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The Editors Dedicate this Issue to the Memory of Harold J. Siebenthaler (1892-1988)
HAROLD J. SIEBENTHALER'S CONTRIBUTIONS TO CHASE COLLEGE OF LAW

Harold J. Siebenthaler, for whom the Chase College of Law's Siebenthaler Lecture Series is named, was a giant of a man in both physical and reputational stature. He was born in 1892 and after graduation from Old Woodward High School in 1911, he attended and eventually graduated from the McDonald Institute, at the Y.M.C.A. in 1914. He joined the Cincinnati law firm of Frost and Jacobs in 1918, became a partner in 1931 and retired in 1970. Perhaps retirement is only technically correct because in a practical sense he continued legal practice until shortly before his death in 1988. During the period from 1970 to 1988 he was designated as Senior Partner and "of counsel" and according to his associates "reduced his work schedule of his pre-retirement period from 70 hours to 40 hours per week."

Harold Siebenthaler was an outstanding lawyer in Cincinnati for over seventy years. He once stated to a colleague that whatever success he enjoyed could be attributed to an exacting nature and approach to the practice of law. He was always well prepared, left nothing to chance, and exhibited an outstanding presence both in the courtroom and in the non-courtroom arena in which he practiced law. While his reputation as a "good lawyer" grew over the years to mammoth proportions, perhaps he was almost as equally well known and respected for his major contributions to the Salmon P. Chase College of Law.

He was, of course, an alumus of the school but he had felt for a long time that he needed to share his appreciation of his alma mater by making some contributions that would accrue to the benefit of future graduates. In 1958 Mr. Siebenthaler accepted a position on the Chase College of Law Board of Regents. In 1968 he became the Board of Regents' Chairman. During the period of 1958-1972, Harold Siebenthaler was a participant and a leader in the on-going process of finding a suitable home for the College of Law. He provided the primary impetus to the negotiation and conclusion of the contract of merger between the Salmon P. Chase College of Law and Northern Kentucky State College.

Subsequent to the merger, Harold Siebenthaler assumed the position of president of the Chase College of Law of Northern Kentucky University Advisory Board and continued in his capacity as president of the Chase College Foundation.
Mr. Siebenthaler, at the behest of family and friends, permitted and encouraged the use of his name in the establishment of a rare book collection at the College of Law. The Harold J. Siebenthaler Rare Book Library is a part of the College of Law Library and houses legal volumes that have been designated as possessing historical value and great cultural interest. Annual contributions by alumni and friends have allowed the collection to grow and have enhanced its value to the law programs at the College of Law.

In appreciation for his many contributions to the College of Law, Harold Siebenthaler was awarded the degree of Doctor of Law in 1964. Since that time the faculty and alumni of Chase have found many occasions to honor him for his major contributions to the College. The Siebenthaler Lecture Series was founded by the College of Law and funded by the Chase College Foundation as a permanent reminder of the dedication of Harold Siebenthaler to his alma mater. The annual lecture, and its subsequent publication in the *Northern Kentucky Law Review* is a symbol of the loyalty, dedication, and affection of Harold Siebenthaler for the Salmon P. Chase College of Law and the appreciation of the College for the gifts of Harold J. Siebenthaler.

This year's Lecture was delivered by Robert M. O'Neil, President of the University of Virginia. President O'Neil has spent over twenty-five years in the legal profession including stays at the University of California, Berkeley, the University of Cincinnati, Indiana University, the University of Wisconsin, and finally the University of Virginia. During these twenty-five years he has written numerous books including: *Classrooms in the Cross Fire* (1981) and *Free Speech: Responsible Communication Under the Law* (1972). He has also written numerous articles including: *Trial and Error: The American Controversy Over Creation and Evolution* (1986); *Academic Freedom and the Constitution* (1984); *Second Thoughts on the First Amendment* (1984); and *Scientific Research and the First Amendment: An Academic Privilege* (1983).

The Chase College of Law and the Northern Kentucky Law Review are proud to dedicate this edition of the Law Review to Mr. Siebenthaler and are especially grateful to President O'Neil for his contribution to this year's Harold J. Siebenthaler Lecture Series.
I. INTRODUCTION

Last summer, amidst the commotion over the Iran/Contra testimony, the Bork hearings, and the Gramm-Rudman fallout, there occurred a constitutional development of potentially greater importance. A nearly unanimous Supreme Court held that Congress may force the states to raise the legal drinking age, or risk significant loss of federal highway funds.1 Surprisingly, this judgment went almost unnoticed—and aroused far less interest within the Court and from the media than one would have expected.

This was not the first time Congress had threatened to withhold funds as a way of inducing state action. The use of conditions on federal support goes back almost to the turn of the century.2 The drinking age conditions, however, differed in several ways from earlier Congressional blandishments. First, the action sought by Congress was in an area left to local action by the twenty-first amendment, which ended Prohibition a half century ago. Moreover, the relationship between the funding and the conditions seemed tenuous. Justices O'Connor and Brennan, in their dissent, felt that Congress' objectives were "not sufficiently related to interstate highway construction to justify so conditioning funds appropriated for that purpose."3 Yet the other seven Justices were satisfied with a minimal link between the goal of the conditions and the program they encumbered. Even Chief Justice Rehnquist, who wrote for the Court, devoted only a few pages to the issue.

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The drinking age is but one recent example of the Congressional propensity for regulating state conduct by conditioned funding. Others come readily to mind, notably the now-modified requirement that states not only adopt 55 miles-per-hour speed limits but police them vigorously as well, or lose federal highway funds.4

Then there is the recently adopted requirement that states must collect overdue child support payments if they wish to continue receiving Aid for Families with Dependent Children.5 This law even specifies the techniques of collection—mandatory wage withholding for chronically delinquent parents and interception of any income tax refunds sent to them. There is another striking recent example of conditioned federal intervention, the Department of Transportation Rule designed to bring about mandatory seat belt laws. It will require auto manufacturers to install some means of automatic protection in all cars by 1990, unless two-thirds of the states have already enacted their own safety belt laws.6

This technique for bringing states into line is by no means a product of the ’80s, or even of the ’60s. Conditioned federal funding dates back at least as far as the Maternity Act of 1921, which provided funds to states that agreed to adopt programs “to reduce maternal and infant mortality and [to] protect the health of mothers and infants.”7 During the New Deal, Congress often used conditions to establish programs for which direct federal power was uncertain—inducing states to create unemployment compensation, remove land from cultivation, and take numerous other steps which served the national interest but which needed the inducement of conditioned appropriations.8 Then

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4. 23 U.S.C. § 154 (1982), amended by 23 U.S.C.A. § 154 (West Supp. 1988). Before modification of the national maximum speed limit last summer, apparently only one state actually suffered the threatened sanction—and that at the level of one percent funding loss rather than the ten percent which the law would have exacted for serious laxity in local enforcement of the limit. N.Y. Times, Jan. 24, 1987, at 1, col. 1-3. (The state was Arizona).
8. See Rosenthal, supra note 2, at 1111-12.
in 1940 came the Hatch Act; in addition to curbing political activity of federal workers, it also barred a range of political conduct to state and local employees paid by federal grants.9

Reflecting these antecedents, the use of conditioned funding does seem to have grown in recent years. That growth may partly reflect a realignment of federal and state governmental roles. Scholars from various disciplines would approach this phenomenon quite differently. The political scientist would ask why it has happened; the historian would trace its early roots; and the philosopher would probe its ultimate implications. My approach, as a constitutional lawyer, is somewhat different. I should like to start by suggesting several reasons for concern about the easy acceptance of the conditioning process. Then I will focus on three facets of its application—the structure and organization of state government; the power and authority of state government; and the relations between government and citizens.

II. SOURCES OF CONCERN

First, why should we even be concerned? If Chief Justice Rehnquist is not worried about Congress dictating to the states on matters like drinking age, who are we to worry? There are several reasons why one might take alarm at such casual acceptance of the increased use of federal conditions in this way. For one, the ability to get states to act in ways that Congress could not act directly might circumvent the process for amending the Constitution. The bypassing effect seems especially troublesome in a case like that of the drinking age, arguably more committed to the states by the twenty-first amendment than, let us say, highway speeds, seat belts, or even prompt payment of child support. If most states can be induced to embrace a single federal standard—and all states seem in this case to have found the Congressional offer one they could not refuse—then constitutional amendment becomes a process to be used only where Congress will not or cannot act. We took much pride during our Bicentennial year at the paucity of amendments to the original document. In so doing we should be sure we are not in fact celebrating the

ingenuity of Congress and the courts at having made the formal amendment process unnecessary.

A second concern relates to the role of the states as innovators. Variety among the states is one of the celebrated features of our federal system—acclaimed decades ago by Justice Brandeis in speaking of “a single courageous state” as a “laboratory [which] may, if its citizens choose ... try novel social and economic experiments without risk to the rest of the country.” The same thought was widely echoed in support of the recent amendment of the 55 miles-per-hour speed limit—an effort at uniformity little more successful than Prohibition, eventhough inspired by equally laudable motives at the time of its inception.

Third, we should be concerned that the reduction in state initiative and latitude could diminish accountability of state and local governments to their own citizens. The risk is not simply that people will look increasingly to Washington when they seek somebody to blame; it is, more basically, a concern that state powers, especially among the smaller and poorer states, may genuinely atrophy if care is not taken to maintain a reasonable balance.

Finally, at the risk of fearing floodgates that have not yet opened, we might be concerned simply about a climate in which opposition to federal uniformity seems pointless. The recent saga of the speed limit may argue that such federalization is far from irreversible. Yet no other example comes readily to mind of an area in which political counter-pressure conspired with new oil supplies to bring about a reversal. In other areas, federal conditions once imposed tend to stay. They are unlikely to be displaced without a major political change or a repudiation of the initial rationale.

These, then, are some of my concerns. Let me make clear that I do not argue for or against any of the particular conditions. In fact I would presumably support most of the actions of this type that Congress has taken, if only because the particular ends seem both laudable and unlikely to be fully achieved if left entirely to the states. My plea is, instead, for greater caution in sustaining federal conditions, and especially for clearer standards and criteria than the rather eclectic Supreme Court decisions have yet

produced. Few fields of constitutional law, and none with the importance of this one, have been approached in quite so casual a fashion.

It is now time to focus on three areas of application. We begin with the effect of federal conditions on state government organization and structure, proceed next to state powers, and finally to the relations between governments (both federal and state) and their citizens.

III. CONDITIONED FUNDING AND STATE STRUCTURE

We begin with an intriguing paradox. Since the turn of the century, the Supreme Court has consistently held that nothing in the Federal Constitution constrains states' choices of their own structure or organization.\(^\text{11}\) So it is that one state may have a bicameral legislature, another may authorize the attorney general to conduct essentially legislative inquiries, and several empower their courts to render advisory opinions at the request of the other two branches.\(^\text{12}\) At the same time, courts have failed to set limits, apart from those contained in the Constitution, on the degree to which Congress may alter the structure of state government.

Professor Lawrence Tribe, one of the few legal scholars to address this issue at all, tries in the new edition of his constitutional law treatise to be reassuring on this point. He suggests that Congress could not “wholly ... federalize such traditional areas of common law as the law of torts or contracts.” “Similarly,” he continues,

it seems clear that Congress could not, under its power to regulate commerce or to protect individual rights, insist that a state alter its basic governmental structure—that it replace a bicameral with a unicameral legislature, for example, or shift from city managers to elected mayors. In sum, Congress cannot deny the states some symbolic corollaries of independent status ... some measure of choice in selecting a political structure.\(^\text{13}\)

Such assurance seems sound enough in principle, but the exceptions that test it are quite striking. Take for example a case in

\(^{11}\) E.g., Dreyer v. Illinois, 187 U.S. 71, 83-84 (1902).
\(^{13}\) L. Tribe, American Constitutional Law 380-81 (2d ed. 1988) (emphasis original).
which compliance with a federal funding condition caused North Carolina to amend its constitution in order to create a separate health department to administer certain federal programs. 14 Professor Albert Rosenthal, who has recently and most helpfully analyzed the cases, shows in his Stanford Law Review article on "Conditional Spending" that Congress has, in fact, come dangerously close to what Professor Tribe argues it could not do. 15 For example, the Rehabilitation Act of 1973 16 conditioned federal aid to the handicapped on states' establishment of new types of agencies. At least one court upheld that requirement even where the state constitution assigned the precise function to other agencies and actually forbade the creation of new agencies. 17 Professor Rosenthal adds:

Similar insistence on major changes in the organization of state government occurred with respect to conditions of eligibility for federal funding of health planning services ... Courts have even upheld such seemingly fundamental intrusions as the conditioning of federal money upon shifts of authority between a state's governor and legislature or between the state government and those of its localities. 18

Most of the worrisome cases come from federal district courts, sometimes with per curiam affirmance, but rarely with substantial review beyond the trial level. There are, however, two recent Supreme Court decisions which bear note. Both seem to suggest the willingness of the Justices to allow Congress to reshape state governmental structures—withstanding the continued insistence that nothing in the Constitution compels states to adopt any model of organization.

The relations between state and local governments were central in Lawrence County v. Lead-Deadwood School District. 19 There the Court struck down a South Dakota law which required localities to distribute federal funds in proportion to the distri-
bution of local tax revenues. Under the federal program, each unit of general local government in which entitlement land was located was to receive funds under a federal formula that compensated these localities for tax revenues lost because of federal ownership of lands in the community. The recipients were directed to use the payments for "any governmental purpose." The Court held that the directives of the federal statute displaced the state law. Localities were, thus, free to use the money for whatever purpose they chose, even if those uses were contrary to the clear intent of the state legislature. Thus, while not saying categorically that Congress could force states to reshape their governmental structure, the decision surely implies something quite close to that conclusion. It is more than simply a vindication of the supremacy clause. It is also a clear recognition of the potentially broader reach of the Congressional conditioning process.

The other case involved the allocation of powers at the state level. In Federal Energy Regulatory Commission v. Mississippi, the issue was whether state utility commissions could be required to consider a specific set of federal energy regulatory proposals. A majority upheld provisions of the Public Utility Regulatory Policies Act of 1978 (PURPA) which prescribed in some detail how state commissions were to consider those proposals, although stopping short of telling state commissions what they must adopt. The Justices clearly recognized the problem. The opinion stated that "the ability of a state ... administrative body—which makes decisions and sets policy for the state as a whole—to consider and promulgate regulations of its own choosing must be central to a State's role in the federal system." But the Majority went on to uphold the law and the "consider" requirement, noting that "Congress adopted a less intrusive scheme and allowed the States to continue regulating in the area on the condition that they consider the suggested federal standards ... There is nothing in PURPA [directly compelling] the States to enact a legislative program."

24. Id. at 765.
The implications of such judgments do seem clear. They are somewhat unsettling to the balance between state and federal power, especially in regard to state organization and structure. If a state can be told—as a condition of federal funding it could ill afford to lose—that it must change its constitution, or alter structure in ways its constitution enjoins, we have come some distance indeed. It is this prospect that evoked a warning at the close of Professor Tribe's section on State Sovereignty and Federal Power: "If there is any form of congressional assault that might truly 'nibble away at state sovereignty, bit by bit, until someday essentially nothing is left but a gutted shell,' it is an assault on those 'democratic processes through which ... citizens retain the power to govern ... their local problems.'"

IV. Conditioned Funding and State Powers

More familiar than the effect on state government organization is the impact of conditioned federal funding on state legislative action. Earlier we reviewed some of the recent examples: highway speed limits, drinking age, seat belts, child support collection, and others. Such requirements abound in the welfare area, including an especially controversial "pass through" provision which required states to maintain certain levels of Supplemental Security Income payments as a condition for receiving federal medicaid funds. We need to be reminded that such conditions are certainly not new. They extend back at least to the 1920s, where they saw early if limited use. Conditions flourished during the New Deal, often seen as the only safe way to accomplish national goals given a restrictive Supreme Court view of the reach of direct congressional power.

By the time the drinking age issue reached the Supreme Court last summer, much had already been written on this subject—though surprisingly little since the last of the New Deal cases. It might be useful to review the background, and recall the one case that came closest to offering a standard by which to judge congressional conditions. In United States v. Butler the Court

25. L. Tribe, supra note 13, at 397.
struck down the Agricultural Adjustment Act. By a 6-3 margin, the Justices held the law invalid because it sought to use federal funds to "purchase" the commitment of farmers to federal regulation in violation of powers reserved to the states under the tenth amendment.

The central premise of Butler has long since been superseded. In fact, the very next year the Court upheld New Deal legislation and steadily expanded the reach of federal power from that time on. Some of Butler's reasoning is, however, still useful. Significantly, the Butler Court stopped well short of voiding all uses of conditioned funding in areas of state initiative. Instead, the majority offered a test that went well beyond the needs of the case at hand. An analogy was drawn to federal aid for education. There, the Court recognized, "no one had doubted the power of Congress to stipulate the sort of education for which the money shall be expended."

In contrast, an appropriation to an educational institution which by its terms is to become available only if the beneficiary enters into a contract to teach doctrines subversive of the Constitution is clearly bad. An affirmation of the authority of Congress so to condition the expenditure of an appropriation would tend to nullify all constitutional limitations upon legislative power. Presumably the same would be said of grants to states, although the Butler Court did not make that leap. Clearly Congress is not confined to using conditions for goals that fall within its direct regulatory power. Indeed, just last term the Court cited Butler as having "established that the constitutional limitations on Congress when exercising its spending power are less exacting than those on its authority to regulate directly." The limit set by Butler is reached only when Congress asks the beneficiary to do something akin to asking a school or college to "teach doctrines subversive of the Constitution."

One such example, of which more very shortly, would be a grant to a state conditioned on that state's promising to violate

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33. Id. at 74.
the federal constitutional rights of its citizens. That is something neither state nor federal government could do directly, and surely is something Congress could not achieve indirectly by inducing the states to abridge the rights of their own citizens. It is not clear what else would amount to requiring a state to "teach doctrines subversive of the Constitution," but at least this is one standard in an area where standards are scarce.

We move forward a half century, from the AAA to the drinking age. The majority in South Dakota v. Dole, with only Justices Brennan and O'Connor dissenting, sustained the use of conditions on federal highway funding to induce states to raise the drinking age. The Chief Justice, stating a clear consensus of the other seven members, declared that such conditioned funding was "within constitutional bounds even if Congress may not regulate drinking ages directly." Although "the spending power is . . . not unlimited," the three limits marked by earlier cases (i.e.: an explicit pursuit of "the general welfare"; clarity of the conditions and of the state's obligation; and the relationship between the conditions and the federal interest) all had been satisfied here. While the link might seem tenuous between the action taken and the national interest in promoting highway safety, it was constitutionally sufficient.

The only possible objections then came from the tenth and twenty-first amendments, and those were easily answered. All the twenty-first did was prevent Congress from directly regulating such matters as drinking age. It did not prevent asking the states to use the powers which the amendment clearly reserved to them. There was, in short, no "independent constitutional bar" to the action taken. That analysis fairly well disposed of the tenth amendment claim as well. A limit derived from Butler (though not attributed to it) posed the only problem: "The power may not be used to induce the States to engage in activities that would themselves be unconstitutional." Examples would be "a grant of federal funds conditioned on invidiously discriminatory

36. Id. at 2796.
37. Id. at 2796-97.
38. Id. at 2798.
39. Id.
state action or the infliction of cruel and unusual punishment . . . .”\(^{40}\)

There was only one other possible concern, a showing that the federal action was coercive. But here the answer was equally casual. A recalcitrant state would lose only “a relatively small percentage of certain federal highway funds.”\(^{41}\) Had the risk of noncompliance been, for example, the termination of all federal highway or other funding, there is just a hint that even this Court would have found the conditions excessive. But the facts of the program made a finding of such coercion unlikely. Nor do we know at what point the present Court would be sufficiently troubled about the degree of inducement to find such coercion.

The Dissent clearly merits our attention—if only because of the intriguing congruence of the views of Justices Brennan and O'Connor. Although they would not reject outright the conditioned funding analysis of the Majority, the decision was simply not so easy. For Justice Brennan, writing briefly for himself before joining the O'Connor opinion, “Congress cannot condition a federal grant in a manner that abridges [a state right such as that created by the twenty-first amendment].”\(^{42}\) Justice O'Connor felt that more needed to be said—mainly about the tenuous relationship between the condition and the program it accompanied. Earlier opinions made clear to her that “Congress may condition grants . . . only in ways reasonably related to the purpose of the federal program.” Such a link was doubtful here; if the purpose of the condition was to deter or reduce drunken driving, then it was both over and underinclusive for reasons she developed at some length.\(^{43}\)

Sensing the need to offer a standard of her own by which to measure the conditioning power, she drew it from one of the amicus curiae briefs\(^{44}\) and ultimately from Butler: Conditions which are not simply specifications on the use of the money, but are in effect regulations, pass muster only if they fall within one of the enumerated powers of Congress. The drinking age stipu-

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40. Id.
41. Id.
42. Id. at 2799 (Brennan, J., dissenting).
43. Id. at 2799-2802 (O'Connor, J., dissenting).
lation, she reasoned, was really a regulation: it went well beyond
telling states how they should spend federal highway money. The
test was not simply whether the goal of the condition lay within
the "general welfare," but the much stricter standard of identi-
fying an enumerated congressional power. Because of the tenuous
link between federal superintendence of highway safety and the
drinking age, Justice O'Connor concluded that the essential link
simply did not exist.\footnote{Dole, at 2801-02 (O'Connor, J., dissenting)}

From the \textit{South Dakota} case we now have two constitutional
tests. They are likely to produce quite different results in cases
that will almost surely come before the Court in the future.
There may be a third test between the Rehnquist view and the
O'Connor view—one which would accept the broad use of con-
gressional conditions, even where they seek to regulate rather
than simply to specify how federal funds are spent. This inter-
mediate view would probe more deeply the relationship between
the program and the conditions than did the \textit{South Dakota} Ma-
jority. It would at least require documentation, which might well
have been available, of ways in which the undoubted federal
interest in highway safety would be enhanced.

Such a requirement seems especially fitting here because of
the degree to which alcohol-related issues were committed to the
states after the repeal of Prohibition. South Dakota and the other
recalcitrant states argued, of course, that no such correlation
could be shown. This is not the place to debate the merits of
that very complex issue, but only to suggest that the Court
should at least have asked that such a nexus be shown, and that
the Dissenters would have been satisfied if it were. Such a test
would fall squarely between the Rehnquist and O'Connor views.
It would allow some conditions designed to achieve ends that
Congress might not achieve directly—even when the purpose
was more for regulation than for guiding the use of appropriated
funds. But it would not, as the \textit{South Dakota} Majority seemed
dangerously close to doing, accept all conditions bearing any
conceivable relationship to the "general welfare." That far, I
would suggest, the Framers of this unique federal system never
meant to go.
We come now to the third situation—one in which conditioned funding threatens not states or their powers, but the rights or liberties of individual citizens. Here the answers should be easier, although the applications may be less familiar. There happens to be one highly pertinent case. In 1940, Congress adopted the Hatch Act, restricting a broad range of political activities by government workers. The primary impact fell on federal employees, who soon took the issue to court. But certain state and local employees on federally funded projects were also covered. One of them—an Oklahoma State Highway Commission member named Paris—was threatened with dismissal for violating the Act. Oklahoma brought suit on his behalf, asserting his interests and its own. This case was argued and decided by the Supreme Court in 1947 along with the federal workers’ challenge.

Oklahoma’s basic claim was that Congress had, through use of conditioned funds, forced a state to abridge the rights of its own citizens, and invaded the state’s own relationship with its employees. By the time the Court reached those claims, however, it had already found the basic prohibition to be compatible with the first amendment freedoms of federal workers. That is, the fundamental rights guaranteed by the first, fifth, ninth and tenth amendments are not absolutes. Congress has the power to regulate, within reasonable limits, the political conduct of federal employees, in order to promote efficiency and integrity in the public service.

The only issue that remained in the case was Oklahoma’s tenth amendment claim. That claim was answered partly by the Court’s limited view of the sanctions visited upon the employee, and the fact that no penalty fell at all upon the state. Citing recent broad interpretations of the powers of Congress, however, the Court did address the central issue: “The end sought by Congress through the Hatch Act is better public service .... Even though the action taken by Congress does have effect upon certain activities within the State, it has never been thought that such

effect made the federal act invalid." 50 Little was added to this ipse dixit. Two Justices dissented without opinion, and Justice Douglas, who dissented in the federal case on first amendment grounds, 51 silently joined the Majority in the Oklahoma case.

It may seem unlikely that federal funding would ever be so conditioned as to force states to choose between continuing eligibility and the rights of their own citizens. Still the prospect is worth considering if only to complete the picture. One group of cases suggests how such a conflict might occur. Soon after the Supreme Court's basic abortion decision in Roe v. Wade, 52 several groups of pregnant women brought suit challenging policies of municipal hospitals denying access to abortions which were now a matter of constitutional right. In one such case the hospital demurred because the major source of the OB-GYN clinic staff was the medical school of a Catholic university. Thus, argued the hospital, requiring abortions on demand would compel the violation of the constitutional rights of Roman Catholic physicians and other staff members. The appellate court acknowledged the possible dilemma, but the judges insisted that a remedy be fashioned which would not pit one set of constitutional rights against another: no staff member should be forced against conscience or religious belief to perform an abortion. 53 The poignant issue that might have been, thus, came to rest just short of constitutional crisis, but not before suggesting the sort of conflict which might someday occur.

If funding conditions should in fact pose such a dilemma, familiar principles provide the answer. It is now well settled that government simply may not use conditions on benefits to compel citizens to forego individual liberties. 54 Thus, loyalty oaths which inhibit free expression, welfare conditions that abridge freedom of worship, or similarly offensive conditions have been consistently held to violate civil rights and liberties as clearly as would

50. Oklahoma, 330 U.S. at 143.
52. 410 U.S. 113 (1973).
53. Doe v. Poelker, 515 F.2d 541, 546 (8th Cir. 1975).
direct sanctions with similar effect. The doctrine of "unconstitutional conditions" which has emerged during the past quarter century forms a basic premise of constitutional law, and a fundamental guarantee of individual freedoms.

If government cannot use such conditions directly against a citizen in ways that would violate constitutional liberties, it seems equally clear that government may not use an intermediary for that purpose. If a public agency may not force its own employees to disclaim political affiliations or compromise religious freedoms, it may not ask a private employer to deny such rights to its employees as a condition of a government grant or contract. Nor, for the same reason, harking back to Butler, could Congress condition federal grants in ways that would cause states or localities to violate the rights of their own citizens. Such conditions would seem just the sort of thing that Butler said Congress could not do through the conditioning power, even though this may not be precisely "teaching doctrines subversive of the Constitution." Such conditions would have been held invalid in 1936. Nothing that has happened since then would make them any more acceptable today. If anything, the development of the doctrine of unconstitutional conditions—basically a creature of the Warren Court—should make the outcome even clearer today.

We have now come essentially full circle. We began with the drinking age and the relations between the federal government and the states. We turned then to the quite different relationship between levels of government and their citizens. In each instance the challenge is to determine how comfortably conditioned funding fits within our federal system. Even if the Framers had no expectation of the imaginative kinds of conditions which would eventually be devised—and surely they could not have foreseen the lengths to which Congress would someday go—they could not be completely surprised that the strains might someday emerge, either from differences over the scope of direct federal authority or from differences of substantive policy between federal and state lawmakers. If the issue were put to the Framers in that way, I suspect a majority would have answered that the federal view should prevail, though there would have been some vigorous dissent. Perhaps the best we could ask, two centuries later, is a careful consideration of each issue as it comes before the Supreme Court and a measure of restraint on the part of
those who shape national policy. Those two elements are crucial to the preservation of that healthy balance which uniquely marks our federal system.
RESPONDING TO CHILD SEXUAL ABUSE AND EXPLOITATION: THE KENTUCKY APPROACH

David L. Armstrong* and John S. Gillig**

I. INTRODUCTION

The growing public awareness of the prevalence of child sexual abuse has only recently been accompanied by increased sensitivity to the trauma that the child victim experiences from the criminal justice system itself. In Kentucky, this has resulted in broad-based, extensive efforts to increase the protections afforded to the most vulnerable citizens of the Commonwealth. These efforts are based upon the simple principle that victims, particularly child victims of sexual abuse and exploitation, also have rights. They have the right to personal safety at home, at school, and at play. They have the right to call upon government for protection from those who would physically and emotionally exploit them. They have the right to be taken seriously in court and to be spared, as much as possible, the trauma associated with a legal process which often is terrifying even to adults. Who would deny our children these rights? And yet, as experience shows, in many states these rights are limited or denied simply because the citizens of that state have failed to act.

Kentucky is in the forefront of those states which have chosen to aggressively respond to the growing tragedy of child sexual abuse and exploitation.¹ It did not get there by accident. Ken-

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¹ Perhaps the most pertinent indicator of this response which can be easily compared to other states is legislation. Kentucky has long taken the lead. As of May, 1985, Kentucky was one of only 17 states to allow videotaped testimony by child sexual abuse victims, and one of only four states to provide a special hearsay exception for videotaped interviews of child sexual abuse victims. Bulley, Evidentiary and Procedural Trends in State Legislation and Other Emerging Legal Issues in Child Sexual Abuse Cases, 89 DICK. L. REV. 645, 666-668 (1985). This legislation was enacted by the Kentucky General Assembly in 1984 and will be discussed in detail below.
Kentucky's national reputation for innovation and commitment in this area was forged through the inspiration and dedication of leaders at the state and local levels, comprehensive legislation enacted in the last two sessions of the Kentucky General Assembly, the efforts of many volunteers, and the strong support of the general public. Because funding for new programs has remained virtually nonexistent, Kentucky has focused on innovation to meet funding requirements at little or no cost to the taxpayer, local leadership to assure local participation united with an approach appropriate to the community, and statewide advocacy, training, and coordination. In adopting this comprehensive approach to the social and legal issues of child sexual abuse and exploitation, Kentucky has set a standard for other states to follow and improve upon. Moreover, the Commonwealth continues to actively build upon its initial success. It is certain that the problem of child sexual abuse and exploitation will not disappear, but the demands of prevention, advocacy, and moderation of the legal process to accommodate the child victim can be squarely faced.

Much has been written on the rise in reported incidents of child sexual abuse in recent years. Studies may be conflicting and it is often difficult to make valid comparisons between child and sexual abuse reporting in the various states. However, the broad dimensions of the crisis of child abuse, and, more specifically, child sexual abuse, are well known. In the past decade, annually reported instances of child maltreatment made to public agencies increased dramatically from 669,000 in 1976 to over 1.9 million in 1985. Approximately twelve percent of the 1985 reports involved child sexual abuse allegations. Although not all of these reports will be confirmed, it is estimated that at least 100,000 children are sexually abused or molested in the United States each year. This means that one out of four girls and one

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4. Id. at 16.

out of eight boys will be sexually abused or molested sometime during their childhood.\textsuperscript{6}

The problem is equally serious in Kentucky. Between 1977 and 1984 reports of general child abuse and neglect increased threefold.\textsuperscript{7} In 1984, of every thousand Kentucky two-year-olds, "19 were known victims of neglect, six were physically abused, two were mentally or emotionally abused, and one was sexually abused."\textsuperscript{8} In Kentucky, from July 1, 1984 to June 30, 1985, there were 3,456 reported cases of child sexual abuse, with nearly 2,000 of these being substantiated cases.\textsuperscript{9} This is "an increase of 1,300 reported cases over the same twelve-month period one year earlier."\textsuperscript{10} Undoubtedly an increase of this size results primarily from heightened public awareness and willingness to report such incidents,\textsuperscript{11} but by the same token it is believed that, as in years past, a substantial number of molestations continue to go unreported.

Kentucky has responded to the challenge of child sexual abuse and exploitation in four ways. First, through local \textit{prevention programs}, run primarily by volunteers and aimed at a specific community. Second, through the improvement and coordination of statewide \textit{advocacy} on behalf of victims, but particularly child victims, through the Attorney General’s Office and the offices of local prosecutors. Third, through \textit{legislation}. Beginning in the 1984 session, the Kentucky General Assembly enacted far-reaching legislation moderating the demands of the legal process upon the child victim and providing for the funding of local prevention programs. It also passed the Victims’ Bill of Rights, which is intended to insure that all victims of crime will be treated with

\textsuperscript{6.} Id.

\textsuperscript{7.} G. \textsc{Bonham}, \textsc{Kentucky Criminal Justice Statistical Analysis Center, Child Abuse and Neglect in Kentucky: 1978-1984, Executive Summary No. 2} (1985).

\textsuperscript{8.} Id. at 2.

\textsuperscript{9.} 1986 \textsc{Annual Report, supra note 5, at 1.}

\textsuperscript{10.} Id.

\textsuperscript{11.} "Many professionals contend, and the \textsc{Child Sexual Abuse and Prevention Exploitation Board} believes, that the increase in reporting is a result of the efforts of primary prevention programs. Typically, these prevention programs focus on acceptable and unacceptable touching. They teach children how to say 'NO' and give them permission to tell someone about the abuse." \textsc{Kentucky Child Sexual Abuse and Exploitation Prevention Board, Annual Report and State Plan for the Child Victims' Trust Fund} (1987) [hereinafter 1987 \textsc{Annual Report and Plan for Child Victims’ Trust Fund}].
compassion, dignity, and simple courtesy by Kentucky's criminal justice system. Finally, active litigation upholds and further defines the extent to which the rights of the child victim can be balanced with the rights of the criminal defendant.

II. PREVENTION AND ADVOCACY

The prevention of child abuse and exploitation, particularly child sexual abuse, is the first line of defense in the protection and continuing well-being of Kentucky's innocent children. It is also the critical first step in breaking the cycle of abuse that passes from generation to generation, since more than eighty percent of child abusers were themselves abused as children. The state's obligation to its youngest citizens is that of parens patriae, the ultimate parent, and is strongest where its charges, by virtue of their age, are most vulnerable. To fulfill this obligation the Kentucky General Assembly established the Child Victims' Trust Fund and the Child Sexual Abuse and Exploitation Prevention Board.

A. The Child Victims' Trust Fund

The Child Victims' Trust Fund was created to provide a central source of funding for local, independently managed projects which would normally be beyond the resources of all but the wealthiest communities. As enacted, the Child Victims' Trust Fund was created as a separate fund in the office of the state treasurer. However, no money is appropriated from the General Fund and no additional burden is placed on the Kentucky taxpayer. All money that goes into the Trust Fund is derived from a voluntary

12. "Child abuse" is a general term denoting many types of physical, emotional, and sexual abuse or neglect of minors. Sexual abuse is more narrowly defined in the Kentucky Revised Statutes as the touching of sexual organs or intimate parts of another by forcible compulsion (use of actual physical force or the threat of such force) or when such activity occurs with one who is incapable of consent because of age or physical helplessness. KY. REV. STAT. ANN. § 510.110 (Michie 1985). Sexual exploitation refers to the use of minors in sexual performances such as films, peep-shows, photographs, dancing, or any other visual representation exhibited before an audience. id. § 531.300-370 (Michie 1985).

13. 1986 ANNUAL REPORT, supra note 5, at 1.


15. KY. REV. STAT. ANN. § 41.400 (Michie 1986).

16. Id. § 15.900-940 (Michie 1985).

17. Id. § 41.400(1) (Michie 1986).
state tax refund check-off, grants from the federal government, or from charitable contributions by business, industry, private groups, and individuals. During its first year, despite limited promotion due to time constraints, over $135,000 was raised from the check-off on 1984 Kentucky tax returns. This rate of return "represents a participation rate of 4.5% among taxpayers receiving refunds. The national norm for similar trust funds is 1 percent." The tax refund check-off has continued this impressive performance in subsequent tax seasons. Donations by groups and individuals have also been significant. Substantial funding now exists to sponsor local programs of education and training dedicated to preventing child abuse and exploitation.

B. The Child Sexual Abuse and Exploitation Prevention Board

The Child Victims' Trust Fund is administered by the Child Sexual Abuse and Exploitation Prevention Board, which reviews and awards grants to nonprofit organizations devoted to child sexual abuse and exploitation prevention activities. By statute, the Board is composed of the Attorney General, the Secretary of the Human Resources Cabinet, the Secretary of the Finance and Administration Cabinet, the Superintendent of Public Instruction, the Commissioner of the Kentucky State Police or their designees, and ten members of the public appointed by the

18. Id. § 41.400, 15.930 (Michie Supp. 1985 & 1985). Originally, the Kentucky Form 740 taxpayer could contribute only $2.00 of his refund ($4.00 if filing jointly). During the 1986 General Assembly, the statute was amended to allow the donation of any amount, up to the full amount of the refund, if desired. The General Assembly chose to terminate the refund check-off privilege when the state treasurer certifies that the assets in the trust fund exceed twenty million dollars ($20,000,000). Id. § 141.440(1) (Michie Supp. 1986). After that time, disbursements from the fund are limited to the earnings as provided by KRS § 41.400(4) (Michie 1986).
19. 1986 ANNUAL REPORT, supra note 5, at 3.
20. Id.
22. To date, the largest single contributor has been the Kentucky Chapter of the American Telephone Pioneers. This organization adopted the program as its statewide charitable endeavor for two years and has contributed over $40,000 to the Child Victims' Trust Fund. Not all contributions are financial. The Louisville Ad Club, for example, developed materials and public service announcements to be used in the promotion of the trust fund. The public service announcements were broadcast during high usage times on television stations throughout Kentucky. Other organizations and individuals gave generously of their time and money to stimulate interest in the fund and to promote the check-off provision. 1986 ANNUAL REPORT, supra note 5, at 3-4.
The Board is charged with developing a biennial, state-wide plan for the distribution of funds from the trust fund which is sent to the General Assembly and the Governor. Additionally, the Board develops criteria for grant recipients; reviews, approves, and monitors the Trust Fund money used by these recipients at the local level; coordinates and provides for the exchange of information among these groups; establishes procedures for the evaluation of the performance of the state board at all levels; and, lastly, performs various statewide educational, training, and public awareness functions.

