphasis added.)
\end{quote}

This conclusion is only partly supportable since the authors used the above conclusion to protect government witnesses from impeachment by prior convictions. They argued that there should not be "undue emphasis on [the] individual remarks in the floor debates, when the debates reveal that impeachment for bias often was confused with impeachment by a prior conviction."\textsuperscript{185} As will be made clear, this does not accurately represent the character of the floor debates.

There is no doubt that all proponents of the harsher Senate version of Rule 609(a) stated no exemptions would be given for prosecution witnesses in a criminal trial.\textsuperscript{186} Further, Representative

\textsuperscript{179} Id.
\textsuperscript{180} 575 F. Supp. 919 (D. Md. 1983).
\textsuperscript{181} Id. at 922.
\textsuperscript{182} Id.
\textsuperscript{183} S. SALTZBURG \& K. REDDEN, FEDERAL RULES OF EVIDENCE MANUAL (3d ed. 1982).
\textsuperscript{184} Id. at 365.
\textsuperscript{185} Id.
Hungate declared before the House that the final version of Rule 609(a)(1), “in practical effect, means that in a criminal case the prior felony conviction of a prosecution witness may always be used. There can be no prejudicial effect to the defendant if he, the defendant, impeaches the credibility of a prosecution [government] witness.”

Saltzburg and Redden also erred when they equated the language “shall be admitted” with legislative error. They asserted: “It may be that the rapid drafting done at the close of the legislative session resulted in the misuse of the word ‘shall’ or that the drafters confused the words ‘admitted’ and ‘admissible.’” Unfortunately, there was no confusion whatsoever among the drafters.

The Senate version was a direct result of Senator McClellan’s efforts. His amendment specifically changed the Senate Judiciary version of Rule 609(a) from “may be elicited” to “shall be admitted.” He specifically related his proposed changes to the earlier Congressional repudiation of the Luck doctrine. In that situation, the District of Columbia courts were applying Rule 403 in criminal trials to exclude prior conviction evidence despite the clear common-law rule that they should be admitted. Congress then made a specific change in the D.C. Code from “may be admissible” to “shall be admitted.” Senator McClellan and Representative Hogan made clear and repeated references to those events during the debates.

Furthermore, the effect to the Saltzburg-Redden analysis would be to emasculate Rule 609(a)(1). To say that the rule only applies to the criminal context and therein only to the criminal defendant is plainly too narrow an interpretation. Very little special protection is left to the defendant if Rule 403 applies to everyone else.

188. Fed. R. Evid. 609(a)(1).
190. Id. at S37076 (statement of Sen. McClellan).
191. Id.
192. Id.; see Luck v. United States, 348 F.2d 763, 767-68 (D.C. Cir. 1965); see generally 3 D. Louise & C. Mueller, Federal Evidence § 314 at 287 (1978); Note, Impeachment, supra note 27, at 540-42.
194. See Note, Interaction, supra note 4, at 381-83.
197. It may be argued that the difference between Rule 403 and Rule 609(a)(1) balancing is that in close cases Rule 403 admits while 609(a)(1) excludes. This difference hardly merits the congressional agonizing over passage of Rule 609(a)(1).
If judges had been free to apply Rule 403 to prior felony convictions of criminal defendants, Rule 609(a)(1) would not have been needed. It must be concluded that Rule 609(a)(1) applies as a specific rule of criminal trials to any witness therein who is not the defendant.

III. INADEQUACY OF A SINGLE RULE

Congress, in considering enactment of a law of evidence that would have substantive as well as procedural effect, was free to regard or disregard prior common law. Certainly prior common law has no power to override the Federal Rules of Evidence where it is in contradiction with the rules. Effectively, Congress wrote on a clean slate.

At bottom, the discussion as to the appropriateness of using prior felony convictions as impeachment evidence cannot be satisfactorily resolved through the enactment of a single rule. That this is true is evidenced by the varied decisions, based on a multitude of factual predicates, wherein the court wrestled with the dilemma of what rule of evidence is appropriate to apply under the circumstances. The results differ because the cases differ; and each of the judges involved perceived that the ends of justice could only be served by their respective decisions to allow introduction or to exclude the prior convictions. By making determinations as a matter of law whether to apply Rule 403 or Rule 609(a), these courts were effecting a Rule 403 decision to include or exclude the evidence based on the power of such evidence to create unfair prejudice versus its probative value.

Also, it becomes apparent that lack of discretion to exclude or include prior felony evidence, as the circumstances require, would lead to unconscionable and unfair results. There can be little doubt that recitation of a criminal past, particularly an offensive criminal past, has a tendency to render such plaintiff unworthy or less deserving in the eyes of the jury. While at one time it may have been appropriate to view all law breakers as unworthy of belief, the current view is that while one may have been a law breaker at some time in the past, such is not evidence of a propensity to presently testify falsely. Obviously, there would be required one rule of probable exclusion where the plaintiff committed a single, unrelated crime many years ago. Certainly another rule, doubtlessly to admit the evidence, would result where the plaintiff was an habitual criminal offender. For even unrelated, illegal acts of
violence, if done regularly, tend to imply an attitude of unlawfulness in general. These are factors that require sensitive consideration so that fairness may result.

IV. CONCLUSION

609(a)(1) should not be applied to plaintiffs in civil trials. Further, Rule 403 balancing should be available to evaluate whether prior criminal convictions of a particular plaintiff may be used for impeachment purposes. The weight of case law, interpretation of the rules as a whole, and the legislative history support these contentions.

The line ought to be drawn at civil cases. There is little valid support for the notion that Rule 403 may be used in the Rule 609(a)(1) criminal trial context. Finally, those mandates given to the courts under Rule 102 and 611(c) can best be carried out where the court has discretion to protect the integrity of the fact-finding process.
COMMENTS

CIVIL RICO AND ITS APPLICATION TO "GARDEN VARIETY" FRAUD WITHIN THE SIXTH CIRCUIT

I. INTRODUCTION

The Racketeer Influenced and Corrupt Organizations Act (RICO), embodied in Title IX of the Organized Crime Control Act, was enacted by Congress in 1970 in an effort to combat the infiltration of organized crime in the United States. RICO is perhaps the broadest, most sophisticated, and most comprehensive federal criminal legislation ever enacted. The Act prescribes enhanced penal sanctions and severe civil penalties against those defendants who participate in the affairs of an enterprise by engaging in a pattern of racketeering activity in violation of its substantive provision, Section 1962 of the United States Code. In addition, the Act grants a private right of action for treble damages and attorneys' fees to any person who is injured in his business or property by reason of a RICO violation.

RICO does not prescribe a new substantive crime; it merely focuses on a defendant's participation in a pattern of racketeering

3. See infra note 30.
5. The enhanced criminal penalties for a violation of Section 1962 are maximum fines of $25,000, imprisonment for a maximum of 20 years, or both, and forfeiture of any interests or right acquired or maintained through a pattern of racketeering activity. 18 U.S.C. § 1963(a) (West Supp. 1986). RICO permits the Attorney General to institute civil proceedings against violators. Id. 1964(b). The possible civil remedies include divestiture, permanent or temporary injunctions against violators, and dissolution or reorganization of the enterprise. Id. § 1964(a) & (b).
activities that are criminal offenses punishable under existing state or federal law. A pattern of racketeering activity requires the commission of at least two predicate racketeering acts within a period of ten years. The statute delineates twenty-four federal crimes and eight state-law felonies that may constitute predicate racketeering acts. Among the most common of these predicate offenses are fraud in the sale of securities, mail fraud, and wire fraud. Section 1962 of RICO prohibits the investment of any income derived from a pattern of racketeering activity in an enterprise affecting interstate or foreign commerce, the acquisition or maintenance of any interest or control in such an enterprise through a pattern of racketeering activity, the participation in the affairs of such an enterprise through a pattern of racketeering activity, and a conspiracy to commit any of the aforementioned prohibited activities. Section 1964(c) of the Act grants a private claim for damages to any person injured as a result of a violation of Section 1962.

The damages provision of RICO, commonly referred to as Civil RICO, was essentially dormant until the late 1970s and early 1980s. Recently, however, many Civil RICO claims have been successfully instituted by private persons injured as a result of a defendant’s prohibited racketeering activities. Although RICO was enacted for the purpose of eradicating organized crime by preventing its infiltration into legitimate businesses, the courts have construed

16. Id. § 1962(a).
17. Id. § 1962(b).
18. Id. § 1962(c).
19. Id. § 1962(d).
22. Id.
23. See Note, Civil RICO and “Garden Variety” Fraud—A Suggested Analysis, 58 ST. JOHN'S L. REV. 93, 96 (1983) [hereinafter cited as Note, RICO and “Garden Variety” Fraud].
the statute liberally allowing numerous plaintiffs to be successful in Civil RICO actions against defendants whose activities are not remotely involved with organized crime.\textsuperscript{24} In response to the avalanche of Civil RICO litigation that developed in recent years as a result of this liberal interpretation and the attractiveness of the treble damages provision, many courts have imposed various restrictions upon the application of Civil RICO.\textsuperscript{25} These restrictions, however, have not managed to circumvent RICO's potential application to the "garden variety" business-fraud case—a matter traditionally litigated in the state courts.\textsuperscript{26}

This comment focuses on the application of Civil RICO within the Sixth Circuit, particularly its potential for federalizing common-law business fraud claims.\textsuperscript{27} At the outset, this comment will present a brief overview of the legislative history and purpose of RICO.\textsuperscript{28} Secondly, the various requirements for Civil RICO actions in the Sixth Circuit will be discussed in conjunction with the judicial restrictions placed upon its application. Finally, this comment will address the issue of RICO's potential application to the "garden variety" business fraud case.

II. BACKGROUND OF THE LEGISLATION

The Organized Crime Control Act of 1970\textsuperscript{29} was enacted by Congress in an omnibus attempt to combat the infiltration of organized crime in our society, specifically to deter the infiltration of organized crime into legitimate businesses.\textsuperscript{30} This legislation was

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\textsuperscript{24} Id. at 97.
\textsuperscript{25} See Note, Judicial Restrictions, supra note 21, at 1103.
\textsuperscript{26} See The Supreme Court, 1985 Term, 95 HARV. L. REV. 312-13 (1985). Until enactment of RICO, no private cause of action was available under federal mail- or wire-fraud statutes. Therefore, victims of common-law frauds committed through the use of mails or wires were thus limited to state remedies in the absence of other jurisdictional predicate acts.
\textsuperscript{27} Since this comment focuses on RICO's application within the Sixth Circuit, the majority of the cases discussed and cited are decisions of federal courts within the Sixth Circuit.
in response to Congress' conclusion that existing law enforcement methods were inadequate to curb this particular type of criminal activity.\textsuperscript{31} RICO comprises Title IX of the Organized Crime Control Act.\textsuperscript{32} Other provisions promulgated by the Act include the authorization of special grand juries for the investigation of organized crime (Title I),\textsuperscript{33} use of immunity and contempt sanctions to coerce uncooperative and reluctant witnesses to testify (Titles II and III),\textsuperscript{34} a witness protection system (Title VI),\textsuperscript{35} and enhanced punishment for "organized crime offenders" (Title VII).\textsuperscript{36}

America's zealous concern with the growing problem of organized crime began to emerge in the early 1950s.\textsuperscript{37} In 1951, the Special Committee to Investigate Organized Crime in Interstate Commerce, commonly referred to as the Kefauver Committee, revealed the problem of the infiltration of organized crime into legitimate businesses.\textsuperscript{38} After this disclosure, the American Bar Association formed the ABA Commission on Organized Crime, which examined various proposals seeking to strengthen the law in its application to organized crime.\textsuperscript{39} By 1960, the Senate Select Committee on Improper Activities in the Labor and Management Field (the McClellan Committee) had documented the criminal infiltration of organized crime into labor unions.\textsuperscript{40} The McClellan Committee then held hearings exposing the structure of the national syndicate of organized crime known as the Mafia or La Cosa Nostra.\textsuperscript{41} As a result of these conferences, federal legislation was enacted in 1961.
prohibiting the promotion of gambling, narcotics, and other criminal enterprises through interstate travel and facilities. Therefore, the pervasive problem of organized crime was well-documented by 1967. In that year, the President’s Commission on Law Enforcement and Administration of Justice listed the four common methods by which organized crime acquires control of business concerns and suggested new approaches to control the infiltration of organized crime into legitimate businesses.

The initial stages of RICO’s legislative process began in 1967 when Senate bills 2048 and 2049 were proposed to implement some of the recommendations made by the President’s Commission; of special interest was the recommendation that antitrust-type remedies be applied against persons participating in the activities of organized crime. Both bills focused only on the “investment” method of infiltration recognized by the President’s Commission. Senate bill 2048 prohibited the investment of certain unreported income from one line of business into another line of business by advocating an amendment to the Sherman Act. Senate bill 2049 was directed at the investment of income derived from certain criminal activities in a business enterprise affecting interstate commerce. No action was taken on either bill by the Senate Judiciary Committee; however, the Antitrust Section of the American Bar Association analyzed the bills and approved of their underlying theory. Expressing concern in the proposed

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43. Blakey, RICO Civil Actions, supra note 28, at 250-51. See also Blakey & Gettings, Basic Concepts, supra note 28, at 1015.
44. The four principle methods delineated by the President’s Commission are: (1) investing concealed profits acquired from gambling and other illegal activities; (2) accepting business interests in payment of the owner’s gambling debts; (3) foreclosing on usurious loans; and (4) using various forms of extortion. See generally Bradley, An Analysis of RICO, supra note 28, at 253; Blakey & Gettings, Basic Concepts, supra note 28, at 1015, n.24.
45. Blakey & Gettings, Basic Concepts, supra note 28, at 1015.
48. See Blakey & Gettings, Basic Concepts, supra note 28, at 1015-16; Blakey, RICO Civil Actions, supra note 28, at 253.
49. Blakey, RICO Civil Actions, supra note 28, at 253-54.
50. See Bradley, An Analysis of RICO, supra note 28, at 840.
51. Id.
52. Id.
53. Blakey & Gettings, Basic Concepts, supra note 28, at 1016; Blakey, RICO Civil Actions, supra note 28, at 254.
54. See Blakey & Gettings, Basic Concepts, supra note 28, at 1016.
amendment to the Sherman Act, the ABA Antitrust Section suggested the bills be redrafted independent of the antitrust laws to avoid the restrictive antitrust precedent.

In 1969, Senator John McClellan introduced Senate bill 30, which was the original proposal of the Organized Crime Control Act. Interestingly, this original proposal of the Organized Crime Control Act did not contain a comprehensive provision comparable to RICO. Senate Bill 1623, also introduced in 1969, combined the concepts of Senate bills 2048 and 2049 with some of the suggestions of the ABA Antitrust Section. As a result of extensive Senate hearings on these two 1969 Senate bills, RICO's immediate predecessor, Senate Bill 1861, was proposed. This bill did not expressly provide for private equitable relief or treble damages. Its remedies included, inter alia, criminal sanctions, equitable relief in government suits, and divestiture. The Department of Justice then reviewed Senate Bill 1861 and expressed concern that the list of predicate offenses included in the bill was "too broad and would result in a large number of unintended applications." The Department suggested a narrower definition of the predicate offenses be adopted, yet it stated that the definition should be broad enough to include all state statutes customarily invoked to prosecute the perpetrators of organized crime.

In response to some of the suggestions of the Department of Justice, Senate bill 1861 was amended and included as Title IX of the Organized Crime Control Act. The Senate passed this

57. Blakey & Gettings, Basic Concepts, supra note 28, at 1017. See also Blakey, RICO Civil Actions, supra note 28, at 256-58.
58. Blakey & Gettings, Basic Concepts, supra note 28, at 1017. See also Bradley, An Analysis of RICO, supra note 28, at 839.
60. See Blakey & Gettings, Basic Concepts, supra note 28, at 1017.
62. Blakey, RICO Civil Actions, supra note 28, at 262.
63. Id. See also Bradley, An Analysis of RICO, supra note 28, at 842.
64. See Blakey, RICO Civil Actions, supra note 28, at 264.
65. Id.
66. Id. at 265.
revised version of Senate bill 30 on January 23, 1970, by an almost unanimous vote.\textsuperscript{68} and the bill was sent to the House for its approval.\textsuperscript{69} The House passed the bill on October 7, 1970, with a few relatively minor revisions\textsuperscript{70} but did not alter the basic structure and scope of the bill.\textsuperscript{71} When the Senate received the bill as amended by the House, the legislative session was drawing to a close.\textsuperscript{72} Consequently, to prevent the possible death knell of a bill it considered a necessity,\textsuperscript{73} the Senate approved the House version of the bill on October 12, 1970, without a request for a conference.\textsuperscript{74} President Nixon signed the legislation into law on October 15, 1970.\textsuperscript{75}

### III. REQUIREMENTS OF A CIVIL RICO ACTION IN THE SIXTH CIRCUIT AND THE JUDICIAL RESTRICTIONS IMPOSED UPON ITS APPLICATION

The explicit statutory requirements of a Civil RICO action are relatively few in number.\textsuperscript{76} Section 1964(c) of the Act,\textsuperscript{77} which was modeled after Section 4 of the Clayton Act,\textsuperscript{78} provides:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

68. Id. See also Blakey, \textit{RICO Civil Actions}, supra note 28, at 271 & n.103. "The vote in the Senate was 73 to 1." 116 \textit{Cong. Rec.} 972 (1970).