The activities of the Child Sexual Abuse and Exploitation Prevention Board described above are performed continuously. A collateral but significant secondary activity is to make recommendations to the Governor and the General Assembly regarding "changes in state programs, statutes, policies, budgets, and standards which will reduce the problem of child sexual abuse and exploitation, improve coordination among state agencies that provide prevention services and improve the condition of children and parents or guardians who are in need of prevention program services."

The primary channel through which the Child Victims' Trust Fund money is put to use in a specific geographical area—typically one or two counties—is the local task force. The local task force serves as the Board's eyes and ears in local communities, making sure that the prevention programs and messages are appropriate and that there is no duplication of existing community services. Although they are themselves authorized

23. Ky. Rev. Stat. Ann. § 15.910(1)(a), (b) (Michie 1985). Guidelines for the Governor's appointment of public members were established as follows:

It is recommended that, as a group, the public members shall demonstrate knowledge in the area of child sexual abuse and exploitation prevention; shall be representative of the demographic composition of this state; and, to the extent practicable, shall be representative of all the following categories: parents, school administrators, law enforcement, the religious community, professional providers of child sexual abuse and exploitation prevention services, and volunteers in child sexual abuse and exploitation prevention services.

Id. § 15.910(1)(b) (Michie 1985). The term of each public member is three years. id. § 15.910(2) (Michie 1985).

24. Id. § 15.920 (1)(b) (Michie 1985).

25. Id. § 15.920(1)(c)(g) (Michie 1985).

26. Id. § 15.925 (Michie 1985).

THE KENTUCKY APPROACH

To receive trust fund grants, the normal role of the local task force, where it exists, is to review grant applications from its service area to be submitted for Board consideration. Because not all areas have local task forces, their encouragement and development is considered to be a critical element in the work of the Board.

By the end of 1987, forty-one Kentucky counties have been or are presently being served by trust fund grants in one form or another. Local projects have directly reached over 37,000 students and 16,000 adults. The formation of new local task forces is a continuing priority. As of December, 1987, a total of over $175,000 had been allocated to thirty-three separate local child sexual abuse and exploitation prevention projects.

Assisting the Board is the Victims' Advocacy Division of the Attorney General's Office. The Division was created in 1985 through a reorganization of resources already existing in the Department of Law. It serves as staff to the Child Sexual Abuse and Exploitation Prevention Board, and as an information clearinghouse and resource center for victims' concerns. Although many of the functions of the Division apply to all victims of crime, special attention is paid to the needs of child victims, particularly victims of sexual abuse and exploitation. Another of its major functions is to develop and lobby for victims' legislation. Efforts by this division were instrumental in the passage of the Kentucky Victims' Bill of Rights in 1986. In addition, the

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28. Id.
29. Id.
30. 1987 ANNUAL REPORT AND PLAN FOR CHILD VICTIMS' TRUST FUND, supra note 11, at 11.
31. Id.
32. Id. at 12.
33. Id. at 11.
35. In this capacity the division staff monitor the implementation of programs and projects financed in part at the local level and by the Child Victims' Trust Fund. The division is also involved in developing local task forces in communities where there is interest in developing such programs.
36. BIENNIAL REPORT 1983-85, supra note 34, at 55.
Victims' Advocacy Division conducts statewide educational seminars and conferences on the prevention of child sexual abuse and the necessity for accommodations during the legal process to prevent further trauma to the child.38

Finally, the Criminal Appellate Division of the Attorney General's Office is responsible for upholding challenged legislation and favorable court precedents. A special unit of this division was created to handle all child sexual abuse cases. Attorneys in this unit not only are more familiar with this rapidly developing area of the law, but can also anticipate potential issues for review and provide training for local prosecutors. This familiarity and training is instrumental in protecting recent gains simply because there are aspects of recent child victims' legislation which are controversial. This is particularly true where, at least arguably, the rights of the child victim are being balanced against the constitutional rights of the criminal defendant. Some critics have presumed that every gain for the child victim represents an equivalent loss for the defendant. These critics charge that special legislation and procedures to lessen the trauma of the criminal justice system upon the young victim have stripped the criminal defendant of important constitutional guarantees. There is, however, no compelling rationale to view this balancing of rights as a "zero sum" game in which one side must lose if the other gains. The goal of the criminal justice system is to reveal and act upon the truth. Where the trauma to the child can be constitutionally lessened, enabling the child victim/witness to reveal the truth as he or she understands it, this goal is furthered. Proponents of increasing protections for Kentucky's children even beyond those in place today, including the authors of this Article, are convinced not only that such accommodations are necessary and constitutional, but also that victims, innocent defendants, and the criminal justice system are benefited. This is one of the more dynamic challenges in the law today—the protection of the child victim.

dates, judicial proceedings, and other actions which affect the status of the defendant such as bail or parole hearings; to submit a victim impact statement to the court at the time of sentencing and to be consulted regarding any ultimate resolution of the case short of conviction, such as dismissal or plea negotiations. Victims shall also be notified of appellate proceedings and a victim impact statement may be submitted to the parole board. id. §§ 421.500(5)(6)(10) and 421.521-530 (Michie Supp. 1986).

from the trauma of the legal process while preserving the constitutional rights of the defendant.

III. PROTECTING THE CHILD VICTIM FROM THE LEGAL PROCESS—LEGISLATION AND LITIGATION

"[Justice, though due to the accused, is due to the accuser also."^39

Conflicts between the constitutional interests of victims and defendants come into sharpest focus in child sexual abuse prosecutions. The only eyewitness to the crime is often a child of tender years who has been betrayed by a powerful, trusted adult. Perhaps for this reason the criminal justice system has been slow to recognize that procedural accommodations can be made to reduce the trauma inherent whenever an abused child enters the legal process as an accuser—often the only accuser.40 This "second victimization," however, is largely unnecessary. While there will always be difficult, even traumatic moments for the child who must testify in court, this trauma can be reduced without infringing upon the rights of the defendant. Again, Kentucky is in the forefront of the states in providing the extra layer of protection that the child victim of sexual abuse needs. Legislation has been enacted by the General Assembly and active litigation by the defense bar and the Office of the Attorney General continues to define the constitutional boundaries. A new and decidedly altered constitutional balance is being struck as courts and legislatures increasingly moderate the traditional demands of the legal process to accommodate this special class of victims.

A. The Need For Special Accommodation

From the first moment of victimization, the sexually abused child lives in a world of shame, false guilt, and fear. It is an experience shared by far too many children. One study has concluded that ten percent of males and perhaps twenty-five

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40. As early as 1969, David Libai eloquently described those "components of legal proceedings that are capable of putting a child victim under prolonged mental stress and endangering his emotional equilibrium...." Libai, The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System, 15 WAYNE L. REV. 977, 984 (1969). It was many years before his words were heeded.
percent of females were sexually abused as children.\textsuperscript{41} Only about six percent of the perpetrators are strangers.\textsuperscript{42} These figures are estimates because the actual incidence of child sexual abuse is believed to be substantially underreported, "largely because of the trauma of pre-trial and trial procedures for the complaining witness.\textsuperscript{43} Furthermore, child sexual abuse is fundamentally different from the way most adults experience sexual assault.\textsuperscript{44} The crime typically does not involve a sudden overpowering by a stranger. Instead, the children "are usually persuaded and tricked by known, and often trusted, adults into repeated sexual activity over extended periods of time."\textsuperscript{45} Because of the inherent violation of authority and trust, the child victim is typically frightened at having to face the molester again.\textsuperscript{46} The psychological damage is more severe if the child must testify against a person he knows than against a stranger.\textsuperscript{47} This damage may be compounded where, as some studies show, between forty and sixty-five percent of reported sexual abuse cases involve parents.\textsuperscript{48} Fear of retaliation is especially likely if the offender is an acquaintance or relative.\textsuperscript{49} In sexual abuse cases, studies suggest, repeated court appearances compound the trauma of public testimony and can be damaging.\textsuperscript{50} Although the National Center on Child Abuse and Neglect reported in 1981 that the average age of a victim of child sexual abuse was between eleven and fourteen, more recent data from one program showed that one-third of the victims were


\textsuperscript{42} Russell & Trainor, Trends in Child Abuse and Neglect: A National Perspective, 1984 AM. HUMANE A. 35.

\textsuperscript{43} Parker, The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?, 17 NEW. ENG. L. REV. 643, 645 (1982) (citing DeFrancis, Protecting the Child Victim of Sex Crimes Committed by Adults, 35 FED. PROBATION 15, 17 (September 1971)).


\textsuperscript{45} Id. at 168.

\textsuperscript{46} Parker, supra note 43, at 651.

\textsuperscript{47} Id. at 646, 653.

\textsuperscript{48} Note, supra note 2, at 131 n.5.

\textsuperscript{49} Parker, supra note 43, at 651.

\textsuperscript{50} Id. at 652; Minnesota Developments, Defendants' Rights In Child Witness Competency Hearings: Establishing Constitutional Procedures For Sexual Abuse Cases, 69 MINN. L. REV. 1377, 1390 (1985).
under age six.\textsuperscript{51} Like the plight of victims of crime generally, the child victim, no matter how young or how fragile, was simply expected to go along. This was the system that, in 1982, the Chairman of the President's Task Force on Victims of Crime described as a "national disgrace."\textsuperscript{52}

Since that time the need for extensive reform in the handling of child victims has been recognized by the American Bar Association,\textsuperscript{53} the United States Attorney General's Task Force on Family Violence,\textsuperscript{54} the more than 2,000 members of the National Council of Juvenile and Family Court Judges,\textsuperscript{55} and the United States Attorney General's Advisory Board on Missing Children,\textsuperscript{56} among others. The Attorney General's Task Force on Family Violence summarized the necessity for accommodation aptly:

"Children are especially vulnerable in the courtroom. They typically feel they are somehow to blame for their victimization. Repeating and reliving the abuse through direct testimony and vigorous cross-examination further compounds their guilt and confusion. They become the pivotal players in an unfolding adult drama they cannot understand. The initial trauma inflicted upon the very young must not recur in the courtroom. Judges should adopt special rules and procedures to enable these victims to more comfortably and effectively communicate the harm they have suffered."\textsuperscript{57}

This perspective is supported not only by the weight of authority, but by common sense and experience.

The impact of the legal process upon the child victim of sexual abuse is most evident in two areas. First, there is the sheer
number of times the victim is required to tell his or her story: to social workers, investigators, prosecutors, defense counsel, at preliminary hearings, and finally, at trial. This repeated interviewing is not only damaging to the victim but is also sharply criticized by the defense bar. When improperly done, this repetition may unintentionally mold the child's perception of what actually occurred.\textsuperscript{58} A second form of trauma occurs because, among child sexual abuse victims, the most frequently mentioned fear was facing the defendant.\textsuperscript{59} For both of these reasons, child advocates strongly recommend the use of videotaping, closed-circuit television and other screening techniques to lessen the trauma of testifying for the child sexual abuse victim and to enhance the reliability of the testimony.\textsuperscript{60} "Whether the courtroom experience is traumatic or therapeutic depends in large measure on the attitude of the court itself toward modifying the proceedings as necessary to accommodate the needs of child victims and witnesses."\textsuperscript{61} Modifications are necessary because the risk of trauma is present in all cases and in many cases is substantial.\textsuperscript{62}

The use of modern technology and revised procedures to protect and reassure the young victim of sexual abuse during the prosecution of the adult defendant is one of the most significant steps taken by the Kentucky General Assembly to aid the innocent victim of crime. Such advancements, however, are tempered by the defendant's rights, particularly the right of confrontation. It is against this backdrop that the use of videotaped interviews

\textsuperscript{58} Underwager and Wakefield, Interviewing the Alleged Victim in Cases of Child Sex Abuse: The Role of the Psychologist, 11 THE CHAMPION 17, 24-25 (January/February 1987) (This is the official journal of the National Association of Criminal Defense Lawyers).


\textsuperscript{60} Arthur, Child Sexual Abuse: Improving the System's Response, 37 JUV. & FAM. CT. J. 1, 30-33 (1986).

\textsuperscript{61} Guidelines, supra note 2, at 19.

\textsuperscript{62} "For a small girl to have to talk about an intimate experience is painful. . . . To be cross-examined by lawyers trying to discredit her, however gently, is painful. To repeat it in a large courtroom with twelve jurors staring at her, and an armed and uniformed bailiff and a judge sitting above her all in black is painful. Each of the pains may be as traumatic as the incident itself, often more so. The pains can be reduced." Arthur, supra note 60, at 30. For a compilation of important papers regarding almost all aspects of legal reforms in child sexual abuse prosecutions, see NATIONAL LEGAL RESOURCE CENTER FOR CHILD ADVOCACY AND PROTECTION, PAPERS FROM A NATIONAL POLICY CONFERENCE ON LEGAL REFORMS IN CHILD SEXUAL ABUSE CASES (1985).
at trial, videotaped depositions, closed-circuit TV broadcasts of live testimony, and other innovations such as screening, a child's hearsay exception, and a speedy trial right for child victims, have been advocated and adopted. These innovations are now being scrutinized by the states' and the nation's highest courts.

B. Videotaped Interviews

One area of common agreement for both prosecutors and the defense bar is the need to avoid repeated interviewing of the child victim. In the view of defense attorneys, repeated interviews by social workers, prosecutors and others may greatly diminish the reliability of the child's testimony.\textsuperscript{63} Under this theory, each interview unconsciously molds the testimony of the child in the direction the interviewers want it to take.\textsuperscript{64} For prosecutors, repeated interviewing is recognized as potentially harmful to the witness and lends strength to the defense claim that the child has been "rehearsed." The fact of repeated interviews is no idle conjecture. Two researchers reported that in some cases they had seen, the children had been "interviewed 30 to 50 times by up to 10 different people."\textsuperscript{65}

Recognizing this, the 1984 Kentucky General Assembly enacted a statute providing that a videotaped oral statement of a child victim of sexual abuse, aged twelve or under, made prior to the initiation of proceedings against the defendant, is admissible into evidence provided certain criteria are met.\textsuperscript{66} Once the statement is admitted, either party may then call the child to testify and the other party may cross-examine.\textsuperscript{67} For the prosecutor, the advantage of the comprehensive videotaped interview is that it avoids needless repetition, protects against the witness later

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\textsuperscript{63} Underwager and Wakefield, \textit{supra} note 58, at 19-20.

\textsuperscript{64} Id. at 24-25.

\textsuperscript{65} Id. at 19.

\textsuperscript{66} Ky. Rev. Stat. Ann. \textsection 421.350(1), (2) (Michie Supp. 1986). The criteria are: (1) no attorney for either party was present when the statement was made; (2) the recording is both visual and oral; (3) the statement is accurately recorded on adequate equipment run by a competent operator; (4) the recording is unaltered; (5) leading questions are not used; (6) every voice is identified and the interviewer is available to testify; (7) the defense had an opportunity to review the tape; and (8) the child is available to testify. \textit{id.} \textsection 421.350(2) (a)-(h) (Michie Supp. 1986).

\textsuperscript{67} Id. \textsection 421.350(2) (Michie Supp. 1986).
recanting, and encourages guilty pleas. The advantage for the defense bar is that the videotaped interview can be used to highlight the inconsistencies in the child's statements, just as it may demonstrate leading or coaching. The use of the videotaped interview however, has been criticized and is subject to constitutional objections, particularly on confrontation clause grounds. State appellate courts facing this issue have not been entirely consistent in their responses. In Long v. State,68 for example, a Texas appellate court held a statute very similar to Kentucky's to be an unconstitutional violation of the defendant's right to confront the witnesses against him. The fact that under the statute the child could be called to the stand, if desired, was deemed insufficient to protect the defendant's confrontation right. Moreover, the statute was found to be an unconstitutional violation of the defendant's right to compulsory attendance of witnesses because the burden—and onus—of calling the child to the stand was shifted to him. This same section of the Kentucky videotaping statute was challenged before the Kentucky Court of Appeals as a violation of the confrontation rights of the defendant and as an unconstitutional infringement of the inherent rights of the judiciary, but was upheld. The Kentucky Supreme Court, however, reserved judgment on the lower appellate court's decision by simply depublishing the opinion, thereby limiting its holding to that case only.69

These arguments were raised again in Gaines v. Commonwealth,70 in which the Kentucky Supreme Court addressed the constitutionality of the statute for the first time. The court held the videotaped interview section of the statute to be an unconstitutional violation of the state constitution's provisions concerning the separation of powers.71 Two violations were cited by the court. First, the statute "permits testimony from a child who has not been declared by the trial court competent to testify as a witness" and, second, it authorizes a "child to be a witness without first having undertaken a solemn obligation to tell the

68. 742 S.W.2d 302 (Tex. Crim. App. 1987).
69. Eastman v. Commonwealth, published in the Advance Sheets at 720 S.W.2d 348-352 (Ky. 1986). This case was depublished by the Kentucky Supreme Court in its denial of discretionary review and is not printed in the final bound volume of the official reporter.
70. 728 S.W.2d 525 (Ky. 1987).
71. KY. CONST. §§ 27 & 28.
truth...”72 Thus the failure to determine competency or to give the oath was considered fatal.73 In this fashion the Kentucky Supreme Court found the statute unconstitutional without even addressing the broader confrontation clause issue. A recent case has held that Gaines error will not be cured by a showing of later competency or taking of the oath at trial—it is “of no consequence...”74 What if the child is found competent and given the oath before the interview? Only then, it appears, will the Kentucky appellate courts reach the broader constitutional issues posed by the use of the videotaped interview at trial.

Although Gaines has foreclosed the use of videotaped interviews at trial as a matter of general admissibility, such procedures remain beneficial and should be utilized. Not only might the use of the videotape cut down on the number of interviews to which the child is subjected, but the videotape interview itself can be useful as a prior consistent statement if the defense claims recent fabrication. On the other hand, if the child recants, the child victim's prior inconsistent statement may be admissible with a proper Jett75 foundation.76

C. Videotaped Depositions and Closed Circuit Testimony

Videotaped depositions of child sexual abuse victims twelve and under are now specifically authorized, by statute, upon motion of either party, as is the one-way closed-circuit broadcast of the child's live testimony into the courtroom.77 During the deposition or testimony, the child is specifically prohibited from hearing or seeing the defendant, although the defendant must be able to observe and hear the testimony of the child “in person” by use of one-way screening.78 Other criteria similar to those imposed upon videotaped statements are enumerated.

72. Gaines, 728 S.W.2d at 527.
73. Compare Hardy v. Commonwealth, 719 S.W.2d 727, 728-729 (Ky. 1986) (no error in failure to administer the oath to child witness before a videotape deposition where defendant did not object and competency hearing demonstrated that child understood her moral obligation to tell the truth).
78. Id.
The use of the videotape itself is not novel. In *Hardy v. Commonwealth*, use of videotaped depositions, taken with the defendant present, was authorized under Kentucky Rules of Criminal Procedure 7.10 and 7.12. These rules generally permit the use of a deposition where there is a prospective witness who may be "unable" to attend the trial. In *Hardy*, the child witness was determined to be "unavailable" based on affidavits from a certified psychologist and the child's physician that "her testimony in person at trial would be detrimental to the child emotionally and psychologically and might permanently endanger her psychological recovery." This was held to be sufficient under the rules where there was no limit placed upon "face to face" confrontation (the defendant was present when the witness was examined) nor upon cross-examination by defense counsel. The effective demonstration of "psychological unavailability" for purposes of depositions under the Kentucky Rules of Criminal Procedure was a key to the holding in this case.

Use of videotaped depositions, closed-circuit live broadcasts of the child's testimony, and in-court screening of the defendant from the sight and hearing of the witness were approved by a sharply divided Kentucky Supreme Court in *Commonwealth v. Willis*. Willis was charged with sexually abusing his girlfriend's five-year-old daughter. At a pre-trial competency hearing the young child made it clear that she was intimidated by Willis' presence in the hearing room. She seemed afraid that she would be hurt again and could not respond to the questioning. In this

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79. 719 S.W.2d 727, 728 (Ky. 1986).
80. Id.
81. Id.
83. 716 S.W.2d 224 (Ky. 1986). This case was orally argued by then Attorney General David L. Armstrong in the first personal appearance of a Kentucky Attorney General before Kentucky's highest court in more than three decades.
84. "When the child was asked why she would not respond to certain questions, she stated:
   A. I don't want him—hurt me.
   Q. Somebody here you don't want to see?
   A. (Witness nods affirmatively.)
   Q. Who's that?
   A. Uncle Leslie. (TH 9.)
   * * * * * * *
landmark case the statute was found constitutional; it did not violate the defendant's right to "face to face" confrontation under Section 11 of the Kentucky Constitution or the sixth amendment to the United States Constitution. In addition, the trial judge's observations at the hearing were sufficient to show the necessity for the videotaping procedure.

*Willis* is significant not only because this was the first such statute to withstand constitutional challenge in a state's highest court, but also because the confrontation clause of the Kentucky Constitution, like those of many other states, uses the words "face to face." This language was initially thought to make it more difficult for the courts to uphold such statutes than under constitutions which use the word "confront."

The heart of the issue in *Willis* was whether a screening of the defendant from the witness would unduly inhibit the right to effective cross-examination embodied in the confrontation clauses of both constitutions. The four-member majority found the use of this television technology to be "the functional equivalent of testimony in court." The defendant could communicate with counsel, see and hear the witness; counsel could cross-examine, and the jury could observe the demeanor of the witness. Under these conditions, where reasonable necessity for the use of these procedures is established, neither constitution was violated. The majority opinion noted the extensive public hearings conducted by the legislature before it "accepted the philosophy

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Q. Are you going to talk for us
A. I don't want him here. (TH 10.)
   * * * * * * * *
A. Yes. I don't want Uncle Leslie, Mommy. (TH 19.)

The trial judge was unable to rule on whether she was competent or incompetent because her answers were unresponsive." *id.* at 226.

85. *Id.* at 227. Subsequent to *Willis* at least two other states have upheld videotaping statutes where the defendant is sight and sound screened from the child victim despite "face to face" confrontation rights under state constitution or statute. State v. Cooper, 291 S.C. 351, 353 S.E.2d 451 (1987); and Commonwealth v. Ludwig, 366 Pa. Super. 361, 531 A.2d 451 (1987).

86. *Willis*, 716 S.W.2d at 230.

87. *Id.* at 228.

88. *Id.* at 231. Although the Kentucky Constitution speaks of "face to face" confrontation, the majority noted that there "is no authority to support the proposition that ... [Kentucky's confrontation clause] should be construed more stringently than the same right in the United States Constitution." *id.* at 229.
that testifying in a formal courtroom atmosphere at a criminal trial before the defendant, judge and jury can be one of the most intimidating and stressful aspects of the legal process for children."\textsuperscript{89} The court found that "the state has compelling interests in prosecuting crimes in which the only witness is a young, fearful and uncommunicative child and protecting that child from the prolonged ordeal of recounting the abusive acts in open court."\textsuperscript{90} It was also suggested that the face to face language in the Kentucky Constitution need not be interpreted as requiring eyeball to eyeball contact between child witness and defendant, but may only reflect an inability to foresee modern technology whereby cross-examination can occur without physical presence.\textsuperscript{91}

Three members of the majority joined in the main opinion and added their own concurring opinion. Dicta in this separate concurring opinion found the statutory provision which would not allow the defendant to call the child to the stand after the videotaped deposition was entered into evidence, to be "constitutionally impermissible under any circumstances."\textsuperscript{92}

\textbf{D. In-Court Screening}

The use of a one-way screen during trial to prevent the child witness from seeing the defendant is not provided for by statute in Kentucky, but its use is sanctioned by dicta in \textit{Commonwealth v. Willis}.\textsuperscript{93} A statute requiring a child's testimony in court but permitting the trial judge to utilize a one-way screen which "does not allow the child to see or hear the party" reached the United States Supreme Court on confrontation and due process grounds.\textsuperscript{94} \textit{Coy v. Iowa}\textsuperscript{95} became the first United States Supreme Court case

\begin{itemize}
  \item \textsuperscript{89} Id. at 227.
  \item \textsuperscript{90} Id. at 230.
  \item \textsuperscript{91} Id.
  \item \textsuperscript{92} Id. at 233 (Leibson, J., concurring) (referring to KY. REV. STAT. ANN. § 421.350(5) (Michie 1987)).
  \item \textsuperscript{93} Id. at 227, 232.
  \item \textsuperscript{94} IOWA CODE § 910A.14(1) (Supp. 1988). The Iowa statute appears to be unique but the use of a shielding device has been repeatedly suggested by commentators. See Libai, supra note 40, at 1017; Parker, supra note 43, at 669.
  \item \textsuperscript{95} 56 U.S.L.W. 4931 (U.S. June 28, 1988). Writing an \textit{amicus curiae} brief on behalf of Iowa that was joined by 34 other states, Kentucky had argued that the confrontation clause did not require eye to eye contact, but simply an opportunity for effective cross-examination. The lower court decision is State v. Coy, 397 N.W.2d 730 (Iowa 1986). A summary of oral argument may be found at 56 U.S.L.W. 3493-94 (January 26, 1988).
\end{itemize}
to address the concept of sixth amendment confrontation as a "face to face" right involving interaction between the witness and the accused. Deferring to such diverse sources as Shakespeare and President Eisenhower, Justice Scalia, writing for the Majority, concluded that "[i]t is always more difficult to tell a lie about a person 'to his face' than 'behind his back.' "\textsuperscript{96} The Court concluded that this interaction was a "core" confrontation right clearly violated by the screen placed between the child victim and the defendant; further, the violation of this right could not be justified by a general legislative presumption of trauma to the child victim found in the Iowa statute. Because there was no individualized showing of necessity, the Court held that the violation of the defendant's confrontation right was clear, and remanded the case back to the Iowa Supreme Court for a determination of harmless error.\textsuperscript{97}

Although \textit{Coy v. Iowa} broke new ground in its veneration of confrontation as a "face to face" experience, its impact upon the measures recently enacted by the Kentucky General Assembly for the protection of child victims/witnesses remains to be seen. In a concurring opinion in \textit{Coy}, Justices O'Connor and White stressed that nothing in the Majority opinion—which they joined—necessarily prevented the use of innovations such as closed-circuit television and other protective procedures where necessity was shown.\textsuperscript{98} Since Justice Blackmun and Chief Justice Rehnquist would have held the Iowa statute constitutional in any event, and Justice Kennedy did not participate, it is apparent that the broader constitutional questions raised by these procedures must be reserved for another day.

\textit{E. Screening of the Child Victim from the Defendant During Competency Hearings}

\textit{Kentucky v. Stincer},\textsuperscript{99} recently decided by the United States Supreme Court, was a significant victory in the moderation of what has come to be known as the "second victimization" of child sexual abuse victims. This second victimization occurs during the prosecution of the offender, when the child is forced to repeatedly

\textsuperscript{96} \textit{Coy}, 56 U.S.L.W. at 4933.
\textsuperscript{97} \textit{Id.} at 4934.
\textsuperscript{98} \textit{Id.} at 4934 (O'Connor, J., concurring).
appear in court and face the perpetrator, who is most likely a member of the family or even a parent.

Sergio Stincer was indicted in 1983 for having deviate sexual intercourse with three children incapable of consent, these being an eight-year-old female, a seven-year-old female, and a five-year-old male. Prior to the testimony of the two girls a hearing was held to determine whether the children were competent to testify. The trial court indicated that Stincer would be returned to the courtroom while the two children were examined. Stincer's counsel did not object, and correctly informed Stincer that the scope of the hearing would be merely to "talk to the children, not about the case really but just to see if they're old enough to understand the difference between telling a lie and telling the truth..." The children were examined by the trial court and counsel and were found to be competent. No questions regarding the crime or relating to Stincer's guilt or innocence were asked.

At trial, in front of the jury, the same process was repeated. Both female witnesses were again asked competency questions before beginning their substantive testimony. Stincer was found

100. The charge involving the five-year-old boy was later dismissed at the request of the prosecutor because the child was too young to testify coherently.

101. A large number of states follow a similar approach when the competency of a witness is questionable. Competency hearings are automatic in these states. Eatman and Bulkley, Protecting Child Victim/Witnesses Sample Laws and Materials 37, 45-46 (1986). Other jurisdictions may presume competency but can hold a hearing if the child's capacity is formally placed in issue. id. at 38-39, 43-44.

102. Stincer, 107 S. Ct. at 2670 n.1 (Marshall, J., dissenting). In Kentucky the standard for competency is whether the child is of sufficient intelligence to observe, recall and narrate facts, and has a moral sense of obligation to tell the truth. Capps v. Commonwealth, 560 S.W.2d 559, 560 (Ky. 1977). Typical voir dire questions require recollection and narration of these past facts such as home address, age, names of relatives, teachers and the like. See Comment, The Competency Requirement For The Child Victim of Sexual Abuse: Must We Abandon It?, 40 U. MIAMI L. REV. 245, 263 (1985). Children are asked their understanding of the truth and whether they will tell the truth. Reported decisions reflect a common practice of voir dire examination in chambers or otherwise outside the presence of a jury. Commonwealth v. Willis, 716 S.W.2d 224, 226 (Ky. 1986); Payne v. Commonwealth, 623 S.W.2d 867,878 (Ky. 1981); Capps, 560 S.W.2d at 560; Hendricks v. Commonwealth, 550 S.W.2d 551, 554 (Ky. 1977).

103. During trial, an additional competency hearing was held concerning a four-year-old boy who had witnessed the incident. Stincer either was present or made no request to be present—the record is silent and no issue was raised on appeal. It is to this hearing that two of the Kentucky Justices refer when they criticize the asking of questions on substantive testimony during a competency hearing. Stincer v. Commonwealth, 712 S.W.2d 939, 942 (Ky. 1986) (Wintersheimer, J., dissenting).
guilty and was sentenced to twenty years imprisonment.\textsuperscript{104}

On direct appeal, the Kentucky Supreme Court, in a 5-2 decision, held that Stincer's exclusion from the competency hearing violated the confrontation clauses of the United States and Kentucky Constitutions.\textsuperscript{105} The Kentucky Supreme Court stated that the competency hearing was a crucial phase of the trial because if it were determined that the children could not testify, the prosecution's case would fall apart.\textsuperscript{106} Because of the importance of this ruling, both in Kentucky and nationally, the Office of the Attorney General sought review from the United States Supreme Court; certiorari was granted December 8, 1986.\textsuperscript{107}

Kentucky argued that the confrontation clause of the United States Constitution could not be extended to cover a preliminary hearing where the guilt or innocence of the defendant was not at stake and where the right to full and complete confrontation at trial was preserved. The Commonwealth also argued that due process was not implicated by the Kentucky trial court's action because Stincer's absence from the competency hearing bore no reasonably substantial relationship to his opportunity to defend himself against the charges. Counsel for Stincer argued that to exclude the defendant from the competency hearing would pro-

\textsuperscript{104} Id. at 940.

\textsuperscript{105} Stincer, 712 S.W.2d at 939. In addition to Kentucky, four state courts had considered the identical question of whether the sixth amendment was violated by holding a competency hearing for a child witness outside the presence of the accused. All four cases involved child sexual abuse victims. All four courts concluded there was no violation of the confrontation clause. State v. Ritchey, 107 Ariz. 552, 490 P. 2d 558 (1971); People v. Breitweiser, 38 Ill. App. 3d 1066, 349 N.E.2d 454 (Ill. App. Ct. 1976); Moll v. State, 351 N.W.2d 639 (Minn. App. 1984) (exclusion of both defendant and counsel); State v. Taylor, 103 N.M. 189, 704 P. 2d 443 (Ct. App. 1985).

\textsuperscript{106} Stincer, 712 S.W.2d at 940-941. There are many phases of any criminal prosecution at which the defendant has no right of presence but at which decisions crucial to the prosecution's case will be made. Many an informal interview has convinced a prosecutor that the child witness was too vulnerable, too scared, or would simply be too traumatized by the courtroom experience to be utilized, and so the case is dropped. See State v. Sheppard, 197 N.J. Super. 411, 417, 484 A.2d 1350, 1353 (N.J. Super. Ct. Law Div. 1984) (out of 75-80 child sexual abuse cases reviewed in a local prosecutor's office, nearly ninety percent "were dismissed as a result of problems attending the testimony of children, who could not deal with the prospect of facing fathers, stepfathers, relatives, and strangers in a courtroom setting").

\textsuperscript{107} 107 S. Ct. 642 (1986) (granting certiorari). In his first written opinion from the bench, newly-confirmed Justice Antonin Scalia denied the Commonwealth's application for a stay of the Kentucky Supreme Court's decision based upon his belief that certiorari would not be granted. Kentucky v. Stincer, 107 S. Ct. 7 (1986) (denial of application for stay).
foundly diminish existing confrontation clause rights and result in a denial of due process. Both sides presented considerable authority both for and against the proposition that repeatedly facing the offender was demonstrably harmful to the child.\textsuperscript{108}

On June 19, 1987 a six-member majority of the United States Supreme Court reversed the Kentucky Supreme Court and held that neither the confrontation clause nor due process was implicated by the defendant's exclusion from the competency hearing.\textsuperscript{109} Reiterating its previous holdings that the fundamental purpose of the confrontation clause is to advance the truth-finding function of the criminal trial through the protection of the defendant's right to cross-examination, the Court dismissed Stincer's confrontation claims.

There was no Kentucky rule of law, nor any ruling by the trial court, that restricted respondent's ability to cross-examine the witnesses at trial. Any questions asked during the competency hearing, which respondent's counsel attended and in which he participated, could have been repeated during direct examination and cross-examination of the witnesses in respondent's presence.\textsuperscript{110}

Moreover, since the competency questions (How old are you? Where do you go to school? etc.) did not relate to the guilt or innocence of the accused, they would have been easy to repeat at trial, and indeed, were substantially repeated. Under these circumstances, the Court held, there was no violation of the confrontation clause.\textsuperscript{111} Nor was Stincer's due process argument of constitutional significance since, due to the limited nature of the competency hearing, there was no reasonably substantial relationship between Stincer's presence at the hearing and his ability to defend against the charges at the later trial.\textsuperscript{112}

The ruling of the United States Supreme Court in \textit{Kentucky v. Stincer} makes clear the standard by which the balancing of the rights of child victim and criminal defendant are to be judged under confrontation clause and due process analysis. As such, it

\begin{footnotesize}
\begin{enumerate}
\item[108.] Many of the authorities found in Brief for Petitioner, Kentucky v. Stincer, 107 S. Ct. 2658 (1987) (No. 86-572) and in Brief for Amici Curiae, Coy v. Iowa, 56 U.S.L.W. 4931 (U.S. June 28, 1988) (No. 86-6757) were utilized in this article.
\item[110.] \textit{Id.} at 2664.
\item[111.] \textit{Id.} at 2666.
\item[112.] \textit{Id.} at 2667-68.
\end{enumerate}
\end{footnotesize}
is a significant milestone in mitigating the number of times the young victim must face a courtroom environment made even more hostile and traumatic by the physical presence of the defendant.\textsuperscript{113} The holding is also significant because it affirmed, in the words of a Kentucky Justice, that "[t]he right to be present and the right to confront does not confer a right to intimidate."\textsuperscript{114}

\textbf{F. Hearsay for Child Victims}

In 1986 the Kentucky General Assembly enacted a statute which specifically provides that, "[n]otwithstanding any other provision of law or rule of evidence, a child victim's out-of-court statements regarding physical or sexual abuse ... are admissible in any criminal or civil proceeding" provided that certain conditions are met.\textsuperscript{115} Prior to admission the trial court must determine that the interests of justice would be best served by the admission of the statement into evidence and that, based upon general criteria, the statements are determined to be reliable.\textsuperscript{116} Once the statement has been admitted, either party may call the child to testify and the opposing party may cross examine.\textsuperscript{117} It would appear, therefore, that the child witness would have to be "available" to take part in the trial in order for the hearsay statement to be admitted. The constitutionality of the child victim's hearsay statute has not yet been litigated.

\textbf{G. Speedy Trial for Child Victims and Victims' Bill of Rights}

The Kentucky Victims' Bill of Rights, enacted by the General Assembly in 1986 following a major lobbying effort by the Office of the Attorney General, outlines the crime victim's rights during criminal proceedings.\textsuperscript{118} These rights include the right to be promptly notified of changing court dates or judicial and other actions which affect the status of the defendant such as bail or

\textsuperscript{113} The United States Supreme Court also decided another important child victims case this same term. Pennsylvania v. Ritchie, 107 S. Ct. 989 (1987) (the confrontation clause does not mandate providing defendant in child sex abuse case access to confidential state child welfare agency files compiled during investigation into witnesses' allegation of child sexual abuse).

\textsuperscript{114} Stincer v. Commonwealth, 712 S.W.2d at 944 (Wintersheimer, J., dissenting).

\textsuperscript{115} Ky. REV. STAT. ANN. § 421.355(1) (Michie Supp. 1986).

\textsuperscript{116} Id. § 421.355(1)(a), (b) (Michie Supp. 1986).

\textsuperscript{117} Id. § 421.355(2) (Michie Supp. 1986).

\textsuperscript{118} Id. § 421.500-550 (Michie Supp. 1986).
parole hearings.\textsuperscript{119} It also allows the victim to submit a victim impact statement to the court at time of sentencing or to the parole board.\textsuperscript{120} Victims are also to be contacted regarding plea negotiations and to be notified of appellate proceedings.\textsuperscript{121}

Where a sexual offense involving a child of less than sixteen is involved, the Victims' Bill of Rights makes the additional provision of a speedy trial.\textsuperscript{122} The trial court is instructed to rule upon a speedy trial motion under this section within ten days and, if granted, to proceed to trial within ninety days.\textsuperscript{123} In ruling on a motion by the defendant to delay the proceedings, the trial court is specifically instructed to take the well-being of the child victim into account.\textsuperscript{124}

\textbf{IV. CONCLUSION}

Kentucky has taken significant steps to address the problem of child sexual abuse and exploitation and to mitigate the inherent danger to the psychological well-being of the child from the legal process. Much more remains to be done. For example, there is no legal duty in Kentucky for a parent to prevent child abuse.\textsuperscript{125} It has been proposed that a statute be enacted to establish such a legal duty for the parent, custodian, or adult residing with the child to make reasonable and proper effort to prevent criminal acts where they have knowledge. Concealment of a child by one parent in order to prevent visitation by the other parent should be criminalized. Child victims of sexual assault or abuse should not be able to be identified by name or biographical data from court documents, and the records of their victimization should be sealed at the conclusion of trial. The requirement of a determination of competency before the child witness testifies should be eliminated, as it is under the Federal Rules of Criminal Procedure and in many states. Other methods to protect Kentucky's innocent children from the perpetrators of child abuse, child sexual abuse, and child exploitation can and must be de-

\textsuperscript{119} Id. § 421.500(5)(a), (b) (Michie Supp. 1986).
\textsuperscript{120} Id. § 421.520-.530 (Michie Supp. 1986).
\textsuperscript{121} Id. § 421.500(6), (10) (Michie Supp. 1986).
\textsuperscript{122} Id. § 421.510 (Michie Supp. 1986).
\textsuperscript{123} Id. § 421.510(2) (Michie Supp. 1986).
\textsuperscript{124} Id. § 421.510(3) (Michie Supp. 1986).
\textsuperscript{125} Knox v. Commonwealth, 735 S.W.2d 711, 712 (Ky. 1987).
veloped, presented, and adopted. Our children are a resource too precious to waste. All of these areas represent unplowed ground. For those who have an interest in the well-being of Kentucky's children, children's rights, or simply in a better world, these are issues for their scrutiny.
LENDER LIABILITY IN THE BLUEGRASS: ARE NEW THEORIES EMERGING UNDER KENTUCKY LAW?

James R. Cox*

I. INTRODUCTION

“Lender liability” has become a watchword of the 1980s. The loan and “work-out” practices of banks and other financial institutions increasingly have been attacked by debtors, bankruptcy trustees, stockholders, creditors, and others. In one landmark case, a Texas plaintiff, Farah Manufacturing Company, received a nineteen million dollar jury award in compensatory damages from a group of financial institutions as a result of an alleged conspiratorial course of tortious conduct marked with fraud, duress, and interference with the debtor’s corporate governance process.1 More recently, a Maine jury awarded fifteen million dollars to two businessmen whose credit was cut off by a bank because of rumors about their alleged connection to organized crime.2

Despite the widespread publicity given these and other cases, lender liability is not a new area of the law. Borrowers have long sued their lenders when credit transactions have gone awry, and the theories of liability asserted have included both recognized common law claims—such as breach of contract, fraud, duress, interference, and breach of fiduciary duty—and statutory claims under the Uniform Commercial Code, the Bankruptcy Code, federal and state securities laws, state usury laws, and even the Racketeer Influenced and Corrupt Organizations Act. What is new is the willingness of some courts to push these theories beyond long established limits, which in turn has encouraged borrowers to assert lender liability claims in response to nearly every move a lender may make to collect a debt.

* B.A., Alma College; J.D. The College of William and Mary. Partner, Hirn Reed Harper & Eisinger, Louisville, Kentucky. The author wishes to thank M. Dianne Hughes for her assistance in the preparation of this Article.
This Article discusses the viability and breadth of this new approach to lender liability under Kentucky law and assesses the Kentucky position on borrower claims of bad faith breach of contract, economic duress, breach of fiduciary duty, interference, fraud, usury and violations of consumer protection and unfair trade practices statutes. After examining, in the context of Kentucky law, some of the legal theories which have proved successful for borrowers in other states, it becomes evident that the Kentucky courts, for the most part, have been unwilling to adopt the more extreme positions. Debtor-creditor practices which have, heretofore, been viewed as acceptable but which are now resulting in extensive liability for lenders in other states, remain seemingly safe in the Commonwealth.

II. BAD FAITH BREACH OF CONTRACT

The debtor-creditor relationship is, at its heart, a contractual one. Kentucky, like the great majority of American jurisdictions, has long recognized that all contracts contain an implied covenant of good faith and fair dealing. Many recent cases in other jurisdictions have imposed this duty of good faith on all phases of the lending relationship, from negotiations for a loan to repossession of a security. A duty of good faith potentially may arise in one of three ways: under the Uniform Commercial Code, under the common law of contract, or the common law of torts.

A. Good Faith Under the Uniform Commercial Code

1. Section 1-203

Section 1-203 of the Uniform Commercial Code, as adopted in Kentucky and elsewhere, imposes an express obligation of good faith on contracting parties: “Every contract or duty within this chapter imposes an obligation of good faith in its performance or enforcement.” Section 1-201(19) of the Code defines good faith

for purposes of the Code as, at the least, “honesty in fact in the conduct or transactions concerned.” The background of this definitional section indicates that it was intended to be a narrow rather than an expansive description of good faith. The Code draftsmen did not at first substantially restrict the definition of good faith, at least as it applied to businessmen. The predecessor to Section 1-201(19) in the 1949 draft of the Code read:

unless otherwise agreed, in this Act: ... “Good faith” means honesty in fact in the conduct or transaction concerned. Good faith includes good faith towards all prior parties and observance by a person of the reasonable commercial standards of any business or trade in which he is engaged.7

Under this definition, businessmen were required to observe their own “reasonable commercial standards,” a potentially far-reaching criterion. This provision was heavily criticized, however, particularly by the Committee on the Proposed Commercial Code of the American Bar Association’s Section on Corporation, Banking, and Business law which recommended that the general Code definition of good faith be

limited either to honesty in fact or at most this plus “commercial decency” or something akin to this concept. A possible definition would be: “(18) ‘Good faith’ means honesty in fact in the conduct or transaction concerned and the absence of trickery, deceit or improper purpose.”

While the Code draftsmen did not adopt the ABA’s recommended definition, they did delete all but the “honesty in fact” half of their 1949 definition of good faith in the 1952 final official draft of Section 1-201(19). At the same time, the Code draftsmen also inserted an objective test of good faith in several other Code provisions. Section 2-103(1)(b), for example, provides that good faith in the case of a “merchant” means “honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.” A lender, however, is not a “merchant” and, therefore, is not bound under Section 2-103(1)(b) to observe “reasonable commercial standards.”

7. U.C.C. § 1-201(18) (May 1949 Draft).
The plaintiff in *Universal C.I.T. Credit Corp. v. Middlesboro Motor Sales, Inc.*, an automobile dealer, relied on U.C.C. § 1-203 as the basis for his claim that a financing company had improperly attached the dealer's inventory after an inspection showed that the dealer had sold some automobiles without remitting the proceeds to the finance company as required by their agreement. The dealer argued that Section 1-203 was violated when it was led to believe that it was being given time to raise the money owed. The dealer claimed that this situation arose because the finance company did not demand immediate payment or threaten to take action if immediate payment was not forthcoming and because the company had accepted two checks in partial payment for the debt. The dealer's claim was based on an earlier Third Circuit case, *Skeels v. Universal C.I.T. Credit Corp.*, which also involved a car dealer and the same finance company. In that case, the finance company had promised, through a local manager, to make a substantial loan to the dealer and the dealer had relied on this promise paying other bills. The finance company then refused the loan and took possession of its collateral when an inspection showed that various cars were missing. The Kentucky court found *Skeels* to be easily distinguishable: "There was no specific assurance, and the company has not shown that they relied on any specific assurances to their detriment. Under these facts it cannot be said that C.I.T.'s action amounts to bad faith."

2. *Section 1-208*

An additional good faith provision of the Code that has particular relevance to the debtor-creditor relationship is Section 1-208, which relates to acceleration of a debt.

A term providing that one party or his successor in interest may accelerate payment or performance or require collateral or additional collateral "at will" or "when he deems himself insecure" or in words of similar import shall be construed to mean that he shall have the power to do so only if he in good faith believes that the prospect of payment or performance is impaired. The burden of establishing lack of good faith is on the party against whom the

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11. 424 S.W.2d 409 (Ky. 1968).
12. 335 F.2d 846 (3d Cir. 1964).
13. *C.I.T. Credit Corp.*, 424 S.W.2d at 411.
power has been exercised.\textsuperscript{14}

Good faith in this context means the same as in other general Code sections—"honesty in fact in the conduct or transactions concerned."\textsuperscript{15}

Section 1-208 provided the basis for one of the theories on which the plaintiff recovered its multimillion dollar damage award in \textit{State National Bank v. Farah Manufacturing Co.}\textsuperscript{16} In that case, the lenders of twenty-two million dollars to Farah Manufacturing Company warned Farah that if its chief executive officer was re-elected, the lenders would declare a default and accelerate payment of the loan under a change-of-management clause in the loan agreement. These warnings were made at a time when (1) the loan was not in default, (2) the lenders had either decided not to declare a default or had reached no decision on the matter, and (3) the lenders had other valid options that they did not pursue. This conduct, according to the court, showed a lack of good faith within the meaning of Section 1-208 and constituted the basis for an actionable claim of duress by the debtor against its lenders.\textsuperscript{17}

The \textit{Farah} case is widely viewed as a landmark decision which in many ways was the catalyst for the development of lender liability as a distinct area of the law. Section 1-208, upon which the \textit{Farah} court relied, also provided the basis for two other decisions which substantially expanded the scope of lender liability, \textit{Brown v. Avemco Investment Corp.}\textsuperscript{18} and \textit{K.M.C. Co. v. Irving Trust Co.}\textsuperscript{19}

Two issues were presented in \textit{Brown}: whether the proper standard for assessing good faith under Section 1-208 is an objective or a subjective one, and whether the good faith obligation of Section 1-208 extends beyond "insecurity" acceleration clauses. The defendant-lender in \textit{Brown} accelerated an indebtedness based upon a "due on lease" clause\textsuperscript{20} in a security agree-

\textsuperscript{17} Id. at 684-85.
\textsuperscript{18} 603 F.2d 1367 (9th Cir. 1979).
\textsuperscript{19} 757 F.2d 752 (6th Cir. 1985).
\textsuperscript{20} Such clauses generally prohibit the lease of secured property without the lender's consent, and allow the lender to accelerate indebtedness upon a breach.
ment covering an airplane. Citing Section 1-208 and Texas equity law, the court used an objective standard to judge the lender’s actions and found that acceleration must be “reasonable in light of the facts.” The court also held that Section 1-208 applies to a “default” acceleration clause as well as to an “insecurity” acceleration clause. This means that a creditor may not exercise an option to accelerate based upon the debtor’s breach of a specific provision of the loan agreement unless the creditor believes in good faith that the breach has impaired the prospects for payment or performance of the debtor’s obligation.

The Brown court acknowledged that an option to accelerate when the debtor leases without consent is different from one based on the creditor’s feelings of insecurity. “The lease is within the control of the debtor; the feelings of insecurity are subject to the whim and caprice of the creditor.” Nevertheless, the court found that “[a]buse is possible with ‘due-on-lease’ acceleration as well.” The “option” to accelerate based on a lease, the court said, could be used “as a sword for commercial gain rather than as a shield against security impairment.”

In K.M.C. Co. v. Irving Trust Co., perhaps the most widely noted good faith case of recent years, a wholesale and retail grocery concern sued its lender for destroying its business by refusing to advance funds under a loan agreement. The financing agreement between the parties contained customary provisions for discretionary lending “up to” an agreed credit line and “up to” maximum percentages of accounts and inventory. It further provided that the indebtedness was payable on demand. Faced with serious financial problems, the borrower requested an up to the limit advance. The lender refused the request and was then sued for acting in bad faith. The jury returned a verdict against the lender for $7,500,000, obviously influenced by the lender’s fully secured position and believing the borrower’s testimony that the lender acted because of a personal dispute rather than because of problems with the borrower’s payables.

The Sixth Circuit affirmed the jury verdict, rejecting the lender’s arguments that the decision to advance funds under the

22. Id. at 1380.
23. Id. at 1378.
24. Id. at 1379.
25. Id.
financing agreement was solely within its discretion. The court also rejected the lender's position that implying a notice requirement prior to the discontinuation of financing up to the maximum credit limit was inconsistent with the demand provisions of the loan agreement.26 The court reasoned that the deposit of the borrower's receivables into a "blocked account," to which the lender had sole access, left the borrower's continued existence entirely at the whim or mercy of the lender, unless an obligation of good faith performance was imposed.27 This obligation to act in good faith, the court continued, logically required a period of notice before financing was curtailed in order to allow the borrower a "reasonable opportunity to seek alternate financing...."28 In reaching this conclusion, the court cited Brown and found the demand provision in the loan agreement to be "a kind of acceleration clause, upon which the Uniform Commercial Code and the courts have imposed limitations of reasonableness and fairness."29 The Sixth Circuit further agreed with Brown that the proper standard for assessing this good faith is "abuse of discretion" rather than "bad faith," measured by objective standards.30

Brown and K.M.C. represent significant extensions of the U.C.C. duty of good faith which, in at least one important respect, have not been accepted by the Kentucky courts. Fort Knox National Bank v. Gustafson31 was an action for abuse of process arising out of a bank's repossession of a mobile diner on which it had a security interest. Reversing the trial court's judgment for the debtor, Kentucky's highest court used a subjective rather than an objective standard to determine the reasonableness of the bank's action. The court noted that "[i]t must be remembered that here we are dealing with the 'good faith' belief of the bank—that is, its state of mind."32

26. K.M.C., 757 F.2d at 759.
27. Id.
28. Id.
29. Id. at 760.
30. Id. The Sixth Circuit approved a jury instruction which in essence stated that there is implied in every contract an obligation of good faith; that this obligation may have imposed on the lender a duty to give notice before refusing to advance the maximum amount under the agreement, and that such notice would be required if necessary to the proper execution of the contract, unless the decision not to advance funds without prior notice was made in good faith and in the reasonable exercise of its discretion. id. at 759.
31. 385 S.W.2d 196 (Ky. 1964).
32. Id. at 200 (emphasis original). But, note, the court continued by indicating that
The Brown holding that Section 1-208 applies to a "default" acceleration clause as well as an "insecurity" acceleration clause has not been addressed in Kentucky. Most other jurisdictions that have considered the issue, however, have rejected the Ninth Circuit's position. Similarly, the K.M.C. holding that the termination of funding for non-monetary default, even under a demand note, is subject to a good faith standard has not been considered in any reported Kentucky cases. At least one court, however, has found that the K.M.C. notice rule does not apply where the debtor has an impaired ability to pay or perform. The court in In re Red Cedar Construction Co. concluded that the K.M.C. decision "simply provides that one relying on even a conditional loan commitment, who by objective measure otherwise qualifies for the loan, should be given a meaningful opportunity to secure alternate financing if the commitment is going to be refused.

Other courts have rejected the K.M.C. rationale entirely, and have enforced a lender's right to demand a loan when exercised for a valid business purpose without regard to the good faith provisions of the Uniform Commercial Code. In Centerre Bank v.
Distributors, Inc., for example, a bank sued to collect the unpaid balance on a demand note from the guarantors of the note (the Browns), and they counterclaimed based, *inter alia*, on fraudulent misrepresentation and nondisclosure. The loan at issue was used to finance a kitchen appliance distribution business owned by Bronfman, who sold his interest in the company to the Browns. The Browns' purchase of the company contemplated a continuation of the loan. Despite a recommendation from the loan officer on the account that the credit line remain in place, the bank's loan committee refused the continuation and decided to call the note. This action was taken because of recent losses suffered by the company, the depressed state of the building industry at the time, problems with an inventory list submitted by the company, a high percentage of past due receivables, and criticism of the loan by the bank's examiners.

In the bank's action to collect on the guarantees, the Browns raised the bank's lack of good faith as a defense. The Browns relied on evidence showing that: (1) various loan officers thought the loan was a bankable one; (2) the bank failed to disclose its concern about the loan, which was considered to be its largest risk exposure; (3) a loan officer led the Browns to believe that the bank approved of their buying the company's stock while the president of the bank was preparing to call the loan; and (4) the loan was called only three days after the Browns delivered their personal guarantees and at a time when the company's financial situation was improving. The jury awarded $7,528,800 in actual and punitive damages against the bank on the claim. The trial court upheld the verdict after remitting one-half of the $6,000,000 punitive damage award. The Missouri appellate court reversed, finding no legal basis for the good faith defense.

A demand note, the court held in *Centerre Bank*, "constitutes an agreement between the borrower and the lender that the note may be called for payment at any time." Demand instruments are recognized by U.C.C. § 3-108, and under U.C.C. § 3-122(1)(b) a cause of action accrues against the maker of a demand instrument on its date or, if no date is specified, on its date of issue. The good faith requirement of U.C.C. § 1-203 concerns the per-

36. 705 S.W.2d 42 (Mo. App. 1986).
37. *Id.* at 47.
formance or enforcement of a contract, the court continued, and is not applicable to demand instruments.

The imposition of a good faith defense to the call for payment of a demand note transcends the performance or enforcement of a contract and in fact adds a term to the agreement which the parties had not included. The additional term would be that the note is not payable at any time demand is made but only payable if such demand is made in good faith. The parties by the demand note did not agree that payment would be made only when demand was made in good faith but agreed that payment would be made whenever demand was made. Thus § 400.1-203 has no application because it does not relate to the performance or enforcement of any right under the demand note but in fact would add an additional term which the parties did not agree to. 38

The court found that when the Browns executed their personal guarantee of the company's note, they knew or should have known that it could be called by the bank at any time. Having guaranteed a note which could be called at any time, the Browns had no legal grounds upon which to assert a good faith defense against the bank's efforts to collect on its guarantee.

Centerre Bank, rather than K.M.C., appears to provide the more appropriate framework for analyzing a lender's responsibility in a demand note situation. Although the Sixth Circuit in K.M.C. acknowledged that the borrower had signed a demand obligation, the court neither cited nor discussed the official comment to Section 1-208 which explicitly states that the provision is inapplicable to demand instruments, which by their very nature permit a call at any time with or without a reason. The Sixth Circuit also applied the good faith principle of Section 1-208 in K.M.C. to a case involving a refusal to advance and not premature acceleration. Finally, the Sixth Circuit ignored its own prior

38. Id. at 48. The other defenses asserted by the Browns were likewise rejected. The claim that they were fraudulently induced to sign the guarantees on the representation that the bank would continue to extend credit to the company was insufficient because they were aware of the limitations on the loan officer's authority. Id. at 50. Their claim that there was an oral agreement with the bank to continue the loan if they delivered their personal guarantees was found to violate the parol evidence rule. Id. at 52. The argument that the bank was liable for failing to disclose its internal negative classification of the loan was unavailing because there was no confidential or fiduciary relationship involved, nor was there any duty on the bank's part to disclose this information. Id. at 53. Finally, the company's claim against the bank for prima facie tort was rejected because the bank had a valid business reason for calling the note due. Id. at 54.
precedent outside the debtor-creditor context holding that an express contractual right to terminate a contract overrides the implied good faith requirement.39

3. Section 9-312(5)

Prior to the Uniform Commercial Code, the law for determining priorities between secured parties provided that when a later encumbrancer knew of an earlier unperfected security interest at the time he gave value and took a security interest, he could not take prior to the earlier interest by filing first. Section 9-312(5) now sets out the rules of priority but is silent on the effect of the parties' knowledge.40 Should Section 1-203 be read into Section 9-312(5), so that a second secured party is not acting in

39. In Cardinal Stone Co. Inc. v. Rival Mfg. Co., 669 F.2d 395 (6th Cir. 1982), for instance, a ceramics firm which supplied the internal cooking shell for slow cookers sued a manufacturer which had cancelled the parties' sales contract. The purchase order by which the sales were made contained a termination clause which read: "Buyer reserves the right to change or amend the specifications and to terminate this purchase order in whole or in part at any time ...." id. at 396. The supplier argued that this "seemingly unfettered right to terminate must be tempered by the good faith requirement of Section 1-203 of the U.C.C ...." id. The Sixth Circuit gave short shrift to this position, stating:

The parties here were experienced businessmen who executed a large number of valuable contracts. From the outset Cardinal was on notice that Rival had the unilateral right to terminate at any time. It accepted this risk when it signed the agreement. Although that risk has not resulted in economic hardship, Cardinal may not here represent itself as an untutored victim of sharp business practice. From the evidence, it appears that Cardinal was cognizant of the fact that the consumer demand for Rival's product was volatile and that the eight orders in issue were interrelated and reflected that volatility. Yet even absent this knowledge, Cardinal cannot be heard to complain of Rival's exercise of a right which Cardinal expressly relinquished. The terms of paragraph 18 are unambiguous and must be given their plain and ordinary effect.

id. at 396.

40. KRS 355.9-312(5) provides as follows:

(5) In all cases not governed by other rules stated in this section (including cases of purchase money security interests which do not qualify for the special priorities set forth in subsections (3) and (4) of this section), priority between conflicting security interests in the same collateral shall be determined according to the following rules:

(a) Conflicting security interests rank according to priority in time of filing or perfection. Priority dates from the time a filing is first made covering the collateral or the time the security interest is first perfected, whichever is earlier, provided that there is no period thereafter when there is neither filing nor perfection;

(b) So long as conflicting security interests are unperfected, the first to attach has priority.

good faith when he takes a security interest knowing that there is a prior unperfected security interest in the same collateral? In **Thompson v. United States**, the Eighth Circuit answered this question in the affirmative, holding that a finding of bad faith on the part of a secured creditor can alter the priorities under Section 9-312.

The Nebraska Supreme Court expressed a contrary view in **Todsen v. Runge**, when it declined to “saddle a good faith requirement on § 9-312(5).” To read a knowledge requirement into Section 9-312(5) by way of Section 1-203 “would bring on unwarranted lawsuits by disappointed secured parties and would do nothing to promote certainty in commercial transactions.” The court concluded:

> We believe the statute is clear. Section 9-312(5) was adopted to promote certainty in commercial transactions by placing reliance on the filing records. This statute requires a secured party to take the diligence to perfect his security interest. If he fails to perfect, then he runs the risk of having his interest subordinated.

Although the Kentucky state courts have not addressed this issue, in **Hutchinson v. C.I.T. Corp.**, a federal district court, apparently applying Kentucky law, rejected a **Thompson**-type argument in favor of the approach adopted in Todsen. This appears to be the majority view and is a prime example of how the “good faith” concept can be limited under the Code.

**B. Good Faith Under the Common Law of Contracts**

By the 1960s, a considerable number of cases imposed a duty of contractual good faith in a variety of contexts. In fact, by this time, it could safely be said by one commentator that “I don’t think you can find a case in the whole history of the common law in which a court says that good faith is not required in the performance of a contract or enforcement of a contract.” This

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41. 408 F.2d 1079 (8th Cir. 1969).
42. 211 Neb. 226, 318 N.W.2d 88 (1982).
43. Id. at ____, 318 N.W.2d at 93.
44. Id.
45. Id.
47. 47 ALI Proceedings 489-91 (1970) (comments of Professor Braucher).
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common law doctrine of good faith was formalized in Section 205 of the Restatement (Second) of Contracts adopted by the American Law Institute in 1979 and published in final form in 1981:

§ 205. Duty of Good Faith and Fair Dealing. Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.

This section, Professor Summers has stated, "reflects one of the truly major advances in American contract law during the past fifty years."48 The Restatement, in contrast to the Uniform Commercial Code, adopts an expansive approach to the good faith duty, which Professor Summers has conceptually described as an "excluder," whereby good faith is defined by identifying various forms of bad faith. "Good faith, then, takes on specific and variant meanings by way of contrast with the specific and variant forms of bad faith which judges decide to prohibit."49 The Restatement, consequently, contains no general definition of good faith. Instead, the phrase "good faith," as used in the Restatement, "is used in a variety of contexts, and its meaning varies somewhat with the context .... [I]t excludes a variety of types of conduct characterized as involving "bad faith" because they violate community standards of decency, fairness or reasonableness."50 This conduct includes "evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of power to specify terms, and interference with or failure to cooperate in the other party's performance."51

Although Section 205 has not been cited in any reported Kentucky decision, it is consistent with the contract principles which have evolved under the Commonwealth's case law. The

51. Id., comment d. The absence of specific detailed rules in the Restatement (Second) addressed to the duty of good faith does not mean that courts are without standards in deciding good faith issues. Both Professor Summers and Professor Burton, although in substantial disagreement with each other, have proposed operational standards by which good faith can be distinguished from bad faith within a particular context. See Summers, supra, note 48 at 823-24; Burton, Breach of Contract and the Common Law Duty to Perform in Good Faith, 94 HARV. L. REV. 369 (1980). The "excluder" approach taken by the Restatement (Second) in Section 205, however, provides a court substantial leeway in deciding what behavior is improper in the performance and enforcement of contracts.
Kentucky courts have long implied an agreement in every contract that the parties will perform those things that, according to "reason and justice," they should do to carry out the purpose of the contract. Parties to contracts are also under an implied obligation not to do anything to prevent or hinder performance or enjoyment of a contract.

Because of its expansive approach to the good faith duty, the Restatement (Second) seems to provide fertile ground for borrowers who would challenge their lender's activities. Courts have not, however, relied on Section 205 when analyzing a lender's good faith obligation, but instead have considered the issue within the context of the more specific provisions of the Uniform Commercial Code. Thus, there are no decisions under the Restatement in the loan context, comparable to the Farah, Brown, or K.M.C. decisions under the Uniform Commercial Code, upon which a borrower could rely to impose liability on a lender for breach of its implied covenant of good faith and fair dealing.

C. Good Faith Under the Common Law of Torts

The most controversial development in the area of good faith is the willingness of some jurisdictions to find that the breach of the implied covenant of good faith constitutes a tort. The imposition of tort liability in contract suits enables courts to award all damages for injuries proximately caused by breach of the contract, as well as punitive damages. This potential liability represents a substantial departure from traditional contract principles of limited liability and neutrality toward willful breach.

Tort liability for breach of the implied covenant of good faith developed principally in insurance cases, where the insurer had a contractual duty to defend the insured against third party claims. This tort was expanded to first party insurance cases primarily by the California courts, which found a breach of good faith when an insured failed to make payments due under a policy. This development was premised on several factors unique

52. See, e.g., Warfield Natural Gas Co. v. Allen, 248 Ky. 646, 650, 59 S.W.2d 534, 536 (1933).
53. See, e.g., Odem Realty Co. v. Dyer, 242 Ky. 58, 45 S.W.2d 838, 840 (1932).
to insurance contracts: the desire of an insured to obtain "protection against calamity" rather than "commercial advantage" when entering into the contract, the "inherently unbalanced" bargaining power between insurer and insured, and the "quasi-public" nature of the service supplied by insurers who "hold themselves out as fiduciaries." 56

Initial attempts to extend the tort action for breach of the implied covenant of good faith and fair dealing to the banking business were rejected by the California courts. 57 These cases involved commercial loan contracts, and the courts found the relationship established by those agreements to be materially different from that created by an insurance contract. In Seaman's Direct Buying Service, Inc. v. Standard Oil Co., 58 however, the Supreme Court of California opened the door to tort liability in the loan context while ostensibly reserving the issue of whether tortious breach of the implied covenant of good faith and fair dealing should be extended to commercial contracts. In acknowledging that tort liability can arise in the insurance context because of the special relationship between the parties, the California court indicated that other relationships with similar characteristics—such as employment cases—should deserve similar treatment. Beyond these areas of special relationship, the court expressed concern that it would be proceeding into "largely uncharted and potentially dangerous waters," because in commercial contracts "it may be difficult to distinguish between breach of the covenant [of good faith] and breach of contract, and there is the risk that interjecting tort remedies will intrude upon the expectations of the parties." 59 The court found it unnecessary to decide this question, but nevertheless held that "a party to a contract may incur tort liability when, in addition to breaching a contract, it seeks to avoid liability by denying in bad faith and without probable cause that the contract exists." 60

59. Id. at 769, 686 P.2d at 1167, 206 Cal. Rptr. at 363.
60. Id. In a partial dissent, Chief Justice Bird expressed the view that a breaching party is liable in tort for breach of the implied covenant of good faith and fair dealing if it (a) acts in bad faith to shield itself entirely from liability for contract damages, id. at
Shortly after the Seaman’s decision, in Commercial Cotton Co. v. United California Bank, the tort action for breach of the implied covenant of good faith and fair dealing was extended to the bank-depositor context. In that case, the defendant-bank had negligently debited a customer’s bank account in payment of a check containing unauthorized signatures. The court affirmed the jury’s award of punitive damages by invoking both prongs of the Seaman’s case. The relationship between a bank and its depositor, the court said, constitutes a “special relationship” characterized by elements of public interest, adhesion, and fiduciary duties. As such, the court concluded, the relationship of a bank to its depositor, like that of an insurer to its insured, is “at least quasi-fiduciary.” In the case before it, moreover, the court stated that the bank (through its counsel) had raised spurious defenses “in an unjustifiable, stonewalling effort to prevent an innocent depositor from recovering money entrusted to and lost through the bank’s own negligence....”

The supreme courts of Oregon and Montana have joined the California court in recognizing the tort action for breach of the implied covenant of good faith and fair dealing in the bank-depositor context. The Montana court has gone further than its California and Oregon counterparts by extending the tort into the loan context as well. In First National Bank v. Twombly, the plaintiffs had re-negotiated the terms of a loan agreement with a bank employee who failed to notify his supervisor of the change in terms. Without investigating or informing the plaintiffs, the bank accelerated the maturity of the note and offset the amount owed against the funds remaining in the plaintiffs’ checking account, causing their checks to bounce. In a brief discussion of the jury’s award of punitive damages against the bank, the court noted that Montana law allows the recovery of punitive

778, 686 P.2d at 1173, 206 Cal. Rptr. at 369, or (b) breaches a contract without regard to good or bad faith, in a situation where the possibility that the contract may be breached is not accepted or reasonably expected by the parties. id. at 780, 686 P.2d at 1174, 206 Cal. Rptr. at 370. (Bird, C.J., dissenting in relevant part).
62. Id. at 516, 209 Cal. Rptr. at 554.
63. Id.
64. Id.
67. 689 P.2d 1226 (Mont. 1984).
damages when malice, oppression, or fraud is shown, and stated: "When the duty to exercise good faith is imposed by law rather than the contract itself ... the breach of that duty is tortious."

Most courts, however, have refused to expand the bad faith tort beyond the insurance context. In one notable case, *English v. Fischer*, the Supreme Court of Texas considered the bad faith tort in a homeowner's suit against a mortgagee for failure to turn over the proceeds of a fire insurance policy in order to aid the homeowners in rebuilding after a fire. Rebuking the lower court for its imposition of tort liability based on breach of the covenant of good faith and fair dealing, the court stated:

This concept is contrary to our well-reasoned and long-established adversary system which has served us ably in Texas for almost 150 years. Our system permits parties who have a dispute over a contract to present their case to an impartial tribunal for a determination of the agreement as made by the parties and embodied in the contract itself. To adopt the laudatory sounding theory of "good faith and fair dealing" would place a party under the onerous threat of treble damages should he seek to compel his adversary to perform according to contract terms as agreed upon by the parties. The novel concept advocated by the courts below would abolish our system of government according to settled rules of law and let each case be decided upon what might seem "fair and in good faith," by each fact finder. This we are unwilling to do.

Kentucky has taken an even more restrictive approach to the bad faith tort. A long line of cases, beginning at least with *Cumberland Telephone and Telegraph Co. v. Cartwright Creek Telephone Co.*, has established the principle that consequential or punitive damages may not be recovered for breach of contract. *Ford Motor Co. v. Mayes* carved out a limited exception to this

69. Twombly, 689 P.2d at 1230 (citation omitted). Although the court did note that the Uniform Commercial Code governed the transaction, and cited the good faith provisions of UCC § 1-203, it failed to recognize that the good faith standard of "honesty in fact" from UCC § 1-201 (19) exculpated the bank from liability for the negligence that occurred.
70. 660 S.W.2d 521 (Tex. 1983).
71. Id. at 552. Four justices, in separate concurring and dissenting opinions, pointed out that the Texas courts have read a duty of good faith and fair dealing into various contractually based relationships, although none apparently had imposed tort liability in banking transactions.
72. 128 Ky. 395, 108 S.W. 875 (1908).
73. 575 S.W.2d 480, 486 (Ky. 1978).
rule for cases in which a plaintiff can establish that the defendant's conduct rises to the level of a separate tort. Then, in *Feathers v. State Farm Fire & Casualty Co.*, a Supreme Court of Kentucky overruled *Feathers* and held that a homeowner's fire insurer is not a fiduciary as to sums owed under an insurance policy, and that breach of the insurance contract by the insurer does not constitute tortious conduct warranting punitive damages. "The only fiduciary relationship we recognize attaching to insurance policies," said the court, "is the excess-of-the-policy-limits cases where good faith is required on the part of the insurance company."

To summarize, some states have accepted the bad faith tort, but only in the insurance context. A few states, like California, Montana, and Oregon, have extended this tort liability to other commercial contracts, including those between banks and their customers. Kentucky, on the other hand, has refused to recognize tort liability for breach of the implied covenant of good faith even by an insurer. Under these circumstances, it is extremely unlikely that the Kentucky courts will, in the foreseeable future, impose tort liability on banks for breach of their contractual good faith obligations.

Although most other courts have accepted tort liability for certain aspects of the insurer-insured relationship, they have for the most part agreed that the bad faith tort should be confined primarily to the insurance context, if it is to be recognized at all. These courts have properly concluded that commercial contracts, particularly in the banking area, usually involve parties of equal bargaining power, and that the imposition of tort liability on a breaching party intrudes upon the reasonable expectations of the parties at the time they negotiated the loan transaction.

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75. 711 S.W.2d 844 (Ky. 1986).
76. *Id.* at 845 (citations omitted).
D. Waiver or Estoppel

Many good faith cases are decided on common law principles of waiver or estoppel. If a secured party has a record of accepting late installment payments, for instance, its pattern of forebearance may be considered a waiver of the creditor's right to enforce the contract according to its strict terms, at least without prior notice to the debtor that the failure to timely pay the next installment will be considered a default. 78

Commercial loan agreements frequently contain "anti-waiver" clauses, which generally provide that the failure of a lender to exercise any rights and remedies under a loan agreement upon a default will not modify the loan agreement or waive future compliance by the borrower. 79 Such clauses are not universally enforced. In Cobb v. Midwest Recovery Bureau Co., 80 for example, acceptance of late payments was deemed to impose on the secured party a duty to notify the debtor when strict compliance would be required. Similarly, in Westinghouse Credit Corp. v. Shelton, 81 the court refused to enforce a nonwaiver clause as a matter of law. The court held that a nonwaiver clause, like any other contract term, can be waived and that the jury must decide whether such waiver has occurred and whether sufficient notice of future strict compliance requirements has been given.

The Kentucky court, on the other hand, respected a nonwaiver clause in Universal C.I.T. Credit Corp. v. Middlesboro Motor Sales, Inc. 82 The car dealer in that case had argued that the finance company waived the requirement that payment be made for each

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79. A typical "anti-waiver" clause reads as follows:

Departure from Terms. Any indulgence or departure at any time by the Bank from any of the provisions hereof, or of any obligation hereby secured, or the failure by the Bank to exercise any rights and remedies shall not modify the same or relate to the future or waive future compliance therewith by the Borrower. The failure of the Bank to exercise any of its options provided herein in the event of any violation of the representations, warranties, covenants and agreements set forth herein shall not constitute a waiver of its rights to exercise such option because of any subsequent violation thereof.