72. Id.

73. Id.


75. See Blakey, \textit{RICO Civil Actions}, supra note 28, at 280; Bradley, \textit{An Analysis of RICO}, supra note 28, at 844; Blakey & Gettings, \textit{Basic Concepts}, supra note 28, at 1021.


> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

See generally Kaplan, \textit{RICO After Sedima}, supra note 76, at 46.
the damages he sustains and the cost of the suit, including a reasonable attorney's fee. 79

Therefore, all Civil RICO actions instituted by private individuals are predicated on Section 1964(c) of the Act. To prove the requisite violation of Section 1962 of the Act, 80 one must show that a "person" has invested in, acquired, or operated an "enterprise" that affects interstate commerce by means of a "pattern of racketeering activity." 81 Although each of these terms is defined in Section 1961 of the Act, 82 the courts are not in total agreement as to the exact meaning to be accorded some of these terms. 83 Consequently, it is necessary to discuss each of these statutory requirements individually to fully explain the requirements of a Civil RICO action. In addition to the explicit statutory requirements of a Civil RICO action, the judiciary has placed various limitations upon the application of RICO in an attempt to counterbalance the flood of Civil RICO litigation that has recently confronted the courts. 84

A. Liberal Construction of RICO

Initially, one should note that although the courts have carved out limitations to the application of Civil RICO, it was Congress' intent that RICO be construed liberally. Congress evidenced this intent by including an explicit directive in RICO that stated the Act "shall be liberally construed to effectuate its remedial purposes." 85 RICO is the only federal criminal statute containing such a liberal construction clause. 86 Congress' decision to include a liberal construction clause was prompted by its belief that the normal practice of strictly construing criminal statutes was "inappropriate in the context of RICO, since RICO did not draw a line between criminal and innocent conduct." 87 The courts have faithfully adhered

81. Id.
83. See generally Blakey & Gettings, Basic Concepts, supra note 28, at 1022-31; Long, Treble Damages, supra note 76, at 210-40.
84. See Note, Judicial Restrictions, supra note 21, at 1105-18; Note, RICO and "Garden Variety" Fraud, supra note 23, at 102-11.
86. Note, RICO and "Garden Variety" Fraud, supra note 23, at 101-02, n.38.
to this congressional mandate in the application of RICO with only a few exceptions. The judicial restrictions placed upon the application of RICO result from the various interpretations that can be given to terms such as “person,” “enterprise,” and “pattern,” rather than being a product of a strict construction of the statute.

B. Requirement of a Person

The first requirement necessary to maintain a Civil RICO action is that the defendant must constitute a “person.” Section 1961(3) of the Act states that the term ‘person’ includes any individual or entity capable of holding a legal or beneficial interest in property.” The statute is not limited to members of organized crime; it also includes white-collar criminals. Thus, the plain language of the statute indicates “any human or juridical person is capable of violating RICO.”

In the Sixth Circuit, a plaintiff must allege the existence of a “person” who is separate and distinct from the “enterprise” element of the statute. This requirement was first enunciated within the Sixth Circuit by the United States District Court for the Southern District of Ohio in *Bays v. Hunter Savings Association*. The plaintiffs in *Bays* sought civil damages due to the defendant’s alleged fraudulent misrepresentations in connection with a consumer credit transaction. The plaintiffs borrowed money from the defendant and executed a mortgage note for the principal amount. The mortgage note contained a clause which gave the lender the right to increase the interest payments on the mortgage after giving thirty days notice. The defendant increased the monthly interest payments in the years of 1974, 1979, 1980, and 1981, giving the plaintiffs the option of extending the term of the loan.

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88. Id. at 1031.
91. Id.
95. Id. at 1022.
96. Id.
97. Id.
98. Id.
However, it failed to inform the plaintiffs that by opting to extend the terms of the loan they would be paying substantially more in interest and principal than they would if they merely paid the increased interest payments during the remaining term of the original note.99

The Bays court noted that the plaintiffs had alleged the existence of an enterprise, but they had not alleged any “person” associated with the enterprise who conducted the affairs of the enterprise through a pattern of racketeering activity.100 The court stated Congress’ intent that the “person” and the “enterprise” be separate and distinct is evinced by the inclusion of separate definitions for each term in Section 1961 of the Act.101 The court further reasoned “it is the activity of the person, not the enterprise which RICO condemns.”102 The court concluded the “person” and the “enterprise” cannot be the same entity;103 consequently, the plaintiffs’ RICO claim in Bays was barred.104 This case represents the prevailing view in the Sixth Circuit: to sustain an action under Civil RICO, a plaintiff must allege the existence of a “person” who is separate and distinct from the existence of the “enterprise.”105

C. Requirement of an Enterprise

A second requirement for a violation of RICO is that the defendant (a person within the definition of Section 1961) must acquire or maintain an interest or control in an “enterprise” or participate in conducting the affairs of an “enterprise” through a pattern of racketeering activity.106 The term enterprise is defined in Section

99. Id. at 1023.
100. Id.
101. Id. at 1023-24.
102. Id. at 1024-25.
103. Id. at 1024.
104. Id. at 1025.
1961(4) of the Act, which provides "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

The concept of an enterprise is all inclusive. One commentator has suggested that the enterprise concept may be divided into four broad categories: (1) commercial entities including corporations, partnerships, and sole proprietors; (2) benevolent organizations including unions and schools; (3) governmental units that include offices of various elected officials as well as the judiciary and executive agencies; and (4) associations in fact formed for the primary purpose of engaging in criminal activities. Pursuant to the liberal construction clause mandated by Congress and the broad definition of enterprise espoused in Section 1961(4), courts have repeatedly held that RICO applies to all enterprises, whether they be legal or illegal, public or private, corporate or individual, domestic or foreign. Due to the expansive interpretation of this term, "virtually no enterprise escapes the scope of the statute."

The Sixth Circuit Court of Appeals first addressed the scope of RICO in 1979 in United States v. Sutton. The Sutton court dealt with the criminal aspect of RICO in connection with the defendants' conviction for narcotics offenses and transporting and receiving stolen property. The defendants in Sutton argued that a group of individuals who merely commit a series of racketeering acts does not constitute an enterprise. Rejecting the reasoning of other circuits, the court accepted the defendants' argument and held:

[A]n "enterprise" within the meaning of the statute is "any individual, partnership, corporation, association ... and any union or group of individuals associated in fact," that is organized and acting for some

108. Long, Treble Damages, supra note 76, at 233.
110. Id.
111. See supra notes 85-88 and accompanying text.
113. See Long, Treble Damages, supra note 76, at 233-34.
114. Id. at 234.
116. Id. at 263.
117. Id. at 264.
118. Id.
ostensibly lawful purpose, either formally declared or informally recognized. 119

The court found that the defendants' acts of racketeering were not related to the affairs of an enterprise and reluctantly reversed the convictions. 120 The court's decision in Sutton was criticized extensively. 121 In a subsequent rehearing of its decision en banc, the Sixth Circuit Court of Appeals rejected its previous reasoning and recognized that a multi-purpose drug ring could constitute an enterprise for the purposes of RICO. 122

The enterprise issue was addressed by the United States District Court for the Northern District of Ohio in Mazza v. Kozel. 123 The RICO claim in Mazza was based upon an alleged violation of Ohio securities laws. 124 The plaintiff purchased from the defendants certain interests in lands for prospective oil and gas development; 125 the plaintiff also purchased certain stock in corporations formed by the defendants. 126 The plaintiff alleged that these purchases were the result of the unlawful sale of securities and, therefore, subjected the defendants to liability under RICO. 127 The Mazza court, quoting from the Supreme Court's decision in United States v. Turkette, 128 stated: "The existence of an enterprise is established 'by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.' " 129

Relying on Turkette, the court in Mazza noted that the enterprise must be an "entity separate and apart from the pattern of [racketeering] activity in which it engages" 130 and that "proof of one [element] does not necessarily establish the other." 131 The court

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119. Id. at 270.
120. Id.
121. See Long, Treble Damages, supra note 76, at 236-38; Bradley, An Analysis of RICO, supra note 28, at 854-55.
124. Id. at 434.
125. Id. at 433.
126. Id. at 434.
127. Id.
130. Id. (quoting Turkette, 452 U.S. at 583).
131. Id. (quoting Turkette, 452 U.S. at 583).
then concluded the plaintiff had not properly alleged the existence of an enterprise and, accordingly, dismissed the RICO claim. Pursuant to the explicit statutory language of RICO and the Supreme Court’s decision in United States v. Turkette, the plaintiff must prove that the defendant participated in the affairs of or acquired control in an “enterprise” and that the “enterprise” is a separate entity from the “pattern of racketeering activity” to maintain a successful Civil RICO claim in the Sixth Circuit.

D. Requirement of a Pattern of Racketeering Activity

A RICO violation also requires that the defendant’s operation of the enterprise be accomplished through a “pattern of racketeering activity.” Initially, it must be determined whether the defendant’s conduct falls within the statutory definition of “racketeering activity.” Section 1961(1) of the Act incorporates by reference twenty-four specific federal crimes and eight state crimes punishable by imprisonment for more than one year that may constitute racketeering activities. The federal crimes include “any act which is indictable” under an expansive list of certain offenses prohibited in Title 18 of the United States Code. The state-law felonies include “any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs.” The Sixth Circuit Court of Appeals recently indicated that the RICO statute is not unconstitutionally vague merely because it adopts the laws of the various states in defining “racketeering activity.”

In Bennett v. E.F. Hutton, the United States District Court for the Northern District of Ohio stated:

132. Id.
138. Id.
139. Id. § 1961(1)(B).
140. Id. § 1961(1)(A).
141. United States v. Tripp, 782 F.2d 38, 41-42 (6th Cir. 1986).
Acts of "racketeering activity" are indictable acts, and allegations concerning them should be viewed in light of the hornbook law that a federal grand jury should return an indictment only where there is probable cause or a reasonable probability that a crime has been committed. Thus, to properly plead an action under the treble damages provision of RICO, a party must allege two acts of 'racketeering' with enough specificity to show there is probable cause the crimes were committed.

Therefore, if other courts within the Sixth Circuit follow Bennett's lead, plaintiffs may find it more difficult to allege that the defendants' conduct constitutes the requisite racketeering activity although racketeering activities encompass the broad range of offenses delineated in Section 1961(1) of the Act.

After a determination that the defendant's conduct constitutes racketeering activity, the plaintiff must demonstrate the existence of a "pattern of racketeering activity." A pattern of racketeering activity "requires at least two acts of racketeering activity" within a ten-year period. Patterns of racketeering activity may be divided into four broad categories: '(1) violence; (2) provision of illegal goods and services; (3) corruption in the labor movement or among public officials; and (4) commercial and other forms of fraud.' Two questions have arisen involving the pattern requirement. First, must the pattern crimes be related? Second, are two acts always sufficient to establish the requisite pattern?

With respect to the first question, it is uniformly recognized that the racketeering acts must be related to one another. By implication, the term "pattern" requires the existence of some relationship between the acts. Furthermore, the legislative history of RICO clearly expresses Congress' intent that the predicate acts be related to one another. Sporadic activity is not sufficient to

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143. Id. at 1560 (citing United States v. Calandra, 414 U.S. 338, 344 (1974)).
144. Id. (quoting Bache Halsey Stuart Shields, Inc. v. Tracy Collins Bank & Trust Co., 558 F. Supp. 1042, 1045 (D. Utah 1983)).
145. See, e.g., American Nursing Care of Toledo, Inc. v. Leisure, 609 F. Supp. 419 (N.D. Ohio 1984) (neither threat of litigation nor use of mails in formation of franchise agreement constitute racketeering acts); Kefalas v. Bonnie Brae Farms, Inc., 630 F. Supp. 6 (E.D. Ky. 1985) (a horse breeding syndication agreement that does not involve a security does not constitute the requisite racketeering activity).
147. Blakey, RICO Civil Actions, supra note 28, at 300-306.
148. Id.
150. Id.
constitute a pattern of racketeering activity.\textsuperscript{151} The Senate Report indicates that the continuity of the activity plus a relationship between the acts combine to produce a pattern.\textsuperscript{152}

Recently, the United States Supreme Court discussed the second question in \textit{Sedima, S.P.R.L. v. Imrex Company}.\textsuperscript{153} The \textit{Sedima} Court offered an enlightening explanation of the pattern requirement in a lengthy footnote without squarely addressing the issue.\textsuperscript{154} First, the Court observed that Section 1961(5) of the Act requires at least two acts of racketeering activity and does not necessarily mean only two such acts are required.\textsuperscript{155} The Court stated “[t]he implication is that while two acts are necessary, they may not be sufficient.”\textsuperscript{156} Since \textit{Sedima} was remanded in part to determine if the requisite pattern was present,\textsuperscript{157} the Court by implication indicated that the pattern requirement could possibly be used in the future to limit the scope of RICO.\textsuperscript{158}

After the \textit{Sedima} decision, the district courts within the Sixth Circuit have rendered conflicting decisions with regard to the pattern requirement. For example, the United States District Court for the Western District of Tennessee stated in \textit{Media General, Inc. v. Tanner} that as long as the numerous racketeering activities of the defendant are found to be related and continuous, the pattern requirement will be satisfied.\textsuperscript{159} On the other hand, the United States District Court for the Eastern District of Michigan in \textit{Zahra v. Charles}\textsuperscript{160} strictly construed the pattern requirement and stated the following:

“[P]attern” also connotes a multiplicity of events: Surely the continuity inherent in the term presumes repeated criminal \textit{activity}, not merely repeated \textit{acts} to carry out the same criminal activity. It places a real strain on the language to speak of a single fraudulent

\textsuperscript{151} Blakey \& Gettings, \textit{Basic Concepts, supra} note 28, at 1030.
\textsuperscript{152} 116 CONG. REC. 18940 (1970) (remarks of Senator McClellan); see Bradley, \textit{An Analysis of RICO, supra} note 28, at 863.
\textsuperscript{153} 105 S. Ct. 3275 (1985).
\textsuperscript{154} Id. at 3285, n.14.
\textsuperscript{155} Id.
\textsuperscript{156} Id.
\textsuperscript{157} Id. at 3287.
\textsuperscript{158} Kaplan, \textit{RICO After Sedima, supra} note 76, at 76.
\textsuperscript{159} 625 F. Supp. 237 (W.D. Tenn. 1985).
\textsuperscript{160} Id.
effort, implemented by several fraudulent acts, as a "pattern of racketeering activity." Thus, it appears that the district courts within the Sixth Circuit will adopt the construction of the pattern requirement that they deem most favorable to the particular case at bar until the Sixth Circuit Court of Appeals has an opportunity to address this issue.

E. Affairs of Enterprise Must Affect Interstate Commerce

Section 1962 of the Act explicitly provides that the affairs of the enterprise must affect "interstate or foreign commerce." This element of a RICO violation warrants only a cursory discussion. In accord with their liberal interpretation of RICO in other areas, the courts have generally been quite liberal in determining whether this requirement has been satisfied. Although this connection can be minimal, the connection between the enterprise and interstate commerce must be present for a successful RICO claim.