80. 295 N.W.2d 232 (Minn. 1980). The creditor improperly repossessed its collateral because it did not give this notice but the court did not award punitive damages because the creditor, in good faith, did not understand the estoppel notion.
81. 645 F.2d 869 (10th Cir. 1981).
82. 424 S.W.2d 409 (Ky. 1968).
car at the time it was sold because of its on-site inspections. After noting that Article 9 of the Uniform Commercial Code contains no provision which allows a secured transaction contract to be varied by performance, unlike Section 2-208 which allows a sales contract to be varied by performance, the court said:

In any event, the contract in question contains a provision covering this situation. It provided that "waiver of any default is not waiver of any subsequent default." This court has previously upheld this provision in a conditional sales contract which is also a secured transaction, and there seems to be no reason not to follow it here.83

Thus, given the Kentucky courts' position, a nonwaiver clause in a loan agreement can effectively protect a Kentucky lender from many of the lack of good faith claims that have proved successful in other states.

III. ECONOMIC DURESS

Economic duress occurs when one party puts another in a position of financial weakness and then exploits the weakened party's position by forcing that party to relinquish its legal rights.84 Most states recognize economic duress as a theory which can be used to avoid a contract. This principle was applied in Kentucky more than a century ago in Buford v. Louisville & Nashville R.R. Co.85 The court explained the doctrine as follows:

Whenever one person is in the power of another, so that a free exercise of his judgment and will would be impossible, or even difficult; and whenever a person is in pecuniary necessity and distress, so that he would be likely to make any undue sacrifice; and advantage is taken of such condition to obtain from him a conveyance or contract which is unfair, made upon an inadequate consideration and the like, even though there be no actual duress or threats, equity may relieve defensively or affirmatively.

This rule is the more appropriate when the pecuniary necessity is the natural result of the willfully wrongful act of the person relying upon and seeking an enforcement of the contract.86

In line with the Kentucky court's reasoning in Buford, modern courts have identified three elements common to all situations where a claim of economic duress has been upheld:

83. Id. at 411 (citation omitted).
85. 82 Ky. 286 (1884).
86. Id. at 290 (citation omitted).
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(1) that one side involuntarily accepted the terms set by another; (2) that circumstances permitted no alternative; and (3) that such circumstances were the result of coercive acts of the other party. 87

A claim of duress was sufficient for the Kentucky court to rescind a note and mortgage in Bond State Bank v. Vaughn. 88 The defendant-bank in that case was insolvent and had been placed in the hands of a special deputy banking commissioner for the liquidation of its affairs. The deputy banking commissioner, in the presence of an officer and stockholder of the bank, had informed a depositor that he was overdrawn on his account and demanded that he take care of it by executing a note secured by a mortgage on his home. In the course of this conversation, the commissioner said that the depositor's failure to pay the overdraft or execute the note would result in criminal charges against him before the grand jury. The depositor signed the note and mortgage, and then filed suit to annul them on the grounds that they were procured by duress. The court agreed, finding that the commissioner's statement that the depositor had committed a crime by overdrawing his account was false, that the depositor was justified in believing the commissioner had the position and authority to dictate and control a prosecution concerning the affairs of the bank, and that the depositor had no means or way of escaping the exercise of the commissioner's authority other than by the execution and delivery of the note and mortgage. 89

Some courts have gone beyond the approach of the Kentucky courts and have recognized economic duress as an affirmative tort for which damages are recoverable. In State National Bank v. Farah Manufacturing Co., Inc. 90 affirmative liability for economic duress was imposed against the lenders whose threats to declare a default pursuant to a management change clause, in order to bankrupt the debtor, and to "padlock his doors" were made in bad faith. Similar liability was imposed in Pecos Con-

88. 241 Ky. 524, 44 S.W.2d 527 (Ky. 1931).
89. Id. at 528-529, 44 S.W.2d at 529.
struction Co. v. Mortgage Investment Co.\(^9\) on a lender who refused to either provide financing to a mortgagor or to transfer its financing commitment to another lender unless the mortgagor first paid a $12,000 debt which the lender had previously incurred.

The Kentucky courts have never directly considered the viability of economic duress as grounds for tort liability. However, their restrictive approach to tort claims based on the breach of the implied covenant of good faith and their insistence that punitive damages not be recovered for other breach of contract claims indicate that they would decline to follow those courts that have imposed tort liability for economic duress. In any event, a finding of duress should not result from a creditor’s assertion of rights granted under pertinent loan documents. Clearly, it is not duress under Kentucky law to threaten to do what one has a legal right to do.\(^{92}\)

### III. Breach of Fiduciary Duty

The courts are split on the issue of whether, and under what circumstances, a fiduciary or confidential relationship may be implied between a bank and its loan customers. (A breach of fiduciary duty, of course, would provide a basis for the recovery of punitive damages, making such claims a favorite among disgruntled borrowers.) There is no question that the relationship between a bank and a borrower is primarily that of debtor-creditor, and thus should not itself impose fiduciary responsibilities. Some courts state flatly that no such relation ever exists between a bank and a borrower.\(^{93}\) Other courts, most notably in Maryland

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\(^{93}\) See, e.g., Centerre Bank v. Distributors, Inc., 705 S.W.2d 42, 53 (Mo. App. 1986). As the Second Circuit has noted, while the development of a fiduciary duty between a bank and its borrower is not "beyond the realm of possibility," such a finding would "face serious obstacles, such as arguments that lending relationships between banks and large corporations are the product of arm's-length bargaining and that it would be anomalous to require a lender to act as a fiduciary for interest on the opposite side of the negotiating table." Weinberger v. Kendrick, 698 F.2d 61, 79 (2d Cir. 1982), cert. denied, 464 U.S. 818 (1983).
and California, have characterized the bank-borrower relationship as at least "quasi-fiduciary" in every instance. Still other courts hold that a fiduciary or confidential relationship may arise only when a customer "reposes trust in a bank and relies on the bank for financial advice, or in other special circumstances." In those jurisdictions which subscribe to the third view, the existence of a fiduciary or confidential relation is generally a question of fact, with the extent of the factual showing required varying according to jurisdiction.

This third view appears to be the majority view, and has been adopted in Kentucky. In *Henkin, Inc. v. Berea Bank & Trust Co.*, the maker of a promissory note alleged that it had a contract with the payee to pay the note off at a discount. The maker applied for a loan from the bank in order to pay off the loan and avail itself of the discount. In making the application, the maker revealed the potential discount to a bank officer. After the loan application was denied, the bank, through an agent, purchased the note itself, thus availing itself of the discount. The maker claimed that the bank's conduct had perpetrated a fraud and was a breach of the confidential or fiduciary relationship between it and the bank which arose at the time it had applied for a loan.

In holding that the maker's counterclaim in an action to enforce the note stated a claim for relief, the court reached two conclusions. First, it held that a bank can stand in a fiduciary capacity with respect to confidential relations with its customers, the breach of which may render it liable for damages. Second, it held that if a bank interferes with a prospective advantage of its customer by purchasing a note of the customer at a discount, after denying a loan application of the customer to enable it to

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97. 566 S.W.2d 420 (Ky. App. 1978).
98. In reaching this conclusion, the Kentucky court implied that the receipt by a bank of confidential information in itself gave rise to a fiduciary-type relationship. Other courts have rejected this approach. See, e.g., Washington Steel Corp. v. TW Corp., 602 F.2d 594, 600-601 (3d Cir. 1979); M.L. Stewart & Co. v. Marcus, 124 Misc. 86, 207 N.Y.S. 685, 691-92 (N.Y. Sup. Ct. 1924).
purchase the same note, the bank may be found to be guilty of a breach of its fiduciary duty.

A bank's breach of a fiduciary duty to its customer, however, may not serve as an affirmative defense to an action to enforce a promissory note owed by the customer to the bank. Instead, such a breach only affords the maker of the note a basis for asserting a counterclaim for damages in such an action. This means that, in an appropriate case, a lender could obtain and execute on a judgment enforcing a note while the customer's counterclaim proceeded to trial.

Even in those cases where there is no fiduciary relationship between a bank and its customer, the bank may still face potential liability for participating in a breach of fiduciary duty by another. In Whitney v. Citibank, N.A., a lender bank incurred liability in the amount of $236,677.25 in compensatory damages and $1.5 million in punitive damages for inducement of and knowing participation in a breach of fiduciary duty where the lender bank knowingly participated in two partners' breach of their fiduciary duty to a third partner by consenting, on behalf of the partnership, to the transfer of a deed in lieu of foreclosure in violation of the third partner's rights. The court held that once the bank was put on notice of questions regarding the two partners' authority to bind the partnership without the third partner's consent, the bank owed a duty to reveal these facts to the third partner and to determine whether the two partners were authorized to act on the partnership's behalf, and, if so, to determine whether the money paid to them would go to the partnership rather than to them individually.

The Kentucky courts have never considered the parameters of a bank's liability when it is only a secondary rather than a primary participant in some allegedly wrongful activity. It is generally agreed, however, that secondary liability requires a showing that the accused party "substantially assisted" a violation. It is also generally agreed that, as a matter of law, secondary liability cannot be imposed on a bank merely because, in the course of normal banking functions, it lent money to or

99. Bale v. Mammoth Cave Production Credit Ass'n, 52 S.W.2d 851 (Ky. 1933).
100. 782 F.2d 1106 (2d Cir. 1986).
performed other routine financial services for one accused of breaching a confidential or fiduciary relation.\textsuperscript{102} Such activities are deemed to be legally insufficient to constitute "substantial assistance" to a breach of another's duty.\textsuperscript{103}

V. \textbf{INTERFERENCE}

Kentucky recognizes the tort of interference with contract as set forth in the \textit{Restatement of Torts} § 766, which provides:

\begin{quote}
[O]ne who, without a privilege to do so, induces or otherwise causes the third person not to (a) perform a contract with another, or (b) enter into or continue a business relationship with another is liable to the other for the harm caused thereby.\textsuperscript{104}
\end{quote}

In order to prevail on a claim of tortious interference with a contract, the plaintiff must prove each of the following elements:

1. an existing contract between the plaintiff and a third party;
2. the defendant's knowledge of this contract;
3. an intentional, unjustified inducement to breach the contract;
4. a subsequent breach by the third party; and
5. resulting damage to the plaintiff.\textsuperscript{105}

Tortious interference was the basis for the plaintiff's claim in\textit{ Henkin, Inc. v. Berea Bank & Trust Co.},\textsuperscript{106} in which the court held that a bank may not interfere with the prospective advantage of its customer by appropriating for itself a business opportunity disclosed during a loan application. In the context of a lending relationship, however, a bank is privileged to interfere with a customer's contractual relation if it acts to protect its own interest from being prejudiced by the relation and if it does

\textsuperscript{102} See, e.g., Seattle-First Nat'l Bank v. Carlstedt, 800 F.2d 1008, 1011 n.2 (10th Cir. 1986); Woodward v. Metro Bank, 522 F.2d 84, 96 (5th Cir. 1975); see also Rolf v. Blyth, Eastman Dillon & Co., 570 F.2d 38, 44 (2d Cir. 1978), cert. denied, 439 U.S. 1039 (1978) (noting that secondary liability requires a fiduciary duty and conduct close to fraud).

\textsuperscript{103} As one court said in dismissing a federal securities claim against a bank, "[i]f the evidence shows no more than transactions constituting the daily grist of the mill, we would be loathe to find 10b-5 liability without the clear proof of intent to violate the securities laws." Resource Investors Group v. Nat'l Resources Inv. Corp., 457 F. Supp. 194, 200 (E.D. Mich. 1978).


\textsuperscript{105} Walt Peabody Advertising, 393 F. Supp at 331.

\textsuperscript{106} 566 S.W.2d 420 (Ky. App. 1978).
not employ wrongful means. A defense of justification based upon economic interest is specifically addressed in Section 769 of the Restatement (Second) of Torts, which provides:

One who, having a financial interest in the business of a third person intentionally causes that person not to enter into a prospective contractual relation with another, does not interfere improperly with the other's relation if he (a) does not employ wrongful means and (b) acts to protect his interest from being prejudiced by the relation. 107

Thus, as a general proposition, a lender's assertion of its rights under a loan agreement should be privileged, even though the lender may interfere with the borrower's ability to create or perform other contracts.

In State National Bank v. Farah Manufacturing Co., 108 the traditional concept of tortious interference was expanded beyond the protection of specific contracts or prospective contracts to include the corporate governance process. In 1977, Farah Manufacturing Company (FMC), founded in 1919 as a family-owned apparel manufacturer, had experienced severe operating losses as a result of a recent strike and a national boycott. It had replaced its chief executive officer, William J. Farah (Farah), with another board member, and had executed a collateralized loan agreement with its three bank lenders prohibiting a change in management "which any two Banks shall consider, for any reason whatsoever, to be adverse to the interests of the Banks." 109

Shortly after the loan agreement was signed, however, Farah proposed to FMC's board that he be reinstated as chief executive officer. When the banks learned of this action, they delivered a letter to FMC's board which warned that Farah's reinstatement would be "unacceptable" and that the banks would not waive their rights under the management change clause. 110 Moreover, representatives of the banks met with various directors and threatened to "bankrupt the company and padlock it the next day" if Farah were elected. 111 At the time when the letter was sent and the threat was made, the banks "previously had either decided not to declare a default which would result in FMC's

109. Id. at 667.
110. Id. at 672.
111. Id. at 673.
LENDER LIABILITY

Because of the banks' actions, Farah backed down. Thereafter, FMC was headed by chief executives who were either affiliated with or proposed by the banks. However, FMC continued to flounder. Finally, when FMC's position was desperate, Farah launched a proxy contest which resulted in his re-election and, within a short time, returned FMC to profitability.

FMC sued the banks for fraud, duress, and interference with FMC's rights of corporate governance. In affirming the verdict and judgment below, the appellate court found that the evidence adduced at trial was sufficient to support the jury's verdict on each claim for relief. The court acknowledged that the actual election of Farah "could have constituted a default under the management change clause [in the loan agreement] thereby enabling the lenders to legitimately enforce their legal rights." The court emphasized, however, that it was not this legitimate option—i.e., declaring a default and exercising their rights under the loan agreement if and when Farah were reinstated—which the banks chose to exercise. Rather, they impermissibly interfered with the election and disrupted without lawful grounds democratic processes in the debtor company. The court essentially held that, while the banks had a right to declare a default in the event of Farah's reinstatement, they had no such right effectively to determine, through the use of coercive threats, the outcome of the election of the chief executive officer of the company, particularly where the banks had not decided among themselves on what course of action they would take if Farah were re-elected. In short, the banks' threats to exercise control over FMC and its business activities constituted actionable interference.

The Farah decision regarding interference with the governance of a corporation was "unprecedented" and to date remains the

112. Id. at 686.
113. Id.
114. Id.
115. Id. at 688-90. The Farah court also ruled that, for the banks to state that they had arrived at a course of action when they had not was fraud, id. at 680-82, and that making the threat in bad faith to force the board to elect someone other than Farah (a right which the banks did not have under the loan agreement) constituted economic duress. id. at 683-87.
only case of its kind.\textsuperscript{117} The decision is so fact-oriented, moreover, that it seems an unlikely basis for the development of additional lender liability theories in Kentucky.

VI. FRAUD

A. Fraud in the Inducement of a Loan

Fraud is perhaps the most common theory pleaded in lender liability cases, particularly in an effort to rescind a loan transaction upon the allegation that a lender used false representations or half-truths to induce a borrower to execute a document. In \textit{Beck v. First National Bank},\textsuperscript{118} a Kentucky court held that the evidence was insufficient to show that a bank officer acted fraudulently in stating to the maker of a note that the stock for which the note was made was a good investment. To constitute actionable fraud in the procurement of a note, the court said, it must appear:

1. that the defendant ... made a material representation; 2. that it was false; 3. that, when he made it, he knew that it was false, or made recklessly, without any knowledge of its truth, and as a positive assertion; 4. that he made it with the intention that it should be acted upon by the plaintiff ... 5. that the plaintiff ... acted in reliance upon it; and 6. that he thereby suffered injury.\textsuperscript{119}

In some jurisdictions, a claim of fraud in the inducement, accompanied by evidence that the loan was induced by the lender's false representations or promises, has enabled a borrower to avoid the parol evidence rule and thereby preclude summary judgment in favor of the lender. In \textit{Holm v. Sun Bank/Broward},\textsuperscript{120} for example, the plaintiff claimed that her bank had

\textsuperscript{117} For example, in Flintridge Station Assocs. v. American Fletcher Mortgage Co., 761 F.2d 434 (7th Cir. 1985), the court rejected the borrower's claim that the defendant mortgage company had improperly interfered with the borrower's business and contractual relationships by conditioning an increase in the borrower's construction loan on the borrower's disassociating itself from an individual to whom the mortgage company attributed most of the construction company's problems. The court held that the mortgage company's action was justified since there was evidence supporting the mortgage company's concern and "[a] lender has a legitimate concern in the management of its borrowers and consequently in the security of its investments." id. at 442 (citations omitted).

\textsuperscript{118} 250 Ky. 764, 63 S.W.2d 937 (1933).

\textsuperscript{119} Id. at 767, 63 S.W.2d at 939.

\textsuperscript{120} 423 So. 2d 1007 (Fla. App. 1982).
fraudulently induced her to execute a mortgage by telling her that signing the document was a mere technicality which would not place the plaintiff's property at any risk of loss through foreclosure. An order dismissing her complaint was reversed on appeal.

A different result would likely obtain under Kentucky law. It is well-recognized by the Kentucky courts that one who executes a contract is conclusively presumed to have knowledge of its contents, to assert those terms, and to agree to be bound by the provisions of the agreement. A party who has had an opportunity to read the contract he has signed must stand by the words of his contract, unless he is misled as to the nature of the writing which he signs or his signature is obtained by fraud. To sustain a charge that a party's signature was obtained by fraud, it must appear that the misrepresentation was relied upon by the person whose action was intended to be influenced. Where, however, the face of the instrument clearly disclosed the terms of the agreement, and this could have been easily ascertained prior to signing, the element of reliance cannot be established. Indeed, the failure to read an instrument is such gross negligence that the signer is estopped, as a matter of law, from avoiding the contract.

**B. Fraud in the Administration of a Loan**

Fraud claims are not limited to the negotiation or execution of loans, but also arise during the administration of a loan, particularly in default situations. In *Farah*, the bank's threats to call a default under the loan agreement, made when the banks had not in fact decided to call the loan, were held to be intentional misrepresentations amounting to fraud. Similarly, in *Stirling v.*
Chemical Bank, the lender promised it would not call the borrower's loan and would lend additional funds if the borrower would agree to turn over more collateral and to have certain of its officers and directors resign. The right of the officers and directors to proceed against the bank after it had called the loan was upheld since they had personal claims based on their agreement to resign. In contrast, the counterclaimants in Centerre Bank, who alleged that the bank had fraudulently induced them to sign guarantees based on the misrepresentations of a loan officer that the bank would continue to extend credit, were held to have unjustifiably relied on the loan officer's representations.

The Kentucky appellate courts have not yet considered, in any published opinion, a fraud claim against a bank for statements made during the administration of a loan. Like their counterpart in Centerre Bank, however, the Kentucky courts can be expected to carefully scrutinize whether a borrower was justified in relying on representations made by a bank's officers or employees.

C. Fraud in the Conveyance of Information to Third Parties

A lender can also face liability to either its borrower or to third parties for negligently or fraudulently giving out incorrect information as to the creditworthiness of its customers. In Central States Stamping Co. v. Terminal Equipment Co., for example, the president of Central States had called the vice-president of Lake County National Bank to inquire about Terminal Equipment's financial capacity, the integrity of its principals, and whether they kept their commitments to the bank. In reliance on the bank's responses, Central States sent $50,000 to Terminal Equipment to construct a steel-splitting machine. Most of the funds were applied to the bank to pay off Terminal Equipment's outstanding loans, and the remainder was used by the company's president to pay his attorney and personal expenses. After Terminal Equipment went bankrupt, Central States sued the bank, claiming it had paid the $50,000 in reliance on its vice-president's representations about Terminal Equipment.

128. The court denied the right of the officers and directors to pursue any claims on behalf of their corporation.
129. 705 S.W.2d 42 (Mo. App. 1986).
130. 727 F.2d 1405 (6th Cir. 1984).
Central States prevailed and the bank appealed, claiming it was not liable for fraudulent misrepresentations since it had no duty to disclose. The court disagreed, noting that the Restatement of Torts provides that:

[A] party is under a duty to speak, and therefore liable for non-disclosure, if the party fails to exercise reasonable care to disclose a material fact which may justifiably induce another party [sic] to act or refrain from acting, and the non-disclosing party knows that the failure to disclose such information to the other party will render a prior statement or representation untrue or misleading.131

The court found a duty to disclose since Central States was reposing confidence in the bank and the bank knew of this confidence. Once the bank undertook to advise about Terminal Equipment's financial condition, it had a duty to disclose information which would reasonably be considered material to the decision it knew Central States was making.

Kentucky law generally is in accord with the Central States holding that a duty to speak may arise in any situation where confidence is reposed in another because of that person's position.132 A bank's liability for giving out incorrect information as to the creditworthiness of its customers, however, is limited under Kentucky law in at least one important respect. The Kentucky Statute of Frauds provides:

No action shall be brought to charge any person ... [f]or any representation or assurance concerning the character, conduct, credit, ability, trade or dealings of another, made with intent that such other may obtain thereby credit, money or goods ... unless the ... representation, [or] assurance ... or some memorandum or note thereof, be in writing and signed by the party to be charged therewith, or by his authorized agent.133

This statute is designed to free the courts of credibility contests over telephone conversations that took place years before, protect financial institutions from suits based on allegedly false and misleading representations, and discourage reliance by third parties who seek oral responses to credit inquiries. This writing requirement, however, applies only in cases of negligent, as

131. Id. at 1408 (quoting Miles v. McSewgin, 388 N.E.2d 1367 (Ohio 1979)).
opposed to fraudulent, responses to credit inquiries. The common law remedy for fraud is not abrogated by the statute of frauds merely because the fraudulent misrepresentations are by parol.\textsuperscript{134}

VII. STATUTORY LIABILITY

A lender can subject itself to liability for violating any number of federal or state statutes. A discussion of all possible statutory claims is beyond the scope of this Article, particularly federal statutory claims which can range beyond federal rules and regulations specifically directed to financial institutions and credit transactions to alleged violations of the securities laws, the Racketeer Influenced and Corrupt Organizations Act and the Comprehensive Environmental Response, Compensation, and Liability Act, or "Superfund." There are, however, two areas of state law which are frequently invoked by borrowers in suits against their lenders: prohibitions against usury and consumer protection or unfair trade practice statutes.

A. Usury

"Usury" is usually defined as the taking or exacting of interest at a rate in excess of that allowed by law for loaning or using money. What constitutes usury is exclusively a creature of statute, and KRS 360.010 is the general usury statute in Kentucky.\textsuperscript{135} In 1974, the legislature amended this provision and removed all limitations and restrictions as to the rate of interest on loans over $15,000. As amended, KRS 360.010 now states:

Any party or parties may agree, in writing, for the payment of interest ... (b) at any rate on money due and to become due upon any contract in writing ... in excess of $15,000.\textsuperscript{136}

In addition, Kentucky law has long provided that the defense of usury is not available to a corporation.\textsuperscript{137} Moreover, if a corporate principal is prohibited from raising usury as a defense, usury likewise may not be raised as a defense by an individual surety or guarantor.\textsuperscript{138} With the 1974 amendment to Section

\textsuperscript{134} Scott v. Farmers State Bank, 410 S.W.2d 717, 722 (Ky. 1966).
\textsuperscript{136} Id.
\textsuperscript{137} E'Town Shopping Center, Inc. v. Lexington Finance Co., 436 S.W.2d 267 (Ky. 1969).
\textsuperscript{138} Id.
360.010 and the absence of a usury defense for corporations or their guarantors, usury is no longer a significant problem for Kentucky lenders.

B. Consumer Protection or Deceptive Trade Practice Statutes

The consumer movement of the late 1960s and early 1970s prodded many states to enact consumer protection or deceptive trade practice statutes, some of which reward plaintiffs with double or treble damages and attorneys' fees upon proof that a merchant resorted to deceptive practices or misrepresented goods or services sold. The allure of such awards has encouraged plaintiffs to hold banks and other financial institutions liable under these statutes when loans or other credit transactions go awry. These statutes are also frequently invoked in consumer class action challenges to banking and credit practices. The courts have reached conflicting conclusions, however, when considering whether extensions of credit and other banking activities fall under the prohibitions of these statutes.\textsuperscript{139}

A number of state statutes limit coverage to transactions involving "goods or services," a term which has engendered the most controversy when applied to banking and credit activities. The Kentucky Consumer Protection Act, for example, makes unlawful "[u]nfair, false, misleading, or deceptive acts or practices in the conduct of any trade or commerce...."\textsuperscript{140} A private right of action for an alleged violation in turn is provided to:

[any person who purchases or leases goods or services primarily for personal, family or household purposes and thereby suffers an ascertainable loss of money or property, real or personal, as a result of the use or employment by another person of a method, act or practice declared unlawful by KRS 367.170....\textsuperscript{141}

By its express language, this statute requires that the action be maintained by one who "purchases or leases goods or services." This in turn requires the existence of some product or service capable of being purchased or leased. An Arizona court, considering an analogous statute, has held that loan transactions

\textsuperscript{139} See generally Cox, State Consumer Protection or Deceptive Trade Practices Statutes: Their Application to Extensions of Credit and Other Banking Activities, 105 Banking L.J. 214 (1988).
are within the coverage of the Arizona Consumer Fraud Act, which forbids deceptive acts "in connection with the sale or advertisement of any merchandise." In *Villegas v. Transamerica Financial Services, Inc.*, money was found to be "merchandise" and a loan transaction a "sale," with the court stating: "While a loan is ordinarily not thought of as a sale, in fact it is the sale of a present use of money on a promise to repay in the future. In form, it is no different than the sale of an object, such as a television set, or a future promise to pay."

Although no reported Kentucky decision has considered the applicability of the Kentucky Consumer Credit Protection Act to credit transactions, the Sixth Circuit held in *George v. United Kentucky Bank*, that the Kentucky Unfair Trade Practices Act is inapplicable to commercial lending institutions. Like the Consumer Protection Act, the Unfair Trade Practices Act applies only to transactions involving a "purchaser" of a product or service. This holding is in accord with other courts who have found that one obtaining money by virtue of a loan is simply a "borrower" of money, which is a medium or exchange, and not the purchaser or lessee of goods or services.

**VIII. Conclusion**

Kentucky, like other states, has a surprisingly substantial body of law concerning the contractual and tort liability of lenders to their borrowers. Unlike some other states, however, the Kentucky courts have generally been reluctant to impose liabilities or responsibilities on banks that are different than those imposed on other commercial enterprises. Despite frequent reference at

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144. Id. at __, 708 P.2d at 783.
146. **KY. REV. STAT. ANN. § 365.050** (Michie/Bobbs-Merrill 1987).
147. See, e.g., *Haeger v. Johnson*, 25 Or. App. 131, 548 P.2d 532, 534 (1976) ("[A] loan of money is not a sale"); *Murphy v. Charlestown Savings Bank*, 380 Mass. 738, __, 405 N.E.2d 954, 961 (1980) ("The plaintiffs argue in substance that a borrower of a loan of money with interest, whether the loan is secured or not, 'purchases' the use of money. We do not think that the legislature intended to include such a transaction as a 'purchase.' "). See also *United States v. Investors Diversified Sers., Inc.*, 102 F. Supp. 645, 649 (D. Minn. 1951) (holding that a loan secured by a real estate mortgage was not a lease, a sale or a contract for sale of a commodity within the meaning of Section 3 of the Clayton Act, 15 U.S.C. § 14).
continuing legal education seminars and in bar publications to "emerging theories" of lender liability, most suits by borrowers against their lenders are governed by established legal concepts generally applicable to commercial entities. The application of these concepts, both in contract and in tort, has served Kentucky well for years, and there is no reason to expect that those theories will be expanded in the future merely because the defendant is a lending institution.
"SECURE THE BLESSINGS OF LIBERTY": A FREE EXERCISE ANALYSIS INSPIRED BY SELECTIVE SERVICE NONREGISTRANTS*

Elizabeth Reilly**

I. INTRODUCTION

Mark Schmucker taught me about freedom. United States v. Schmucker II taught me about institutional power.

The security we derive from liberty depends upon its exercise. Freedom is like a social muscle. It atrophies with disuse. First amendment liberties have been described as "hazardous freedoms." Are the freedoms hazardous to entrenched and insecure governments, hazardous to the very idea of government, or hazardous to those few who take them seriously enough to rely upon them to act? Good government depends upon the hazard of open dissent. Well-developed theories behind freedom of expression support a thesis that free expression is good precisely because it challenges the government to reassess its policies and to adapt to dissent as a positive influence. If so, it is peculiarly inappropriate to penalize those whose strength of idea and character permits the effective utilization of this liberty.

Mark Schmucker was nineteen years old when his government forced him to choose between registering for military service or obeying his conscientious religious belief that peace is right and war-making, in any form, is wrong. As a person of principle, Mark carefully evaluated his conflicting duties and chose what he believed

* The author thanks attorneys William Whitaker, John Lawson, Dale Baich, and James Feldman, professors Richard Aynes and Wilson Huhn, and assistants Deborah Mahusky, Brenda Mosteller and Deborah Brown for their aid, research, and comments. But most of all—thank you, Mark.

** Associate Professor of Law, University of Akron School of Law; J.D. University of Akron; A.B. Princeton University.

3. See, e.g., id. at 507, 509, 512.

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to be the greater good and higher value. As a person of integrity, Mark wrote to the Selective Service to inform them of the choice he had made and the reasons for his choice.

That letter changed Mark from one of over half a million nonregistrants to one of the nineteen persons indicted for nonregistration. Mark respected both civil government and its law. However, the civil government did not respect Mark's conscientious choice to exercise a freedom basic to our law and society. Instead, the government chose to prosecute only Mark and those few principled young men who identified themselves and their opposition to this law. The million who defied the law—selfishly, unthinkingly or without the courage to reveal their choice—were exonerated.

In Schmucker II, institutional power influenced the Sixth Circuit in three ways. First, the court used little analysis to consider Schmucker's claim of a free exercise right not to register for military service. It simply followed the lead of other circuits and rejected the claim. Because the Supreme Court has never settled

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5. Wayte v. United States, 470 U.S. 598 (1985) (an estimated 674,000 nonregistrants). This number was variously estimated as possibly reaching one million violators.
6. Id. at 604, n.3. After Wayte, several others were indicted. The persons indicted under "passive" enforcement were Mark Schmucker, David Wayte, Gary Eklund, Enten Eller, Charles Epp, Russell Ford, Jon Harshbarger, Edward Hasbrouck, Paul Jacob, Gilliam Kerley, Michael McMillan, Andrew Mager, Russell Martin, Samuel Matthews, Daniel Rutt, Benjamin Sasway, and Stephen Schlossberg. The "active" enforcement system, initiated much later, resulted in two indictments by the end of 1987. Both were eventually dismissed.
7. Id. at 602-03; United States v. Schmucker I, 721 F.2d 1046, 1049 (6th Cir. 1983), rehearing denied, 729 F.2d 1104 (6th Cir. 1984), cert. granted and judg. vacated, 471 U.S. 1001 (1985), remanded, 766 F.2d 1582 (6th Cir. 1985), on reappeal, 815 F.2d 413 (6th Cir. 1987).
8. Schmucker II, 815 F.2d 413.
this question, the Sixth Circuit had a choice. It chose the easier path, deferring to military power, empty precedent, and Congress.\textsuperscript{10}

Second, in \textit{Wayte v. United States},\textsuperscript{11} the Supreme Court rejected a nonregistrant’s first amendment free speech claim and equal protection selective prosecution claim. Mark Schmucker provided the Sixth Circuit with two ways to distinguish \textit{Wayte}. First, he was a religious objector who was personally denied the government’s discretion not to prosecute.\textsuperscript{12} Second, he relied on free exercise rights with a deeper cut than those of free speech.\textsuperscript{13} He claimed a free exercise infringement in both the registration requirement and in the operation of the “beg policy”\textsuperscript{14} which forced prosecution after the government knew and could easily have accommodated his religious convictions. The Sixth Circuit refused to distinguish \textit{Wayte} and read it as legitimizing all facets of the prosecutorial policy.\textsuperscript{15} Whatever their differences, Schmucker and Wayte fell prey to a unitary government policy. \textit{Wayte} did not require rejecting Schmucker’s claims. But the Sixth Circuit decided that the Supreme Court’s rejection of David Wayte’s rights spelled doom for Mark Schmucker.

\textsuperscript{10} Schmucker II, 815 F.2d at 417-18.
\textsuperscript{11} 470 U.S. 598 (1985).
\textsuperscript{12} See infra text accompanying notes 47-48, 125-29, 227-229.
\textsuperscript{13} “The [First] Amendment protects belief and speech, but as a general proposition, the free speech provisions stop short of immunizing conduct from official regulation. The Free Exercise Clause, however, has a deeper cut: it protects conduct as well as religious belief and speech.” Welsh v. United States, 398 U.S. 333, 372 (1970) (White, J. dissenting).
\textsuperscript{15} The “beg policy” is described in Wayte. The government sent a letter to each self-reported nonregistrant demanding registration and offering the opportunity to register. Then the FBI questioned those who failed to register in response to this letter. The FBI offered immunity from prosecution in exchange for registration. Those who continued to refuse to register were contacted by the local United States Attorney, who again offered immunity from prosecution in exchange for registration. After indictment, the U.S. Attorney continued to offer dismissal or diversion to those who would compromise their conscience and submit to registration. Thus, the only persons prosecuted were those who did not succumb to the Government’s “begging.” Wayte, 470 U.S. at 602-03; see also United States v. Schmucker I, 721 F.2d 1046, 1049-50 (6th Cir. 1983), \textit{rehearing denied}, 729 F.2d 1040, 1042 (6th Cir. 1984), \textit{cert. granted and judgment vacated}, 471 U.S. 1001 (1985), \textit{remanded}, 766 F.2d 1582 (6th Cir. 1985), \textit{on remand}, 815 F.2d 413 (6th Cir. 1987).
\textsuperscript{16} Schmucker II, 815 F.2d at 419.
Third, the Supreme Court's free exercise cases require the government to grant benefits more often than they exempt persons from legal duties or protect them from prosecution. The compulsion is clearly more severe in the latter case. Persons threatened with prosecution need more protection than those seeking benefits. But, the nature of a criminal prosecution also exerts considerable institutional pressure to defer to the prosecution and overlook constitutional justifications.

I was, and must remain, an unabashed advocate of Mark Schmucker's right to exercise his freedoms. I also advocate our right to allow Mark to defend the reality of freedom for all of us. I will nonetheless attempt to present a balanced and scholarly analysis of the Schmucker cases and the reach of first amendment liberties. The first part of this Article will analyze the prosecution of Mark Schmucker. The second part will discuss and critique the Sixth Circuit's denial of Mark's claims to religious liberty in the context of the registration scheme and the prosecutorial policy. The third part will sketch a theory of first amendment religion clause protections, arguing that they differ in scope from free speech protections.

To the extent that I have forsaken Erasmus and the scholar's cloister for Luther and flaming causes, I hope to “raise the standard against oppression [and] leap into the breach to relieve in-

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18. E.g., Bowen v. Roy, 476 U.S. at 701-08 (Burger, C.J., Plurality opinion): “[G]overnment regulation that indirectly and incidentally calls for a choice between securing a governmental benefit and adherence to religious beliefs is wholly different from governmental action or legislation that criminalizes religiously inspired activity or inescapably compels conduct that some find objectionable for religious reasons.” id. at 706. The Chief Justice proposes a lower standard of review for benefits cases. See also Clark, Guidelines for the Free Exercise Clause, 83 HARV. L. REV. 327, 344-46 (1969).
19. Mark Schmucker retained William T. Whitaker and me to represent him just prior to his indictment in July, 1982. With the assistance of attorneys John Lawson and Dale Baich, we represented Mark throughout his trial, appeal, remand, and reappeal.
Blessings of Liberty. Together, in the spirit of liberty, may we secure its blessings. 

II. The Prosecution

A. Selection

In 1861 the great-grandson of the first Quaker was drafted. "But it will be no use," he said. "I shall never fight. My mother taught me it is a sin. It is her religion, and my father’s, and their fathers. I shall never raise my hand to kill anyone."

The recruiting officer took little notice. "We'll see about that later," he commented carelessly.

The regiment went to Washington, and the Quaker boy drilled placidly and shot straight. "But I shall never fight," he reiterated.

Word went out that there was a traitor in the ranks. The lieutenant conferred with the captain, and all the forms of punishment devised for refractory soldiers were visited on him. He went through them without flinching, and there was only one thing left. He was taken before the colonel. "What does this mean?" demanded the officer. "Don’t you know you will be shot?"

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20. You may take Martin Luther or Erasmus for your model, but you cannot play both roles at once; you may not carry a sword beneath a scholar’s gown, or lead flaming causes from a cloister. Luther cannot be domesticated in a university. You cannot raise the standard against oppression, or leap into the breach to relieve injustice, and still keep an open mind to every disconcerting fact, or an open ear to the cold voices of doubt. I am satisfied that a scholar who tries to combine these parts sells his birthright for a mess of pottage; that when the final count is made, it will be found that the impairment of his powers far outweighs any possible contributions to the causes he has espoused. If he is fit to serve in his calling at all, it is only because he has learned not to serve in any other, for his singleness of mind quickly evaporates in the fires of passion, however holy.