F. The Plaintiff Must Suffer Injury to Maintain a Civil RICO Action

Section 1964(c) of the Act requires the plaintiff to suffer injury to "his business or property by reason of a violation of Section 1962" of the Act. This requirement has engendered more conflicting decisions among the judiciary than any other Civil RICO requirement. Injury is one term that is not expressly defined by the Act; therefore, the courts can easily use this requirement to limit the application of Civil RICO without running afoul of an express statutory directive. Two of the most prevalent types of injury courts have required the plaintiff to suffer are an injury of a competitive nature and a racketeering enterprise injury. A majority of courts rejected the competitive injury requirement, but until

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162. Id. at 1408.
164. Id.
165. See Long, Treble Damages, supra note 76, at 240.
166. Id.
168. Id.
170. Comment, Resolution of Injury Requirement, supra note 169, at 368.
recently, courts were split on the requirement of a racketeering-enterprise injury.\textsuperscript{171}

The United States District Court for the Eastern District of Michigan in \textit{Landmark Savings & Loan v. Rhoades}\textsuperscript{172} determined that an injury of a competitive nature is not required for a Civil RICO action.\textsuperscript{173} The plaintiff in \textit{Rhoades} alleged violations of various securities laws and that the violations occurred through the use of the mails and wires of interstate commerce.\textsuperscript{174} The \textit{Rhoades} court first stated "something more or different than injury from predicate acts is required for a plaintiff to have standing to recover treble damages under the RICO statute."\textsuperscript{175} The court then addressed the competitive-injury requirement and stated that the RICO statute should not be construed to require a competitive injury as that term is defined in the antitrust context.\textsuperscript{176} The \textit{Rhoades} court appears to be the only court within the Sixth Circuit to directly address the competitive-injury requirement. Therefore, one would assume the Sixth Circuit rejects this requirement; however, subsequent decisions by other district courts in the Sixth Circuit declined to follow the \textit{Rhoades} requirement of a separate injury in addition to the injury suffered from the predicate acts.\textsuperscript{177}

The United States Supreme Court's decision in \textit{Sedima, S.P.R.L. v. Imrex Company}\textsuperscript{178} is dispositive of the nature of injury a plaintiff is now required to suffer. The Second Circuit Court of Appeals in \textit{Sedima} held the plaintiff must suffer a racketeering-enterprise injury, which is an injury by reason of a RICO violation rather than the injury resulting from the commission of the predicate racketeering acts.\textsuperscript{179} In contrast, the Seventh Circuit Court of Appeals in \textit{Haroco v. American National Bank and Trust Com...
pany of Chicago expressly rejected the requirement of a racketeering-enterprise injury.\textsuperscript{180} It is suggested that the reason the Supreme Court granted certiorari in \textit{Sedima} was to resolve the complete disagreement between two of the most prestigious circuits.\textsuperscript{181}

In its 5-4 decision in \textit{Sedima}, the Supreme Court put an end to this disarray by flatly rejecting the requirement of a racketeering-enterprise injury.\textsuperscript{182} The Court observed that the difficulty of defining racketeering injury "cautions against imposing such a requirement."\textsuperscript{183} The Court further noted that the express language of the statute does not require any special type of injury.\textsuperscript{184} In addition, the Court indicated "[t]he fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth."\textsuperscript{185} In its conclusion, the Supreme Court stated: "It is true that private civil actions under the statute are being brought almost solely against such defendants, rather than against the archetypal, intimidating mobster. Yet this defect—if defect it is—is inherent in the statute as written, and its correction must lie with Congress."\textsuperscript{186}

The Sixth Circuit Court of Appeals in \textit{Drake v. B.F. Goodrich Co.}\textsuperscript{187} made it clear that the requisite injury must be to a plaintiff's business or property rather than to his person to maintain a Civil RICO action. The \textit{Drake} court dealt with the personal injury action of an employee and the wrongful death actions on behalf of other employees of the defendant.\textsuperscript{188} The plaintiffs alleged that the defendant intentionally concealed the serious health hazards associated with working in an environment containing vinyl chloride;\textsuperscript{189} they allegedly suffered injuries as a result of exposure to vinyl chloride.\textsuperscript{190} The court found RICO inapplicable because the

\begin{itemize}
\item \textsuperscript{180} 747 F.2d 384 (7th Cir. 1984), aff'd, 105 S. Ct. 3291 (1985).
\item \textsuperscript{181} See Brown, \textit{RICO Repercussions: Sedima and Haroco}, 21 CAL. W.L. REV. 282 (1985) [hereinafter cited as Brown, \textit{RICO Repercussions}].
\item \textsuperscript{182} \textit{Sedima}, 105 S. Ct. at 3285.
\item \textsuperscript{183} \textit{Id.} at 3284.
\item \textsuperscript{184} \textit{Id.} at 3285-86, n.13.
\item \textsuperscript{185} \textit{Id.} at 3287 (quoting \textit{Haroco}, 747 F.2d at 398).
\item \textsuperscript{186} \textit{Id.}
\item \textsuperscript{187} 782 F.2d 638 (6th Cir. 1986).
\item \textsuperscript{188} \textit{Id.}
\item \textsuperscript{189} \textit{Id.}
\item \textsuperscript{190} \textit{Id.}
\end{itemize}
injuries sustained were not "within the ambit of the statute." 191 The court held that the statute permits recovery only for injury to business or property and excludes recovery for personal injuries. 192 Therefore, it is clear that a plaintiff must suffer some type of direct injury to his business or property before he has standing to bring a Civil RICO action within the Sixth Circuit. 193

G. Connection to Organized Crime is not Required

The first judicial restriction placed upon the application of Civil RICO was a requirement that the defendant have some connection with organized crime. 194 The language of the statute does not require a connection to organized crime; 195 therefore, this judicially imposed restriction has been extensively criticized for several reasons. 196 First, Congress' intent that such a requirement should not be inferred by the courts is demonstrated by the following assertion of Senator McClellan, an avid sponsor of the RICO legislation: "The Senate Report does not claim that ... the listed offenses are committed primarily by members of organized crime, only that those offenses are characteristic of organized crime." 197 The second criticism is that a connection to organized crime would allow the principal targets of the RICO legislation to avoid liability under the Act in the same way they had circumvented previous attempts by Congress to curb their activities. 198 Third, the concept of organized crime is vague and difficult to define, and many representatives feared that an attempt to define the concept would result in con-

191. Id. at 644.
192. Id.
193. See, e.g., County of Oakland v. City of Detroit, 628 F. Supp. 610 (E.D. Mich. 1986) (plaintiff must suffer an injury as a result of the defendant's actions before he has standing to bring an action under RICO); Blount Financial Services, Inc. v. Walter E. Heller & Co., 632 F. Supp. 240 (E.D. Tenn. 1986) (plaintiff must suffer a direct injury and sustain damages to recover under Civil RICO); Smith v. Oppenheimer and Co., Inc., 635 F. Supp. 936 (W.D. Mich. 1985) (in addition to the other elements of a Civil RICO action, the plaintiff must sustain some injury to business or property to have standing to maintain an action).
195. Note, Judicial Restrictions, supra note 21, at 1107.
196. See generally Note, RICO and "Garden Variety" Fraud, supra note 23, at 102-05; Note, Judicial Restrictions, supra note 21, at 1106-09.
197. Note, Judicial Restrictions, supra note 21, at 1109. See also United States v. Gibson, 486 F. Supp. 1230 (S.D. Ohio 1980) (The court, in dealing with RICO in a criminal context, observed that the Act was designed to reach far beyond organized crime to encompass less serious offenses).
stitutional challenges to RICO.\textsuperscript{199} Finally, requiring a connection to organized crime would impose a burden of proof that is essentially impossible to meet.\textsuperscript{200} The prevailing view within circuits that have directly considered this issue is to reject this requirement,\textsuperscript{201} and the Sixth Circuit district courts uniformly follow the lead of these other circuits.\textsuperscript{202}

In \textit{Austin v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.},\textsuperscript{203} the United States District Court for the Western District of Michigan addressed the issue of whether an allegation of ties to organized crime is a necessary element of a Civil RICO claim. The \textit{Austin} court was the first court within the Sixth Circuit to address this issue. Quoting from \textit{United States v. Turkette},\textsuperscript{204} the court stated "we are unpersuaded that Congress ... confined the reach of the law to only narrow aspects of organized crime."

Relying on decisions from other circuits,\textsuperscript{205} the court then held a connection to organized crime is not necessary for the plaintiff to maintain a successful Civil RICO claim.\textsuperscript{206} The \textit{Austin} court further noted "if the Act is to be limited so as to only pertain to only [sic] 'organized crime,' such limitation should be reflected by Congress and not by the courts."\textsuperscript{207}

On the day following the decision in \textit{Austin}, the organized crime issue was addressed by the United States District Court for the Eastern District of Michigan in \textit{Ralston v. Capper}.\textsuperscript{208} The \textit{Ralston} court noted that "criminal RICO decisions have uniformly held that RICO is not limited to a judicially created definition of organized crime."\textsuperscript{209} The court stated two good reasons for rejecting an

\textsuperscript{199} Id. See also Note, \textit{Judicial Restrictions}, supra note 21, at 1107.
\textsuperscript{200} See, \textit{Judicial Restrictions}, supra note 21, at 1108.
\textsuperscript{201} See, \textit{Judicial Restrictions}, supra note 21, at 1109.
\textsuperscript{202} Id. See, \textit{Judicial Restrictions}, supra note 21, at 1109.
\textsuperscript{203} Id. See, \textit{Judicial Restrictions}, supra note 21, at 1109.
\textsuperscript{204} See, \textit{Judicial Restrictions}, supra note 21, at 1109.
\textsuperscript{205} Id. See, \textit{Judicial Restrictions}, supra note 21, at 1109.
\textsuperscript{206} Id. See, \textit{Judicial Restrictions}, supra note 21, at 1109.
\textsuperscript{207} Id. See, \textit{Judicial Restrictions}, supra note 21, at 1109.
\textsuperscript{208} Id. See, \textit{Judicial Restrictions}, supra note 21, at 1109.
\textsuperscript{209} Id. See, \textit{Judicial Restrictions}, supra note 21, at 1109.
organized-crime requirement in the context of Civil RICO. First, Congress rejected an attempt to confine the scope of RICO to the “Mafia” or “La Costra Nostra” because it feared the unconstitutional creation of a status offense that would limit the scope of RICO to a specified group of individuals. Second, the court stated that “Congress feared a narrow definition of the groups Congress was trying to reach through RICO would unnecessarily limit the scope of the statute and weaken the ability of Congress to combat organized crime.” In conclusion, the Ralston court stated:

[I]t seems clear that RICO creates a functional offense rather than a status offense. It is aimed at conduct, and if the conduct meets the definitions provided in the statute, then the conduct is within the meaning of the statute. To hold otherwise would simply create too much judicial discretion in defining what constitutes “organized crime.”

Relying on these cases and others within the Sixth Circuit, the prevailing approach within the Sixth Circuit is to reject a requirement of a connection to organized crime.

H. Prior Conviction of Defendant Is Not Required

Early decisions uniformly held a plaintiff could institute a Civil RICO action against a defendant who had not been convicted of the underlying predicate offenses. In recent years, however, some courts have required that the defendant be previously convicted of the underlying predicate offenses or of a RICO violation before a private civil action could be instituted against him. The Sixth Circuit Court of Appeals explicitly rejected this restriction in a footnote in USACO Coal Co. v. Carbomin Energy, Inc. The court stated, “[w]e are of the opinion that 18 U.S.C. § 1964(c) creates a private right of action for parties injured by conduct that violates 18 U.S.C. § 1962 without any requirement of a prior criminal conviction for that conduct.” Federal district courts within the Sixth Circuit addressing the issue have faithfully adhered to the precedent set forth in USACO.

211. Id.
212. Id.
213. Id.
214. Id.
215. See supra note 202 and accompanying text.
216. 689 F.2d 94 (6th Cir. 1982).
217. Id. at 95, n.1.
In the event USACO did not completely clarify the issue, the United States Supreme Court's decision in *Sedima, S.P.R.L. v. Imrex Company* resolves all doubts concerning whether a prior conviction requirement exists. Confronted with the Second Circuit's decision in *Sedima* requiring a prior criminal conviction, the Court expressly held that a prior criminal conviction of the defendant is not a prerequisite to a Civil RICO action. In conclusion, the *Sedima* Court stated:

> [W]e can find no support in the statute's history, its language, or considerations of policy for a requirement that a private treble damages action under Section 1964(c) can proceed only against a defendant who has already been criminally convicted. To the contrary, every indication is that no such requirement exists.

I. Statute of Limitations in a RICO Action

The provisions of RICO do not include a specific statute of limitations. Since Congress did not provide a specific statute of limitations for RICO actions, the task of selecting the appropriate statute of limitations is delegated to the judiciary. Generally, when a federal statute creating a federal cause of action fails to specify a particular statute of limitations, the federal courts apply the nearest analogous state statute of limitations. It is suggested that the most favorable approach would be to apply the statute of limitations of the nearest analogous federal statute.

This approach would promote clarity, predictability, and uniformity, and it would avoid defeating the remedial purposes of RICO by having its application encumbered by an unworkable body of law on the question of which state statute of limitations to apply to the wide range of actions that might be brought under it. If the nearest analogous state statute of limitations is observed, one commentator submits that the result will be "unequal enforce-

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222. *Id*.
225. *Id*.
226. *Id*. 
ment of a federal statute because of variations between the statute of limitations in force in the various states."

Congress' failure to expressly set forth the specific statute of limitations applicable to RICO actions, whether it was intentional or unintentional, has created confusion and seemingly inequitable results in the federal courts within the criminal context. Prosecutors have employed RICO to successfully prosecute actions that would have been barred by the statute of limitations if they had been prosecuted as respective predicate offenses rather than RICO actions. In allowing such prosecutorial conduct, one court noted that the Act contemplated "a prolonged course of conduct." One commentator indicates that principles of due process could be implicated when the government attempts to use RICO to prosecute, if the defendant is unable to adequately prepare his defense due to an unreasonable lapse of time between his illegal conduct and the prosecution.

Recently, in Silverburg v. Thomson McKinnon Securities, Inc., the Sixth Circuit Court of Appeals first addressed the issue of the applicable statute of limitations for a Civil RICO violation predicated on allegations of fraud in the sale of securities. The Silverburg court initially noted that determining the appropriate statute of limitations for a federal cause of action is indubitably controlled by federal precedent as a question of federal law. Quoting from Wilson v. Garcia, the court enunciated the following principle: "Where ... 'Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so.'"

The court in Silverburg indicated that the RICO statute does

227. Atkinson, Broader Criminal Statute, supra note 4, at 8.
228. Id. at 7.
229. Id. at 7 (quoting United States v. Field, 432 F. Supp. 55, 59 (S.D.N.Y. 1977)).
230. Id. at 8.
231. 787 F.2d 1079 (6th Cir. 1986).
232. Id. at 1082.
233. 105 S. Ct. 1938 (1985). The Court in Wilson was not confronted with the RICO statute; however, the Court did discuss three factors which should be applied in determining the statute of limitations for a federal statute containing no express limitations period. Basically, the Court in Wilson utilized a generic characterization approach, which analyzed the particular federal cause of action and applied the most closely analogous state statute of limitations on a uniform basis. Id. at 1942-49.
234. Silverburg, 787 F.2d at 1083 (quoting Wilson, 105 S. Ct. at 1042).
not create a “uniquely federal remedy” and rejected the generic characterization approach in determining the applicable statute of limitations for Civil RICO actions. The Silverburg court, in rejecting the generic characterization approach, relied extensively upon the fact that Congress expressly considered enacting a statute of limitations for Civil RICO actions. Congress, however, rejected the idea and declined to adopt a uniform limitations period for all RICO claims. In conclusion, the court in Silverburg stated, “as with most federal causes of action without incorporated periods of limitations, the selection of the applicable state limitations period in the individual case should be made on the basis of a characterization of the kind of factual circumstances and legal theories presented.” The court then characterized the plaintiffs’ RICO claim as a cause of action most closely analogous to a state common law fraud action and held that the plaintiffs’ RICO claim was barred by the four-year statute of limitations applicable to actions predicated on allegations of fraud.

In Stevens Operating, Inc. v. Home State Savings, the United States District Court for the Southern District of Ohio reached an identical conclusion and rejected proposed analogies to the statute of limitations applicable to liabilities created by statute or statutes imposing a penalty or forfeiture. The holding of the court in Stevens was premised upon its conclusion that “one must look to the statute of limitations that applies to the legal theory underlying the application of the RICO statute in this case, to wit, fraud.” The issue concerning the statute of limitations in Civil RICO actions has not been extensively litigated; however, the approach adopted by the Sixth Circuit Court of Appeals in Silverburg seems to be the prevailing view in other circuits.

The court in Silverburg did not address the issue of when the statute of limitations begins to run in a Civil RICO action. Circuits confronted with this issue have uniformly held that the

235. Id.
236. Id.
237. Id.
238. Id. at 1083-84.
240. Id. at 11.
241. Id.
discovery rule applies and the limitations period begins to run when the plaintiff knows or has reason to know of the injury that is the basis of his action. Whether it is the plaintiff's discovery of his own personal injury or his discovery that his injury is part of a RICO pattern remains a completely unresolved issue.

IV. CIVIL RICO'S APPLICATION TO "GARDEN VARIETY" BUSINESS FRAUD

Civil RICO's potential application to the "garden variety" business-fraud case, which was traditionally litigated in a state forum, has been a vital concern of many commentators. This concern stems from the statute's inclusion of federal mail and wire fraud in the list of possible predicate racketeering acts. Prior to the enactment of the RICO legislation, a private cause of action under the federal mail and wire fraud statutes did not exist; therefore, in the absence of some other jurisdictional predicate, victims of common-law frauds committed through the use of the mails or wires were limited to seeking redress in state courts. Since RICO provides a federal private right of action to victims of two or more related acts of mail or wire fraud, plaintiffs in increasing numbers have pursued treble damages under RICO in the federal courts by complaints predicated on allegations of ordinary, common-law fraud. As a result, RICO has been utilized by plaintiffs to attack virtually every new scheme invented by man's ingenuity "ranging through securities transactions, loan-sharking, land sales, credit sales, drug distribution, franchising, and pyramid sales schemes."