21. I find it significant that the word the Framers chose to describe liberty is “Blessings.” This word has religious or divine connotations and resonances. The Oxford English Dictionary includes six primary definitions of Blessing: “1. Hallowing; consecration, 2. a. Authoritative declaration of divine favour and countenance, by God or one speaking in his name ..., 3. The bestowal of divine favour and prospering influence; favour and prospering influence of God ..., 4. A beneficent gift of God, nature, etc. ..., b. A gift or favour bestowed, a present. 5. The rendering of grateful adoration, 6. A euphemism for: A curse.” Vol. I, 918 (1978).

22. E. Hertz, Lincoln Talks 535-36 (1986) (quoting R. Jones: Later Periods of Quakerism). This story continues in the text accompanying notes 62 and 404. I am grateful to Associate Dean Richard Aynes of the University of Akron School of Law for providing me with these stories.
Mark Schmucker's odyssey to indictment began in January 1980 when President Carter expressed an interest in reinstituting registration after the Soviet Union began military action in Afghanistan. Mark, a student at Goshen College, a Mennonite school in Indiana, reacted to that suggestion by joining a group of concerned students. Mark was raised in the Mennonite religion. He personally adopted the Mennonite beliefs, especially as they related to war, peace, and Christian love. The young men in Mark's group explored the religious underpinnings of opposition to military participation and the place of registration in the military system. After much thought, discussion and soul-searching, Mark realized that registration was a type of military participation and violated his deeply held religious conviction that peace is right and war is wrong.

On July 2, 1980, President Carter reinstituted registration. At the signing of the Proclamation, the President remarked:

I would like to ask the support of all Americans for this move: Americans in the age that will be registered and Americans of all ages ... who believe in maintaining peace through strength.

Presidential Proclamation 4771 required males born in 1960 to register for military service between the dates of July 21, 1980 and July 26, 1980, unless precluded by a condition beyond their control.

On August 10, 1980, Mark Schmucker wrote this letter to Selective Service.

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23. Much of my personal knowledge is reflected in court documents. Much other personal knowledge is from the close working relationship we formed during this litigation. A glimmering of this particular information is contained in Mark's affidavit to the court in support of his claim of selective prosecution.

24. Mark's testimony at trial, summarized in the text accompanying notes 55-58 explicates these beliefs.


26. Remarks on Signing Proclamation 4771, 16 WEEKLY COMP. OF PRES. DOC. 1274, 1274-75 (July 2, 1980). Carter also said:

"We are deeply concerned about the unwarranted and vicious invasion of Afghanistan by the Soviet Union .... We have taken a series of steps—... [including] military steps—in order to convince the Soviet Union that their action is ill advised .... [this registration] means that we are expediting the process by which the marshalling of our defense mechanisms can be expedited...."

27. Mark Schmucker was born October 4, 1960.


29. Id., § 1-109.
August 10, 1980

To Whom it may concern:

I am writing to inform you that I have violated the Military Selective Service Act by not registering. I feel that I must refuse to comply with this law because registering would force me to compromise my Christian faith.

I believe that war in any form is wrong. Christ meant for Christians to love each other and to love their enemies. War is an expression of hatred and an institution that has legalized and encouraged types of violent conduct that no civilized country would allow within its borders during peacetime. The use of force to resolve disputes has created an atmosphere of coercion which directly conflicts with the message of love preached by Christ. A Christian must use truth, love, understanding, and equality to resolve any disputes in which he is involved. As a Christian, I feel that I must avoid participation in the conscription process by not registering because conscription is an inherent part of the war process.

At this point, I feel that I should emphasize that I am not anti-American. I consider myself privileged to live in a country where basic human rights, self-government, and religious freedom are granted to the citizens. I am not opposed to serving this great land of ours by working in a hospital, teaching, or by working at some other type of public service job. However, I can not participate, in any manner, with the armed forces.

Sincerely,

Mark Schmucker

The letter was saved pursuant to government policy. By June 1981, the government had developed a filing system, and Mark Schmucker became a named file. On August 19, 1981, the System sent a certified letter to Mark at the home address he supplied with his letter. The letter advised Mark to register or be subject to criminal prosecution and penalty. Mark adhered to his conscientious decision that registration violated his religious tenets. He continued to refuse to register. Mark's file was referred to the

30. This policy is entitled the "passive enforcement policy." It was designed by Edward Frankle of Selective Service. The information is contained in Mr. Frankle's affidavit to the District Court, filed as part of the Government's opposition to the defense motion to dismiss for selective prosecution (Government Exhibit 3, para. 1-4), and in Mr. Frankle's testimony at trial (Transcript of 10-1-82). The District Court case number is CR 82-133A.
32. Id. at para. 10-12.
Department of Justice on October 21, 1981. After a period of dormancy triggered by President Reagan's decision to grant a grace period to register, the government proceeded further on June 8, 1982, by sending a letter to the local United States Attorney in Mark's district. On June 15, 1982, all local United States Attorneys were advised to handle nonregistration prosecutions on a priority basis.

The FBI contacted Mark Schmucker in Goshen on June 22, 1982. Mark again explained that his religious beliefs precluded him from registering. Agent Quigley recounted the conversation at trial:

He said that he felt that all wars were wrong, and therefore he could not support any military organization...[If] he registered with Selective Service, he would be condoning the escalation of the nuclear arms race, and this he could not condone....[He] didn't feel he could ever register for the Selective Service.

This dichotomy emphasized Mark Schmucker's religious objections. To register would smooth military operations and make him a partner in the military. Not to register would delay mobilization and conform to his religious scruples. After conversing with Mark, Quigley had no doubts that Mark sincerely believed that registration was wrong.

Assistant U.S. Attorney Gary Arbeznik telephoned Mark a week later to urge him to register. Once again Mark explained that registration was impossible due to his religious convictions. Mr.
Arbeznik called Mr. Kline at the Department of Justice to request authority to decline prosecution because Mark sincerely objected to the act of registration itself. Mr. Kline refused, opining that religion was no basis upon which to institute or decline prosecution. On July 14, 1982, an internal Justice Department memorandum reported:

We tentatively expect an indictment to be returned on July 19, 1982, in the Northern District of Ohio. The expected defendant is a Mennonite seminary student.

Mark Schmucker was indicted by the Grand Jury for the Northern District of Ohio, Eastern Division, on July 22, 1982. The indictment charged him with knowingly and willfully failing, evading, and refusing to register as required by the Military Selective Service Act, Rules and Regulations and Presidential Proclamation 4771 of July 2, 1980, in violation of 50 U.S.C. §§ 453 and 462(a) (Appx. 1980).

B. Trial

After indictment, Mark's case progressed swiftly to trial. Before trial, the defense filed several motions including motions to dismiss on grounds of selective prosecution, of denying equal protection, and of infringing upon the free exercise of religion. All motions were summarily denied by the trial court.

The selective prosecution argument relied upon government documents. The government admittedly used a "passive enforcement system" to identify those who would be prosecuted for failing to register. The government made no active effort to identify persons who did not register. It relied entirely upon self-reporting (as in Mark's case) or on reports from third parties of noncompliance (primarily of vocal opponents of registration). Once singled out, these young men were pursued according to the "beg policy." A

40. Affidavit of David Kline, supra note 34, at para. 23.
41. Memorandum from Lawrence Lippe, Chief of General Litigation and Legal Advice Section, Criminal Division, to D. Lowell Jensen, Assistant Attorney General, Criminal Division (July 14, 1982, p. 1 of 2). This memorandum was Defendant Exhibit 13 in support of the motion to dismiss for selective prosecution.
repeated series of government demands to register escalated from a Selective Service form letter, to FBI contact, to a local United States Attorney's threat to prosecute unless the target registered. If the persons registered at any time prior to indictment, the case was dropped. If he registered any time after indictment, prosecution was deferred. 44

The combined operation of these two prosecutorial policies resulted in sixteen indictments. Consistent with the government's expectation that the eventual defendants would be vocal opponents and religious and moral conscientious objectors, 45 the indicted men were all principled objectors to registration. Fifteen had written to the government. One was an exceptionally well publicized vocal opponent. 46

As part of its selective prosecution argument, the defense argued that Schmucker had been denied prosecutorial discretion when Mr. Kline refused to permit Mr. Arbeznik to decline prosecution. Mr. Kline stated in his affidavit to the District Court:

In June of 1982, I spoke to Assistant U.S. Attorney Gary D. Arbeznik concerning an alleged Selective Service non-registrant in his district. I do not recall the name of the alleged nonregistrant; however, I assume that it was Mr. Schmucker. Mr. Arbeznik sought authority to decline prosecution primarily because the alleged non-registrant was a Mennonite seminary student. I refused such authority, explaining that religious beliefs could not be a reason either for prosecuting or for refusing to do so. 47

43. "[W]e have asked that non-registration matters be assigned to experienced Assistant U.S. Attorneys and handled on a priority basis." Memorandum from D. Lowell Jensen to United States Attorneys, (July 9, 1982). This memorandum was Defendant Exhibit 1 in support of the motion to dismiss for selective prosecution.
44. Memorandum from D. Lowell Jensen, Assistant Attorney General, Criminal Division, to All United States Attorneys, (August 17, 1981). This memorandum was Attachment A to David Kline's Affidavit, supra note 34.
45. "The first prosecutions are liable to consist of a large sample of (1) persons who object on religious and moral grounds and (2) persons who publicly refuse to register." Memorandum from D. Lowell Jensen to the Attorney General (June 20, 1982). This memorandum was Defendant Exhibit 2 in support of the motion to dismiss for selective prosecution.
47. Affidavit of David Kline, supra note 34, para. 23.
Mr. Arbeznik’s affidavit nonetheless asserted:

"The officials of the United States Department of Justice did not decide, nor did they influence the decision to present an indictment against Mark Schmucker."\(^{48}\)

To support its equal protection argument, the defense noted that Congress had designated objectors like Mark as noncombatants. Several classes of noncombatants, notably females\(^{49}\) and males with serious mental conditions,\(^{50}\) were exempt from registration. The defense claimed that these exemptions, together with the absolute refusal to exempt Mark from either registration or prosecution, denied Mark equal protection. The defense further questioned this refusal because both the Presidential Proclamation\(^{51}\) and Justice Department guidelines\(^{52}\) provided for individual exemptions from registration. During an in-chambers examination on this issue, Edward Frankle, the architect of the passive enforcement policy, explained the exemptions. Frankle testified that the Proclamation was designed to exempt persons suffering from temporary physical incapacity, such as hospitalization. Once the incapacity ceased, the person was required to register. Mentally incapacitated persons sometimes requested an exemption from registration. Although the law required them to register, the Selective Service unilaterally exempted them from registration. A degree of mental incapacity was accepted as a condition entitling persons to accommodation and exemption. The criterion was "the intensity of the [claimant’s mental] condition in [the] view of the guardian."\(^{53}\)

The defense insisted that by recognizing exemptions, the Selective Service had:

1) adopted an administrative mechanism to accommodate valid reasons for exempting noncombatants from registration, and
2) singled out a class of noncombatants (conscientious objectors to registration) for different adverse treatment.

Trial commenced on September 30, 1982. At the trial, Mark was permitted to testify to his reasons for refusing to register. The

\(^{48}\) Affidavit of Gary Arbeznik, supra note 39, para. 13.
\(^{50}\) Testimony of Edward Frankle, Transcript of 10-1-82, pp. 103-22.
\(^{51}\) Proclamation No. 4771, § 1-109 (conditions beyond control).
\(^{52}\) Memorandum, supra note 44 ("compelling reasons").
\(^{53}\) Testimony, supra note 50.
jury was instructed that this testimony was irrelevant to his criminal responsibility. The court also told the jury that good motive was no defense, even if sincere religious conviction required the conduct.

In his testimony, Mark Schmucker identified the specific biblical passages upon which he based his beliefs opposed to militarism. He explained that President Carter's desire to send a message of "hostile intent" to the Soviet Union conflicted with these beliefs. To Mark, an important quality of Christ was that in addition to being peaceful, He had actively opposed the wrongs in life. "He did not sit back and just allow the evil in the world to go on." Mark believed that quietly fitting in by registering would condone and facilitate militarism. His refusal to register followed Christ's example of both avoiding wrongdoing and opposing the evil of using military force to solve problems. His letter explained these convictions to the government and reflected his respect for law.\(^{54}\)

After this testimony, the judge questioned Mark:

Q. If there would have been a space available on the registration form where you could have checked "conscientious objector," would you then have registered?

A. No.\(^{55}\)

On cross-examination, the prosecution emphasized three points. First, Mark knew of the registration requirement and decided not to comply with it. Second, this decision was one of free will, which he would not have changed even if the government had provided him an opportunity to identify his conscientious objection to war. Third, one reason for not registering was to delay military mobilization and he understood that the government's decision to prosecute him would divert time and resources away from militarization.\(^{56}\)

Neither the government nor the trial court could accept Mark's opposition to what they termed "mere" registration. The government emphasized that Mark's father had registered during World War II and had served in civilian alternative service. Mark's younger brother had also registered after writing "conscientious objector" on the form. The defense explained these different choices of individual conscience through the testimony of a Mennonite

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\(^{54}\) Testimony of Mark Schmucker, Transcript of 10-4-82, pp. 223-33.

\(^{55}\) Id. at 232-33.

\(^{56}\) Id. at pp. 240-43.
theologian. He testified that Mark's choice of total noncooperation—nonregistration—was officially recognized by the Mennonite Church as a means of living the belief against war. The choice was one of personal faith and conscience. Mark's conscience chose nonregistration.

WHEN THE DRAFT WAS MADE, MY NAME WAS ONE THAT WAS DRAWN . . . THE PROPER MILITARY OFFICER CAME OUT AND NOTIFIED ME THAT I WOULD BE EXPECTED TO REPORT IN THE MILITARY CAMP . . . . I TOLD HIM THAT I COULD NOT CONSCIENTIOUSLY BE THERE . . . . THEN HE DEMANDED THE THREE HUNDRED DOLLARS. TO THIS I REPLIED:

"IF I BELIEVED THAT WAR IS RIGHT, I WOULD PREFER TO GO MYSELF THAN TO HIRE SOMEONE ELSE TO BE SHOT IN MY PLACE."

57. The Mennonite theologian, Don Blosser, testified:

Q. Could you please explain to the jury what [the official Mennonite] position [toward registration] is?

A. This would need to go back to a number of statements that the general assembly has made in the Mennonite Church. I'd go back to 1937, if I could highlight maybe four. 1937, when the Mennonite Church officially said we could not participate in war or any kind of message which communicated war-like messages. In 1951, meeting in Goshen, Indiana, the church reaffirmed the 1937 statement and advocated again a full statement of peace position. In 1969, meeting in Turner, Oregon, the Mennonite Church officially recognized and affirmed non-cooperation as a church position and pledged support to young men who were doing this. In 1979, the denomination in its official statement said, I believe I can quote, "We view with alarm the proposed congressional action with regard to draft registration and again reaffirm the 1969 statement which accepted non-cooperation." In 1981 this was affirmed again at Bowling Green when we met. In 1982, the official agencies of the church, the general board which acts for the general assembly between sessions, sent a letter to Reagan asking this be identified again.

Q. Does the word "non-cooperation" which you have referred to include within that official stance not registering with the Selective Service?

A. That was one of the prime definitions of it.

Q. For what reason does the church, through the general assembly, give several options to its members?

A. [The] Mennonite Church is not a monolithic structure. That is, we do not tell people what individuals must believe.

We have statements which are held. We believe that faith is a very personal thing. It's supported by a congregation in this, but faith is very personal.

I would distinguish that from what we often think of is private where it's my inner feeling. For us, faith is more than that; it's a personal expression which is then lived out, but it's personal.

Testimony of Don Blosser, Transcript of 10-4-82, pp. 258-60.

58. E. HERTZ, LINCOLN TALKS 538 (1986) (quoting The American Friend). Each of these three stories illustrates a different line drawn by conscience.
The jury returned a verdict of guilty on October 5, 1982. Mark was sentenced on October 19, 1982 to three years probation, conditioned upon serving two years of confined community service at Emmaus House, a Missouri home for severely and profoundly mentally retarded adults. He was confined to the premises, and was neither permitted to join the staff on excursions nor to visit the library. He was fined $4000.

In delivering her sentence, the trial court recognized Mark’s honorable and sincere religious conflicts.

This Court specifically does not make your registering for the draft a condition of your probation. This Court believes that such a condition would insult what this Court believes to be an honest religious conviction on your part.

Although Mark appealed his conviction, he specifically refused to authorize his counsel to file for a suspension of his sentence pending appeal. The trial judge later expressed dismay at his decision.

“That is nothing,” said the Quaker. “Thee didn’t think I was afraid, did thee?”

59. The court instructed the jury, in part:
Intent and motive should never be confused. Motive is what prompts a person to act. Intent refers only to the state of mind with which the act is done. Good motive of the accused is immaterial except insofar as evidence of motive may aid determination of state of mind or intent. One may not commit a crime and be excused from criminal liability because he desired or expected that ultimate good would result from his criminal act. Moreover, if one commits a crime under the belief, however sincere, that his conduct was religiously, politically or morally required, that is no defense to the commission of a crime. A person may not decide for himself whether a law is good or bad, and whether he is free to disobey it. Jury Instructions p. 24.

60. The trial court sentenced Mark to deter others. She imposed alternative service and probation under the Youth Corrections Act as being more severe than the very short prison term to be expected. One rationale for her sentence was:
Based upon observation of you throughout the trial, and upon the material provided in the presentence report, this Court comes to the conclusion that not only are you very young chronologically, but that you are also very young in terms of real experience. You have led a very sheltered life and you are not street-wise.

61. Mark served at Emmaus House from October 29, 1982 until December 8, 1983, when the District Court suspended the sentence following the Sixth Circuit's reversal of Mark's conviction. Mark was one of the handful of young persons who served this country in any capacity whatsoever as a result of the registration scheme reinstated in July 1982. Nothing could make clearer the purity and sincerity of his conscientious action.

62. Hertz, supra note 22 and infra note 404.
C. The First Appeal

On appeal, the Sixth Circuit Court of Appeals reversed Mark's conviction. The court remanded for an evidentiary hearing on his claim of selective prosecution, and reserved jurisdiction on the remaining issues. The Sixth Circuit found that Mark was "concededly a sincere Mennonite" for whom "registering would violate his religious convictions." The court found it significant that Mark's letter to Selective Service had "included his name, current and permanent address, and his age eligibility," and that, despite the threatened consequences, he had not yielded to the efforts to persuade him to register.

The court also found that the government had not pursued those who engaged in "covert refusal." Rather it had prosecuted only those nonregistrants who "publicly expressed their conscientious refusal to register." The government admitted that the passive enforcement policy singled out "Mennonites and 'others with religious and moral objections' and 'vocal proponents of nonregistration.'"

Writing for the court, Judge Merritt found that the prosecutorial policy directed solely at nonregistrants who openly objected to the law clearly violates the first amendment. It selects for prosecution only those who speak out against the law. It selects people based on their expression of beliefs and the strength of their convictions. It excludes, and therefore rewards, thousands who engage in covert non-compliance and evasion of the law including all those who would confess their violation if sought out and interviewed. It discourages dissenters from expressing their criticisms of government policy.

The court did not differentiate Schmucker's status as a religious objector from the status of moral (conscientious) objectors or political (free expression) objectors. However, the court did

64. Id. at 1048.
65. Id. at 1052.
66. Id. at 1048.
67. Id.
68. Id.
69. Id. at 1049.
70. Id.
71. Id.
recognize that these separate classes existed.\textsuperscript{72} In order to reach its decision that this policy selected defendants based upon the exercise of first amendment rights, the court had no need to draw any distinction based upon the particular liberty invoked.\textsuperscript{73} It relied upon the free speech clause to condemn the government's selection of only those whose objections were communicated directly to the government.\textsuperscript{74} The court held that such a system was not content-neutral.\textsuperscript{75} Because the prosecutions were based on the content of the letters, the court required a compelling justification for the prosecutorial policy. It rejected the government's contention that the system rationally targeted those who were most easily prosecuted, due to their "confessions" in their protests.\textsuperscript{76} Ease of prosecution did not meet the standard of compelling justification.\textsuperscript{77}

The court also rejected the reasoning of the Ninth Circuit in United States v. Wayte.\textsuperscript{78} The Sixth Circuit found a first amendment analysis more appropriate than the Ninth Circuit's more stringent equal protection analysis.\textsuperscript{79} The Ninth Circuit excused the government's selectivity as being "in spite of" rather than "because of" the first amendment expressions in the letters of the indictees.\textsuperscript{80} The Schmucker I court decided that the dissent and the "confession" were inextricably intertwined in those letters, creating a strong inference that Mark and the others were prosecuted "because of" the exercise of first amendment freedoms.\textsuperscript{81} The effect of allowing prosecution would be to condone the government's choice to prosecute upon the basis of expressed opposition to its policies rather than upon violation of law.\textsuperscript{82}

The Schmucker I panel of Judge Merritt, Senior Judge Phillips, and District Judge Spiegel was the only Court of Appeals\textsuperscript{83} with the courage to hold the government to the limits of the Constitution.

\textsuperscript{72} Id. at 1050.  
\textsuperscript{73} Id. at 1050-51.  
\textsuperscript{74} Id.  
\textsuperscript{75} Id. at 1050.  
\textsuperscript{76} Id. at 1050-51.  
\textsuperscript{77} Id. at 1051 (citing Cohen v. California, 403 U.S. 15, 26 (1971)).  
\textsuperscript{78} 710 F.2d 1385 (9th Cir. 1983), aff'd, 470 U.S. 598 (1985). The Supreme Court had not accepted or decided Wayte when the Sixth Circuit decided Schmucker I.  
\textsuperscript{79} Schmucker I, 721 F.2d at 1051.  
\textsuperscript{80} Wayte, 710 F.2d at 1387.  
\textsuperscript{81} Schmucker I, 721 F.2d at 1051.  
\textsuperscript{82} Id. at 1052 (citing Wayte, 710 F.2d at 1390 (Schroeder, J., dissenting)).  
\textsuperscript{83} District Judge Hatter ordered discovery and a hearing and ruled that the government had selectively prosecuted by using passive enforcement. United States v. Wayte,
D. On Remand

The government moved for a rehearing en banc. The Sixth Circuit denied the rehearing, with Judge Wellford dissenting. The government moved to stay further proceedings in the district court, pending a petition for certiorari. When the government petitioned the Supreme Court for certiorari, the Court had already granted certiorari to David Wayte.

The Supreme Court issued its opinion in Wayte v. United States on March 19, 1985. On April 1, 1985, the Court granted certiorari in Schmucker I, vacated the judgment, and remanded for reconsideration in light of Wayte. The Sixth Circuit remanded to the district court.

On remand, the defense raised several claims to distinguish Wayte. The first involved the need for additional discovery. The Supreme Court had considered David Wayte's claim of selective prosecution based upon the testimony and documents presented to the lower court. There were other documents the Wayte district court had ordered disclosed. Schmucker's defense also sought documents detailing the fate of persons within passive enforcement who had not been indicted. The defense claimed these additional documents would disclose improper motivation by revealing discriminatory disposition of cases in the system.

Second, the defense contended that the individualized decision to prosecute Mark constituted improperly motivated selectivity of a Mennonite generally and Mark specifically. In contrast, David Wayte had been "anonymously" identified by the passive enforcement system alone.

88. Id. at 605 n.5.
89. Id. at 615-19 (Marshall, J., dissenting).
90. Id. at 604 n.3.
91. In Wayte, the Supreme Court noted that of the approximately 286 persons referred for prosecution under the passive enforcement system, only 16 had been indicted. The other 270 "either registered, were found not to be subject to registration requirements, could not be found, or were under continuing investigation. The record does not indicate how many fell into each category." 470 U.S. at 604 n.3.
Third, the defense emphasized Schmucker's first amendment free exercise claim. Wayte had relied only upon free speech and the right to petition for redress in support of a first amendment right to be free from this prosecution. The Supreme Court explicitly found that the prosecutorial policy punished nonregistration, not the right to protest. Because free speech protects only the expressive and communicative elements of conduct, the Court believed a person could fully exercise free speech rights while complying with a law which required conduct inimical to belief. In essence, it decided that a person could both register and engage in active protest and dissent. In contrast, the defense pointed out that a person who objects to registration because it conflicts with his or her religious duties cannot both comply with the law and exercise guaranteed rights. Thus, the free exercise claim is fundamentally different from a free speech claim. The Supreme Court did not address whether registration and prosecution violated free exercise.

Fourth, the defense argued that even if registration itself did not violate free exercise, the "beg policy" did. That policy systematically isolated only those nonregistrants who believed so deeply that registration was wrong that they refused to capitulate to persistent government offers to drop prosecution in return for compliance. The government knew every piece of information about Mark required by the registration form, and much more. It knew he was a sincere religious objector to the very act of registration. No government agent had any question about Mark's sincerity or religious convictions. The Department of Justice made an individualized choice to prosecute Mark, overriding local prosecutorial discretion despite the Department's knowledge that

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92. Id. at 610-11.
93. Id. at 611 n.12: "Strictly speaking, then, the passive enforcement system penalized continued violation of the Military Selective Service Act, not speech."
95. See supra note 14, which explains the operation of the "beg policy." See especially the Department of Justice guidelines for prosecution, supra note 44, which explicitly provided that registration at any time before indictment would result in prosecution being completely abandoned, despite the proof of wilfulness contained in the nonregistrant's letter to the government, response to the Selective Service warning letter, refusal to comply with in-person FBI demands to register, and even initial refusal to capitulate to local United States Attorney demands to register.
Mark's claim was genuine and the fact that the government had the means to accommodate him. This persistence in the policy of prosecution therefore violated free exercise.

The district court rejected these arguments and found Wayte dispositive, refusing to distinguish the claim of free exercise from one based on free speech.

III. SCHMUCKER II

Once again, Mark Schmucker appealed to the Sixth Circuit for the security of his guaranteed liberties.

During oral argument in Schmucker I, Judge Spiegel had asked counsel which claim on appeal was most important. "The free exercise of religion," counsel answered. "Isn't selective prosecution your best claim?" the judge inquired. "You cannot understand our selective prosecution claim without its basis in free exercise."

In Schmucker II, the shadow of Wayte dramatically highlighted the importance of Schmucker's free exercise claim. The defense had to accept and credibly distinguish Wayte. The government had to rely upon and credibly broaden Wayte. The court had to abide by the Supreme Court's pronouncements in Wayte and decide whether they extended to Schmucker.

Wayte did provide some clear guidelines. First, Schmucker's selective prosecution claim had to be analyzed under "ordinary equal protection standards." These standards required proof of both discriminatory impact and government motivation by a discriminatory purpose. In assessing discriminatory impact in Wayte, the Supreme Court used a base class of "all reported nonregistrants."

96. Mr. Arbeznik decided to accommodate Mark because of his religious convictions. Mr. Kline withdrew that accommodation. In spite of themselves, the Department of Justice had designed a beautiful mechanism of accommodation. When it worked, they were forced to ignore it to avoid exempting Mark Schmucker.

97. Sitting by designation from the United States District Court for the Southern District of Ohio.

98. In the context of this litigation and appeal, the defense could not realistically urge the Sixth Circuit to ignore Wayte, nor the Supreme Court to overrule it mere months after reaching its 7-2 decision. The fact that we "accepted" this reality does not mean that I, or we, accept the validity of the Wayte Court's decision or reasoning. The opinion is open to great criticism. Those criticisms are beyond the scope of this Article.

99. Wayte, 470 U.S. at 608.

100. Id.

101. "[T]he Government treated all reported nonregistrants similarly. It did not subject vocal nonregistrants to any special burden." id. at 610.
In assessing discriminatory purpose, it demanded proof that the government prosecuted "because of" the nonregistrant's exercise of first amendment freedoms. Second, the Wayte Court found that the passive enforcement system coupled with the "beg policy" did not place an impermissible burden upon free speech, especially in light of the governmental interest in "ensur[ing] registration for the national defense." 

A. Selective Prosecution

Wayte was most devastating to the selective prosecution claim which challenged the system of passive enforcement. Therefore, Schmucker's attorneys attempted to limit Wayte to its circumstances and argued that the Wayte Court evaluated passive enforcement in the absence of relevant documents. Schmucker continued to request discovery of additional documents to support his claim. The defense noted that both the Wayte majority and dissent had agreed that the approval of the passive enforcement system was based only upon the evidence actually admitted in the district court. The dissenters emphasized that additional relevant documents existed, and that the government's refusal to supply these documents raised an inference that the documents supported the allegations that the government impermissibly chose to prosecute nonregistrants because they expressed opposition to its policies.

The Sixth Circuit rejected Schmucker's argument. The court determined that he was not entitled to additional discovery. Then it found that Schmucker was unable to present "some evidence tending" to show either discriminatory impact or purpose. Virtually every court which has reviewed the documents which the government did produce in Wayte has noted that the govern-

102. Id. (citing Personnel Administration of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979)).
103. Id. at 611-13.
104. See supra notes 89-92, and text accompanying them.
105. Wayte, 470 U.S. at 605 n.5.
106. Id. at 614-15, 622 n.1 (Marshall, J., dissenting).
107. Id. at 616-19, 621-23, 629 (Marshall, J., dissenting).
108. Id. Such a holding encourages the government to withhold information relevant to intent and motivation. If the government hides information, a defendant may not prove enough to get discovery of the documents which could prove discriminatory intent and therefore a violation of equal protection. The circular trap for defendants is obvious.
109. Id. at 417-18.
ment was keenly aware that its policy targeted vocal and moral objectors almost exclusively. These courts also admit that the government persisted in this policy with this known adverse effect. Each court nevertheless determines that this reaffirmation of the policy was in spite of rather than because of its remarkable accuracy in singling out only persons who exercised constitutional rights. The government, however, relying in part on United States v. Kerley, contended that the Supreme Court had completely analyzed passive enforcement and had found that the system passed constitutional muster.

The court required Schmucker to demonstrate a discriminatory impact on himself as compared to a base class of reported nonregistrants who persisted in refusing to register. By defin-

110. Id. at 610 ("The evidence [Wayte] presented demonstrated only that the Government was aware that the passive enforcement policy would result in prosecution of vocal objectors and that they would probably make selective prosecution claims."); id. at 627-28 (Marshall, J. dissenting) ("[T]he record suggests that responsible officials in the Justice Department were aware that the vast majority of [the passive referrals] would be vocal opponents of draft registration," referring to a letter drafted by Kline stating "Indeed, with the present universe of hundreds of thousands of non-registrants, the chances that a quiet non-registrant will be prosecuted is probably about the same as the chances that he will be struck by lightning."); Wayte, 710 F.2d at 1387 (9th Cir. 1983) ("[T]he government was aware that the passive enforcement policy would result in prosecution of primarily two types of men: religious or moral objectors and vocal objectors."); Schmucker II, 815 F.2d at 419 (6th Cir. 1987) ("[T]he government was aware that the enforcement scheme would result in prosecution of religious objectors."); Schmucker I, 721 F.2d at 1049 (6th Cir. 1983) ("[T]he government's prosecutorial policy in these cases [is] a "passive enforcement" policy based on "self reporting." [Lipp'e] says the group of "self reporters" consists of Mennonites and "others with religious or moral objections" and "vocal proponents of nonregistration."); Kerley, 787 F.2d at 1149 (7th Cir. 1986) ("facts which tend to show that the government was aware of discriminatory consequences of its policy but went ahead and implemented the policy in spite of its adverse affects upon an identifiable group") cf United States v. Jacob, 781 F.2d 643, 647 (8th Cir. 1986); United States v. Martin, 733 F.2d 1309, (8th Cir. 1984) (continuing offense opinion); United States v. Eklund, 733 F.2d 1287, 1292-93 (8th Cir. 1984) (en banc), cert. denied, 471 U.S. 1003 (1985); United States v. Sasway, 730 F.2d 1003 (9th Cir. 1983), cert. denied, 471 U.S. 1003 (1985).
111. See, e.g., Wayte, 470 U.S. at 603.
112. See cases cited in note 110, supra. Contra Schmucker I, 721 F.2d at 1052; cf. Wayte, 470 U.S. at 629 (adherence to a policy with full knowledge of predictable effects); id. at 630 (the government policy should not be immunized if it discriminated in defining the pool and then used permissible methods); id. at 632 (violations of law intertwined with political activity, speech so unpalatable to the government, and conceded discriminatory effect create a significant need for discovery and a hearing) (Marshall, J., dissenting).
113. 787 F.2d 1147 (7th Cir. 1986).
114. Id. at 1149.
115. Id. at 419: "[I]ndividuals prosecuted under the passive enforcement policy were selected because they reported themselves or were reported by others and thereafter persisted in their unlawful refusal to register."
The measuring class as identical and coextensive with the prosecuted class, the court chose a premise to dictate the result. The Sixth Circuit resorted to the same measuring class as the Wayte Court. Perhaps the Sixth Circuit can be excused for following the Supreme Court's lead. But the Supreme Court had no excuse for such intellectual vacuity and circular logic.

The Sixth Circuit also rejected Schmucker's claim that he was both targeted and retargeted as a religious objector, a distinctive sub-class of those prosecuted under passive enforcement. Schmucker noted that internal government documents consistently classified religious objectors separately from vocal opponents. The government explicitly singled out Mennonites in these memoranda. A March 19, 1982 memorandum noted that religious objectors were likely to be potentially "sympathetic defendants." The court noted there was no disparate impact on religious objectors. Objectors who were not reported or objectors who registered were not prosecuted. The inference defendant drew was that the government considered successful prosecution of sympathetic "true believers" to be a benefit. The government thus committed the

116. While requiring Schmucker to distinguish himself from this class, the court simultaneously refused to allow him discovery of information about the members of that class. See supra text accompanying notes 91, 100, and 109.

117. No person can win an equal protection argument if the class he or she belongs to is chosen as the measuring class. Thus, in Batson v. Kentucky, 476 U.S. 79 (1986), no black juror who was removed by a preemptive strike could prove discrimination when compared with other black jurors in the venire. That was the point. In Hunter v. Underwood, 471 U.S. 222 (1985), no black felon needed to prove discrimination when compared with other black felons who were disenfranchised. In Rogers v. Lodge, 458 U.S. 613 (1982), no black voter proved that her or his vote was of lesser value than that of every other black voter. In Davis v. Bandemer, 478 U.S. 109 (1986), no Democrat proved that he or she was injured more than other Democrats by the Republican-controlled redistricting process.

118. Wayte, 476 U.S. at 610 ("all reported nonregistrants").

119. Schmucker II, 815 F.2d at 418-19.

120. E.g., Memorandum from D. Lowell Jensen to the Attorney General (June 20, 1982), Defendant Exhibit 7 to the Motion to Dismiss for Selective Prosecution, p.2 ("The first prosecutions are liable to consist of a large sample of (1) persons who object on religious and moral grounds and (2) persons who publicly refuse to register. The former are liable to be sympathetic defendants; the latter are liable to raise thorny selective prosecution claims.")

121. Memorandum from Lippe to Jensen (March 19, 1982), Defendant Exhibit 12 to the selective prosecution motion, p.2 ("A number of Mennonites, who historically have been reluctant to comply with Selective Service requirements, and others with religious or moral objections are represented in the 'self-reported' referrals.")

122. See supra note 120.

123. Id. at 419.
"constitutional accounting error of treating the infringement of a constitutional right as a benefit rather than as a cost." The Court then rejected Schmucker's claim that the government had a purpose to discriminate against religious objectors.

The defense relied heavily upon factual distinctions from Wayte. The key fact was that Mark was explicitly known (to the highest levels of the Department of Justice) not merely as a "religious objector," but as a Mennonite whose undisputedly sincere convictions classified registration itself as participation in warmaking. Because of Mark's sincere beliefs, the local prosecutor wished to decline prosecution. No other reason motivated the prosecutor's decision. The Department of Justice made a deliberate and individualized decision to prosecute. No "system" operated mechanically or inexorably to choose Mark "in spite of" his religion.

Both the Wayte and Schmucker courts accepted the proposition that improper motive may be proven by demonstrating that the decisionmaker reaffirmed a particular course of action in part because of its adverse effects upon an identifiable group. Both courts failed to apply this principle to the facts of passive enforcement. Mark's religious beliefs were the only reason that U.S. Attorney Arbeznik wanted to decline—and that David Kline refused to decline—prosecution. Yet, the Sixth Circuit denied that the decision to prosecute was because of that reason.