A claim of mail fraud or wire fraud encompasses two well-defined elements. First, a scheme to defraud must be proven; secondly, the mails or wires must be used in furtherance of the fraudulent scheme. Although only one scheme to defraud may be present

243. See, e.g., Alexander v. Perkin Elmer Corp., 729 F.2d 576 (8th Cir. 1984); Compton v. Ide, 732 F.2d 1429 (9th Cir. 1984).
244. See Compton v. Ide, 732 F.2d 1429, 1433 (9th Cir. 1984).
246. See Note, RICO and "Garden Variety" Fraud, supra note 23, at 122-26; Note, Judicial Restrictions, supra note 21, at 1104-05.
249. Id.
250. Brown, RICO Repercussions, supra note 181, at 286.
in a given case, each use of the mails is considered a separate violation for the purpose of establishing the predicate racketeering activity of RICO. Given the prevalence of mail and wire use in commercial transactions, it is difficult to conceive a business fraud case that does not involve a letter sent through the mails or the use of the telephone. Consequently, it is argued that "one's over-enthusiastic sales representatives, eager brokers, fast marketers, hard bargainers, sharp dealers, active acquisition departments, or subsidiary-manipulating clients can bring [RICO] litigation upon an unsuspecting firm just by using the telephone or the Postal Service." The United States District Court for the Eastern District of Michigan in Ralston v. Capper was one of the first courts within the Sixth Circuit to address the issue of RICO's application to the "garden variety" business-fraud case. The Ralston court observed that neither the language of the statute nor its legislative history revealed that Congress did not intend for the Civil RICO provisions to intrude on areas of state law. Quoting from United States v. Turkette, the court stated:

[T]he language of the statute and its legislative history indicate that Congress was well aware that it was entering a new domain of federal involvement through the enactment of this measure.... The view was that existing law, state and federal, was not adequate to address the problem, which was of national dimensions.

The court then concluded a RICO fraud claim is not identical to a state common-law fraud claim since all of the elements of a RICO cause of action must be satisfied before RICO can come into effect.

In Ross v. Omnibusch, the United States District Court for the Western District of Michigan addressed the "garden variety" fraud issue. The Ross court adopted the view espoused by the Seventh Circuit Court of Appeals in Haroco v. American National Bank and Trust Company of Chicago. The court, quoting from Haroco, stated:

252. See Note, Judicial Restrictions, supra note 23, at 1104.
253. Id. at 1105.
256. Id. at 1579.
259. Id. at 1580.
261. 747 F.2d 384 (7th Cir. 1984), aff'd, 105 S. Ct. 3291 (1985).
Congress deliberately cast the net of liability wide, being more concerned to avoid opening loopholes through which the minions of organized crime might crawl to freedom than to avoid making garden variety frauds actionable in federal treble damage proceedings — the price of eliminating all possible loopholes.\textsuperscript{262}

Thus, the \textit{Ross} court indicated that although RICO would be applied to the “garden variety” fraud case, this result is inevitable if the statute is to reach all of those persons whose conduct Congress intended to deter.\textsuperscript{263}

Recently, the Supreme Court’s decision in \textit{Sedima, S.P.R.L. v. Imrex Company}\textsuperscript{264} essentially turned all of the fears of RICO’s potential application to “garden variety” business fraud into a reality. In a 5-4 decision, the \textit{Sedima} Court held that neither a prior criminal conviction\textsuperscript{265} nor a racketeering-enterprise injury\textsuperscript{266} is a prerequisite for a successful Civil RICO action. In a dissenting opinion, Justice Marshall argued that Congress did not intend to federalize areas of state common law fraud or displace existing federal remedies.\textsuperscript{267} Although the repercussions of the Court’s decision in \textit{Sedima} have not yet been felt, arguably the majority’s decision removes practically all barriers to Civil RICO actions, and for all fundamental purposes federalizes common-law business fraud.

In the aftermath of \textit{Sedima}, the power of the judiciary to preclude the application of Civil RICO to virtually every business fraud case is limited. There are, however, two suggested approaches by which the courts could restrict the scope of Civil RICO. First, the courts could strictly impose the requirement that the fraud be alleged with particularity in cases predicated on acts of mail or wire fraud. Pursuant to Rule 9(b) of the Federal Rules of Civil Procedure, “in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.”\textsuperscript{268}

In \textit{Van Dorn Company, Central States Can Co. Division v. Howington},\textsuperscript{269} the United States District Court for the Northern District of Ohio utilized this approach. The plaintiff in \textit{Van Dorn} alleged

\begin{itemize}
\item \textsuperscript{262} \textit{Ross}, 607 F. Supp. at 840 (quoting \textit{Haroco}, 747 F.2d at 390).
\item \textsuperscript{263} \textit{Id}.
\item \textsuperscript{264} 105 S. Ct. 3275 (1985).
\item \textsuperscript{265} \textit{See supra} notes 219-22 and accompanying text.
\item \textsuperscript{266} \textit{See supra} notes 178-86 and accompanying text.
\item \textsuperscript{267} 105 S. Ct. 3275, 3293-96 (Marshall, J., dissenting).
\item \textsuperscript{268} \textit{Fed. R. Civ. P.} 9(b).
\item \textsuperscript{269} 623 F. Supp. 1548 (N.D. Ohio 1985).
\end{itemize}
that the defendants' acts of mail and wire fraud constituted racketeering activity for the purposes of a Civil RICO action. The court stated the plaintiff must describe with particularity the circumstances constituting the fraud when alleging mail and wire fraud as the predicate racketeering acts. The court further stated that these circumstances include at a minimum "such matters as the time, place and content of false representations, as well as the identity of the person making the misrepresentation and what was obtained or given up thereby." Holding that the plaintiff failed to allege the acts of racketeering with particularity, the Van Dorn court granted the plaintiff thirty days in which to amend his complaint setting forth the allegations of fraud with particularity before dismissing the RICO action.

Recently, the United States District Court for the Eastern District of Michigan in Zahra v. Charles also utilized this approach. The Zahra court indicated that, at a minimum, the plaintiff must provide the defendant with a brief sketch of the alleged scheme that outlines the time, place, methods, and participants in the alleged activity. Several other federal district courts have employed Rule 9(b) to dismiss Civil RICO claims alleging mail and wire fraud for failure to plead the acts of fraud with the requisite particularity.

The second avenue by which the courts could restrict the scope of Civil RICO involves the "pattern" requirement. In Sedima, the Supreme Court hinted that the federal courts might utilize the "pattern" requirement to limit RICO's application in cases involving "garden variety" business fraud. The "pattern" requirement should be strictly construed to require a relationship between the predicate racketeering acts as part of a common scheme that establishes continuity between the racketeering acts.

[A] stricter interpretation of the "pattern" requirement could ... foreclose the use of RICO against sporadic instances of commercial fraud while still allowing the statute to reach continuing racketeering.

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270. Id. at 1554-55.
271. Id. at 1555.
272. Id.
273. Id. at 1560.
275. Id.
277. See supra notes 159 and 160 and accompanying text.
ing activity designed to harm, infiltrate, or corrupt legitimate businesses. Such a requirement would prevent the use of Civil RICO in most instances of garden variety fraud without hampering the use of RICO's broad substantive provisions to combat organized criminal behavior.\textsuperscript{278}

Unlike many restrictions previously imposed upon Civil RICO’s application by the judiciary, the “pattern” requirement is explicitly set forth in the statute; therefore, the courts could impose a restrictive “pattern” requirement without circumventing RICO’s express statutory language or the Supreme Court’s decision in \textit{Sedima}.

Recently, the United States District Court for the Eastern District of Michigan in \textit{Zahra v. Charles}\textsuperscript{279} accepted the Supreme Court’s invitation to strictly construe the “pattern” requirement in cases involving “garden variety” business fraud. The court emphatically noted that “RICO ought not be used as a basis for federal question jurisdiction in every ‘garden variety’ fraud case.”\textsuperscript{280} The court indicated that since most commercial transactions involve two or more uses of the mail during negotiations, permitting plaintiffs to maintain RICO actions when the alleged pattern of racketeering activity merely consists of two uses of the mails or wires would result in virtually every fraudulent business transaction falling within the purview of RICO.\textsuperscript{281} In holding that the pattern requirement was absent, the court in \textit{Zahra} stated the predicate acts must have occurred in different criminal episodes rather than being repeated criminal acts that are part of the same criminal scheme or episode.\textsuperscript{282}

The task of restricting the application of Civil RICO ultimately lies with Congress. In \textit{Sedima}, the Supreme Court implicitly indicated that Congress should consider revising the language and restricting the application of Civil RICO.\textsuperscript{283} Some members of Congress also deem it necessary to clarify RICO.\textsuperscript{284} If Congress elects to reconsider the RICO legislation, it should first examine the effectiveness of the private right of action as a means of deterring

\footnotesize{\textsuperscript{278} The Supreme Court, 1985 Term, 99 Harv. L. Rev. 312, 320-21 (1985).  
\textsuperscript{280} Id. at 1408.  
\textsuperscript{281} Id.  
\textsuperscript{282} Id. at 1408-09.  
\textsuperscript{283} See supra note 188 and accompanying text.  
\textsuperscript{284} See Brown, RICO Repercussions, supra note 181, at 283, n.9.}
organized criminal activity. If such an examination reveals that only an insignificant number of organized criminals have been held liable in Civil RICO actions, Congress would be justified in concluding the private right of action is an ineffective tool for combatting organized crime and should be abolished. 286

A less drastic measure would be for Congress to adopt certain revisions to the RICO legislation and yet retain the private right of action. One possible revision that would prevent the application of RICO to the "garden variety" business-fraud case would be a deletion of federal mail and wire fraud from the list of predicate racketeering acts. 286 A second option would entail redefining the term "pattern" so as to encompass only more frequent criminal activity. 287 A third alternative would require Congress to work in conjunction with the various state legislatures. Many states have adopted their own RICO-like acts that are similar in nature to the federal statute. 288 Some of these, however, do not contain provisions granting a private right of action. 289 Congress should first encourage all states to adopt RICO-like statutes that grant a private right of action to persons injured as a result of a violation of the statute. Congress could prevent the federalization of common law fraud in those states whose RICO-like acts grant a private right of action by adopting a provision that requires RICO claims predicated on "garden variety" business fraud to be instituted in the state forum. This alternative would retain the federal cause of action for plaintiffs in those states that either do not provide for a private right of action in their RICO-like statutes or have not adopted their own RICO-like legislation. Although this alternative would be more effective in preventing the federalization of common-law fraud if all states had their own RICO-like acts pro-

286. See Rakoff, Federalization of Commercial Torts, supra note 276, at 123.
287. Note, Judicial Restrictions, supra note 21, at 1119.
289. See generally State RICO, RICO Bus. DISPUTES GUIDE (CCH) ¶ 2051-2700 (1985).
PROVIDING a private right of action, it would still reduce the application of federal RICO in those cases involving "garden variety" business fraud. Regardless of the course Congress elects to pursue with respect to RICO, it is a necessity for Congress to limit the federalization of common-law business fraud.

CONCLUSION

Although RICO was enacted for the purpose of deterring organized crime, its application has extended to virtually every case involving fraudulent business transactions. The widespread application of Civil RICO is largely due to the inclusion of mail and wire fraud in the list of predicate racketeering activities. This essential federalization of common-law fraud not only usurps the power of the states in the area of common-law fraud but creates a potential avalanche of Civil RICO actions in federal district courts. Within the Sixth Circuit, the courts have liberally construed the language of RICO to permit a federal cause of action in many cases that have traditionally been litigated in the state forum. Recognizing the increased availability of Civil RICO actions after the Supreme Court's decision in Sedima, many resourceful plaintiffs may employ RICO in the ordinary, "garden variety" business-fraud case. Until Congress undertakes the task of revising RICO, the judiciary should limit the use of RICO in those cases predicated on acts of mail or wire fraud by strictly imposing the requirement set forth in Rule 9(b) of the Federal Rules of Civil Procedure and by adopting a strict interpretation of the "pattern" requirement. Inevitably, however, Congress will be forced to reconsider the efficacy of Civil RICO and to revise its provisions so as to preclude the federalization of common-law business fraud.

JACQUELINE S. SAWYERS
YOUTH ON DEATH ROW: WAIVER OF JUVENILE COURT JURISDICTION AND IMPOSITION OF THE DEATH PENALTY ON JUVENILE OFFENDERS

I. INTRODUCTION

Ronald Ward is a sixteen-year-old youth scheduled to die in the Arkansas electric chair for killing two elderly women and a twelve-year-old boy.¹ Fourteen-year-old Jason Rocha is serving a twelve-year prison term for killing a schoolmate.² Fourteen-year-old Timothy Bass is serving twenty-five years in prison for killing a five-year-old girl.³ Should these and other juveniles be subjected to the death penalty? Since the reemergence of capital punishment in 1977,⁴ the issue has been hotly debated.

The execution of juvenile offenders in this country is not a new concept. Of the over 14,000 executions in American history, more than 280 of them involved persons under the age of eighteen.⁵ While no juvenile has been executed since the reemergence of capital punishment, the execution of James Terry Roach marked the second time a person has been executed for a crime committed as a juvenile.⁶

Juvenile crime is growing at an alarming rate and has now become a nationwide problem.⁷ The recent wave of juvenile crimes

¹ Silas, On Death Row, 72 A.B.A.J. 26 (March 1986) [hereinafter cited as Silas, On Death Row]. During the initial writing of this comment, the fate of Ronald Ward was unknown; however, the case has been appealed to the Arkansas Supreme Court and is pending. The Arkansas capital-punishment statute would permit the execution of a juvenile. The serious nature of the crime Ward committed and the fact that he was sentenced by a jury tends to indicate that the Arkansas Supreme Court may affirm the sentence. Ward's case illustrates society's growing acceptance of the death penalty as a permissible form of juvenile punishment.

² Comment, Should Juvenile Murderers be Sentenced to Death?, 72 A.B.A.J. 32 (June 1986).

³ Id.

⁴ The execution of Gary Gilmore in Utah on January 17, 1977, marked the end of a decade-long moratorium on capital punishment in the United States.


⁶ Silas, On Death Row, supra note 1, at 26. A twenty-eight-year-old man was executed in Texas for a crime he committed when he was seventeen. Id.

has caused society to search for alternatives to the juvenile-justice system's method of punishment. This attitude has led many courts to consider the death penalty as a viable method of punishment for juveniles who commit serious crimes.

II. THE JUVENILE-COURT SYSTEM

Normally, when a juvenile commits a crime, he or she is not treated as an adult. The idea of different treatment for juvenile offenders originated in common-law jurisprudence. At common law, a child under the age of seven could not formulate the criminal intent necessary to commit a crime. A child between the ages of seven and fourteen was presumed incapable of forming the requisite criminal intent; however, this presumption could be rebutted by showing that the child possessed the intelligence to discern between right and wrong and the capacity to understand the illegality of his acts. A child over fourteen was considered an adult with regard to criminal intent unless he could show that he lacked the necessary capacity to form the requisite criminal intent.

Eventually, the juvenile-court system developed, and by the latter part of the nineteenth century, separate court systems for adults and juveniles began to emerge. In this country today, more than 3,000 juvenile courts and approximately 1,000 juvenile correctional facilities are in operation. The theory of parens patriae serves as the foundation of the American juvenile-justice system. Under this theory, the state takes the place of the parent and acts as guardian for the wayward youth. Basically, the juvenile court acts on behalf of the child by providing understanding, guidance, and protection. The primary objectives of the system revolve around

9. Id.
10. Id.
14. Id.
rehabilitation rather than punishment. The underlying idea of this theory is that the child offender should not be viewed and treated as an adult offender; rather, "he should be viewed and treated in the same manner as a wise and understanding parent would view and treat a wayward child."\

III. TRANSFERRING THE JUVENILE TO ADULT CRIMINAL COURT

In many cases, the juvenile-court system is effective and the rehabilitated youth can be channeled back into society. Thus, the system furthers society's concern for the protection of its young people. Unfortunately, the system is not always effective. The system often fails in its treatment of juveniles who commit serious and heinous crimes. Generally, the unsuccessful cases involve juvenile offenders who are near the age of majority. In typical problem cases, the offenders have had previous encounters with the law without showing signs of benefiting from treatment. Given their age, experience, sophistication, and failure to respond to rehabilitation, the rationale for continued treatment in the juvenile system is vitiated.