The "because of/in spite of" dichotomy becomes totally illusory if the decisionmaker's articulated reasons identify an impermissible basis for classification and still qualify as incidental ("in spite of") reasons. David Kline reaffirmed the prosecution of Schmucker with a statement that offends the premises of the first amendment. As Chief Justice Burger has noted, religious beliefs are a basis for treating people differently. The refusal to accommodate religion is an "illusory and hostile neutrality." Exempting per-

125. Schmucker II, 815 F.2d at 416; see supra text accompanying notes 45-48 and 100-01.
126. Wayte, 470 U.S. at 610.
127. Schmucker II, 815 F.2d at 419.
130. Bowen v. Roy, 416 U.S. at 693; Wisconsin v. Yoder, 406 U.S. 205, 220 (1972); L. Tribe, American Constitutional Law § 14-4, pp. 821-22 (1978) (religion-blindness is an "il-
sons of conscience is an "affirmative purpose [which is] neutral . . . [It is] hardly impermissible . . . to accomodate free exercise values, in line with 'our happy tradition' of 'avoiding unnecessary clashes with the dictates of conscience.' "

According to Wayte the "beg policy" presented nonregistrants with a choice to register or be prosecuted. This choice meant that the prosecutorial scheme did not select persons "because of" the exercise of their rights. Mark's beliefs precluded him from considering such a "choice." Therefore, Mark was prosecuted because the government refused to accomodate his religious conviction. In this special context, the government's "neutrality" was an explicit decision to refuse to accomodate religion. The first time the government chose to exercise a "neutral" principle in this prosecutorial scheme was in mandating Mark's prosecution. Before the Supreme Court, the government defended passive enforcement as permissibly selective.

In the end, the Sixth Circuit opinion institutionalized a profound paradox. It allowed the government to ignore its responsibility for accomodating free exercisers by exempting virtually everyone else. The passive enforcement system admittedly exempted the vast majority of nonregistrants from prosecution. It exempted wilful violators who did not report their violation. It exempted wilful violators who capitulated to governmental pressure and registered at the eleventh hour. It exempted religious dissenters who were able to register without violating their religious convictions. However, the passive enforcement system did not exempt the class of nonregistrants to which Mark Schmucker belonged—reported nonregistrants who could not capitulate to government coercion without extinguishing their constitutional guarantee of free exercise. Mark's was the only class to which the government provided no meaningful choice to escape prosecution.

The brevity of the Sixth Circuit's discussion of selective prosecution and its persistent reliance upon Wayte demonstrate the

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132. Cf. Wayte, 470 U.S. at 607-09; id. at 631 (Marshall, J., dissenting) ("discriminatory effect is conceded"); Tribe, supra note 130 at 821-22, 852 (decrying such religion-blind choices which actually refuse to adhere to the constitutional ideal of liberty).
power of institutional constraints. The court could have distinguished *Wayte*. However, the overwhelming pressure of *Wayte* led the court to accept the entire prosecutorial scheme as well as its very individualized application to Mark Schmucker. *Schmucker I*’s reliance on free speech, rejected by the Supreme Court, made this even easier. To hold for Schmucker would have required the court to adopt a new rationale, based upon free exercise. The court avoided this path. It refused to recognize the distinction between choice and compulsion which set Schmucker apart from *Wayte*. It ignored the hostile “neutrality” of non-accomodation. Judge Merritt, author of *Schmucker I*, concurred specially. 133 Even he accepted *Wayte* as easily binding precedent, broadly characterizing Schmucker’s free exercise claim with Wayte’s free speech claim as “First Amendment claims of selective prosecution.” 134 But the Supreme Court never addressed Mark Schmucker’s claim that the government discriminated against him on the basis of free exercise.

**B. Free Exercise**

Schmucker’s primary claim to the Sixth Circuit rested upon free exercise. 135 David Wayte’s case rested upon a free speech right to challenge the government’s prosecutorial policy. 136 Although the two rights are distinct, it is tempting to treat free speech and free exercise as coextensive. 137 The Sixth Circuit succumbed to the temptation.

Although the Supreme Court had no claim of free exercise before it, it projected an inhospitable aura toward claims of constitutional exemption from registration. The *Wayte* Court found a lofty interest in national security 138 and the “Common Defence.” 139 The Court stressed the neutrality of the registration requirement and belittled the existence of a right not to register. 140 In this at-

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133. *Schmucker II*, 815 F.2d at 421.
134. *Id.*
135. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...” U.S. Const., amend. I.
139. *Id.*: see Tribe, *supra* note 130, at 855 (“the mesmerizing force of the interest in national security”).
140. *Id.* at 611 n.12.
mosphere, Schmucker's free exercise claim did not receive the serious attention it deserved. However, both free exercise jurisprudence and Wayte contain reasoning which in the abstract supports Schmucker's claims.\textsuperscript{141}

The Wayte Court heavily relied on the "beg policy" to validate the prosecutorial scheme. The Court emphasized that the choice given to David Wayte and other passive enforcement targets proved that passive enforcement did not select victims on the basis of their speech.\textsuperscript{142} Rather, "those prosecuted in effect selected themselves for prosecution by refusing to register after being reported [sic] and warned by the Government."\textsuperscript{143} Therefore, the "beg policy" removed the burdens on free expression by allowing protestors to register later and still avoid prosecution. "By simply registering after they had reported themselves to the Selective Service, nonregistrants satisfied their obligation and could thereafter continue to protest registration."\textsuperscript{144}

This rationale has no application whatsoever to Mark Schmucker and free exercise. Mark's right, and duty, to adhere to his religious convictions and the government's requirement that he register could not coexist. Unlike Wayte, whose right of free speech survived the act of registering, Schmucker's right of free exercise depended upon his ability to refuse to register. The device which saved passive enforcement under equal protection and free speech analysis in Wayte proved the coercive conflict and failure to accommodate which violated Schmucker's free exercise.

The Sixth Circuit's reluctance to distinguish the two first amendment claims probably arose from a sense that it would be inherently unfair to treat Mark Schmucker differently from David Wayte. David Wayte, like Mark, is an exemplary and inspiring person whose moral sincerity and strength are unmistakable.\textsuperscript{145} David

\begin{itemize}
\item \textsuperscript{141} One explanation for this failure of principled decisionmaking is the institutional power of the Armed Forces, the Department of Justice, and the Supreme Court. The power of the Constitution was lost. Cf. Giannella, \textit{Religious Liberty, Nonestablishment, and Doctrinal Development: Part I. The Religious Liberty Guarantee}, 80 HARV. L. REV. 1381, 1384-85 (1967) (Free exercise balancing test is hazardous because it permits subjective judgment to substitute for objective standards and may result in "judicial approval of established or orthodox values.")
\item \textsuperscript{142} Wayte, 470 U.S. at 611 n.12.
\item \textsuperscript{143} Id. at 610.
\item \textsuperscript{144} Id. at 611 n.12.
\item \textsuperscript{145} As a representative of Mark, I had the opportunity to meet several of the indicted nonregistrants. The persons I met were admirable and principled. David Wayte is a genuine,
Wayte, however, chose to rely on free speech. He never raised free exercise nor a right of conscience tantamount to religion. 146

In the Sixth Circuit, the defense used traditional free exercise analysis to argue two ways in which Mark's first amendment right was distinct from Wayte's. First, the requirement to register itself compelled Mark to act in a manner which violated a prohibition of his religious convictions. The free exercise clause protects conduct, and thus exceeds the protections of free speech in this context. 147 Together with the amicus brief filed by the Central Committee for Conscientious Objectors (CCCO), the defense presented multiple avenues of accommodation which would not impinge upon the governmental interest found to exist in Wayte. Several of the trial errors pressed on appeal were opportunities for accommodation which the district court refused to implement. 148 Second, the "beg policy" violated free exercise by attempting to coerce abandonment of religious convictions under threat of criminal prosecution. It was a governmentally designed, adopted, and mandated

and apparently introspective, person who was thrust into his public role by his conscience. I feel privileged to have met both Mark and David.


148. The defense objected to the District Court instructing the jury to disregard his religious motivation if it did not bear on his knowing violation of the law. If the court had permitted the jury to consider the sincerity and religious basis of Mark's refusal as a defense to nonregistration, this jury instruction would be clearly incorrect. See United States v. Murdock, 290 U.S. 399, 398 (1933) (A good faith belief that the Fifth Amendment protects a person from answering IRS investigators is a defense and justification to a specific intent crime of failing to provide the agents with information.). Cf. Freeman, Remonstrance, supra note 146, at 822-23.
policy which proved that accommodation was possible and nondisruptive. 149

Current free exercise doctrine requires a tripartite analysis: (1) Does the government's obligation conflict with, and thus burden, sincere religious conviction? (2) Does the government have a compelling interest for imposing the obligation? (3) If so, can the government accommodate the religious conviction without unduly interfering with accomplishing the governmental interest? 150

1. Burden on Sincere Conviction

Mark Schmucker irrefutably believed that the very act of registration was wrong, 151 because it was participation in the military. His religious and conscientious beliefs compelled him to refuse to participate in the military in any manner. 152

Mark's personal acceptance of Christ and the scriptures taught him that hostility is a moral evil. Furthermore, the Mennonite Church specifically accepts that an individual's faith may find nonregistration to be the only position consistent with the religious belief in peace. 153 The Mennonite Church advocates obeying the law. But when the law conflicts with faith, "then we advocate following the biblical command. We do it with regret but we do it seriously." 154

149. The "beg policy" was used to exempt some persons from registration. During trial, Edward Frankle, the architect of the passive system, testified that several letters demanding registration had been sent to persons whose parents or guardians called or wrote to say they were mentally retarded. The Selective Service decided to exempt some of these persons from registration and further pursue under the passive policy. The Service recognized that these persons were required under the law to register and seek exemption through classification later. (Transcript of 10-1-82, pp. 102-22). Cf. Schmucker II, 815 F.2d at 419.


151. The government never contested that Mark believed that registration was wrong and stipulated at trial that Mark was sincere. The trial judge explicitly decided, based on the evidence and her observation of Mark, that Mark had an honest religious conviction against registration. Neither the court in Schmucker I nor Schmucker II questioned the fact that Mark objected to registration itself. Schmucker II, 815 F.2d at 415-16.

152. Id. See supra notes 30-40, 54-56, and accompanying text.

153. Mennonite theologian Don Blosser testified at trial that the Mennonite Assembly adopted a resolution endorsing complete noncooperation with the military, i.e., nonregistration. Transcript of 10-4-82, pp. 258-60.

Mark Schmucker's interpretation of registration was not only sincere, it accorded with the perception of all three branches of government. The government itself identified the registration as militaristic policy. President Carter declared that registration was a "military step" taken "to convince the Soviet Union that their action [in Afghanistan] is ill-advised." Registration expedited the process of "marshalling of our defense mechanisms." The inauguration of registration by the President and Congress was not merely a prelude to possible future conscription. It was an act of independent foreign policy significance—a deliberate response to developments overseas. Registration served "no purpose beyond providing a pool for the draft." Its purpose was "to prepare for a draft of combat troops ..." and "to develop a pool of potential combat troops."

Requiring Mark to register, therefore, required him to participate in a military activity repugnant to his deeply held religious convictions. Yet, the Sixth Circuit insisted that registration was a "minimal" burden on Mark. The court felt that registration is less intrusive, physically and "arguably morally," than training or combat. But this "minimal" act for Mark became a vital "need"

155. The legislative history behind the appropriation of funds for registration, the Presidential Proclamation, Proclamation No. 4771, 3 C.F.R. 82 (1981), and Rotsker v. Goldberg, 453 U.S. 57 (1981), made clear the warlike purpose of the registration requirement.
156. 16 WEEKLY COMP. PRES. DOC. 1274 (July 2, 1980).
159. Id. at 76 (emphasis original).
160. Id. at 79.
161. The Supreme Court has recognized the illegitimacy of requiring persons to bear messages they find repugnant on religious grounds. Wooley v. Maynard, 430 U.S. 705 (1977) (Jehovah's Witness who objects to the message "Live Free or Die" cannot be prosecuted for obscuring the words on his license plate); West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943) (Jehovah's Witness schoolchildren who object to the salute to the flag cannot be forced to engage in this symbolic conduct in opposition to their beliefs).
162. Schmucker II, 815 F.2d at 417. The Court quoted case law from the early 1970s which rejected a free exercise challenge to registration. United States v. Bertram, 477 F.2d 1329 (10th Cir. 1973); United States v. Koehn, 457 F.2d 1322 (10th Cir. 1972); case law which rejected a class action challenge to registration as a due process violation of liberty, Detenber v. Turnage, 701 F.2d 233 (1st Cir. 1983), and case law which approved forcing postal workers to conduct registration. Garman v. United States Postal Service, 509 F. Supp. 507 (N.D. Ind. 1981).
163. Schmucker II, 815 F.2d at 417 (quoting Detenber, 701 F.2d at 234).
for national security when the court assessed the government’s interest.\footnote{164}

The fallacy is blatant. The Sixth Circuit wrongly differentiated between the impact of registration on Mark and on the government. Registration was a virtually meaningless act if Mark Schmucker was coerced to do it.\footnote{165} But the governmental interest in this head-counting scheme was indistinguishable from the need to provide military manpower in a national defense emergency. If registration is inextricable from war in the national defense, then the act of registering is as warlike as shooting a gun. The court ignored the importance of personal religious conscience. It erred by substituting its own line of conscience rather than respecting Mark’s line.\footnote{166}

The court cited cases which broadly held that registration did not infringe on religious freedom. But the issue was whether this particular registration infringed on Mark Schmucker’s freedom. The core of the court’s analysis denigrated Mark’s religious belief.\footnote{167} Free exercise cases have consistently warned against such an error of orthodoxy.\footnote{168} It is not for the court to evaluate the religious belief. The court may only probe for sincerity and religious basis.\footnote{169} “There can be no assumption that today’s majority is ‘right’ and the [dissenters] are ‘wrong.’ A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different.”\footnote{170} A court may not conclude that the required act “will not threaten the integrity of the ... religious belief.”\footnote{171} The Sixth Circuit’s view that this burden of registration on Mark was minimal reflected a “judicial perception” of what it deemed “comprehensible” about his honest con-

\begin{footnotesize}
\begin{enumerate}
\item[164.] \textit{Id.} at 418 (citing \textit{Wayte}, 470 U.S. at 611).
\item[166.] “We see, therefore, that \textit{Thomas} drew a line, and it is not for us to say that the line he drew was an unreasonable one.” \textit{Id.} at 715.
\item[167.] The Sixth Circuit simply did not think registration was a “big deal,” and it refused to accept mark’s belief that it is.
\end{enumerate}
\end{footnotesize}
The court exceeded the judicial function and became "arbiters of scriptural interpretation." The correct evaluation of a burden upon religious exercise is the weight demanded by the "imperatives of a personal faith." The Sixth Circuit ignored Mark Schmucker's personal convictions. It determined that forcing him to register, and to affirm his support of the policy of peace through military strength were not very important or hard things to ask. However, the Constitution protects against governmental compulsion to affirm an idea repugnant to an individual's beliefs. This registration requirement demanded symbolic acceptance of a policy which violated Mark's conscience. Mark's convictions deserved more respect.

Freedom to differ is not limited to things that do not matter much. The test of its substance is the right to differ as to things that touch the very heart of the existing order.

2. **Governmental Interests**

While downplaying the importance of Mark's beliefs, the Sixth Circuit exaggerated the weight of the governmental interest in this registration program. The court equated enumeration with actual mobilization in response to a national defense emergency. But the program was designed only as a first step—identifying the pool of combat-available troops. Expedited conscription and mobilization would follow only if necessary. Presidents Carter and Reagan and Congress remained committed to a national policy of an all-volunteer army.

The defense argued that the governmental interest in registration was not coextensive with the entire spectrum of "national

172. Thomas, 450 U.S. at 716. This same error was made in United States v. MacIntosh, 283 U.S. 605, 626 (1931), when the court opined that obedience to any government law to make war as well as peace was "not inconsistent with the will of God." Such declarations of religious authority and orthodoxy have no place in free exercise analysis. Girouard v. United States, 328 U.S. 61 (1946), overruled MacIntosh and recognized that people with genuine religious scruples object to military service, and that those who share these scruples are still patriotic and exemplary citizens who defend the values of this nation in their own ways and capacities.

177. Wayte, 470 U.S. at 600 n.1; Rotsker, 453 U.S. at 75-76; Schmucker II, 815 F.2d at 417, 419.
178. Rotsker, 453 U.S. at 60-61, esp. n.1.
security," and insisted that accommodating Mark Schmucker at the registration stage would pose no threat to the national security, the government, however, argued that registration could not be isolated from the entire "national defense context." Registration was a "prelude to a draft in a time of national emergency." The court accepted the government's position that "[f]ew interests can be more compelling than a nation's need to ensure its own security."

However, the free exercise cases make it clear that the weight of the governmental interest should be carefully limited to the precise obligation which burdens religion. Resounding references to the "common defense," "national security" and "national emergency" should not be used to make a governmental interest weightier. Such generalizations obscure the preliminary role of registration and the lack of a national emergency in order to deny the right of religious liberty to an exemption. Registration is part of the national defense context, but in 1980 and 1982, that context encompassed neither conscription nor mobilization.

The government must prove that the specific obligation it imposes necessitates overriding the free exercise right with which it conflicts. In Wisconsin v. Yoder the Court insisted that the state prove its interest in "universal compulsory education" would not survive an exemption of the Old Order Amish. The Court rejected overbroad generalizations of the governmental interest in education despite the importance of education to individual self-reliance and a body politic prepared to preserve freedom and independence. The Court demanded that the state prove that its specific interest in an additional two years of conventional schooling outweighed the free exercise interest of the Amish in providing an agrarian education for their children. The state could not justify its refusal to accommodate the Amish and was required to exempt them.

179. Id. at 68; Schmucker II, 815 F.2d at 417.
180. Rotsker, 453 U.S. at 75; Schmucker II, 815 F.2d at 417-18.
181. Wayte, 470 U.S. at 611; Schmucker II, 815 F.2d at 418.
182. L. Ribe, supra note 130, at 849, 855; see infra text accompanying notes 185-195.
183. The government reinstituted registration in 1980.
184. Mark was indicted and tried and punished in 1982.
186. Id. at 214-15, 221. The Court noted that the State interest in issue was "an additional one or two years of compulsory high school education to Amish children." id. at 224.
187. Id. at 221.
188. Id. at 222, 224.
Justice O'Connor has also limited the state interest to the specific obligation in issue: the one which conflicts with free exercise. Her separate opinion in *Bowen v. Roy* analyzed prior free exercise case law and concluded that the government must prove that "unbending application" of the law is essential to achieving its purpose. If the interest asserted could be "wholly served after accommodating . . . sincere religious beliefs," the first amendment requires such accommodation. No matter how compelling, the governmental interest alone does not justify a burden on free exercise. Only an inability to accomplish that interest if an exemption is made justifies that burden.

Most apt is the analysis of free exercise in *Gillette v. United States*. The Court refused to accept a "categorical, global 'interest' in stifling individualistic claims to noncompliance" with military service requirements. Justice Marshall exposed the illogic of equating the governmental interest in conscripting persons who conscientiously opposed "unjust wars" with the governmental interest in forcing citizens to adhere to the democratic decision to make war. Allowing such a sweeping characterization would allow the government to refuse "to accord any breathing space whatever to noncompliant conduct inspired by imperatives of religion and conscience." Instead, the Supreme Court limited the governmental interest to the specific reasons which justified its refusal to distinguish between the objection to all war and an objection only to unjust war.

Despite these precedents, the Sixth Circuit did not require the government to prove that its interest in registration justified forcing conscientious religious objectors to register conventionally. The court never found that the refusal to accommodate Mark Schmucker's beliefs was "strictly justified by substantial govern-

190. *Id.* at 727 (O'Connor, J., concurring in part and dissenting in part).
191. "The Government here has clearly and easily met its burden of showing that the prevention of welfare fraud is a compelling governmental goal. If the Government could meet its compelling needs only by refusing to grant a religious exemption, and chose a narrowly tailored means to do so, then the Government would prevail." *Id.* at 732 (O'Connor, J. concurring in part and dissenting in part).
193. *Id.* at 459.
194. *Id.* at 456-57, 458, 460.
mental interests that relate directly to the very impacts questioned."

What were the government's interests in Mark Schmucker's registration? What did the government want from him? It could not have been the information on the registration form. He gave that voluntarily in 1980. It could not have been the form itself. The government has no compelling interest in insisting upon receiving information only in the form it dictates, especially if that form violates religious conscience. It could not have been to expedite conscription. The information Mark gave actually facilitated the classification required before induction. It could not have been to prove intentional nonregistration. It had exempted all intentional nonregistrants except those "most adamant in their refusal to register." The government did not choose to prosecute only its "easy cases." It chose cases it expected to be difficult to win, either because they involved strong and "thorny selective prosecution" claims or sympathetic defendants. The government did not want to deter all nonregistrants. It tolerated evasive non-

195. Id. at 462.
196. Bowen, in its multiple opinions, determined that Roy could not preclude the government from using an existing Social Security Number for its welfare files. Bowen, 476 U.S. at 724 (O'Connor, J. concurring in part and dissenting in part) (lining up the eight Justices whose opinions reflected this decision). However, the government could not force Roy to use the Number on penalty of forfeiting AFDC benefits. id. at 724 (O'Connor, J., joined by Brennan and Marshall, JJ.); id. at 733 (White, J., dissenting); id. at 712 (Blackmun, J. concurring in part) (case is moot, but on remand the court should not allow the government to deny benefits solely because religious conviction prevents Roy from using the Number); id. at 716 (Stevens, J. concurring in part and concurring in result) (case is unripe because there is no evidence that the government will refuse to give benefits despite the Roys' refusal to use the Number).
197. Memorandum from D. Lowell Jensen to the Attorney General (June 28, 1982), p. 2, Defendant Exhibit 7 to the motion to dismiss for selective prosecution.
198. Cf. Wayte, 470 U.S. at 607, 612-13 (noting prosecutorial justification for choosing the strongest cases or those with "conclusive evidence" of the element of intent).
199. Cf. Memorandum cited in note 197, supra; Memorandum from Lippe to Jensen, March 19, 1982, p. 2, Defendant Exhibit 12 to the motion to dismiss for selective prosecution: Because of selective prosecution claims and/or sympathetic defendants, "[t]he initial prosecutions . . . are liable to appeal least to a prosecutor;" deferring passive prosecutions would be a way to "avoid some of the 'passive' legal problems [and] probably even avoid some of the 'passive' prosecutions."
200. The government expected selective prosecution claims (which would result in scrutiny and exposure of the passive policy) and an "inordinate amount of news media interest" in the passive prosecutions (which would result in public exposure of the passive policy). See Memorandum cited in note 197, supra, p. 2 and n.3. The government also knew that when the policy became public, "its provisions may act as a disincentive, until the last possible moment, to registration." id. at 2.
compliance, but not forthright dissent. 201

What the government wanted was to force Mark to succumb, to bow to the superior power of civil authority—to abandon conscience for obeisance. The government could not tolerate its inability to coerce Mark Schmucker into the symbolic 202 act of registering and acquiescing in a policy dependent upon military strength. The government met a person of pure principle, and branded him as stubborn and deserving of punishment. The lofty principles of *West Virginia State Board of Education v. Barnette* 203 were forgotten and abandoned.

> Two sergeants soon called for me and, taking me a little aside, bid me lie down on my back, and stretching my limbs apart tied cords to my wrists and ankles, and to these four stakes driven into the ground, somewhat in the form of an X. . . . I wept, not so much from my own suffering, as from sorrow that such things should be in our own country, where Justice and Freedom and Liberty of Conscience have been the annual boast of Fourth-of-July orators so many years. It seemed that our forefathers in the faith had wrought and suffered in vain, when the privileges they so dearly bought were so soon set aside. And I was sad, that one endeavoring to follow

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201. This inescapable logic convinced the *Schmucker I* court: The passive policy "excludes, and therefore rewards, thousands who engage in covert noncompliance and evasion of the law." 721 F.2d at 1049.

202. The government referred to registration as a mere "symbolic" act for Mark, quoting *Koehn*, 457 F.2d at 1333, ignoring the fact that the act was actual participation in the military to Mark. *See Bowen*, 476 U.S. at 718, where Justice O'Connor notes that compliance with the government meant "evil." In reality, the act was symbolic to the government: symbolic of agreement and obeisance. If the act really is "symbolic," the government has virtually conceded that Mark's liberty should prevail. The attempt to coerce symbolic conduct violates the First Amendment according to *Barnette*, 319 U.S. at 632-33:

> Symbolism is a primitive but effective way of communicating ideas. . . . A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn. . . . Here it is the State that employs a flag as a symbol of adherence to government as presently organized. It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks.

203. It may be doubted whether Mr. Lincoln would have thought that the strength of government to maintain itself would be impressively vindicated by our confirming power of the State to expel a handful of children from school. . . . Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

> It seems trite but necessary to say that the First Amendment of our Constitution was designed to avoid these ends by avoiding these beginnings. *Barnette*, 319 U.S. at 636, 641.
our dear Master should be so generally regarded as a despicable and stubborn culprit.\textsuperscript{204}

3. Accommodation

The Sixth Circuit also erred in applying the third prong of the free exercise analysis: accommodation. The court determined that the conscientious objector classification provided in § 456(j) of the Selective Service Act\textsuperscript{205} was sufficient accommodation for Schmucker's religious objections.\textsuperscript{206} The court accorded "substantial deference" to the Congressional choice of this mechanism for accommodation.\textsuperscript{207}

The Sixth Circuit stated that Mark Schmucker insisted upon an evaluation of "conscientious objector status either prior to, or immediately after, registration."\textsuperscript{208} This misstated Mark's claim. Mark claimed that the government had to accomodate free exercise at the point at which his religious beliefs conflicted with the government's requirement.\textsuperscript{209} For Mark, that point is registration. The government refused to accomodate Mark's free exercise rights at the registration stage. Both Schmucker and the CCCO in its amicus brief suggested several methods by which the government could accomodate the religious objection to registration itself. First, the government could adopt a civilian registration which was not administered by or for Selective Service exclusively for military manpower enumeration. Second, the government could permit registrants to choose to provide all required information either to a civilian service agency, or to Selective Service's combat-pool data bank.\textsuperscript{210} Third, the government could allow persons to raise sincere religious conscientious objection to registration as a valid defense to prosecution.\textsuperscript{211} Fourth, the government could have used

\textsuperscript{204} Hertz, Lincoln Talks 537 (1986) from Hirst, The Quakers in Peace and War.
\textsuperscript{205} 50 U.S.C. app. § 456(j) (1986).
\textsuperscript{206} Schmucker II, 815 F.2d at 418.
\textsuperscript{207} Id.
\textsuperscript{208} Id.
\textsuperscript{209} See also Clark, Guidelines For the Free Exercise Clause, 83 Harv. L. Rev. 327, 358 (1969).
\textsuperscript{210} The English system does have a separate register for conscientious objectors with no apparent resulting government problems. Brown, Kohn and Kohn, supra note 146, at 568, n.182. Cf. Clark, supra note 209, at 345, 348.
\textsuperscript{211} Clark, supra note 209, at 351-58; cf. Barnette, 319 U.S. at 643 (Black, J., concurring) ("The devoutness of their belief is evidenced by their willingness to suffer persecution and punishment.").
its own "beg policy" to exempt persons it had evaluated as sincere religious objectors to the very act of registration.

Free exercise should be accommodated unless the accommodation itself would substantially hinder the purposes of the governmental system. The unemployment compensation system, although burdened, will work even if religious objectors to certain work conditions qualify for benefits. The state's interest in compulsory civic education will survive exempting Old Order Amish children from attendance beyond the eighth grade. The program for Aid to Families with Dependent Children will effectively confront fraud if the few American Indians who object to obtaining a Social Security Number are permitted to receive the benefits for which they are known to qualify. The government can assign a number without requiring an application. In *United States v. Lee,* the Court agreed that the integrity of universal taxation for Social Security was not threatened by exempting individual employees on religious grounds. In *Gillette v. United States,* the Court found that the fairness and administrative efficiency of conscription was not jeopardized by exempting persons opposed to all wars. However the complexities of sorting out conscientious objection from political opposition to "unjust" wars only, and of defining "war" in varying political contexts, would compromise the system. Mark Schmucker presented no substantial obstacle to the vitality of the registration system.

One primary method for accommodating free exercise requires the government to use administrative mechanisms already in place. Once the government adopts a mechanism to review individual cases, that mechanism must also be used to evaluate religious exemptions. In *Sherbert v. Verner,* *Thomas v. Review Board,* and

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212. See especially *Bowen,* 476 U.S. at 724 (O'Connor, J., concurring in part and dissenting in part); *see supra* notes 185-195.
216. 455 U.S. 252, 256, 261 (1982) (that the fiscal vitality of the system demanded universal contributions from employers for their employees).
218. *Bowen,* 476 U.S. at 693 (Burger, C.J., plurality opinion); *id.* at 722 and n.17 (Stevens, J. concurring in part and concurring in result). Both opinions construe *Sherbert* and *Thomas* to require such use of the mechanism.
Hobbie v. Unemployment Appeals Commission, the "good cause" standard for unemployment benefits "created a mechanism for individual exemptions. If a state creates such a mechanism, its refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent" and violates free exercise. The government's willingness to extend exemptions and assistance to others requires the same deference to "religious inability." Even exemptions based on religious belief alone do not necessarily infringe upon government programs. A mere handful of objectors will not demonstrably interfere with the government achieving its goal. "Administrative inconvenience is not alone sufficient to justify a burden on free exercise unless it creates problems of substantial magnitude."

In the Schmucker case, the Sixth Circuit accepted the government's claim that evaluating religious objections to registration would make extra work for Selective Service because the absence of conscription created no need to classify anyone. The court ignored the salient fact that Selective Service, the Department of Justice, the FBI, and Mr. Arbeznik had used its own mechanism to complete this very task—the "beg policy." The "beg policy" enabled the government to evaluate Mark's sincerity and to exempt him from registration or prosecution. It worked perfectly. The policy quickly and efficiently exempted some mentally disabled persons from registration. But, having adopted this mechanism, the government refused to use it to accommodate religious beliefs. Therefore, Schmucker simply asked the government to use its own individualized system to recognize his religious freedom. The Sixth Circuit avoided this issue entirely.

222. Bowen, 476 U.S. at 727; see also Hobbie, 107 S. Ct. at 1050 n.7: "[A] scheme which labels and penalizes behavior dictated by religious beliefs as intentional misconduct" exhibits great hostility to religion.
223. Hobbie, 107 S. Ct. at 1053 (Stevens, J., concurring in the judgment).
224. See Gillette v. United States, 401 U.S. at 460.
226. Id.
227. Schmucker II, 815 F.2d at 418 (citing 46 Fed. Reg. at 56,436 (1981)).
228. David Kline expressly refused to decline prosecution of Mark because "religious beliefs could not be a reason either for prosecuting or for refusing to do so." Government Exhibit 4, para. 23, supra note 34. Mr. Kline understood equal protection law well enough to couch his language in terms which did not blatantly reveal impermissible motive. Apparently, he did not understand first amendment free exercise law well enough to know that coercion against religious conscience requires, or at least justifies, exemptions.
BLESSINGS OF LIBERTY

The suggestion that religious objection should be a valid defense was also ignored by the court. The government need take no action to effectuate this accomodation which is both workable and limited. Very few objectors would risk conviction unless their convictions were sincere.\(^229\) The "beg policy" itself recognizes this truism. The district court recognized Mark's convictions and exempted him from the requirement to register despite the guilty verdict. The court's exemption proves the ease and availability of accomodation. If an exemption at this point did not undermine the national defense or the registration scheme, how would an earlier exemption have done so?

No other accomodation existed to relieve the government of its responsibility to Mark Schmucker. Congress did not accomodate religious objectors to registration by deferring exemption to the time of conscription. The Supreme Court has ruled that the only valid legislative choices are those which reflect a considered decision to refuse exemptions because they will cause the integrity of the entire scheme to collapse.\(^230\) Congress made no choice about accomodating objections to the 1980 registration-only scheme. The prior conscientious objector law reflected a choice applicable only to conscription. That choice does not insulate the government from accomodation. The Constitution requires the government to show that accomodation at registration substantially interferes with the military process.\(^231\) The government made no such showing in Mark Schmucker's case.

Deference to Congressional judgment is an ironic escape hatch from a free exercise challenge. The challenge frequently concerns apparently neutral legislation.\(^232\) How can a court defer to Congressional judgment when the very words of the first amendment insist that "Congress shall make no law..."?

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\(^{229}\) Mark's willingness to undergo the trauma and expense of trial and risk of punishment is eloquent proof of the severity of the burden which registration imposed upon him. E.g., Barnette, 319 U.S. at 643 (Black, J., concurring); see also Clark, supra note 209 at 351-52; cf. Bowen, 476 U.S. at 726 (O'Connor, J., concurring in part and dissenting in part) (exemption from use of a Social Security Number is unlikely to attract potential defrauders, who would first have to arouse suspicion and call attention to themselves to obtain the exemption).


\(^{231}\) See especially Bowen, 476 U.S. at 724 (O'Connor, J., concurring in part and dissenting in part), cf. Freeman, supra note 146, at 822 and n.67.

Deference to Congress and lack of precedent made the Sixth Circuit's decision to reject free exercise easier. No case had directly held that there was a free exercise right not to register. However, analysis of the free exercise cases supports this right. The court simply refused to undertake the analysis. Only by discounting the burden on Mark Schmucker, exaggerating the governmental interest, and ignoring the government's own mechanisms suited to accommodation was the court able to reject Mark's claim. The compelling inference is that if not for institutional power and the emotional impact of "national security," freedom for religion and conscience would have prevailed.

"Put to a hard choice between contravening imperatives of religion and conscience"233 and the perceived need of the nation "to ensure its own security,"234 the System faltered.

IV. A THEORY OF FREE EXERCISE

Mark Schmucker deserved the protection of the free exercise clause. Free exercise theory and history support his right. The case was difficult "not because the principles of its decision [were] obscure"235 but because it involved our own military system. The talismen of "national defense" made the Sixth Circuit "discount important principles of our government as mere platitudes."236 The court abdicated principle and substituted deference to Congress237 for analysis of the values at stake.

Announced degrees of "deference" to legislative judgments ... may all too readily become facile abstractions used to justify a result .... Simply labeling the legislative decision [as] "military" ... does not automatically guide a court to the correct constitutional result.238

The three part test in current use appears too manipulable to remain the "standard." This last section proposes a test which would protect liberty of conscience in the manner it deserves. This test is not proposed in an empty attempt to "strive for victory in disputa
tion or the triumph of a side."239 It is proposed to serve justice and protect freedom.

236. Id. at 637.
237. Schmucker II, 815 F.2d at 418.
A. Proposed Theories of Commentators

The free exercise clause and the religion clauses in general have evoked many proposed methods of analysis. They have notoriously eluded definitive explication. However, they have inspired thoughtful and provocative scholarship. With the exception of Professor William Marshall, the judicial and academic consensus is that free exercise protection differs from that of free speech, and extends to conduct which would otherwise be subject to state prohibition or regulation. The chief source


241. See especially Marshall, supra note 3, at 545. Marshall argues that free exercise and free speech are coextensive protections.

242. See, e.g., Choper, Free Exercise, supra note 240, at 943; Stone, supra note 94, at 985. Giannella, supra note 141.
of disagreement concerns the standard to be used to determine what conduct to protect, against what countervailing government claims.\footnote{243}

A brief review of some major theories reveals that each is creatively distinct from the others.\footnote{244}

Professor Phillip Kurland's theory of neutrality reads both religion clauses together.\footnote{245} As long as government action does not discriminate for or against a religion explicitly, it passes constitutional muster.\footnote{246} This approach, however, disallows accommodation for religious scruple if the underlying scheme is neutral to religion.\footnote{247}

Strictly applied, his neutrality principle would overrule \textit{Wisconsin v. Yoder},\footnote{248} \textit{Sherbert v. Verner},\footnote{249} \textit{Thomas v. Review Board},\footnote{250} \textit{Hobbie v. Unemployment Appeals Commission},\footnote{251} and all other cases which mandate an exemption from a facially neutral government scheme. This neutrality principle has been equated with equal protection analysis.\footnote{252} In this sense, even in a neutrality analysis, Mark Schmucker may be protected by free exercise and accommodated because he, unlike other persons, had no options.\footnote{253} Coupled with the analysis in \textit{Wooley v. Maynard}\footnote{254} and \textit{West Virginia State Board

\begin{itemize}
\item \textit{Kurland, Of Church and State, supra note 240}, at 1.
\item \textit{Id. at 5.}
\item \textit{See Merel, supra note 146, at 806-09.}
\item 406 U.S. 205 (1972).
\item 374 U.S. 398 (1963).
\item 450 U.S. 707 (1981).
\item 107 S. Ct. 1046 (1987).
\item \textit{E.g., Lupu, supra note 4, at 761. Tushnet, Religion, supra note 240, at 703.}
\item \textit{See supra text accompanying notes 130-133; Clark, supra note 209, at 346.}
\item 430 U.S. 705 (1977).
\end{itemize}
of Education v. Barnette, which held that coercing conduct which symbolizes a repugnant belief is nonneutral, even Kurland's limited neutrality principle would require accommodation for Mark Schmucker.

The neutrality principle, as modified by Professor Laycock, can accommodate religious convictions so long as the accommodation neither encourages nor discourages religious beliefs or practices. Laws which violate conscience can provide exemptions without promoting religious belief. Such a principle is implicit in Wisconsin v. Yoder and Widmar v. Vincent.

Dean Jesse Choper champions the view that the scope of free exercise protection is "markedly greater than the security" provided to free speech. Free exercise permits—and sometimes requires—exemptions from general laws. Such exemptions are allowable as long as they 1) do not have a purpose to aid religion and 2) do not endanger religious liberty by coercing, compromising or influencing religious beliefs. However, Choper would restrict the occasions for accommodation by permitting the state to prove an overriding compelling interest. In effect, he accepts the tripartite free exercise analysis used by the Burger Court, but rejects the idea that accommodation violates establishment unless the accommodation has the purpose of aiding religion and the effect of endangering religious liberty.