Due to their dangerous nature and propensity to commit serious crimes, a majority of these experienced juvenile offenders are transferred from juvenile court to adult criminal court for prosecution. In Kent v. United States, the United States Supreme Court espoused the following principle with respect to the transfer of juveniles to criminal court:

An offense falling within the statutory limitations of the [juvenile-justice system] will be waived if it has prospective merit and if it is heinous or of an aggravated character, or, even though less serious, if it represents a pattern of repeated offenses which indicate that the juvenile may be beyond rehabilitation under juvenile-court pro-

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17. Id.
20. Id.
cadies, or if the public needs the protection afforded by such action.\textsuperscript{22}

The majority of states provide some prescribed method by which juvenile offenders may be transferred to adult criminal courts for prosecution.\textsuperscript{23} The transfer process is normally accomplished through a system of waiver. There are basically three methods of waiver: (1) judicial—the juvenile judge is vested with discretion in determining whether to transfer; (2) legislative—certain crimes may be removed from juvenile court jurisdiction by legislative mandate; and (3) prosecutorial—the prosecutor is given discretion to determine which cases should be transferred.\textsuperscript{24}

\section*{A. Judicial Waiver}

Judicial waiver exists when juvenile court judges are vested with discretion in determining whether to transfer juvenile offenders to criminal courts for prosecution as adults.\textsuperscript{25} This method of transfer is commonly used.\textsuperscript{26} In Kent v. United States, the Supreme Court...

\begin{itemize}
\item \textsuperscript{22} Id. at 566.
\item \textsuperscript{24} Stamm, Transfer of Jurisdiction in Juvenile Court: An Analysis of the Proceeding, Its Role in the Administration of Justice, and a Proposal for the Reform of Kentucky Law, 62 Ky. L.J. 122, 138 (1973) [hereinafter cited as Stamm, Transfer of Jurisdiction]. One other type of waiver is "Texas style" waiver. It has basically been confined in use to Texas. Id.
\item \textsuperscript{25} Id.
\item \textsuperscript{26} Schornhorst, The Waiver of Juvenile Court Jurisdiction, 43 Ind. L.J. 583, 597 (1968) [hereinafter cited as Schornhorst, Waiver of Jurisdiction].
\end{itemize}
Court established that waiver decisions accomplished by the judiciary must comply with certain aspects of due process.\textsuperscript{27} The Kent court noted that "there is no place in our system of law for reaching a result of such tremendous consequences without ceremony, without hearing, without effective assistance of counsel, without a statement of reasons."\textsuperscript{28} Therefore, judicial-waiver decisions require a hearing, assistance of counsel, access to social records, and written findings capable of review by higher courts.\textsuperscript{29}

Judicial waiver of jurisdiction is often only exercised in felony cases;\textsuperscript{30} however, many jurisdictions permit waiver to be considered with respect to any criminal act.\textsuperscript{31} The final decision is made after considering various factors in conjunction with an adversarial fact-finding proceeding.\textsuperscript{32}

Judicial waiver is criticized as being an unlawful delegation of legislative authority to the judiciary.\textsuperscript{33} This method of waiver receives additional criticism for allowing a judge to exercise discretion without any clear guidelines.\textsuperscript{34} Yet, the judicial method can be seen as a viable means of transfer given the due-process requirements that must accompany judicial waiver.\textsuperscript{35}

\textbf{B. Legislative Waiver}

Legislative waiver occurs when the legislature sets a maximum age after which the juvenile court's jurisdiction will no longer attach.\textsuperscript{36} Usually, the age limit varies from sixteen to twenty-one.\textsuperscript{37} Further, when a juvenile commits certain crimes such as murder, rape or robbery, the legislature may automatically exclude him from the juvenile court's jurisdiction.\textsuperscript{38} The legislature has classified these crimes as "adult," and juveniles who commit these crimes will be tried as adults.\textsuperscript{39} Normally, when these serious and heinous

\textsuperscript{27} 383 U.S. at 554-57 (1966).
\textsuperscript{28} Id. at 554.
\textsuperscript{29} Id. at 554-57.
\textsuperscript{30} Schornhorst, \textit{Waiver of Jurisdiction}, supra note 26, at 597.
\textsuperscript{31} Id.
\textsuperscript{32} Note, \textit{Waiver of Jurisdiction and the Hard-Core Youth}, 51 N.D. L. Rev. 655, 659 (1975) (hereinafter cited as Note, \textit{Hard-Core Youth}).
\textsuperscript{33} Stamm, \textit{Transfer of Jurisdiction}, supra note 24, at 138.
\textsuperscript{34} Note, \textit{Hard-Core Youth}, supra note 32, at 659.
\textsuperscript{35} Id. at 661.
\textsuperscript{36} Schornhorst, \textit{Waiver of Jurisdiction}, supra note 26, at 596.
\textsuperscript{37} Id.
\textsuperscript{38} Note, \textit{Hard-Core Youth}, supra note 32, at 659.
\textsuperscript{39} Id.
criminals are committed, society insists upon punishment rather than rehabilitation.\footnote{*}

The major criticism of legislative waiver is that Kent's due-process requirements that attach to judicial waiver have never been extended to legislative waiver.\footnote{41} Legislative waiver is also criticized because it denies the youth an opportunity to go through rehabilitation.\footnote{42} It is argued that this method of waiver is incompatible with the philosophy behind the juvenile-justice system in that it does not properly serve the interests of the child and society.\footnote{43} On the other hand, legislative waiver is a more appropriate mechanism for identifying the serious and persistent offender and transferring the "proper" offender for adult prosecution.\footnote{44}

C. Prosecutorial Waiver

Prosecutorial waiver is the method of waiver that vests the discretion to determine the forum in which a juvenile will be tried with the prosecutor.\footnote{45} If the judge disagrees with the prosecutor's choice, some jurisdictions permit the court to decide in which court the juvenile should be tried.\footnote{46} While this method may be expedient,\footnote{47} it is subject to the same criticism as legislative waiver but with more intensity.\footnote{48} First, this method of transfer involves political pressures and assumes that one individual can adequately handle the interests at hand.\footnote{49} Secondly, the youth is denied the opportunity to receive rehabilitative treatment.\footnote{50} Finally, prosecutorial waiver is contrary to the concepts of equal protection and due process.\footnote{51}

The end result of using . . . the [p]rosecutorial waiver procedure is that the hard-core youth will be charged in adult court, never having been given a waiver hearing with counsel and a statement of

\footnote{40. Schornhorst, Waiver of Jurisdiction, supra note 26, at 597.}
\footnote{41. Note, Hard-Core Youth, supra note 32, at 662-63.}
\footnote{42. Id. at 660.}
\footnote{43. Stamm, Transfer of Jurisdiction, supra note 24, at 139.}
\footnote{44. Feld, Legislative Alternative, supra note 19, at 572-616.}
\footnote{45. Note, Hard-Core Youth, supra note 32, at 660.}
\footnote{46. Schornhorst, Waiver of Jurisdiction, supra note 26, at 598. These jurisdictions are Illinois and Iowa. Id.}
\footnote{47. Note, Hard-Core Youth, supra note 32, at 660.}
\footnote{48. Id.}
\footnote{49. Stamm, Transfer of Jurisdiction, supra note 24, at 139.}
\footnote{50. Note, Hard-Core Youth, supra note 32, at 660.}
\footnote{51. Schornhorst, Waiver of Jurisdiction, supra note 26, at 599.}
reasons. If the youth is convicted he will be sent to adult prison, never having been given a chance to show that he was entitled to treatment in a facility for juveniles.\textsuperscript{52}

On the other hand, it should be noted that the judge may override the decision of the prosecutor and thereby prevent the exercise of unbridled discretion on the latter’s part.

IV. IMPLICATIONS OF WAIVER

Regardless of the waiver method employed, after the transfer process is complete, the juvenile offender is held to the same standard as an adult. The defendant will be subject to the full authority of the adult court. As a result, waiver is unquestionably considered the most critical stage of juvenile proceedings.\textsuperscript{53} “In effect, waiver is a ... determination that the child is beyond the rehabilitative philosophy of the juvenile court and is critically important for the child who may be abandoned as ‘incorrigible’ and for the society which has thus abandoned the child.”\textsuperscript{54} It must be remembered that the juvenile system may be the last opportunity a youth is afforded to receive effective treatment and possibly accept society’s standards in hopes of eventually becoming a productive citizen. Consequently:

“To brand a child a criminal for life is harsh enough retribution for almost any offense. But it becomes an all but inconceivable response when we realize that to so brand him may in fact make him a criminal for life. The stigma of a criminal conviction may itself be a greater handicap in later life than an entire misspent youth. More important, casting a youthful offender to the wolves who prowl adult jails may well dash any hope that he will mature to be a civilized man. On the other hand, there is some hope that a youth can be recalled from the wrong road he has started down—whether by psychiatric help, a changed environment, proper schooling, or even just attention and understanding.”\textsuperscript{55}

\begin{itemize}
  \item \textsuperscript{52} Note, \textit{Hard-Core Youth, supra} note 32, at 661.
  \item \textsuperscript{53} See Feld, \textit{Legislative Alternative, supra} note 19, at 516, 519; Stamm, \textit{Transfer of Jurisdiction, supra} note 24, at 143; Schornhorst, \textit{Waiver of Jurisdiction, supra} note 26, at 597; Note, \textit{Hard-Core Youth, supra} note 32, at 658.
  \item \textsuperscript{54} Schornhorst, \textit{Waiver of Jurisdiction, supra} note 26, at 586 (quoting Watkins v. United States, 343 F.2d 278, 282 (D.C. Cir. 1964)).
  \item \textsuperscript{55} Note, \textit{Hard-Core Youth, supra} note 32, at 656 n.10 (quoting Bazelon, \textit{Racism, Classism, and the Juvenile Process}, 53 \textit{J. AM. JUD. SOCY.} 373 (1970)).
\end{itemize}
The line between juvenile courts and adult courts is not blurred by a penumbra of similarities. On the one side lies the reality of the criminal-justice system that is based on punishment. On the other, an individualized method of treatment and understanding can be observed within the juvenile-justice system. It is argued that "the sides are two wholly different worlds, and the liabilities of the adult system are so great that every effort should be made to keep children within the jurisdiction of the juvenile court."

Transfer proceedings weaken the juvenile-justice system at its roots. The transfer process admits that the rehabilitation of certain juvenile offenders cannot be accomplished. Thus, transferring juveniles to adult court derogates the view that youth are capable of being rehabilitated no matter what crime they may have committed.

Even with these considerations in mind, the juvenile-justice system has historically proven to be inadequate in dealing with serious juvenile offenders. Society itself has become less tolerant of the juvenile offenders who commit serious crimes. Furthermore, retaining the hardened juvenile offenders in the juvenile system may have a negative impact upon the less criminally inclined youth with whom they are housed. Therefore, prosecuting the hard-core juvenile as an adult preserves the juvenile system for youth who are more susceptible to rehabilitative treatment. Finally, older juveniles who are involved in serious crime cause societal fear and outrage that may only be quelled by subjecting such juveniles to prosecution in the adult criminal-justice system.

[A] juvenile can reliably be considered too sophisticated for and beyond the reach of mere juvenile therapy if the particular juvenile has already been exposed, in years of relative discretion, to the juvenile system and treated to the extent that his case required ... and nevertheless returned to serious misconduct....

56. Stamm, Transfer of Jurisdiction, supra note 24, at 143.
57. Id.
58. Id.
59. Id. at 145.
60. Id.
61. Id.
63. See id. at 1184-85.
65. Note, Hard-Core Youth, supra note 32, at 664 n.69.
In effect, the transfer process can be viewed as a protective measure balancing the needs of the juvenile with the interests of society.

When one considers these arguments, the importance of transfer laws become apparent. "As long as good rehabilitative programs remain conspicuously absent for those children subject to transfer, there will have to be some way to maintain an effective jurisdiction over the child to preserve the interests of justice, if not of juvenile court philosophy or the child." 66

Even though the waiver mechanism may seem like an unsatisfactory way of dealing with the problem offender, in many cases it is the only common-sense method available. Clearly, there are mature youthful offenders who are beyond rehabilitation. These offenders have not responded to treatment and adult punishment may be the only available deterrent for them.

The problem arises because some offenders who do not require punishment may slip through during the transfer procedure to the adult-court system. Given this fact, strict procedural and investigatory safeguards are needed to protect the youth who is undeserving of punishment. The legislative and prosecutorial methods of transfer would be more acceptable if some due-process requirements were infused into them. To implement this proposal, waiver procedures should be made more difficult and Kent's due-process requirements should be mandatory regardless of the type of waiver employed. Upon completion of the process, the juvenile becomes subject to adult punishment. The question then becomes whether the juvenile should be subject to the more severe penalties, including capital punishment.

V. CAPITAL PUNISHMENT

The United States Supreme Court has historically accepted the death penalty as a constitutional form of punishment. 67 With the increased number of capital punishment cases in recent years, however, the Supreme Court has reevaluated capital punishment's premise of constitutionality. Today, the imposition of the death penalty necessarily involves lengthy procedures and an analysis of eighth amendment standards against cruel and unusual punish-

66. Stamm, Transfer of Jurisdiction, supra note 24, at 145.
ment. The eighth amendment is the general threshold standard in capital punishment cases and states that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.” The eighth amendment was interpreted by the Supreme Court in *Trop v. Dulles*, wherein the Court stated that the eighth amendment is based upon “the evolving standards of decency that mark the progress of a maturing society.”

In *Furman v. Georgia*, the Supreme Court applied the eighth amendment to prohibit absolute discretion in capital punishment cases. A jury is not permitted to use unguided discretion in determining whether to impose the death penalty. According to the *Furman* Court, allowing a jury to use unguided discretion would result in “wanton” punishment.

Subsequent to *Furman*, the Supreme Court handed down another opinion in *Gregg v. Georgia*. In *Gregg*, the defendant was found guilty of committing robbery and murder. A Georgia statute required a second trial to be held to consider the issue of sentencing. At this trial, the defendant received a death sentence. Before the death penalty could be imposed, the statute required the jury to find one of ten possible aggravating circumstances. The Court

69. U.S. CONST. amend. VIII.
71. Id. at 101.
73. Id. at 309-10 (Stewart, J., concurring).
75. Id. at 158-61.
76. Id.
77. Id.
78. Id. at 165-66 n.9. These statutory aggravating circumstances are:

1. The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.
2. The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.
3. The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.
upheld the death sentence and approved the weighing of aggravating circumstances against mitigating factors. Gregg teaches that imposing the death penalty after the consideration of certain statutory aggravating circumstances does not violate Furman's prohibition against unbridled discretion and arbitrary and capricious action.\textsuperscript{79}

In \textit{Lockett v. Ohio},\textsuperscript{80} the United States Supreme Court further limited the power of courts to impose the death penalty as a form of punishment. In \textit{Lockett}, the Court reversed a death-penalty sentence imposed on a driver of a getaway car for a murder committed by a co-felon. While the statute in question permitted consideration of mitigating factors, it limited the number of mitigating factors that could be considered and, therefore, violated the prohibitions of Furman.\textsuperscript{81} Pursuant to \textit{Lockett}, a statute must not improperly exclude mitigating factors such as prior record, age, and intent to cause death.\textsuperscript{82} In addition, the sentencing body must be permitted to consider all mitigating factors that are presented at trial.\textsuperscript{83}

These cases act as limitations on a court's power to impose the death penalty. To pass constitutional muster, a sentencing body must not be accorded unguided discretion in deciding on the death penalty as a form of punishment. A death-penalty statute must

\textsuperscript{4} The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

\textsuperscript{5} The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

\textsuperscript{6} The offense caused or directed another to commit murder or committed murder as an agent or employee of another person.

\textsuperscript{7} The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

\textsuperscript{8} The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

\textsuperscript{9} The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

\textsuperscript{10} The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another. \textit{Id.}

\textsuperscript{79} \textit{Id.} at 206-07.
\textsuperscript{80} 438 U.S. 586 (1978).
\textsuperscript{81} \textit{Id.} at 608.
\textsuperscript{82} \textit{Id.} at 604-08.
\textsuperscript{83} \textit{Id.} at 604-05.
permit the decision to be made in a reasonable manner and must also allow for consideration of all factors that might affect mitigation. Once a death-penalty statute is determined to be constitutional, the next question is whether the statute should apply to juveniles.

VI. CAPITAL PUNISHMENT AND ITS APPLICATION TO THE JUVENILE TRIED AS AN ADULT

A. Historical Overview

Early American courts hesitated in executing children and death sentences significantly outnumbered actual executions. The first recorded execution of a juvenile in this country occurred in Massachusetts in 1642 and the most recent occurred in Texas in 1964. After the juvenile-justice system developed in the United States, states executed over seventy-seven persons for crimes committed while under the age of eighteen between 1900 and 1930; as of 1983, statistics indicated that 192 juveniles have been executed since 1900. The youngest person executed was ten years old and numerous others have been executed for crimes they committed while fifteen years old or younger. In recent years, the majority of juvenile executions occurred at age sixteen or seventeen.

Most states have death-penalty statutes that would permit the execution of juveniles who have been transferred to adult courts. Presently, thirty-seven states have death-penalty statutes. Sixteen states have no minimum age limit for imposition of the death penalty. Indiana does specify an age limit; however, the statute is liberal and allows the execution of children as young as age ten. While the state statutes evince some conformity, the question of the constitutionality of executing juveniles remains unresolved. This fact is evidenced by the conflicting opinions handed down by state courts.