One commentator has observed that Dean Choper protects free exercise by approaching the issue from the standpoint of liberty

255. 319 U.S. 624 (1943).
257. Laycock, Nonpreferential, supra note 240, at 922 (citing Laycock, Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers, 81 NW. U.L. REV. 1, 3 (1986); Laycock, Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy, 81 COLUM. L. REV. 1373, 1384 (1981) (The core of an establishment violation is support; the core of a free exercise violation is burden.). See also Galanter, supra note 130.
260. Choper, Free Exercise, supra note 240, at 943.
261. Id. at 944-45, 947.
262. Id. at 948. This is Choper’s definition of an establishment violation. His analysis would follow the burden, governmental interest, accommodation test, and then subject any proposed accommodation to establishment analysis.
263. Id. at 961; Choper, Religion Clauses, supra note 240, at 696-97.
rather than the limits of governmental authority.264 Dean Choper's test would allow an exemption to Mark Schmucker because accommodation would not influence or coerce beliefs. This conclusion is supported by the fact that there is no incentive for others to risk prosecution; the "beg policy" proves that people were not "lining up"265 to adopt Mark's beliefs. Therefore, an exemption would pose no danger at all to religious liberty.266 Neither is the governmental interest undermined by a nearly insuperable administrative burden.267

Even views which compare free exercise analysis to free speech analysis would exempt Mark Schmucker from registration. Professor Lillian BeVier argues that recent cases analyzing free speech in the public forum have focused on preventing viewpoint discrimination rather than on enhancing the individual benefit of expressive activity.268 Using this focus, government regulations which "predictably interfere with 'practices central to a well-established organized religion'" would be invalid.269 Because such rules interfere with known central practices, the impact is probably not only foreseen, but desired.270 This restrictive view of free exercise would protect Mark Schmucker because the prosecutorial policy knowingly interfered with the "historically pacifist" central beliefs of Mennonites.271

Professor Stone helpfully compares and contrasts equal protection, free speech, and free exercise.272 He insightfully observes that the Supreme Court is uncomfortable with treating religious and political activity of the same sort differently.273 But the jurisprudence of the first amendment leads to such results.274 His basic thesis is that free exercise should extend protections beyond the protections of free speech only if the conflict between law and

264. See BeVier, supra note 240, at 964-65.
265. Choper, Free Exercise, supra note 240, at 948.
266. Choper, Religion Clauses, supra note 240, at 694 (The indirect cost of exemption from Selective Service does not threaten religious liberty or other establishment values.)
267. Id. at 961.
268. BeVier, supra note 240, at 971.
269. Id. at 974.
270. Id.
271. See supra note 45.
272. Stone, supra note 94.
273. Id. at 995.
274. Id. at 996.
religion is one of compelled duty rather than preference. Stone notes that the courts permit the government to regulate speech if alternative methods of expression exist. The speaker, therefore, has a right to communicate effectively, but not to choose only one particular means of communication. Of course, the government cannot deny the speaker the only available forum. Free exercise, however, is different in that it protects a choice made in response to a higher duty. The conflict between duty to law and religion is the "very core" of free exercise. Thus, exemptions are the only available means of preserving the right. Mark argued precisely this point to the Sixth Circuit. Mark had no alternative means of exercising his constitutional rights. According to the Supreme Court, David Wayte and other "speakers" did.

Professor Mark Tushnet proposes that the real problem with religion clause jurisprudence is an unwillingness to confront the impact of the republican tradition on the clauses. Individual liberty, as limited by the concept of ordered government, simply fails to explain the republican impact of the communal life of religion. Liberal analysis fears the very power which the first amendment preserved to religious conscience. For that reason, religious liberty is perceived as a threat to government programs. It is therefore made subservient to such programs. However, a liberty preserved by an accommodation neither threatens the government program nor creates the spectre of establishment by aiding and supporting religion.

Religion is republican because it advances a theory of public good

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275. Id. at 993.
276. Id. at 991.
277. Id. at 992.
278. Id. at 993.
279. Id.; Laycock, General Theory, supra note 240, at 1388-89, identifies three types of free exercise problems: 1) religious activity itself, e.g., worship and proselytizing; 2) internal church autonomy; 3) conscientious objection to government policy. Stone is discussing type 3) and sometimes type 1). This Article focuses on type 3) only.
280. See supra text accompanying notes 142-145; Clark, supra note 209, at 346 recognizes this same truth: laws which compel positive conduct, e.g. the Selective Service Act, "alone face the individual with the sole alternative of acting in violation of conscience or risking criminal punishment."
281. Wayte, 470 U.S. at 611 n.12.
283. Id. at 730, 733.
284. Id. at 730.
285. Id. at 732.
over individual preferences.\textsuperscript{286} If so, granting an exemption does not exalt the individual. It simply recognizes the value of adherence to an ethos of communal good and protects that value. From this perspective, Mark Schmucker did not ask for exemption for a private, selfish reason. He was entitled to freedom from government compulsion because he served interests of great value to the social and moral fiber of this nation's communality.\textsuperscript{287}

In contrast, Professor Lupu sees religious liberty as a private, individual, internal freedom.\textsuperscript{288} As such, it does not pose an institutional threat to government. Further, religious liberty has less potential for social disruption than unchecked public expression does. It needs more latitude than expression does because its noninstrumental nature eliminates the availability of alternative outlets.\textsuperscript{289}

Professor Garvey notes that free exercise must serve different purposes from free speech for it to merit different protections.\textsuperscript{290} The two rights share values of pluralism and autonomy. Thus, those values cannot justify exempting only religious conduct from regulation.\textsuperscript{291} The "special" quality of religious freedom inheres in the potential conflict between religious and civil duties. A coerced choice would extinguish either a civil right or a religious right.\textsuperscript{292} Garvey posits that such conflicts are tantamount to coerced action beyond one's will, \textit{i.e.} legal "insanity."\textsuperscript{293} Schmucker's defense raised precisely this point, urging that his religious choice was a condition beyond his control, deserving of a special exemption.\textsuperscript{294} Although Mark agreed his choice was one of "free will,"\textsuperscript{295} he also testified that his beliefs permitted no option other than refusal to cooperate with and participate in the military. The government

\begin{footnotes}
\textsuperscript{286} Id. at 729, 735-36.
\textsuperscript{287} See \textit{Gillette}, 401 U.S. at 445 ("the value of conscientious action to the democratic community at large"); \textit{Accord Freeman}, supra note 146, at 827-29; \textit{Giannella}, supra note 141, at 1411-13 (Moral revulsion to war and exemptions based thereon are "not subversive of social aims and values."); \textit{id.} at 1421 (The Framers were interested in moral and spiritual values, not merely liberty for its own sake. Liberty was an aid to developing the "finest qualities" in people.).
\textsuperscript{288} Lupu, supra note 4, at 778.
\textsuperscript{289} Id. at 778 and n.182.
\textsuperscript{290} Garvey, supra note 4, at 782-84.
\textsuperscript{291} Id. at 779-80, 787-90.
\textsuperscript{292} Id. at 791-92.
\textsuperscript{293} Id. at 798-800.
\textsuperscript{294} Transcript of 10-4-82, pp. 212-15.
\textsuperscript{295} Id. at p. 242.
\end{footnotes}
had the choice to punish or accommodate: of what value was punishment? 296

Most of the traditionally hard questions for free exercise jurisprudence did not surface in Mark Schmucker's case. Defining religion, determining sincerity, qualifying the burden as coercion rather than preference, centrality (even orthodoxy) of the tenet in issue—all were easy. The single hard question was whether the governmental interest which restricted modes of expression justified denying an exemption for religious conduct. The principled answer is no.

B. Guidance of History

History is not always clear and may be subject to manipulation. 297 But history may illuminate values, and thus offer guidance. I am no historian, and will rely on what appear to me to be careful explanations of the history of religion and the draft. One striking fact is that the struggle between military requirements and religious beliefs is nation-old. Even in colonial times, pacifist scruples to military service needed to be addressed. The colonies which passed conscription laws 298 also expressly provided that members of pacifist sects could exempt themselves from service. 299 In 1775, the Continental Congress exempted persons with religious scruples from fighting, and asked only that they contribute to the Revolution in any manner consistent with their conscience. 300

296. See, e.g., Garvey, supra note 4, at 795 (recognizing the social harm of encouraging civil disobedience by refusing to exempt religious actors) and id. at 797 (urging that forcing sincere believers into civil disobedience and punishment is not a desirable way to resolve social conflicts and was designed to be protected against by the free exercise clause).

297. See, e.g., Kurland, Origins, supra note 240, at 842.


299. P. Brock, History of Pacifism in the United States from the Colonial Era to the First World War (1968); Freeman, supra note 146, at 809. These arguments and authorities were presented to the Sixth Circuit by the CCCO in its amicus brief.

300. J. Ruth, Twas Seeding Time, A Mennonite View of the American Revolution (1976); Russell, supra note 298, at 414, and Giannella, supra note 141, at 1413 (citing 2 Journals of the Cont. Cong. 189 (July 18, 1775, Library of Congress 1905); Freeman, supra note 146, at 809 (citing the exact language from Journals of Congress 159 (1800)).

As there are some people, who from religious scruples cannot bear arms in any case, this Congress intend no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed country, which they can consistently with their religious principles. Even the obligation to fight for freedom did not override sincere religious beliefs that
The Framers of the Bill of Rights were also willing to give faith and conscience primacy over civic duty. Through multiple drafts,\textsuperscript{301} the first amendment religion clauses retained two common threads: prohibition of establishment and protection of religious freedom.\textsuperscript{302} Interestingly, many drafts explicitly guaranteed the rights of conscience.\textsuperscript{303} This language disappeared in the ultimate draft, but its disappearance was unmarked by recorded debate and unexplained by recorded history.\textsuperscript{304} Nevertheless, Harrop Freeman argues that the concept was fully incorporated into the language of the free exercise clause.\textsuperscript{305} Because the phraseology, “rights of conscience,” is related to the earlier phraseology exempting objectors from military service,\textsuperscript{306} it can be argued that the words of the free exercise clause included an understanding of conscientious opposition to war.\textsuperscript{307}

In addition to the free exercise clause, an express right for citizens to be exempt from punishment for refusing to bear arms was proposed during debate on the Bill of Rights. This provision also disappeared into history. A motion to strike the language was defeated. No other record of its fate exists.\textsuperscript{308} Little can profitably be read into this record of silence. But it seems fair to discern both acceptance of and sensitivity to moral opposition to warmaking.

\textsuperscript{301} Kurland, \textit{Origins}, supra note 240, at 855-56.
\textsuperscript{302} Id.
\textsuperscript{303} Id.; Freeman, \textit{supra} note 146, at 810-12 (detailing the history of proposals from the new states and drafts and debates on protecting conscience).
\textsuperscript{304} Id.; Dorsen, \textit{supra} note 240, at 864.
\textsuperscript{305} Freeman, \textit{supra} note 146, at 810-13.
\textsuperscript{306} Id.
\textsuperscript{307} Id.
\textsuperscript{308} Id.; Brown, Kohn and Kohn, \textit{supra} note 146, at 555. Clark, \textit{supra} note 209, at 327-38 (citing 1 Annals of Congress 750-51 (1789)); Giannella, \textit{supra} note 141, at 1412 (noting that a motion to strike the amendment was defeated but that the amendment disappeared nonetheless).
From the Revolution on, conscientious objectors have received special accommodations. Those who fought to establish a nation committed to freedom did not object to fighting on behalf of those whose freedoms included "Religious Principles" against bearing arms. Some exemption for conscientious objection has accompanied every conscription act. There has never been an exemption from registration. However, the point is not that Congress has exempted religious objectors from registration, rather, the point is that the draft and the common defense have never been considered superior to those religious beliefs concerning opposition to warmaking.

This respect for individual principle is eminently sensible. Taking part in military activity in order to "preserve" freedoms which are in reality abrogated by the activity itself, is profoundly destructive.

A government secure in its policy need not fear the freedoms of its people.

Government of limited power need not be anemic government. Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it

309. Gillette, 401 U.S. at 443 n.8.

310. The first conscription act was passed during the Civil War. 1863 Draft Act, 12 Stat. 631 (1863). It contained an exemption for anyone who paid $300. Not all conscientious objectors would or could pay. The act was amended to permit conscientious objectors prohibited from bearing arms by their religious sect to serve as noncombatants or pay $300. Acts of February 24, 1864, 13 Stat. 6, 9 (1864).

The Selective Draft Act of 1917 was the next draft. Conscientious objectors with religious convictions against war or participation in war, and who were members of a well-recognized sect whose creed forbade service in the military, were given noncombatant status. 40 Stat. 76, 78 (1917). President Wilson directed that other conscientious objectors be accorded noncombatant status insofar as possible. Exec. Order No. 2823 (1918). In 1918, Congress authorized furlough to agriculture and industry. 40 Stat. 450 (1918).

The next conscription act was the Selective Training and Service Act of 1940. It provided exemptions to anyone who by "religious training and belief" was opposed to participation in "war in any form." 54 Stat. 885 (1940), 50 U.S.C. App. 311 (1946). The draftee could choose noncombatant duty or national service in lieu of induction to the military at all. Id. In 1948, Congress defined religious training and belief as distinct from "political, sociological, or philosophical views or a merely personal moral code." 50 U.S.C. App. 456(j) (1948). However, such persons were completely exempted from service of any kind. The civilian work requirement was reinstated in 1951. 50 U.S.C. App. 456(j) (1951). After United States v. Seeger, 380 U.S. 163 (1965), defined conscientious objection to include beliefs which occupied a place in one's life similar to that occupied by religion, Congress amended section 456(j) to delete "Supreme Being" and to conform to Seeger. 81 Stat. 100 (1967).

311. Pragmatism also supports exempting sincere objectors, who are unlikely to be effective fighting men or contribute to morale. See, e.g., Gillette, 401 U.S. at 452-53; Welsh v. United States, 398 U.S. 333, 369 (1970) (White, J., dissenting).
makes for its better support. Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.312

Strength of moral principle preserves this nation as surely as military activity does. One of America's civic parables is that Rome fell from moral degeneracy, not from the lack of a standing army.313 Moral strength serves a central purpose in preserving the essence of our civil republic.314 Thomas Jefferson stressed the need for an educated citizenry for the survival of a republic.315 His ideal for education included both factual instruction and moral responsibility. Civic duty involved allegiance to principle greater than self. Religion is a prime repository of such power of conscience. Pacifism is an abiding and powerful moral and religious principle.316 Persons of principle have consistently opposed any form of military activity. National governments have historically preserved themselves with military activity. It is disturbing that governments cannot coexist with such persons of principle.

The pretense that Mark Schmucker's liberty was adequately protected by a nonexistent (or fully realized) conscientious objector status is not accommodation, but toleration as Thomas Paine saw it. "Toleration is not the opposite of Intolerance, but is the counterfeit of it. Both are despotisms. The one assumes to itself the right of withholding Liberty of Conscience, and the other of granting it."317

C. The Proposed New Theory of Free Exercise

The free exercise clause is different from the free speech clause.

313. Cf. Freeman, supra note 146, at 816.
314. E.g., Yoder, 406 U.S. at 221.
315. See, e.g., Yoder, 406 U.S. at 221; Abington School District v. Schempp, 374 U.S. 203, 230 (1962) (Brennan, J., concurring) ("Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government."); cf. Bartnete, 319 U.S. at 637. See also L. Tribe, supra note 240, at 825 (noting that schools are the source to transmit basic norms and inculcate societal values).
316. See, e.g., United States v. MacIntosh, 283 U.S. 605, 633, 635 (1931) (Hughes, C.J., dissenting); Freeman, supra note 146, at 813-16; Giannella, supra note 141, at 1411-15.
To protect some conduct under free exercise which is not protected by free speech does not ascribe priority or superiority to religious liberty over political liberty. It simply recognizes that the liberties differ in nature and therefore in scope.

This distinction between the two rights has been variously characterized. The free exercise protection has a "deeper cut" than speech. It includes a "nonindividualist principle," which is "virtually unique" in the extent of protection provided. Conceptually, the reason for according such protection is "recognition of the value of conscientious action" and "respect" for the "principle of supremacy of conscience." Concretely, decisions of religion, unlike those of expression, are "made not as a matter of preference, but as a matter of duty to higher authority." The values behind free speech are external and instrumental. They promote both self-governance of a free people and self-fulfillment of autonomous speakers. The values of free exercise are more internal and self-directing. They are communal within a separate society and

318. See especially Yoder, 406 U.S. at 220 ("[T]here are areas of conduct protected by the free exercise clause of the first amendment and thus beyond the power of the State to control, even under regulations of general applicability."). 235; Welsh v. United States, 398 U.S. 333, 372 (1970) (White, J., dissenting); Pfeffer, supra note 240, at 1120-21.

319. Mansfield, The Religion Clauses of the First Amendment and the Philosophy of the Constitution, 72 CAL. L. REV. 847, 856 (1972). Compare Pfeffer, The Supremacy of Free Exercise, 61 GEO. L.J. 1115 (1973) urging that free exercise has a preferred position and gives greater protections) with Marshall, supra note 4, at 576 (contending that to say free exercise protects conduct more than free speech does is to order first amendment freedoms, giving religion supremacy). A species of this same debate can be seen in Supreme Court language. Compare Martin v. Struthers, 319 U.S. 141, 143 (Murphy, J., concurring) (freedom to practice religion enjoys a preferred position) with Prince v. Massachusetts, 321 U.S. 158, 164 (1944) (all first amendment freedoms have a preferred position, with no ordering among them); cf. Gillette, 401 U.S. at 468-69 (Douglas, J., dissenting) (quoting Justice Black to the effect that religion cannot be preferred to irreligion or give greater rights).

320. Cf. Prince v. Massachusetts, 321 U.S. 158, 164-65 (1944) ("Differences there are in them and in the modes appropriate for their exercise."); Garvey, supra note 4; Tushnet, Religion, supra note 240, at 714-19.


322. Tushnet, Religion, supra note 240, at 734.

323. Choper, Free Exercise Clause, supra note 240, at 943.


325. Id. at 453; Freeman, supra note 146, at 827-29.

326. Stone, supra note 97, at 993.

327. Garvey, supra note 3, at 780; Lupu, supra note 3, at 776.

328. E.g., Stone, supra note 94, at 991.

329. E.g., Lupu, supra note 4, at 774, 776, 778.

system of value priorities. The freedom to act, as well as speak and believe, is necessary to avoid requiring “virtuous citizens” to face the “painful dilemma” and “cruel choice” between conflicting imperatives of personal responsibility to different authority. The civic authority can visit punishment and stigma, while the moral authority may withdraw hope and salvation.

The values of pluralism, diversity, and checking overweening governmental power are shared by free exercise and free speech. But free exercise respects a value system, a moral code which inescapably influences conduct as well as belief. This distinction may cause “special embarrassment” when the activity which seeks constitutional protection is susceptible to analysis under either guarantee. But that embarrassment is codified in the first amendment and provides no principled basis for abandoning the protection accorded to religious action. The embarrassment ex-

331. E.g., Bradley, supra note 240, at 837; Clark, supra note 209, at 336-37; cf. Greenawalt, supra note 240 (proposing that religion uses nonrational thought to resolve difficult issues of value priorities which rational, liberal thought cannot resolve).

332. Bradley, supra note 240, at 834.

333. E.g., Clark, supra note 209, at 336; Garvey, supra note 4, at 792-97.


Much has been said of the paramount duty to the state, a duty to be recognized, it is urged, even though it conflicts with convictions of duty to God. Undoubtedly that duty to the state exists within the domain of power, for government may enforce obedience to laws regardless of scruples. When one’s belief collides with the power of the state, the latter is supreme within its sphere and submission or punishment follows. But, in the forum of conscience, duty to a moral power higher than the state has always been maintained. The reservation of that supreme obligation, as a matter of principle, would unquestionably be made by many of our conscientious and law-abiding citizens. The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation. Freedom of conscience itself implies respect for an innate conviction of paramount duty. The battle for religious liberty has been fought and won with respect to religious beliefs and practices, which are not in conflict with good order, upon the very ground of the supremacy of conscience within its proper field.

Cf. Freeman, supra note 146, at 826 (“Every great religion is not merely a matter of belief; it is a way of life; it is action.”); Laycock, General Theory, supra note 240, at 1390 (People exercise religion by following its moral dictates).

335. Stone, supra note 94, at 994.

336. Id.; Tushnet, Religion, supra note 240, at 718.

337. Contra Marshall, supra note 4; cf. Kurland, Of Church and State, supra note 240.
plains why Schmucker II reached the same result as Wayte. It does not justify it.

The free speech guarantee developed potency in factual contexts interweaving religious speech and free exercise. This is hardly a reason to reduce free exercise to the parameters of free speech protection. Rather, it emphasizes the distinct quality of free exercise—protection from compulsion to act against conscience.

There are important limitations upon religion which do not apply to expression. The establishment clause prohibits any direct governmental involvement in religious beliefs, speech or practices. Conversely, the government may freely and actively participate in speech and expression. In fact, the government consistently promotes its own ideology and political philosophy. The price of religious freedom is exacted in refusals to permit state aid to support religious schools. The appearance of governmental support or approval invalidates any scheme of aid to parochial school students. In free speech analysis, the government can support


340. See Marshall, supra note 4, at 565.


342. E.g., Meese v. Keene, 107 S. Ct. 1862, 1869-71, 1873 (1987) (Labelling films on nuclear war and acid rain as “political propaganda” pursuant to a statute which authorizes such labelling in order to identify material with its source [foreign “agents”] is a permissible governmental regulation. The case presented no occasion to “decide the permissible scope of Congress’ right to speak.”’ The impact of such governmental required labelling of material which could influence those exposed to its message is some government expression, even if it is characterized as neutral additional information for use in evaluating the message given.; id. at 1874, 1877-78 (Blackmun, J., dissenting in part) (Congress intended to counteract messages with the label, to lessen its credence when it differed from the government’s position, “to reduce the effectiveness of speech.” The label thus is governmental speech and opinion.; Barnette, 319 U.S. at 640; cf. Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring) (government speaks by word and deed to a large audience); Stone v. Graham, 449 U.S. at 43-47 (Rehnquist, J., dissenting) (schools should be able to convey the message of the Ten Commandments due to their secular impact on our law, culture and ethics).

343. Garvey, supra note 4, at 787. See supra cases cited in note 342; cf. Mansfield, supra note 240.


345. See Mansfield, supra note 240, at 883, 886; L. Tribe, supra note 240, at 843-44.
any idea as long as it reacts neutrally to the rights of others to express ideas in opposition. The Supreme Court refuses to interpret or resolve disputes within religious organizations which it would readily submit to legal process in a nonreligious context. Free exercise protections also impose a low cost on government—exempt the believer in conflict. Free speech protections have a broader sweep, and often invalidate the entire law as to all citizens. What free exercise gains in depth, it loses in breadth.

That free exercise protects conduct more so than free speech results from explicit language in the first amendment itself. Freedoms of religion and expression are classified and protected in distinct clauses of the amendment. They cannot mean the same thing or one would be mere surplusage. The choice of the word “exercise,” instead of “belief” or “worship,” suggests protection for action and conduct. Simply, the first amendment says that religion and speech are different and that liberty for religion includes the right to exercise, i.e., act.

Resistance to this obvious distinction may come from discomfit with the separateness of the religious from the political community. But the respect for value systems is the foundation of both the amendment and our “constitutional philosophy.” The decision to preserve values different from those protected by free speech and equal protection was made in the first amendment. Our task is to implement this vision. A primary stumbling block, as Professor Tushnet wryly notes, is not our failure to understand the Constitution; it is our failure to understand religion.

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347. Mansfield, supra note 240, at 858-68 (citing and analyzing the major cases).
348. Clark, supra note 209, at 332; Galanter, Religious Freedom, supra note 130, at 281; Stone, supra note 94, at 986, 992.
349. Clark, supra note 209, at 332; Stone, supra note 94, at 986.
351. E.g., Tushnet, Religion, supra note 240, at 718; cf. Stone, Compelled Exemptions, supra note 94, at 995.
353. Barnette, 319 U.S. at 637; Freeman, supra note 146; Mansfield, supra note 240, coined the phrase “constitutional philosophy.”
354. Lupu, supra note 4, at 761.
355. Laycock, Nonpreferential, supra note 240, at 1008-09.
356. Tushnet, Reflections, supra note 240, at 1008-09.
To say that free exercise protects conduct is only to begin. The parameters of that protection need to be established. The fundamental function of the religion clauses is the guarantee of liberty. To assess the scope of liberty, the appropriate inquiry is what limits must the government observe, not how much liberty must the government grant. Liberty restricts power. To focus on the nature of a countervailing governmental interest fundamentally misconceives the problem. Our focus should not be on whether the government has a valid reason for pursuing its purposes. Our focus should be on whether the liberty is invaded by the government. This does not make liberty absolute. Rather, it frames the legal question in terms of which exercises of government powers are fundamental to liberty and therefore are permissible.

Free speech has a jurisprudence of its own, developed with an eye toward workable rules and an underlying policy which exalts

357. Grand Rapids School District v. Ball, 473 U.S. at 382 (The religion clauses solve the problem of religious and governmental interference by "guard[ing] the right of every individual to worship according to the dictates of conscience while requiring the government to maintain a course of neutrality among religions, and between religion and nonreligion."); id. at 385 (Religious indoctrination with government support "would have devastating effects on the right of each individual voluntarily to determine what to believe (and what not to believe) free of any coercive pressures from the State, while at the same time tainting the resulting religious beliefs with a corrosive secularism."); Abington School District v. Schempp, 374 U.S. 203, 214-19 (1963) (The two religion clauses overlap in their purpose to protect religious freedom from government encroachment. The Court extensively quotes authority expressing this idea.); id. at 227 (Douglas, J., concurring) (Both clauses serve "the same goal of individual religious freedom."); id. at 231, 232 (Brennan, J., concurring) (The boundary between religion and government is "central to our scheme of liberty."); "[T]he Framers of the First Amendment were not content to rest the protection of religious liberty exclusively upon either clause."); Everson v. Board of Education, 330 U.S. 1, 8-11 (Using Virginia as an example of all the colonies' struggles for religious liberty, the Court noted that "individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise assist any or all religions, or to interfere with the beliefs of any religious individual or group."); id. at 40 (Rutledge, J., dissenting) ("Establishment" and "free exercise" were correlative and coextensive ideas, representing only different facets of the "single great and fundamental freedom."); Kurland, Origins, supra note 255, at 860. See also Engle v. Vitale, 370 U.S. 421, 429-30 (1962); Zorach v. Clauson, 343 U.S. 306, 313-14 (1952); Choper, Religion Clauses, supra note 240, at 677; Galanter, Religious Freedom, supra note 130.

358. See BeVier, Free Exercise Clause, supra note 240, at 972.

359. E.g., Barnette, 319 U.S. at 636-38; Madison, Memorial and Remonstrance, para. 2, 8, 15: "Either then, we must say that the will of the Legislature is the only measure of their authority; and that in the plenitude of this authority, they may sweep away all our fundamental rights; or, that they are bound to leave this particular right untouched and sacred."

360. This is what the current free exercise test not only allows, but mandates. E.g., Lee, 455 U.S. at 257.

361. E.g., Barnette, 319 U.S. at 636.
dissent and unpopular ideas as worthy contenders.\textsuperscript{362} The values are intertwined with our theory of good government. Speech and dissent are an aid to good government, to progress and growth, to accommodating diversity, and to providing individual outlets respecting dignity and autonomy.\textsuperscript{363} These values are part of the ethos of liberalism and republicanism. These "first freedoms" balance liberty and power in a dynamic political state.

The amendment, places no explicit limit on expression;\textsuperscript{364} however, the structure of the Constitution implies some limitations.\textsuperscript{365} Such limits emanate from the classic dichotomy between collective power and individual liberty and are properly political in nature. The forum doctrine, the clear and present danger limit, and the time, place and manner restrictions all provide political limits which avoid content-based regulations.\textsuperscript{366} The "least-restrictive-alternative"/"narrowly-tailored" tests accommodate political necessity to personal liberty. As a political freedom, free speech warrants political limits.

Free exercise does not present this doctrinally pure question of the political value of the liberty versus political structural necessity. In fact, the religion clauses attempt to remove the spheres of religion and politics from each other.\textsuperscript{367} The clauses represent a

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\item \textsuperscript{362} Id. at 642; BeVier, supra note 240; Garvey, supra note 4, at 780; Stone, supra note 94, at 991.
\item \textsuperscript{363} E.g., Garvey, supra note 240, at 780.
\item \textsuperscript{364} Barnette, 319 U.S. at 639.
\item \textsuperscript{365} Lupu, supra note 4, at 773, 776.
\item \textsuperscript{366} BeVier, supra note 240, at 970-72.
\item \textsuperscript{367} In essence, the religion clauses represent the separation of powers concept embodied in the Constitution with relation to internal government relations. Madison, Memorial and Remonstrance, para. 2: "The preservation of a free government requires not merely, that the metes and bounds which separate each department of power may be invariably maintained; but more especially, that neither of them be suffered to overleap the greater Barrier which defends the rights of the people." See, e.g., Abington School District v. Schempp, 374 U.S. 203, 226 (1963) ("[I]t is not within the power of government to invade that citadel [of church, individual heart and mind], whether its purpose be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality."); id. at 229 (Douglas, J., concurring) ("the balance of power between individual, church and state that has been struck by the first amendment"); id. at 231 (Brennan, J., concurring) (quoting John Locke's sentiment that it is "necessary to distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and the other."); McGowan v. Maryland, 366 U.S. 420, 465-66 (1961) (Frankfurter, J., separate opinion) (Establishment assured that "the national legislature would not exert its power in the service of any purely religious end... [I]t withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct."); Mansfield, supra note 240, at 848 ("It is necessary to see the religion clauses as working together to create a single standard that
dynamic balance of power between those spheres. Neither sphere of influence should exercise power within or over the other. Free exercise protects religion from political power. Establishment protects politics from religious power as well as religion from political power. The liberty guaranteed to religion is thus both collective and individual.

It is inappropriate to limit religious liberty with any politically defined governmental interest. The necessary result of such a limitation is the intrusion of political power into individual religious

dictates the proper relationship between government and religion."; Giannella, supra note 141, at 1382-83. Cf. L. Tribe, supra note 240, at 816-18 (Three theories of the meaning of the clauses relate to historical schools of thought. The Supreme Court consistently accepts a Jeffersonian/Madisonian model.).

368. E.g., Everson, 330 U.S. at 31-32 (Rutledge, J., dissenting) ("[The Amendment's purpose] was to create a complete and permanent separation of the spheres of religious activity and civil authority.") and id. at 52 ("[The sphere of religious activity, as distinguished from the secular intellectual liberties, has been given twofold protection and, as the state cannot forbid, neither can it perform or aid in performing the religious function.")

369. Id. at 53 ("There cannot be freedom of religion, safeguarded by the state, and intervention by the church or its agencies in the state's domain or dependence on its largesse.") See also Engel v. Vitale, 370 U.S. 421, 431 (1962) (The first amendment prevents a "union of government and religion [that] tends to destroy government and degrade religion."); Zorach v. Clauson, 343 U.S. 306, 320 (1952) (Black, J., dissenting) ("State help to religion injects political and party prejudices into a holy field. It too often substitutes force for prayer, hate for love, and persecution for persuasion. Government should not be allowed, under cover of the soft euphemism of 'cooperation,' to steal into the sacred area of religious choice."); McCollum v. Board of Education, 333 U.S. 203, 212 (1948) ("Religion and government can best work to achieve their lofty aims if each is left free of the other within its respective sphere.").

370. E.g., Madison, Memorial and Remonstrance, para. 5: "Because the bill implies either that the Civil Magistrate is a competent Judge of Religious truth ...[which is] an arrogant pretension ..." and para. 9: The bill is wrong because "It degrades from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority." and para. 15.

371. Id. at para. 5: The bill wrongly implies that the Civil Magistrate "may employ Religion as an engine of Civil policy," and para. 8: Ecclesiastical establishments have erected tyrannies and "in no instance have they been seen the guardians of the liberties of the people.... A [just] government will be best supported by protecting every citizen in the enjoyment of his Religion...."

This does not mean that religiously-motivated political expression is unconstitutional. Such expression is protected by Free Speech and is inextricable from political values. See Choper, Religion Clauses, supra note 240, at 683-84; cf. McDaniel v. Paty, 435 U.S. 618 (1978).

372. Madison, Memorial and Remonstrance at para. 6: Establishment "is a contradiction to the Christian Religion itself; for every page of it disavows a dependence on the powers of this world;" and para. 9: "[T]he proposed establishment is a departure from that generous policy, which, offer[s] an asylum to the persecuted and oppressed of every Nation and Religion ... [and] is the first step ... in the career of intolerance."

373. See Lupu, supra note 4, at 739, 742.
freedom. The Constitution gives government no power to make or execute such a choice. Justices Jackson and Rutledge forcefully point out that incidentally assisting religion is not a "public purpose" which supports a governmental action. Conversely, a "public purpose" should have no ability to infringe upon religion. Because a generalized governmental interest is political, such an interest cannot justify intruding upon religion. As Madison explains in the Memorial and Remonstrance, there is a higher duty than that owed to civil authority, and civil authority is bound to recognize that duty. Civil authority may not decide that it imposes a superior duty even if its interests are politically "compelling."

Such an understanding underlies the unitary purpose of the two religion clauses. They each give a correct answer to the separate but related questions of the role of religion in government and the role of government in religion. There can be no political answer to a religious question nor religious answer to a political question. If a governmental interest can outweigh and override a religiously compelled action, the government is forcing a political answer to a religious question.

In accord with this thesis, the test for free exercise protection should be:

1) whether a sincere belief of conscience compels conduct or the refusal to engage in conduct (i.e., burden)
2) if so, the conscientious action must be accommodated, unless accommodation would accord affirmative political power which would violate the establishment clause.

374. Everson, 330 U.S. at 26-27 (Jackson, J., dissenting) and at 52-53 (Rutledge, J., dissenting).
376. Madison, Memorial and Remonstrance, para. 1.
377. This analysis admittedly loads the concept of establishment. Establishment is already a loaded concept, however. The requirement of finding the distinction between political power and religion-power is a part of establishment analysis. It is better to eliminate the balancing of religious burden and political interest in free exercise analysis, to keep the spheres clearly separated. If we approach establishment by looking for the distinction between religion/conscience and politics, we still avoid the blurring of the two spheres necessitated by balancing them against each other. The problem becomes one of definition, and exertion of power, rather than one of deciding whether religion or politics is more important in any given scenario or case. Conscience has already been reserved as the higher value.

Cf. Kurland, Of Church and State, supra note 240, at 93, presented Justice Douglas's view that "The reverse side of an 'establishment' is a burden on the 'free exercise' of religion." (McGowan v. Maryland, 366 U.S. 420, 578 (1961) (Douglas, J., dissenting), and critiqued it for not noting "that the reverse side of 'free exercise' might be 'establishment.'")
This test protects religion and conscience from political power, the purpose of the free exercise clause. The establishment clause remains to protect political power from religion power as well as religion from political power. The balance of power is properly struck. The test for each clause asks and answers the correct questions.

Analyzing Schmucker II with this test shows that the Sixth Circuit first erred in allowing registration, part of the military foundation to national security, to be balanced against religious conscience at all. This is a political interest of government. The Sixth Circuit next erred in allowing this interest to override accommodation of liberty of religion and conscience. The court had to make both errors to reject free exercise. In the throes of World War II, the Supreme Court understood that the exercise of liberty contributes to our security by making it real.378 The Sixth Circuit failed to understand. A commitment to "[n]ational unity [as] the basis of national security" does not authorize "compulsion as ... a permissible means for its achievement."379 We should realize that smothering Mark's freedom is a far greater threat to our national values than is his refusal to subordinate principle to political objectives.

This proposed test by no means makes religious liberty absolute. It simply denies the power of political judgment to intrude on that liberty. Because religion is not a political tool, political limits are inappropriate. The limit to religious liberty is, however, already contained in the Constitution. The limit is establishment. If making room for free exercise would result in the government according political power to—Establishing—religion, then the liberty cannot be exercised. The barrier is religion and is contained in the Constitution.

Liberty is in tension with collective power. Collective power preserves peace and order in a consensual society. An asserted liberty may do harm to others (the classic boundary in liber-


379. Id. at 640. "There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent." id. at 640.

"[W]e apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization." id. at 641.
If the government—the collective power repository—allowed such a result of liberty, the government in essence gives a power to the actor which belongs only to the collective. In religion terms, if the government allows the free exerciser to do affirmative harm to another, the government gives that person a political power no other individual has. That power is then the power to transgress the political boundaries of liberty. As such, it can be characterized as political power, because it distorts the structure of government and the people governed. That result violates establishment.