84. Streib, Death Penalty for Children, supra note 5, at 615.
85. Id. at 619.
86. Id. at 617.
87. Id. at 619.
88. Id.
89. Id. at 620.
91. Id.
92. Id.
B. Recent State Court Cases

In *State v. Maloney*, a fifteen year old was sentenced to death after he had been convicted of murdering his mother and stepfather. The Arizona Supreme Court reversed the decision and stated, "[w]e feel compelled . . . because defendant was only fifteen years of age at the time he killed, to . . . carefully examine the propriety of the ultimate penalty here, particularly in view of the fact that at his first trial the jury did not decree his execution." The court noted that even though the defendant had committed a heinous crime, he should not be sentenced to death because of his immaturity.

In *State v. Stewart*, the Supreme Court of Nebraska reduced a death-penalty sentence imposed on a sixteen year old to a sentence of life imprisonment. When the trial court imposed the death penalty on the offender, it failed to consider age as a mitigating factor. In reducing the sentence, the court concluded that a youthful offender is entitled to have mitigating factors such as age and prior record considered by the trial court when issuing a death sentence.

On the other hand, other state supreme courts have upheld the application of the death penalty to juvenile offenders. In *State v. Harris*, the Ohio Supreme Court upheld the imposition of the death penalty on a seventeen-year-old defendant who had robbed and murdered a woman. The *Harris* court concluded that the eighth amendment did not prohibit sentencing a juvenile to death. The Ohio Supreme Court subsequently decided *State v. Davis*, and reiterated its holding in *Harris*.

In *State v. Valencia*, the Arizona Supreme Court withdrew from its position in *Maloney* and indicated that the death penalty is a reasonable measure of punishment on a sixteen-year-old defendant.

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94. 464 P.2d at 803.
95. Id. at 805.
96. 197 Neb. 497, 250 N.W.2d 849 (1977).
97. 250 N.W.2d at 865.
98. Id.
100. 359 N.E.2d at 68.
101. Id.
102. 56 Ohio St. 2d 51, 381 N.E.2d 641 (1978).
who robbed and murdered a woman. The defendant claimed that imposing the death penalty on a sixteen year old constituted an abuse of discretion and impermissibly inflicted cruel and unusual punishment upon him. The court responded by stating "the age of the offender is an important consideration to the court in sentencing as shown [by the statute]. There is, however, no constitutional or statutory provision which prohibits the sentencing of a sixteen year old to death." These cases indicate that there is little agreement among the states with respect to whether the death penalty should be imposed upon juveniles. It is clear that the United States Supreme Court needs to address this issue to make a definitive statement regarding the constitutionality of capital punishment for juveniles.

C. The Supreme Court Speaks in Eddings v. Oklahoma

The Supreme Court has never determined that the Constitution prohibits imposing the death penalty on juvenile offenders. In Eddings v. Oklahoma, the Court effectively avoided the issue and failed to provide any answers to the constitutional question. The Court in Eddings considered whether applying the death penalty to a sixteen year old violated the eighth amendment's prohibition against cruel and unusual punishment. Eddings was convicted in an Oklahoma court of first-degree murder for killing a police officer and sentenced to death. The Eddings majority rested its decision on a collateral issue and side-stepped the constitutional issue, holding that the trial court had violated the prohibitions of Lockett v. Ohio by refusing to consider relevant mitigating evidence presented at trial. At trial, the defendant had been precluded from presenting evidence of a troubled youth and psychological problems as mitigating factors.

Applying Lockett, the Court held that just as the state cannot by statute preclude a sentencer from considering mitigating factors,

104. 602 P.2d at 808.
105. Id. at 809.
106. Id.
108. Id. at 106-110.
109. Id.
111. 455 U.S. at 113.
112. Id. at 107.
neither may the sentencer exclude mitigating evidence by refusing to consider it. 113 The Court further found that a child's exposure to a brutal family history during susceptible years and mental and emotional instability have a bearing on a child's character and must be duly considered in sentencing. 114 Based upon this analysis, the Court held that the sentence imposed on Eddings violated Lockett's standards and it remanded the case.

While the majority did not address the constitutional question, the dissenting opinion suggested that the case should have been decided in view of eighth amendment standards and that the Oklahoma Supreme Court should have been affirmed. 115 The dissent found that the lower courts properly considered the aggravating and mitigating factors presented at the sentencing hearing. 116 In addition, the dissent indicated that the majority improperly analyzed the trial court's evaluation of mitigating factors. 117 The dissent concluded that the decision of the Oklahoma Supreme Court should have been affirmed since it was not inconsistent with Lockett for the sentencing body to find the aggravating circumstances outweighed the mitigating factors. 118

Clearly, the Eddings' holding is limited in scope. Rather than providing states with necessary guidelines for imposing the death sentence on juveniles, the Court left the question to be decided by individual state courts. The Court merely applied the established rules of Lockett in addressing the juvenile death-penalty issue. Eddings indicates the Supreme Court chose to avoid deciding the constitutionality of imposing the death penalty on juveniles. In the case of Maryland v. Trimble, 119 the petitioner sought review by the United States Supreme Court. The Court denied certiorari, indicating only that it would vacate the death sentence. 120 The Trimble case further evidences the Supreme Court's reluctance to decide the constitutionality of executing juveniles. Consequently, states are free to continue imposing the death penalty on juvenile offenders.

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113. Id. at 113-114.
114. Id. at 115-116.
115. Id at 120-28 (Burger, C.J., dissenting). The Chief Justice was supported by Justices Blackmun, Rehnquist, and White.
116. Id. at 128.
117. Id. at 125.
118. Id. at 121-26.
D. Federal Cases After Eddings

While Eddings failed to address the constitutional question, a later federal court opinion provides some support for the argument that imposing the death penalty on juvenile offenders is constitutional. In Prejean v. Blackburn, a seventeen-year-old black male was convicted by a jury for murdering a Louisiana state police officer. The defendant argued, inter alia, imposing the death penalty on a juvenile was excessive and disproportionate and violated the eighth amendment. The court found no eighth amendment violation and upheld the death sentence. It found the punishment to be proportionate to the crime committed.

Prejean appealed the decision to impose the death sentence. In addition to claiming the death penalty violated the eighth amendment, the defendant relied on the tradition that juveniles receive special treatment in this country and the trend toward elimination of capital punishment, both nationally and internationally. The court of appeals noted the Supreme Court had left the issue unresolved in Eddings. The court recognized that age was a mitigating factor but stressed that a majority of state statutes allowed juveniles to be executed. The court explained:

Nothing in society's standards of decency compel more than consideration of... youth as a mitigating factor. A survey of state capital punishment statutes provides us with "evidence of the country's present judgment," [citations omitted] concerning the acceptability of the death penalty for such youthful offenders. Of the thirty-seven death penalty statutes now in existence, only six prohibit execution of offenders who committed capital crimes while under age eighteen.... The current judgment among state legislatures thus strongly indicates that capital punishment can be imposed on youthful offenders.

The Prejean opinions can be viewed as supporting the constitutionality of applying the death penalty to juveniles; however, the

122. Id. at 998.
123. Id.
124. Id. at 999.
125. Id. at 998.
126. Prejean v. Blackburn, 743 F.2d 1091 (5th Cir. 1984).
127. Id. at 1098.
128. Id.
129. Id. at 1098-99.
court in the original Prejean opinion effectively ignored the constitutional standards established by the Supreme Court in Furman and Gregg. The Prejean court failed to consider the defendant's character and, throughout the opinion, seemed to overlook his age. Arguably, the subsequent Prejean decision is of greater constitutional dimensions given that the court of appeals considered age as a mitigating factor.

Yet, the layout of the opinions in the Prejean cases leaves the door open for the Supreme Court to again ignore the constitutional issue and decide the case on alternative grounds as it did in Eddings. Though the court of appeals considered the age of the defendant, it failed to properly weigh the mitigating factors against the aggravating factors. Instead, the court considered the age in light of the increased acceptance of the capital punishment of juveniles. At best, the Prejean opinions are weak support for the constitutional question at issue. After Eddings and Prejean, state courts began to espouse the view that imposing the death penalty on juveniles is a constitutionally valid form of punishment.

E. Subsequent State Cases

In High v. Zant, the defendant minor was sentenced to death after being found guilty of murder, kidnapping, armed robbery, and possession of a firearm. The defendant argued, among other things, that imposing the death penalty on a minor constituted cruel and unusual punishment. The court concluded that the death penalty was not cruel and unusual punishment per se simply because the defendant was a minor at the time of the offense.

In State v. Battle, the Missouri Supreme Court derived support from the Zant opinion and upheld the death penalty as a constitutional form of punishment. Even though the defendant did not fall within the scope of the juvenile court's jurisdiction as established by a Missouri statute, the court noted that applying the death penalty to juveniles would be permissible absent the statute. The court stated that

132. 300 S.E.2d at 654.
133. Id. at 661-62.
134. Id. at 662.
135. 661 S.W.2d 487 (Mo. 1983).
136. Id. at 495 n.7.
the legislatures in some states have enacted statutes prohibiting the
death penalty sanction in cases involving youthful offenders. Absent
such a statute, states are free to apply their death penalty statutes
to young offenders, and even juvenile offenders who stand trial as
adults, so long as such statutes comport with general eighth amend-
ment standards. 137

A recent Maryland Court of Appeals case applied the standards
of Gregg to uphold the application of the death penalty to a juvenile
found guilty of murder. In State v. Trimble, 138 the defendant argued
that imposing the death penalty on a juvenile violated the eighth
amendment standards against cruel and unusual punishment. 139 The
court, in determining that the penalty did not violate the eighth
amendment, recognized that imposing the death penalty on
juveniles undermined the philosophy of the juvenile-justice system
but reasoned that not all juveniles could be effectively treated in
the juvenile system. 140 The court relied on the fact that several
other states allowed capital punishment in juvenile cases. 141

These state court cases further indicate a trend in the courts
toward accepting the view that imposing the death sentence on
juvenile offenders may be constitutional. These courts relied on
the fact the Supreme Court left the constitutional question open
in Eddings. Clearly, the courts are justified in relying on Eddings;
however, the reliance on the Eddings opinion should be limited
and should extend only to a certain point. Eddings provides no
guidelines for the state courts to follow; it simply leaves the door
open for states to decide the issue on their own initiative. Thus,
no definitive answer to the constitutional question has been given
and the need for the Supreme Court to squarely address the issue
is evident.

VII. AGE AS A MITIGATING FACTOR

The one principle that clearly emanates from the Supreme Court
and state court decisions is that age must be considered a mitigating
factor. The Supreme Court addressed the issue of possible
mitigating factors in Lockett v. Ohio. 142 The Court in Lockett stated

137. Id. at 494 n.7.
139. 478 A.2d at 1158.
140. Id. at 1161.
141. Id. at 1160-61.
that the "[e]ighth and [f]ourteenth [a]mendments require that the sentences ... not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record ... that the defendant proffers as a basis for a sentence less than death." 43

While the Supreme Court in Eddings v. Oklahoma 144 failed to address the constitutional issue, the Court further evinced the importance of considering age as a mitigating factor. The death-penalty sentence affirmed by the Oklahoma Supreme Court was reversed because the trial court had failed to properly consider the age of the defendant. 45 Not only must age be considered in mitigation, but other factors that bear upon an individual's social and emotional development are important. The Court explained that "just as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered in sentencing." 46 The Eddings Court did not state that age alone would preclude the use of the death penalty as a form of punishment for juveniles. The Court did indicate, however, that a youth may lack the necessary maturity to form the requisite criminal intent to commit certain crimes. 47

Age is considered to be relevant for two reasons. First, age may indicate an offender's ability to discern between right and wrong and bear upon a person's ability to control his or her actions. 48 The second relevant aspect of age as a mitigating factor is its social importance. 49 Life is a treasured possession and the decision to terminate a person's existence should not be made with haste. 50 A decision to execute a juvenile deprives that person of an opportunity to live a full life. Thus, the age of the offender should be given great weight during the sentencing phase of a trial. 51

While society may approve of applying the death penalty to hardened juvenile offenders as an abstract concept, society must also demand that when faced with the actuality of such a sanction, the decision to put an
individual to death should be made only after the true extent of the deprivation is completely considered. 152

VIII. ACCEPTANCE OF THE IMPOSITION CAPITAL PUNISHMENT ON JUVENILES

Most state legislatures have adopted death-penalty statutes that permit the execution of juveniles. This tends to indicate that society has countenanced this form of punishment for juveniles. Furthermore, recent case law indicates that the execution of juveniles may be a constitutional form of punishment. 153 The use of the jury method in many of these cases is another indication that society is prepared to accept capital punishment of juveniles. A cross-section of the community relies on common-sense determinations to arrive at an accepted form of punishment. 154 Yet, society’s acceptance alone will not span eighth amendment analysis. 155 “In this regard the challenged penalty must have some penological justification.” 156 Therefore, it must be determined that the death sentence is proportionate to the crime and that it serves some purpose.

The Supreme Court has recognized at least six purposes that may be served by capital punishment: retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics (improvement of the human species), and economic reasons. 157 These considerations should apply to death-penalty cases that involve juvenile offenders.

Throughout history, society has sought retribution for crimes committed against society; however, this retribution may be misplaced when it is applied to juvenile offenders. 158 On the other hand, capital punishment of juveniles may be an expression of society’s outrage with heinous crimes. 159 “When, by legislative permission, a jury decides that capital punishment is the only appropriate sanction, it is an expression of the community’s belief that certain

152. Id.
153. See supra text accompanying notes 106, 119, 124, 130, 134, and 137.
155. Id.
156. Id.
159. See generally Note, Youthful Offenders, supra note 62.
crimes are so grievous an affront to society that the only adequate response is retribution in the form of the penalty of death." Thus, retribution may be a proper consideration in deciding whether to apply capital punishment to juvenile offenders. 161

The next analysis concerns whether capital punishment acts as a deterrent to crimes committed by juveniles. This question has spawned considerable debate. 162 Adolescents often live life with little concern about future events or consequences. 163 They often play games with death and do not understand its finality. 164 "Adolescents tend to view death as a remote possibility; old people die, not teenagers. Consider, for example, teenagers' propensity to flirt with death through reckless driving, ingestion of dangerous drugs, and other similar 'death-defying' behavior." 165 As a consequence, capital punishment may lose its effect when applied to juveniles. A youth may not understand the finality of such punishment.

Capital punishment may prevent subsequent criminal activity but it could be considered harsh by society's standards. 166 Imposing capital punishment clearly offends the standards established by the juvenile-justice system. Rehabilitation seems more appropriate given society's concern for its youth. It must be remembered, however, that some juveniles are beyond rehabilitation and capital punishment may be the appropriate punishment if the crime committed is serious. 167

The use of capital punishment on juveniles may be an effective method of soliciting guilty pleas and confessions given the proper circumstances, but this is a questionable method. Life imprisonment would seem a more appropriate punishment since a youth has the better part of life remaining ahead of him. 168

However, sentences of life imprisonment give rise to economic arguments. In effect, the state must take over the care of the individual, which entails serious financial responsibility. 169 Yet, when

161. Id.
162. Id. at 65-66.
163. Streib, Death Penalty for Children, supra note 5, at 639.
164. Id.
165. Id.
166. Id.
167. Id.
168. Id.
169. Id.
one considers the cost of trials and appeals and performing executions, arguably, the cost of execution nearly equates with life imprisonment.\textsuperscript{170}

\begin{center}
\textbf{IX. Conclusion}
\end{center}

Many serious crimes are committed by persons under the age of eighteen. Many people feel that such a juvenile offender should be tried as an adult. If a youth is tried as an adult, he will lose his opportunity for rehabilitation and the rationale of a whole system of justice will be ignored. In effect, society's ideas with regard to how a juvenile should be treated are meaningless. Yet, it would be ridiculous to suggest that the juvenile-justice system is effective in every case. Clearly, the system is less likely to be successful in the rehabilitation of a hard-core juvenile offender.

It is evident that society is becoming increasingly less tolerant of barbarous and heinous crimes regardless of the age of the offender. Thus, the need for a system of transferring serious juvenile offenders to adult criminal courts is evident. The criminal nature of adult courts may be able to eliminate some of these serious crimes. Transferring a juvenile to adult court, however, should be done with caution. Waiving juvenile-court jurisdiction entails the critical decision that a youth is mature enough to be treated as an adult and understands any consequences facing him. Thus, a waiving body should also be given specific criteria to consider because once the decision is made to transfer, the youth will never be the same.

Once in adult criminal court, the juvenile offender may be tried for capital crimes and possibly face the death penalty. This is a serious decision and legislatures are saddled with the decision of whether to take a youthful life. Few state death-penalty statutes prohibit the execution of juveniles. The United States Supreme Court has seemingly removed any constitutional barriers and the clear trend in the state courts is toward allowing capital punishment of juveniles. The juvenile has only age working in his favor and, as a mitigating factor, it can easily be overcome by mounting aggravating circumstances.

Imposing the death penalty upon a juvenile offender is the harshest of all punishments. The sentence of death takes away an in-

\textsuperscript{170} Id.
individual's most precious possession. Specific guidelines should be implemented to assure a rational decision. A minority of states oppose the death penalty for juveniles and many states are reforming their death-penalty statutes. Any reformation should give great consideration to prohibiting the imposition of the death penalty on juveniles. While capital punishment has been accepted as a method of punishment, the purposes it serves are questionable, especially when applied to juveniles.

On the other hand, society is the backbone of our legal system. Social values should affect the decision whether to punish a person, especially when the death penalty is at issue. In the present context, society has chosen to deal with juveniles through a separate system of justice. However, when society's chosen methods fail, it must be permitted to use alternative methods. Many states have chosen that alternative method.

Charles A. "Pete" Polen
NOTE

A TAILOR-MADE TORT FOR VICTIMS OF HANDGUN CRIMES, KELLEY V. R.G. INDUSTRIES, INC.

Over the last decade, various actions have been brought in which plaintiffs who were injured by the criminal use of handguns have sought to impose civil liability upon the guns' sellers or manufacturers.¹ Although these actions have been supported by some commentators,² it wasn't until Kelley v. R.G. Industries, Inc.,³ that a jurisdiction sustained a ruling that a valid cause of action exists in these circumstances.⁴

In Kelley, the Maryland Court of Appeals held that if a plaintiff who is injured by the criminal use of a handgun can show that that gun is a "Saturday Night Special"⁵ and that it caused his injury, an action will lie against that gun's manufacturer and its


⁴. The sole reported exception was Richman v. Charter Arms Corp., 571 F. Supp. 192 (E.D. La. 1983), which was reversed in Perkins v. F.I.E. Corp., 762 F.2d 1250 (5th Cir. 1985).

⁵. The court in Kelley admitted that there is "no clear-cut definition of a Saturday Night Special. . . . Relevant factors include the gun's barrel length, concealability, cost, quality of materials, quality of manufacture, accuracy, reliability, whether it has been banned from import by the Bureau of Alcohol, Tobacco and Firearms, and other related characteristics." 304 Md. at 157, 497 A.2d at 1159, 1160.
sellers for the injury. In so holding, the court rejected the traditional tort theories pleaded by the plaintiffs and briefed by the parties and created from whole cloth a new theory of tort liability.

I. FACTS

Olen J. Kelley was shot in the chest by an unnamed assailant during a robbery of the store in which Kelley worked. The weapon used was a Rohm Revolver Handgun, Model RG-38S, a small and relatively inexpensive handgun. The gun was designed and marketed by Rohm Gesellschaft, a West German corporation, and was assembled and distributed by R.G. Industries, Inc. of Miami, a subsidiary of Rohm Gesellschaft.

Kelley and his wife brought suit in a Maryland Circuit Court under several theories. The first count claimed that the handgun was abnormally dangerous and relied on the Restatement (Second) of Torts §§ 519 and 520. The second count claimed that the gun was defective in its "marketing, promotion, distribution and design" and hence was unreasonably dangerous. Thus, they sought strict liability under Restatement (Second) of Torts § 402A. The

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6. Id. at 157, 497 A.2d at 1160.
7. All facts are taken from the court's rendition. Id. at 128-32, 497 A.2d at 1144-46.
8. The suggested retail price of an RG-38S was $124.95-134.95, depending upon the construction of the grips. K. WARNER, GUN DIGEST (1983) at 306.
9. R.G. Industries evidently assembled the handgun from parts manufactured by Rohm Gesellschaft in West Germany. Although federal regulations prohibit the importation of this type of hand gun (27 C.F.R. § 178.112 (1986)), only a completed gun or its frame is considered a firearm under these regulations. 27 C.F.R. § 178.11 (1986).
10. "One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm." RESTATEMENT (SECOND) OF TORTS § 519 (1977). To determine whether an activity is abnormally dangerous, the following are examined:
   (a) existence of a high degree of risk of some harm to the person, land or chattels or others;
   (b) likelihood that the harm that results from it will be great;
   (c) inability to eliminate the risk by the exercise of reasonable care;
   (d) extent to which the activity is not a matter of common usage;
   (e) inappropriateness of the activity to the place where it is carried on; and
   (f) extent to which its value is outweighed by its dangerous attributes.
12. (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
   (a) the seller is engaged in the business of selling such a product, and
third count sounded in traditional negligence. The action was removed to the United States District Court for the District of Maryland and R.G. Industries was dismissed as a defendant.

Rohm Gesellschaft, the remaining defendant, moved for dismissal for failure to state a claim for which relief can be granted, arguing no liability could be found because the handgun performed as expected and because the defendant should not be responsible for the criminal acts of the assailant. Finding no applicable authority in Maryland, the district court certified the question to the Maryland Court of Appeals, which ultimately addressed and answered three questions:

1) Is the manufacturer or marketer of a handgun, in general, liable under any strict liability theory to a person injured as a result of the criminal use of its product?

2) Is the manufacturer or marketer of a particular category of small, cheap handguns, sometimes referred to as “Saturday Night Specials,” and regularly used in criminal activity, strictly liable to a person injured by such handgun during the course of a crime?

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relationship with the seller.


13. The plaintiffs also sought relief for loss of consortium in a fourth count. Kelley, 304 Md. at 129, 497 A.2d at 1145.


15. R.G. Industries moved for summary judgment because it was not involved in the sale or distribution of the gun. The parties then stipulated that R.G. be dismissed without prejudice. Id.

16. FED. R. CIV. P. 12(b)(6).

17. The District Court originally certified two questions that asked whether this type of handgun is an unreasonably dangerous or defective product and whether the abnormally dangerous activity doctrine applies when the tortfeasor is not an occupier of land and has no control over the person who causes the injury.

After oral argument and because issues were present that were not addressed in the certification order, the plaintiffs requested a new order from the District Court. Thereafter, the District Court withdrew its order and substituted a later order, except there was a reference to the Rohm Model RG-38S. For this opinion, the Court, sua sponte, posed the new questions. Kelley, 304 Md. at 129-131, 497 A.2d at 1145-1146. The parties never did fully brief or argue the questions actually examined. Dorr, Burch & Siegel, Saturday Night Fever, Brief, Winter 1986, at 14 [hereinafter cited as Saturday].
3) Does the Rohm Revolver Handgun Model RG-38S, serial number 0152662, fall within the category referred to in question 2? 18

II. HOLDING

A person whose injury is caused by a defect in the design or manufacture of a handgun can recover under traditional tort theories. If the plaintiff can show that the gun was negligently made or designed and that this negligence was the proximate cause of his injury, he can recover.19 If he can show that the product was unreasonably dangerous and defective under the Restatement (Second) of Torts § 402A, he can recover.20 And, if the manufacturer or marketer, expressly or impliedly, warrants21 the product or, negligently22 or non-negligently,23 misrepresents the product, the plaintiff can recover. When none of the above factors are present and when the plaintiff is a victim of a criminal act that injures him, various theories have been tried to impose liability and the courts have denied, until Kelley, recovery.24

In Kelly, the plaintiffs sought recovery under the theories that similar and previous plaintiffs had attempted.25 As previous courts had done, the Court of Appeals rejected all three theories. Instead, it imposed a new strict liability theory—liability for a product the manufacturer knows will be used for criminal activity of which public policy has disapproved and which causes harm during the course of criminal activity.26

The Kelleys had first tried to impose liability upon Rohm for engaging in an “abnormally dangerous activity” (the manufacture

18. Kelley, 304 Md. at 131, 497 A.2d at 1146.
24. See note 1, supra.
25. Id.
26. Kelley, 304 Md. at 154-159, 497 A.2d at 1158-60.
and sale of handguns) and relied upon the Restatement (Second) of Torts §§ 519 and 520. As the court stated, "[t]hese sections recognize the liability of one engaged in an abnormally dangerous or ultrahazardous activity even though that person may have exercised the utmost care to prevent harm." To determine the potential liability under this doctrine, the court must examine the six factors set forth in § 520. And, although the manufacture and sale of handguns, especially Saturday Night Specials, may arguably satisfy some or most of these factors, when the "inappropriateness of the activity to the place where it is carried on" is examined, the theory fails.

Maryland courts, and in fact most courts, have refused to extend this doctrine to circumstances in which the actor is not an owner or occupier of land. This doctrine does not apply here because "[t]he dangers inherent in the use of a handgun in the commission of a crime ... bear no relation to any occupation or ownership of land.

The Kelleys' next argument relied upon the Restatement (Second) of Torts § 402A and alleged that a handgun is an abnormally dangerous product, and that the manufacturer should be held strictly liable for injury that the handgun causes. To establish liability under this section, the plaintiff must show that:

1. the product was in a defective condition at the time that it left the possession or control of the seller,
2. that it was unreasonably dangerous to the user or consumer,
3. that the defect was a cause of the injuries and
4. that the product was expected to and did reach the consumer without substantial change in its condition.

27. *Id.* at 132, 497 A.2d at 1146. For text of Restatement (Second) of Torts §§ 512-520 (1977), see notes 10 and 11, supra.
29. *Id.* at 132-33, 497 A.2d at 1146.
30. *Id.* at 133, 497 A.2d at 1147 (citing Restatement (Second) of Torts § 402A, comment h (1977)).
32. *Kelley*, 304 Md. at 133, 497 A.2d at 1147.
34. *Kelley*, 304 Md. at 134, 497 A.2d at 1147.
This test requires that the product be defective. To make this determination, the courts have alternatively applied one of two tests—the consumer-expectation test and the risk-liability test.

To satisfy the consumer-expectation test, the product must, at the time it leaves the seller's hand, be in a condition not contemplated by the ultimate consumer and will be unreasonably dangerous to him. "A product is not in a defective condition when it is safe for normal handling and consumption." Under this test, which is applicable in Maryland, the court held that the handgun is not defective. "For the handgun to be defective, there would have to be a problem in its manufacture or design, such as a weak or improperly placed part, that would cause it to fire unexpectedly or otherwise malfunction." Here, the gun performed as designed and as the consumer would expect.

The risk-utility test was first formulated in *Barker v. Lull Engineering* and was subsequently adopted in other jurisdictions, although not in Maryland. In this test, the court determines whether the product's benefits outweigh the risk of danger in the product's design. "[A] product may ... be found defective in design if the plaintiff demonstrates that the product's design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk inherent in such design." This test, likewise, is not applicable here, the court stated, since it requires that something go wrong with the product. Again, the gun worked exactly as a gun is designed to work and nothing went wrong. As the court noted, this holding is consistent with the decisions of other courts and with the opinions of most commentators.

38. *Kelley*, 304 Md. at 137, 497 A.2d at 1148.
42. *Id.* at 137, 497 A.2d 1149 (citing *Barker v. Lull Engineering Co.*, 20 Cal. 3d 413, 432, 143 Cal. Rptr. 225, 239, 573 P.2d 443, 457-58 (1978)).
43. *Kelley*, 304 Md. at 139-40, 497 A.2d at 1150.
Although the Maryland court did not address liability under common-law negligence theories, because the question was not presented to it, it appears clear that in a situation such as this, that theory is precluded. As one court stated in addressing this theory of recovery for injuries inflicted from the criminal use of a gun,

'[t]he general rule is that where there has intervened between the defendant's negligence and the injury an independent, illegal act of a third person producing the injury, and without which it would not have occurred, such independent criminal act should be treated as the proximate cause, insulating and excluding the negligence of the defendant."

Having rejected the traditional theories of products liability and the theories on which the plaintiffs relied, the court then went on to hold that the plaintiffs did state a claim for which relief could be granted. This liability will attach to any handgun that can be defined as a Saturday Night Special,\(^4\) is strict, is not affected by the criminal use of the handgun, and allows recovery for those criminally induced injuries.\(^4\) In effect, the court created a new strict liability out of its perception of public policy and scarce precedent.

The court first stated that the common law in Maryland is not static and that it is "subject to judicial modification in the light of modern circumstances or increased knowledge."\(^49\) Also, "common law principles should not be changed contrary to the public policy of the State set forth by the General Assembly of Maryland."\(^50\)

Consistent with these statements, the court then examined the relevant legislation and Maryland history pertaining to handguns:

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\(46.\) Decker v. Gibson Products Co. of Albany, 505 F. Supp. 34, 37 (M.D. Ga.), rev'd on other grounds, 679 F.2d 212 (1980) (the court held that it was a matter for the trier of fact to determine whether the defendant's sale of a handgun to a person known to have committed an aggravated assault was reasonable in light of a federal statute prohibiting such sale and other factors.) \(\text{Id. at 216. } \)

\(47.\) See supra note 5.

\(48.\) Kelley, 304 Md. at 158-59, 497 A.2d at 1160.


\(50.\) Kelley, 304 Md. at 141, 497 A.2d at 1151.
Maryland does have statutes that regulate the wearing, carrying, and transporting of handguns. These statutes are prefaced with statements indicating that there has been an alarming increase in the number of violent crimes perpetrated in Maryland and that "a high percentage of those crimes" are accomplished with the use of handguns. This use has resulted in an increase in death and injury that is traceable to the concealed carrying of handguns by persons bent on their criminal use. Since the laws that were previously in effect were ineffective in preventing handgun use during crimes, the Maryland General Assembly has found it necessary to enact further legislation to prohibit the open or concealed carrying of handguns.

These statutes, however, do not prohibit such carrying by certain individuals or in certain situations, such as law enforcement and military personnel, transport for sale or for a recognized sporting event, with a permit, or in a person's home or business. Since the General Assembly specifically enacted these exceptions, not all handgun uses are "inconsistent with Maryland public policy" and, therefore, "to impose strict liability upon the manufacturers or marketers of handguns for gunshot injuries resulting from the misuse of handguns by others" would be inconsistent with Maryland public policy.

However, this reasoning does not apply to Saturday Night Specials, a class of handguns that is clearly not sanctioned as a matter of public policy, since this type of weapon is characterized by its total lack of utility for legitimate purposes and its attractiveness for criminal and illegal uses. Because the legislative policies of the Maryland General Assembly and the United States Congress have distinguished this type of handgun from guns and handguns generally, Saturday Night Specials are to be accorded different treatment.

The court stated that, in enacting the Gun Control Act of 1968, Congress clearly indicated its intent to separate Saturday Night

56. Kelley, 304 Md. at 144, 497 A.2d at 1153.
57. Id. at 144-46, 497 A.2d at 1153-54.
58. Id. at 147, 497 A.2d at 1154.
Specials by banning their importation. Pursuant to the Act, the Secretary of the Treasury promulgated regulations that state no firearm may be imported unless it can be shown that,

1) the caliber or gauge of the firearm is suitable for use in a recognized shooting sport, 2) the type of firearm is generally recognized for or readily adaptable to such use, and 3) the use of the firearm in a recognized shooting sport will not endanger the person using it due to deterioration through such use or because of inferior workmanship, materials or design.

Thus, the intent is to ban inexpensive, and poorly made, non-sporting firearms. The court then proceeded to review at some length the legislative history of the Gun Control Act. From the quoted passages, it was shown that the importation of military surplus and relatively inexpensive handguns has greatly affected the lawlessness of this country and contributed to the problems encountered by law enforcement agencies.

Relying primarily upon the legislative history of the Act and upon the Maryland gun-control legislation, the court found that Saturday Night Specials comprise a group of firearms that legislatures have singled out as unique. The court said such weapons “are largely unfit for any recognized legitimate uses sanctioned by the Maryland gun control legislation” and “are too inaccurate, unreliable and poorly made for use by law enforcement personnel, sportsmen, homeowners, or businessmen.”

Thus, the policy implications of the gun control laws enacted by both the United States Congress and the Maryland General Assembly reflect a governmental view that there is a handgun species, i.e., the so-called Saturday Night Special, which is considered to have little or no legitimate purpose in today’s society.

Additionally, the court noted that manufacturers and sellers of these handguns are not blameless. They know or should know that Saturday Night Specials are made and sold primarily to be used in criminal activity. To establish this premise, the court cited a statement in a popular monthly magazine in which an R.G. salesper-

60. Kelley, 304 Md. at 147, 497 A.2d at 1154.
63. Id. at 154, 497 A.2d at 1158.
64. Id. at 155, 497 A.2d at 1158.
son supposedly indicated that the Rohm handgun will sell well in the ghettos, specifically stating "it's a piece of crap," and that he would be afraid to fire it because of its shoddy construction. The court also cited one commentator who had stated, without evident support, that "[m]ost Saturday Night Specials are, in fact, used in crime." The court did note there was no authority for singling out the manufacturers and sellers of Saturday Night Specials for such liability. It did draw a tenuous analogy to Moning v. Alfano, a case in which the Michigan Supreme Court concluded that a slingshot manufacturer could be held liable for injuries received when a child struck a playmate with a projectile and when the manufacturer could foresee a child's misuse.

Just as a slingshot manufacturer or marketer should foresee a child's misuse of a slingshot, so too "the manufacturer or marketer of a Saturday Night Special knows or ought to know that the chief use of the product is for criminal activity" and that this use and "the virtual absence of legitimate uses" for these guns "are clearly foreseeable" by manufacturers and sellers, according to the court in Kelley.

Finally, the court stated that manufacturers and sellers of this type of handgun who know of its chiefly criminal uses are "certainly more at fault" than the innocent victims of the guns' use. For all these reasons, the court recognized "a separate, limited area of strict liability for the manufacturers as well as all in the marketing chain, of Saturday Night Specials." The court continued that this imposition of liability is consistent with public policy and

65. Id.
66. Id. (citing Brill, The Traffic (Legal and Illegal) in Guns, HARPER'S, Sept. 1977, at 40).
69. Id. at 440, 254 N.W.2d at 765-66. But see Borjquez v. House of Toys, Inc., 62 Cal. App. 3d 930, 933, 133 Cal. Rptr. 483, 484 (1976) ("Here [plaintiff] wants us to hold a retailer and distributor negligent for selling toy slingshots to the class of persons for whom they were intended—the young; in effect she asks us to ban the sale of toy slingshots by judicial fiat. Such limitation is within the purview of the Legislature, not the judiciary."); See also Morris v. Toy Box, 204 Cal. App. 2d 468, 22 Cal. Rptr. 572 (1962) (bow and arrow); Pitts v. Basilie, 35 Ill. 2d 49, 219 N.E.2d 472 (1966) (darts); Levis v. Zapoltiz, 72 N.J. Super. 168, 178 A.2d 44 (1962) (plastic slingshot is not a dangerous instrumentality); Atkins v. Arlan's Dept. Store of Norman, 522 P.2d 1020 (Okla. 1974) (fawn darts).
70. Kelley, 304 Md. at 156, 497 A.2d at 1159.
warranted by the increase of deaths and injuries resulting from the criminal use of these guns.\textsuperscript{71}

To recover under this theory, the plaintiff must first show that the weapon was indeed a Saturday Night Special.\textsuperscript{72} This determination will rarely be made by the court. Rather, the plaintiff must make an initial showing that the gun is sufficiently like a Saturday Night Special to reach the trier of fact.\textsuperscript{73} Once there, the factors to be considered are "the gun's barrel length, concealability, cost, quality of manufacturer, accuracy, reliability, whether it has been banned by the Bureau of Alcohol, Tobacco, and Firearms, and other related characteristics."\textsuperscript{74}

If the trier of fact decides the weapon is, in fact, a Saturday Night Special, "then liability may be imposed against the manufacturer or anyone else in the marketing chain," only for injuries from gunshots and only if the plaintiff is not a participant in the criminal activity.\textsuperscript{75} This liability extends not only to the criminal's intended victim, but also to innocent bystanders, police, and others who intervene to prevent the crime, assist the victim, or apprehend the criminal.\textsuperscript{76}

The court then declined to answer the third question, whether the Rohm Model RG-38S was indeed a Saturday Night Special because it had held that this was a matter for the fact finder.\textsuperscript{77} Having said this and noting little relevant information was found in the pleadings, it went on to cite numerous writings and testimony that would imply that the Rohm Model RG-38S is, indeed, a Saturday Night Special.\textsuperscript{78} Included was misleading information concerning the price and legal availability of that model.\textsuperscript{79}

Finally, the court stated that this change in the Maryland common law will apply in the instant case and in all cases in which an injury occurs from a handgun that is sold to a consumer after this decision.\textsuperscript{80}

\textsuperscript{71} Id. at 157, 497 A.2d at 1159.
\textsuperscript{72} Id.
\textsuperscript{73} Id. at 158, 497 A.2d at 1160.
\textsuperscript{74} Id.
\textsuperscript{75} Id. at 157, 497 A.2d at 1159-60.
\textsuperscript{76} Id. at 158, 497 A.2d at 1160.
\textsuperscript{77} Id. at 159, 497 A.2d at 1160, n.20.
\textsuperscript{78} Id. at 159, 497 A.2d at 1160.
\textsuperscript{79} Id. at 159-61, 497 A.2d at 1160-61.
\textsuperscript{80} The court stated that the suggested list price of an RG-38S is thirty-five dollars in good condition and fifty-five dollars in excellent condition. Id. at 160, 497 A.2d at 1161
III. ANALYSIS

That this decision is significant and controversial is evident from the attention it has received.\(^{41}\) That it is correct or wise is not as evident.

It is estimated that more than fifty million handguns are possessed by private citizens in this country and that a person is injured by the use of a handgun every two-and-a-half minutes, resulting in 13,000 murders and non-negligent homicides annually.\(^{42}\) That such carnage exists on such a scale in the United States is the shame of this country and demands a solution. Although some, but certainly not all, of the blame could be placed upon the easy availability of inexpensive handguns by social misfits, it is not certain that this blame, and consequent civil liability as proposed by the Maryland court, should be imposed on handgun manufacturers and marketers. Nevertheless, as the Kelleys' attorney stated, "Kelley has put a de facto end to the commercial sale of Saturday Night Specials in the State of Maryland, and perhaps the entire country."\(^{43}\)

Just as the court noted in *Patterson v. Gesellschaft*,\(^ {44}\) a case with almost identical facts, "it is an obvious attempt—unwise and unwarranted, even if understandable, to ban and restrict handguns through courts and juries, despite the repeated refusals of state legislatures and Congress to pass strong, comprehensive gun-control measures."\(^ {45}\)

As the Maryland court noted, no precedent has been established for allowing an action in such a situation.\(^ {46}\) This holding is a clean break from established Anglo-American tort law, presenting a dis-

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(citing BRYON, THE OFFICIAL 1982 GUIDE TO ANTIQUE AND MODERN FIREARMS (2d ed. 1982) at 359). These prices are for used firearms. The retail price for a new RG-38S in 1983 was $124.95, with plastic grips, and $139.95, with wooden grips. WARNER, GUN DIGEST (1983) at 307. The RG-38S is still sold today. W. JARRETT, SHOOTER'S BIBLE (1986) at 145.

81. *Kelley*, 304 Md. at 162, 497 A.2d at 1162.


83. For a general discussion of handgun ownership and deaths and a proposed scheme for liability, see Turley, Manufacturers' and Suppliers' Liability to Handgun Victims, 10 N. KY. L. REV. 41 (1982).

84. *Saturday*, supra note 17, at 11.


86. Id. at 1208 (their emphasis).
quieting gloss upon our concept of that law. In addition, the holding is entirely contrary to cases with similar facts.\textsuperscript{87} The only case that even tangentially supports this proposition is \textit{Moning v. Alfano},\textsuperscript{88} where the court allowed an action against a slingshot marketer by a child who was injured due to a playmate’s use of a slingshot. In \textit{Moning}, however, the court did not impose strict liability, but required that the plaintiff show some fault on the part of the seller—that is, the seller knew that marketing slingshots directly to children created an unreasonable risk of harm.\textsuperscript{89} The court did not state that such a sale was unreasonable as a matter of law, but that it was a matter for the trier of fact to determine.\textsuperscript{90} The trier was to determine whether the benefits of the sale and use of slingshots by children offset the risks of such a sale.\textsuperscript{91} It should be noted that \textit{Moning} has also met with disapproval and is a minority position.\textsuperscript{92}

The situation in \textit{Kelley} may have been different had it been shown that the marketer knew that the assailant who purchased the gun was a criminal or that the marketing was directed exclusively at criminals. In those situations, a showing of fault would be established and a resultant holding would square more easily with our concept of fairness. No such showing was made in \textit{Kelley} and, indeed, of all Saturday Night Specials sold, a certain number, perhaps the large majority, are never used in crimes and may be in the hands of law-abiding citizens. In fact, it would be entirely correct and logical for the court to assume that these guns are not sold or marketed to criminals because federal regulations prohibit the sale of any firearm to convicted felons or those addicted to drugs.\textsuperscript{93}

Because only scant precedent existed and this decision was a clean break from the common law, the court stated that the common law should not be changed contrary to the public policy as enumerated by the legislature.\textsuperscript{94} The court’s usurpation of the legislative prerogative is this decision’s greatest flaw. The court first cited Maryland statutes that regulate the carrying of concealed

\textsuperscript{87} \textit{Kelley}, 304 Md. at 140, 497 A.2d at 1150.
\textsuperscript{88} See supra note 1.
\textsuperscript{89} 400 Mich 425, 254 N.W.2d 770.
\textsuperscript{90} Id. at 447, 254 N.W.2d at 769.
\textsuperscript{91} Id. at 447, 254 N.W.2d at 770.
\textsuperscript{92} Id. at 451, 254 N.W.2d at 771.
\textsuperscript{93} Id. at 459-68, 254 N.W.2d at 775-79 (Fitzgerald, J., dissenting).
\textsuperscript{94} 18 U.S.C. § 922(h) (1982).
weapons, but stated that "generally to impose liability upon the manufacturers and marketers of handguns for gunshot injuries resulting from the misuse of handguns by others would be contrary to Maryland public policy as set forth by the Legislature." But the court imposed liability upon the manufacturers and sellers of Saturday Night Specials and contended that public policy supported this finding.

The court's reasoning was that although Maryland does to some extent limit handgun use and since Congress has passed legislation prohibiting the import of certain firearms, the public policy of Maryland is to impose this liability. This reasoning seems particularly tenuous when one considers that the Maryland General Assembly has, on two occasions, refused to enact legislation to distinguish Saturday Night Specials or ban their use. The Rohm Model RG-38S is not banned and its sale continues today. The Maryland legislature has, however, singled out subcategories of other weapon types for prohibition, such as "dirk knives, bowie knives, switch-blade knives, and star knives." Here, it could at least be argued that as a matter of public policy such weapons are to be accorded special treatment by the Maryland General Assembly. For the court to make an exception for the treatment of Saturday Night Specials is "to enact legislation which the Maryland General Assembly has specifically and repeatedly refused to enact."

When the Maryland Court of Appeals recently decided not to judicially adopt comparative negligence in Harrison v. Maryland Bd. of Educ., it stated that it will defer "to the legislature where change is sought in a long-established and well-settled common law view."

It appears obvious that well-settled common law principles require some legal fault or, at least, a defect and that the interven-

95. Kelley, 304 Md. at 141, 497 A.2d at 1151.
97. Kelley, 304 Md. at 144, 497 A.2d at 1153.
99. While the import of any firearm not specifically approved by the Director of Alcohol, Tobacco, and Firearms is prohibited, 27 C.F.R. § 178.112 (1985), the category of "firearm" includes only the completed gun or its frame, 27 C.F.R. § 178.11 (1985). The Model RG-38S is evidently assembled in Miami from, at least, a domestically produced frame and is available for sale today in the United States. W. Jarret, Shooter's Bible (1986) at 145. Its retail price is $125.50 to $135.
101. Saturday, supra note 17, at 12.
Further, as the court noted in Harrison, the rationale underlying these decisions—denying a change in the common law—is buttressed where the legislature has declined to enact legislation to effectuate the change.\(^{104}\)

Although the court went to great lengths to examine testimony before Congressional committees concerning these guns, thus belying its legislative agenda, this examination could not be adequate. Courts, by definition, are not legislatures and are “at best, ill-equipped to deal with the emotional issues of handgun control.”\(^{105}\) Also, this holding extends the legislative process into the trial courts. There, the trier of fact will struggle with the question of whether a gun is a Saturday Night Special? The court acknowledged that there is “no clear-cut, established definition”\(^{106}\) of a Saturday Night Special, but cited eight factors, along with “other related characteristics,” to consider in this evaluation.\(^{107}\) Thus, guided by these admittedly vague guidelines, the jury must come to a consensus.

Where will the jury draw the line? The RG-38S has been made with two-, three-, four-, and six-inch barrels, with different handles, sights, and prices.\(^{108}\) Smaller, more expensive, and better made handguns than the RG-38S are readily available as are larger, more poorly made, and less expensive handguns.\(^{109}\) Under the newly established law, each jury will pass on a certain model, equipped a certain way, and will establish if that gun is a Saturday Night Special. This finding may or may not be binding on a later court through collateral estoppel. Thus, the legislative process has found a home in the trial courts of Maryland. As the Patterson court noted,

\(^{103}\) Id. at 461, 456 A.2d at 904.
\(^{104}\) Under all ordinary circumstances, in the absence of any reason to expect the contrary, the actor may reasonably proceed upon the assumption that others will obey the criminal law. Under such ordinary circumstances, it is not reasonably to be expected that anyone will intentionally ... assault a railway passenger, or hold up a bowling alley and shoot a patron.
\(^{106}\) Harrison, 295 Md. 442, 461, 456 A.2d 894, 904.
\(^{107}\) Patterson, 608 F. Supp. at 1211.
\(^{108}\) Kelley, 304 Md. at 157, 497 A.2d at 1159.
\(^{109}\) Id. at 157, 497 A.2d at 1150-60.
[c]ertainly there can be no effective handgun control imposed on an ad hoc basis by six or twelve jurors sitting in judgment on a single case. Decisions in these suits—made on the basis of a particular record developing a unique set of facts—will necessarily be inconsistent and there can be only varying and uneven results in different jurisdictions.110

Something should be said, too, concerning the procedural propriety of this decision. The plaintiffs posed three theories of recovery in the suit111 and the District Court certified four questions.112 While the court correctly rejected these theories, it also, sua sponte, changed the questions. The parties neither briefed nor argued the issues113 and the court's eventual holding was only tangentially related to the plaintiffs' theories. It was as if the court was searching for a theory under which the plaintiffs could recover. Since this decision is not appealable, a grave question whether the defendant was afforded due process arises.

Plaintiffs' counsel is correct when he states that "[e]very person ought to find a remedy in the law for all injuries and wrongs that he may receive,"114 assuming that another is legally at fault and the "[c]ourts must continue to provide remedies against that which is wrong, even in the absence of precedent."115 The plaintiffs here do have a remedy—against the assailant. It is unfortunate that the perpetrator is unavailable and probably judgment-proof, but the unavailability of the tortfeasor should not be justification for imposing liability upon another party. In effect, the plaintiffs sought and the court granted insurance for criminally inflicted gunshot injuries with the manufacturers, marketers, and consumers paying the premiums. As one court stated, "[t]he ability of a gun manufacturer to 'spread the loss' is not a sufficient basis for requiring guiltless purchasers of guns to subsidize the actions of those who use firearms wrongfully."116

Such a result is clearly in conflict with our notion of tort law fairness and requiring individuals to be responsible for their own acts.117 Indeed, it is this perceived unfairness that militates against

110. See generally id.
111. Patterson, 608 F. Supp. at 1216.
112. See notes 10-12 and accompanying text, supra.
113. See notes 16-17 and accompanying text, supra.
114. Saturday, supra note 17, at 14.
115. Id.
116. Id.
117. Patterson, 608 F. Supp. at 1213.
this holding and accounts for the virtual dearth of authority in support of it.

Perhaps the most disquieting aspect of this decision and what may, as plaintiffs' counsel has noted, cause it to "be required reading for students to tort law well into the twenty-first century" is its effect on the law of Maryland. It does not require too great a suspension of disbelief to envision other products that could fall into this unprotected category. In the future, a court could use this doctrine to extend liability to many products. Alcoholic beverages, for example, the sale of which is highly regulated by both state and federal authorities, are prohibited in many localities. Certain cheap wines have very little, if any, benefit to society and, in fact, the sale of such wines is prohibited in some localities because they encourage alcoholism. They do not taste good and their chief use is by skid-row alcoholics who wish to become intoxicated. If one of these persons were to use this product, become intoxicated, and injure another under that product's influence, it does not appear to be stretching the court's holding too far to impose liability upon the vintner for the damage. After all, the manufacturer and seller knew or should have known of the products probable use, and as the plaintiffs' counsel has stated, "[e]very person ought to find a remedy in the law for all injuries and wrongs that he may receive."

To be sure, a problem exists in this country with regard to firearm deaths and injuries. A contributing factor, perhaps, is the easy availability of inexpensive handguns to social misfits. The solution is not, however, to realign our tort theories, at least not judicially. The determination of the cause of this carnage and its eventual solution is not easily determined by a court with its limited resources but should be left to the legislature. As the Patterson

119. Saturday, supra note 17, at 11.
120. By this holding, it appears possible that the manufacture or sale of any product that is perceived to have little social value, is subject to some governmental regulation, and is used criminally to injure another will subject the maker or seller to liability for that person's injury. This could conceivably apply, for example, to most non-sporting weapons, radar detectors, often abused and seldom prescribed legitimate drugs, and alcoholic beverages.
121. Portland, Oregon, recently banned the sale of cheap, high-alcohol wines in certain areas of the city in an effort to clear alcoholics from the streets. Banning the Saturday Night Special of Booze, Newsweek, Mar. 10, 1986, at 46. "Cheap, high-alcohol wine is the Saturday night special of booze."
court, when confronted with facts almost identical to those in Kelley, quite succinctly summarized:

As an individual, I believe, very strongly, that handguns should be banned and that there should be stringent, effective control of other firearms. However, as a judge, I know full well that the question of whether handguns can be sold is a political one, not an issue of products liability law — and that this is a matter for the legislatures, not the courts.\textsuperscript{122}

E. Lee Wagoner, Jr.