Conversely, an exemption for conduct compelled by religious faith does not accord the religion any political power. It simply accords the individual freedom. By exempting an individual, the government does not lend its influence to the idea. Instead, it avoids exerting a coercive, compromising influence on it. In fact, the exemption effectuates the establishment clause by removing the idea and the conduct from the political realm. By according the religious belief an “outsider” status, the government deflates and dilutes any political impact. Therefore, accommodation removes both the need and the opportunity to secure the right of conscience by converting the act of faith into a politically powerful idea. In contrast, a failure to accommodate makes political action inevitable.

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380. E.g., Barnette, 319 U.S. at 630: “The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin.... The sole conflict is between authority and the rights of the individual.” See also Clark, supra note 209, at 327, 334, 361; Galanter, supra note 130, at 282; Mansfield, supra note 240, at 886; cf. Prince v. Massachusetts, 321 U.S. 158, 177 (1944) (Jackson, J., separate opinion).

381. Lynch v. Donnelly, 465 U.S. 668, 687-88 (1984) (O'Connor, J., concurring); Galanter, supra note 130, at 288 (noting that the essence of Establishment is coercive power through “institutional collaboration,” and that exemptions for religious conduct would seldom result in this).

382. Cf. id. at 688.

383. The government proved this point in its prosecution of Mark Schmucker. Both the government and the Sixth Circuit took offense at Mark's explanation that continuing to adhere to his conscience had the incidental benefit of taking government time and resources to prosecute, thus potentially delaying mobilization as well. Schmucker II, 815 F.2d at 415. This is an irony. The government insisted that its choice to proceed with conscious awareness of the discriminatory impact of prosecution did not show impermissible motive. The same government then insisted that Mark's awareness that its choice involved expending resources proved that Mark had an impermissible motive. It was not Mark who required the government to ignore his rights and prosecute. The government itself created this “political” impact of Mark's conscientious beliefs. Mark was content to give the government his reasons and follow his sincere beliefs opposing registration as participation in the military. Mark
dividual must either engage in civil disobedience, succumb to political intrusion into faith, or turn private conscientious choice into a political cause. If the conscientious choice achieves political power, both the law and policy may change. With an exemption, the general law remains intact. 384

The establishment clause is also an effective check to some exercises of liberty which do no affirmative harm to others. It halts religious liberty at the point where it becomes coercive or influential on government exercises of power. This recognition glimmers beneath the vaguely realized distinction between compulsion and benefits, which Justice Powell, former Chief Justice Burger, and present Chief Justice Rehnquist have urged. 385 These Justices accept the legitimacy of an exemption from a government obligation which coerces a violation of conscience. However, if the coercion is exerted only as a prelude to receiving government benefits, reasonable legislative judgments may override the violation of religious conscience. 386

This lower standard of scrutiny is not a correct interpretation of free exercise. The compulsion/benefit distinction focuses on political choices rather than on liberty interests. It also uses tests which weigh political judgments ("least restrictive alternative" or "legitimate means to accomplish") instead of tests which evaluate freedom in the sphere of religious choices. The rationales offered by the Justices do speak to more essential questions of the limits which establishment places upon free exercise.

For instance, in Bowen v. Roy, the plaintiffs claimed that religious convictions precluded them 1) from obtaining a Social Security Number and 2) from allowing the government to use a Social Security Number for them to receive welfare benefits. The plaintiffs claimed that the government policy violated free exercise by forcing them to choose between obtaining benefits for which they qualified or violating sincere religious beliefs. Chief Justice Burger characterized the claims as attempts to "compel [the government] to accomodate religious-based objection[s]," 387 and "to require the

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384. E.g., Clark, supra note 209, at 330-31; Stone, Compelled Exemptions, supra note 94.
386. Id. at 703-06.
387. Id. at 695.
Government itself to behave in ways that the individual believes will further his or her spiritual development.\textsuperscript{388}

The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. Just as the Government may not insist that appellees engage in any set form of religious observance, so appellees may not demand that the Government join in their chosen religious practices.\ldots The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures.\textsuperscript{389}

\ldots

Claims of religious conviction do not automatically entitle a person to fix unilaterally the conditions and terms of dealings with the government.\textsuperscript{390}

The Chief Justice asserts that some exemptions really exercise power in the political sphere or force the government to engage in a particular religious practice. Each of these results is a violation of the establishment clause. The true reason for finding no right of free exercise should not be that the governmental interest in a political program is more important. The reason should be the asserted liberty is really an involvement of government in religion or vice versa.

The Chief Justice urges that Thomas and Sherbert were correctly decided because they reflect government hostility to religion. The hostility was the government's refusal to adapt a mechanism of exemption to consider a religious reason as legitimate.\textsuperscript{391} More appropriately analyzed, Thomas, Sherbert, and Hobbie realized that an exemption which relieves persons from compulsion to act against their religious conscience is not an exertion of religious power over the government nor an exertion of governmental power over religion. Thus, the exemption does not violate establishment.\textsuperscript{392}

When the Chief Justice recognized that a Congressional exemption to Roy would not violate establishment,\textsuperscript{393} he proved his own

\textsuperscript{388}. Id. at 699.
\textsuperscript{389}. Id.
\textsuperscript{390}. Id. at 699-700.
\textsuperscript{391}. Id. at 706.
\textsuperscript{392}. All three cases specifically contend that the exemption is not aid or support of religion and therefore does not violate establishment.
\textsuperscript{393}. Bowen, 476 U.S. at ___.
opinion wrong. If Congress can make such a law, the Court must require such an accomodation. The exemption would not diminish liberty nor engage the government in religion. No governmental purpose other than avoiding establishment should be permitted to deny religious liberty of action. Otherwise the denial engages the government in coercive influence over religion, which is both a free exercise and an establishment violation. 

Justice Stevens also implicitly recognizes the effectiveness of establishment as the boundary for free exercise. "[The] Free Exercise Clause does not give an individual the right to dictate the Government’s method of recordkeeping." It does give the individual the right to an exemption which does not confer favored status. Again, this is establishment analysis, divorced from considering the relative priority of religious conviction and governmental interest. Although recordkeeping is hardly compelling, it is a governmental power function. Thus, establishment prevents religion from dictating the form. However, religious freedom can be accomodated without dictating. Requiring the government to be flexible differs from mandating new and uniform methods, and demonstrates the distinction between free exercise exemptions and establishment violations. Mark Schmucker did not attempt to dictate to the government. He provided the information it desired. Just as Roy was entitled to receive benefits without capitulating to demands to use a Social Security Number, Mark was entitled to be free of prosecution.

Thomas, Hobbie and Sherbert implicitly recognize that coercive pressure to forego conscience is wrong. It violates establishment for the government to override or alter conscience by coercion. This principle emphasizes the correctness of protecting free exercise, and replaces the manipulative analysis that the government has a compelling political interest to refuse accomodation.

Chief Justice Rehnquist presents a similar understanding of establishment and free exercise, although he imposes far greater limits on free exercise and fails to apply the understanding purely
to the facts of the cases. His Thomas dissent reveals discomfort with the idea of using free exercise to "conform" statutes to "the dictates of religious conscience of any group." But a legislative choice to exempt would not violate establishment. Two errors pervade this analysis. First, legislative choice is a pristine violation of an amendment which states "Congress shall make no law respecting an Establishment of religion." If the legislature can choose without violating establishment, then the liberty must exist. Second, exemptions do not "conform" a statute. The statute or program remains intact. Exemption simply accommodates those liberties which do not, in themselves, violate establishment. If establishment is not violated by exemptions, free exercise requires them. No political power is awarded and no political compulsion is imposed. Both religion clauses are served and the government is precluded from penalizing religious conduct or affirmatively exerting power to advance a religious belief.

In summary, free speech protects the political process. The limits to free speech are properly found in the political process and the need for political power to accomplish compelling political interests. Free exercise protects religious freedom. The limits of free exercise are properly found in the limits to religious power over the political sphere, i.e., in the establishment clause. Using political interests to limit religious liberty permits government to exert power in the sphere of religion for political purposes only. That violates establishment.

The current free exercise test, which allows a political interest to justify coercion against religious conscience, violates establishment at the same time that it violates free exercise. The proposed test is not manipulable for results as is the current balancing test. Its principle respects the unity and values of both religion clauses.

398. 450 U.S. at 723 (Rehnquist, J., dissenting).
399. Id. at 724-25.
400. Cf. Choper, Free Exercise, supra note 240, at 948 (Choper accepts the balancing test but then says any accommodation mandated after that test is applied will not violate establishment unless it "significantly endangers religious liberty in some way by coercing, compromising, or influencing religious beliefs." Although I agree that establishment violations should confine the right of free exercise, I do not agree that the religious burden should be weighed against, and perhaps be "outweighed by," a governmental interest of political dimensions.); L. Tribe, supra note 240, at 819-23 (Free exercise should have primacy over establishment to conform most closely with the consensus at the time of framing the Constitution and the first amendment.)
The clauses work together rather than being in "tension" with each other.

V. CONCLUSION

Free exercise jurisprudence did not make it hard to exempt Mark Schmucker from registration. Political power and orthodoxy\(^{401}\) made it hard. If according a freedom the value and respect it deserves is so hard that we abandon principle, we should be worried.

In conformity to constitutional principle, Mark Schmucker invoked the higher value of religious and moral abhorrence to human hostility, as expressed in militarism. For his civic strength, he earned the wrath of all three powers of American government.\(^{402}\) In the name of the Common Defence, the government refused to allow the principled use of a liberty it purported to defend.

There is something puzzling about the power the government mustered against Mark and the few others who acted on the highest civic and conscientious principle in refusing to register. What possible threat did these courageous, patriotic and forthright young people pose to The American Way? How did they offend the law by identifying themselves and their objections to the government? More to the point, how did they offend the law more by doing this than did over half a million others who hid their noncompliance, or whose principles did not survive a clash with repeated government threats to prosecute?

This inexorable engine, set to crush the few who acted in the spirit of liberty, in the end belittled itself. The victims it chose were the true republicans, whose commitment to American values encompassed exercising the hazardous freedoms upon which those values depend.

By losing\(^{403}\) Schmucker II, I hope we have not taken the step to a graver loss. The day that dignity, principle and conscience pose a real threat to the security of the Government is the day we lose our more perfect Union.

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401. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion, or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642.


403. I am proud to have represented Mark Schmucker. I would rather be right than victorious. As my colleague Richard Aynes suggested, it is no honor to have won *Dred Scot v. Sanford*, 60 U.S. (19 How.) 393 (1856), or *Plessy v. Ferguson*, 163 U.S. 537 (1896).
The colonel went to the President. Lincoln listened and looked relieved. "Why, that is plain enough," he answered. "There is only one thing to do. Trump up some excuse and send him home. You can't kill a boy like that, you know. The country needs all her brave men wherever they are. Send him home." 404

404. E. Hertz, Lincoln Talks 536 (1986) quoting Jones, Later Periods of Quakerism. This completes the story begun at note 22 and continued at note 62, supra.
THE TORT THEORY OF CHARLES OSCAR GREGORY*

Daniel J. Hoffheimer**

This passion for the honour of a profession, like that for the grandeur of our own country, is to be regulated not extinguished. Every man, from the highest to the lowest station, ought to warm his heart and animate his endeavours with the hopes of being useful to the world, by advancing the art which it is his lot to exercise; and for that end he must necessarily consider the whole extent of its application, and the whole weight of its importance.

Samuel Johnson

I. INTRODUCTION

The dictum of a great eighteenth-century moralist—one, indeed, who disliked lawyers—may seem a bizarre touchstone for the study of Charles Gregory's contribution to the theory of torts. Gregory's own enthusiasm for Johnson reveals a greater relevance, perhaps, than at first appears. Until his death last year Gregory, like Johnson, throughout his life sought to pierce the theories of his colleagues with a lance of common sense. As Johnson had an accurate estimate of the character of man, so Gregory had an accurate estimate of the character of the law: both recognized their inconsistencies, the common illogic between theory and reality. Boswell's image of Johnson kicking a stone with all his might to refute Bishop Berkeley's idealist theory of material reality is not at all inapposite to Gregory, who, like


** Member of the Ohio Bar; partner, Taft, Stettinius & Hollister; A.B. 1973, Harvard College; J.D. 1976, University of Virginia; former Lecturer in Law, University of Cincinnati College of Law.

1. S. Johnson, Rambler No. 9, in 1 THE RAMBLER (W.J. Bate & A. Strauss eds. 1969).

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Johnson, had little use for abstract theories and rationalizations which had no bearing on the improvement of the human condition. While, for example, Gregory, could author a uniform act\(^4\) intended to reform and improve the law, he criticized the *Restatement of Torts*\(^5\) for its abstract and misleading sense of certainty about the law.\(^6\)

Although one is still enlightened upon reading the great classic of American tort law, Holmes' *The Common Law*,\(^7\) it does not represent a modern theory of torts. The nature of modern legal education and of *stare decisis* makes it especially difficult to grasp the essential relationship between the rules and doctrines of torts, and the underlying jurisprudential basis. Gregory early recognized this difficulty and, therefore, was among the first to focus his work on the law as a social instrument, rather than as a theory. Because of this practical bent, it is paradoxical to look for Gregory's "theory" in his own scholarly writings. Nevertheless, this Article will suggest some generalizations about Gregory's theory of torts, recognizing that Gregory himself would have scoffed at such an endeavor, much as Johnson kicked the stone.

Gregory's contribution to the jurisprudence of torts cannot readily be compared with the grand theoretical schemes of Oliver Wendell Holmes,\(^8\) Fowler Vincent Harper,\(^9\) Leon Green,\(^10\) or other great torts scholars eminent at the time Gregory began writing in the early 1930s. In contrast to the writings of Green, Harper, and their teachers, tort theory first came of age with Gregory. With a minimum of serious theorizing, Gregory approached his subject not with a view toward rationalization and justification but rather toward elucidation and improvement. He was fond of beginning and ending his articles with casual summaries outlining only what "law students should be aware of."\(^11\) In the context of

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4. Uniform Contribution Among Tortfeasors Act (Nat'l Conf. of Comm'rs on Uniform State Laws 1939).
7. O.W. Holmes, The Common Law (1881). If I have misinterpreted Holmes in this Article, it is not for lack of much appreciated guidance from my brother, Professor Michael H. Hoffheimer, a sensitive Holmes scholar.
8. Id.
10. L. Green, Rationale of Proximate Cause (1927).
his time and his scholarly predecessors, this was truly revolutionary. He did not follow Holmes' historical approach as a means of explaining torts, Green's attempt to present a "rationale," or Harper's effort to present a "treatise." Gregory viewed the many rules of proximate cause, duty, scope of the risk, res ipsa loquitor, last clear chance, and the myriad other doctrines of torts for which his predecessors and colleagues had sought connection and theoretical unity as merely expressions of judicial policy decisions, not as a universal theory. His concerns were pragmatic and focused; he viewed rules as manifestations of concrete policy decisions made by common law judges who sought solutions to social problems. Gregory's interests were in legislative policies, not in philosophy. Gregory favored sound policy-making in legal development, and he disliked the tendency of scholars to clothe the process of judicial policy-making in the garb of universal limitations on liability, such as duty and proximate cause.

Gregory recognized that many of the policies and rules of stare decisis were outmoded and ill-suited to the modern era. Instead of explanation, historical analysis, or theoretical justification, Gregory offered proposals for reform, ideas for legislative judgment in rethinking the common law, and explanations for progress. In his perspective toward the future, and in his concern for legislation and change, Gregory was the first major torts scholar to focus on the legislature, rather than on the courts, as a source of tort law. Gregory's greatness lies in his breakthrough from theorizing about, to socializing of, the law of torts. He did so unobtrusively, subtly, in straightforward prose, but with a sustained scholarship and keen sense of justice.

II. Gregory's Theory of Civil Responsibility

A. The History of the Law of Torts

Gregory's interpretation of the history of the common law of torts was superficial and descriptive. He was the first important

12. See supra note 7-10.
13. It is not insignificant that the first article published on the laws of tort by Fleming James, Jr., who has had more influence than any other writer on tort law reform, was a book review of Gregory's major text, Legislative Loss Distribution in Negligence Actions. See James, Book Review, 4 U. CHI. L. REV. 158 (1936).
torts scholar to look back to the origins of tort doctrine very much from the perspective of a lawyer and very little from that of an historian. He began his survey of the evolution of torts, in his well-read article *Trespass to Negligence to Absolute Liability*, with the early common law writ of trespass. He asserted that the availability of trespass as a form of action depended solely on the directness of the physical invasion suffered by the plaintiff. Directness of harm was both a necessary and sufficient condition of liability in those legally primitive days. No distinction was drawn between causation and liability; direct injury equalled absolute liability. Gregory offered no explanation for this early state of the law. He neither sought, nor was he interested in, sociological or historical reasons for the early common law.

From his simplistic postulate of the early common law system, Gregory described the transition from trespass to negligence as "plain." Courts, he said, "did not wish to place on enterprise of any kind the burden of losses caused by them through accident." Such a rule of law would have discouraged enterprise and investment, and thus would have inhibited the industrial revolution.

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18. See Gregory, *Trespass to Negligence*, supra note 11, at 365. Gregory gives no authority for his interpretation, and he may be criticized for this simplistic interpretation. One writer has compared Gregory's economic determinism with Holmes' view that social morality was determinative of the fault principle. Roberts, *Negligence: Blackstone to Shaw to? An Intellectual Escapade in a Tory Vein*, 50 CORNELL L.Q. 191, 205 (1965).
19. The American case that Gregory believed marked the departure from the trespass theory, or at least best exemplified it, was Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850). It is the only nineteenth century case included in Gregory's casebook in the section on the transition to negligence. See C. GREGORY AND H. KALVEN, *CASES AND MATERIALS ON TORTS* (2d ed. 1969). In this case, as readers of Gregory's casebook will recall, Chief Justice Lemuel Shaw revealed a commitment to negligence as the condition precedent to liability for inadvertently caused harm. In this case, two dogs, owned by the plaintiff and defendant respectively, were fighting. The defendant sought to separate the dogs and, in raising a stick over his shoulder, struck the plaintiff in the eye, severely injuring him. The plaintiff brought a writ of trespass—the injury was clearly sustained as a direct
Given his explanation of the transition to negligence, Gregory views the famous nineteenth century case of *Rylands v. Fletcher* to be the landmark of absolute liability where industry was involved. He believed the decision in *Rylands* was an exception to evolving negligence law, rather than a trend in itself. Indeed, he interpreted the rejection of strict liability in numerous American jurisdictions, rather than the rule itself, as the real consequence of *Rylands*. He even went so far as to describe the concurrent development of absolute liability and negligence in some jurisdictions as "double dealing" on the part of judges. But Gregory failed to offer any coherent explanation in historical terms for the two developments. At times he seems to see strict liability as a judicial policy to ameliorate the harshness of negligence, which is consistent with his industrial revolution argument, but at other times he seems to believe that negligence was something of an exception to the harshness of the trespass notion.

Extrahazardous, non-negligent blasting, which Gregory presents as a case study of strict liability, presented common law judges with a dilemma: either courts could hold blasters to the negligence standard and disallow recovery for injury caused by objectively dangerous activity, or they could require blasters to bear the consequences of their activities—a notion like trespass. Whatever the deficiencies of his purported historical explanations of each of the two lines of cases, Gregory did not attempt to reconcile them. He delighted in the irrationality and inconsis-

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22. Unlike Jeremiah Smith, for example, who had been an articulate proponent of the idea that strict liability was in reality a form of negligence and the view that a single
tency of legal history, very much to the chagrin of his younger colleagues at the University of Virginia Law School, Professors Bergin and Woodard. He regarded the persistent judicial attempts to impose strict liability under the label of negligence as a "Freudian fixation" on the theory of strict liability itself.\textsuperscript{23}

Gregory obviously had no stake in a consistent theory of liability, and he cared little for the scholars who argued for universal theories. Whether tort law was to be viewed as a negligence system with pockets of strict liability, or as a strict liability system with pockets of negligence, was of no importance.\textsuperscript{24} He was not at all averse to the infiltration of social policy into legal doctrine, but he was frustrated with the hedging devices of legal scholars, like Jeremiah Smith, and judges who sought consistent rules and fancy rationalizations at the expense of desirable legal results.\textsuperscript{25} In all his criticism of the judicial rationalizations of strict liability, Gregory did not oppose the concept that industry should "pay its own way or shut up shop."\textsuperscript{26} But he did believe that the law must embody the social policy which experience gives to it,\textsuperscript{27} and he abhorred the disguise of reasons within obsolete expressions of doctrine. Therefore, when the Supreme Court of Connecticut in 1951 openly embraced strict liability for non-negligent blasting,\textsuperscript{28} Gregory hailed it, quoting Pope, as the honest acceptance of "what oft was thought, though ne'er so well expressed."\textsuperscript{29}

Unlike Holmes, Gregory found no notion of fault or foreseeability implicit in the early writ of trespass. In his description of the transition to negligence, Gregory pays scarce attention to the jurisdictional basis for expanded liability. He does not emphasize as a limitation on liability the importance of the develop-
opment of the action of trespass on the case four hundred years prior to Brown v. Kendall.\textsuperscript{30} No attempt is made to link the writ of trespass on the case with the later development of negligence. His unsupported assertion that trespass lacked any notion of fault assumes too simplistic a correlation between the ancient writ and modern strict liability.\textsuperscript{31}

With his deficient historical explanations and no desire for rationalization, Gregory simply accepted both the negligence and the strict liability trends of modern tort law. His refusal to accept the more far-reaching strict liability proposals of Fleming James\textsuperscript{32} and later writers\textsuperscript{33} does reflect, however, his supreme respect for the negligence system as a whole. In all his writings one clearly senses his refusal to abandon the notion of fault which the transition to negligence had infused into the law of torts. While Gregory may have been the first writer to accept strict liability and negligence as co-equal elements of the common law in their respective domains, and as distinct and separate rules based squarely upon competing and at times irreconcilable policies,\textsuperscript{34} he was also the last major scholar to defend the fault principle as more important than the policy of compensation and loss distribution which has dominated modern ideas on tort theory.

What emerges, finally, from Gregory's superficial historical treatment is his indifference to abstract theory and to the history of tort law. Instead of seeking, like his predecessors, to rationalize history into a predictive tool, he accepted the vagaries and inconsistencies for what they were—reflections of policy judgments formulated into specific rules of law at different stages of common law development. He undoubtedly appreciated Roscoe Pound's comparison of the common law to the streets of Boston, blazed by wandering cows. Having accepted confusion and inconsistency where grand theorists like Fowler Harper and Leon

\textsuperscript{30} 60 Mass. (6 Cush.) 292 (1850).
\textsuperscript{31} Gregory criticized Prosser for not having consolidated in his treatise material dealing with trespass and with extrahazardous activity. Gregory, supra note 6, at 197.
\textsuperscript{32} James, Accident Liability Reconsidered: The Impact of Liability Insurance, 57 Yale L.J. 549 (1948).
\textsuperscript{34} See generally Gregory, Trespass to Negligence, supra note 11, at 382-88, 395-97.
Green could not, Gregory was able to proceed quickly to a more critical and policy-based appraisal of the continuing validity of common law doctrine than had been ventured by the more theoretical scholars.

B. Traditional Tort Doctrine

1. The Policy Theory of Liability

Every article that Gregory wrote prior to the publication of his only full-length text (it is not a treatise) on the law of torts concerned the procedural and doctrinal limits on vicarious and third-party liability. Unlike Holmes, Smith, and Harper, Gregory never felt compelled to expound anything approaching a unified theory of liability. Even in his uncharacteristic historical and theoretical discussions, he carefully limited his method to the definition and clarification of legal rules, rather than to their explanation.

Although Gregory disagreed with Holmes' belief that the early action in trespass contained within it a notion of fault or blameworthiness, he clearly accepted Holmes' notion that liability is to be determined by the degree to which common experience indicates a risk of harm. Gregory's reluctance to formulate a jurisprudential theory of torts enabled him to approach judicial rule-making with less reverence for the sanctity of judicial reasoning. His early concern with procedural problems reflects his inclination toward a problem-oriented methodology. In this he is true to his training at Yale Law School in the age of the Legal Realists. But like Holmes, Gregory believed that the law was not


37. Gregory, Proximate Cause, supra note 11, at 61: "I hope I have stated the issues which I believe law students should be aware of. But I know that I have solved nothing and, indeed, I had not set out to do so."

38. Compare O.W. Holmes, supra note 7, at 80-81, 162-63 with Gregory, Trespass to Negligence, supra note 11, at 361-62.
derived from an immutable theory; there was, therefore, no reason to expect it to develop into one.\textsuperscript{39} To this extent at least, Gregory shared with Holmes an empirical, positivist\textsuperscript{40} attitude toward the nature of legal rules. Unlike Holmes,\textsuperscript{41} he saw no need for a theory but focused throughout his career on the need for change.

The transition to negligence had convinced Gregory of the wisdom of the fault principle as a socially acceptable and procedurally manageable limitation on liability.\textsuperscript{42} Even as James and others were proposing new systems of liability designed for compensation, Gregory remained committed to the reform of the old fault system through the modernization of third-party practice and the more scientifically exact apportionment of fault. Although he recognized the inconsistencies of common law rules, he accepted them as the result of competing social interests and democratic policy decisions. He was not bothered by the absence of an elegant, consistent model to reconcile these rules.

Gregory's abiding concern was to preserve negligence because of its socially desirable effects. Although he agreed with James that many old rules of negligence were ill-suited to modern problems, he wanted to reform the fault system above all because of its deterrent value.\textsuperscript{43} Despite Gregory's recognition, for ex-

\textsuperscript{39}. See O.W. Holmes, supra note 7, at 77-78: "The law did not begin with a theory. It has never worked one out." See also Gregory, Trespass to Negligence, supra note 11, at 359-60: "[I]f [students] are given a fair sampling of representative torts cases, they must become impressed by the unintellectual nature of legal thinking, by the repeated inconsistencies occurring at the principle and theory level, and by the shabbiness of explanations given for decisions in judicial opinions."

\textsuperscript{40}. Without sophistication, I employ the term "positivist" in the Austinian sense of a jurisprudence which looks at law as a collection of external doctrines applicable generally in society, rather than a jurisprudence which looks at law as the reflection of internal community morality. For the classic modern contrast in these two perspectives, compare H.L.A. Hart, The Concept of Law (1961) with L. Fuller, The Morality of Law (rev. ed. 1969).

\textsuperscript{41}. See generally Holmes, Privilege, Malice, and Intent, 8 Harv. L. Rev. 1 (1894).

\textsuperscript{42}. If one bears in mind his adherence to fault, Gregory's famous disputes with Fleming James over the desirability of no-fault automobile insurance and over contribution among tortfeasors are placed in their proper perspective. See Gregory, Loss Distribution in Torts, supra note 16, at 68-72; James, Contribution Among Joint Tortfeasors: A Pragmatic Criticism, 54 Harv. L. Rev. 1156 (1941); Gregory, Contribution Among Joint Tortfeasors: A Defense, 54 Harv. L. Rev. 1170 (1941) [hereinafter Gregory, A Defense]; James, Contribution Among Joint Tortfeasors: Rejoinder, 54 Harv. L. Rev. 1184 (1941).

\textsuperscript{43}. James was surely correct in asserting that Gregory's entire system of contribution
ample, that automobiles are the “most fertile source of harm ever devised by man,” he refused to abandon individual loss-shifting and its deterrent function in favor of society-wide loss distribution. His whole procedural approach to loss distribution is a sophisticated defense of the fault principle and of its deterrent function in a system of civil responsibility. His sustained advocacy of contribution among tortfeasors had as its goal the assessment of liability to each blameworthy party commensurate with his fault, a goal that was abandoned by most other torts scholars.

Gregory’s support for absolute liability in certain circumstances is not inconsistent with his attachment to negligence. He never balked at strict liability for intrinsically extrahazardous activity; indeed, he viewed such activity as sufficiently likely to cause injury as to constitute blameworthiness in itself.

In crossing the grain of contemporary scholarship, Gregory’s attitude toward those who would abandon negligence for no-fault liability sometimes appears defensive. However, after deliberate reading, one concludes that Gregory is not opposed to all social insurance schemes on policy grounds per se; rather he often objects to the legislative means by which others would effect them.

The best explanation for Gregory’s zealous adherence to individual fault as the lynch pin of civil liability is his respect for

among tortfeasors would merely enable insurance companies to shift losses based on fault rather than facilitate the absorption of the loss by society as a whole. James, Book Review, supra note 13, at 161.


45. James thought Gregory’s loss distribution system was mechanical without purpose, and F.H. Bohlen disapproved of Gregory’s strong reliance on the fault principle. Compare James, supra note 13, at 160-61 with Bohlen, Book Review, 45 YALE L.J. 1528 (1936).

46. Holmes’ view of fault emphasized the foreseeability that the defendant’s action might injure the particular plaintiff. See United Zinc & Chem. Co. v. Britt, 258 U.S. 268 (1922) (Holmes, J.). Gregory, however, focused on the practical nature of the activity itself in calculating fault. Gregory, Blasting, supra note 15, at 141-45. If sufficiently dangerous, the activity was blameworthy per se and merited the application of strict liability.

47. Unlike James, Gregory is evasive and hesitates to give opinions. He refused, for example, to confess in his conclusion to Trespass to Negligence to Absolute Liability that he had any “moral” to offer. Gregory, supra note 11, at 395. He criticizes James’ no-fault insurance scheme as “socialistic.” Gregory, Loss Distribution in Torts, supra note 16, at 70. He also criticizes James’ support for products liability as “hidden taxation” of society, but he approves of legislative reform such as workers’ compensation. id. at 66.
the deterrent function of negligence law, which most other scholars had abandoned as psychologically obsolete. Gregory would never elevate compensation as a social value over accident prevention. He believed that the modern emphasis on compensation and cost avoidance had deflected attention from the salient social and moral values, as he would define them, of civil responsibility. But even to Gregory the value of minimizing social loss due to injury required balancing the values of social insurance with those of social accountability. Because those competing values can never be entirely reconciled, he fully accepted strict liability in truly dangerous activities. His criticism of James and no-fault schemes reflects his emphasis on the need to make policy choices and his argument that such choices are best left to the common law and the legislature and not to scholars, economists, and philosophers.

2. Limitation on Liability for Negligence: The Duty of Care and Proximate Cause

Gregory's problem-oriented method of analysis and his distrust of universal theories for what he believed to be, in many instances, accidents of the common law naturally led him to reject traditional notions of limitations on liability. He then described the "principles of proximate cause," as "problems of policy" used by the courts in "ordinary and weird fact situations . . . so heterogeneous and internally unrelated" that general rules of proximate cause are of minimal predictive value for future cases.

49. See, e.g., Calabresi, Optimal Deterrence and Accidents: To Fleming James, Jr., il miglior fabbro, 84 YALE L.J. 656 (1975).
51. While Gregory was willing to acknowledge Leon Green's achievement in establishing an "intellectual structure" for the doctrine of proximate cause, Gregory refused to accept Green's seminal Rationale of Proximate Cause. See Gregory, Leon Green's Contribution to a Better Understanding of the Law of Torts, 43 ILL. L. REV. 15 (1948) [hereinafter Gregory, Leon Green].
52. See Gregory, Proximate Cause, supra note 11, at 37.
In short, Gregory viewed proximate cause limitations on liability—from Bacon's ancient maxim *In jure non remota cause sed proxima spectatur* to Green's modern incarnation—as little more than slogans which allowed the courts in particular cases to arrive at whatever policy decisions the facts should allow.

The concept of a duty limitation on liability for negligence, usually attributed to Green and Harper, did not impress Gregory as much of an improvement over the proximate cause doctrine. It was too much a theory, too little a practicum:

Close on the heels of this development [of proximate cause] follows another hedging device to the effect that the defendant cannot be held accountable for harm he causes unless he was under a duty to refrain from the alleged negligence causing it.53

In universalizing limitations on liability into a duty theory, Gregory said the courts "will be able to dispose of nice issues of policy in the name of duty just as they have been doing under the issue of proximate cause."54

To Gregory, then, the duty limitation put forth by Green and Harper as an alternative to proximate cause rules merely turned the causation issue inside out. The scope of the risk defining duty was merely another issue requiring policy decisions as to the point at which liability would be cut off. In this acknowledgment of the policy-making involved in the causation issue, Gregory drew heavily from the conclusions of Bohlen and Harper, but he refused to elevate the reality of policy-making into a legal theory or to leave the problem to the jury as a "mixed question" of law and fact. By emphasizing the practical, decisional nature of duty and causation, Gregory drew attention to the inadequate social control of such judicial policy-making through the common law. He suggested that lawyers ought not parrot legal rules

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53. *Id.* at 38. Gregory cited Smith and Bohlen, as scholars who used the "hedging device" of proximate cause as a cloak for what he viewed as judicial policy choices. As one who employed the duty limitation, among others he cited Cardozo's celebrated opinion in *McPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).


as precedent without an appreciation of what precise policies they represent.  

Gregory's assessment of Green's approach to causation as a functional one could serve as well as an assessment of his own methodology. Green's bifurcation of the causation issue into problems of cause in fact and of legal cause, defined by duty, was a necessary first step toward a realist method of analysis of tort doctrine.  

In an effort to delve into the duty issue and to define its limits as an analytic tool, Gregory paid particular attention to the legislative purpose doctrine, which prescribes the standard of care to be implied from statutes. Gregory supported the notion that criminal statutes should give rise to a civil standard of care, but only where the statute defines both the risk to be avoided and the class of persons protected. Mere licensing statutes should not, therefore support such a definition of duty because they do not articulate the risk to be avoided or the persons to be protected.

58. A condition, of course, to any change in policies underlying rules of law is that these policies first be recognized for what they are and that their reasons be exposed.  

59. See Gregory, Leon Green, supra note 51, at 17-18.  

60. It was certainly an improvement over Bohlen's use of "mixed question of law and fact" to describe the judicial process in torts cases. See Bohlen, Mixed Questions of Law and Fact, 72 U. Pa. L. Rev. 111 (1924). Nevertheless, the notion of duty did not by itself define a transparent rule of liability. In this view that the duty of care as defined by the risk of harm is but a generalized version of the foreseeability doctrine, Gregory anticipates later developments. It would be of no more help than proximate cause, for example, in determining the policy underlying why Mrs. Palsgraf should recover and others should not. See Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928); H.L.A. Hart & A. Honore, Causation in the Law 256-57 (1959). See also Gregory, Gratuitous Undertakings and the Duty of Care, 1 De Paul L. Rev. 30, 31 (1951) [hereinafter Gregory, Gratuitous Undertakings].  


63. Id. at 640. Gregory said that "defining negligence as a breach of duty of care is a futile and meaningless verbalism." Id. at 626. Statutes, however, were carefully articulated reflections of legislative policy decisions, not vague generalities. Such positive, external definitions of where liability should be cut off would meet Gregory's criteria for a defendant's civil responsibility for violation of a statute. E.g., Brown v. Shyne, 242 N.Y. 176, 151 N.E. 197 (1926). Gregory criticizes this classic case in Gregory, Criminal Licensing, supra note 62, at 633. If the plaintiff could show that the legislature had intended to protect him from injury from just the sort of conduct which had in fact caused the injury, then the statute should support a duty of care. The use of the legislative purpose doctrine
In short, to Gregory proximate cause and duty were but terms of art\textsuperscript{64} that had outlived their usefulness in a modern society which was becoming increasingly complex and which required increasingly more refined definitions of policies for loss-shifting.\textsuperscript{65} The precise definition of social policy underlying legal rules was, Gregory believed, no longer served by the common law alone, for the common law was too easily and too often manipulated by foggy-headed judges with religious reference to empty "verbalisms" like "proximate cause" and "duty." The law required that duties of care and legal rules be carefully articulated in terms of the policies adopted by the society, through legislative and judicial processes.\textsuperscript{66} In many ways, Gregory's treatment of traditional tort doctrine is far from satisfactory.\textsuperscript{67} However, his focus on the need for clearly defined policies underlying legal rules was a necessary first step toward reform of the common law. Furthermore, his respect for statutes as the source for standards of care reflects a major step forward in tort theory. Reliance on the legislature as a source of a system of civil responsibility was a new idea. Once Gregory had rejected the need felt by his predecessors to rationalize the common law of torts, he was able to direct attention to the reform of the inherited system.\textsuperscript{68} And it was as a reformer that Gregory made his salient mark upon the law of torts.

\textsuperscript{64} Gregory, \textit{Gratuitous Undertakings}, supra note 60, at 31.

\textsuperscript{65} It is not, therefore, surprising that Gregory preferred Prosser's rule-oriented hornbook to Harper's more theoretical treatise. Gregory, \textit{supra} note 6.

\textsuperscript{66} For example, gratuitous undertakings should give rise to a legal duty of care only upon carefully defined conditions, such as the defendant's having entered upon a course of performance of his promise or his having taken possession of a gratuitous bailment. Gregory, \textit{Gratuitous Undertakings}, \textit{supra} note 60, at 37-39. An "absolutistic approach" to causation and the duty issue was merely a means of submerging the necessity of policy choice and the formulation of legal rules of predictive value in outmoded but flexible terms of art. \textit{See} Gregory, \textit{Justice Maltbie's Dissent in Mahoney v. Beatman}, 24 CONN. B.J. 78, 86 (1950); B. Cardozo, \textit{The Nature Of The Judicial Process} (1921).

\textsuperscript{67} His realist attitude toward judicial behavior makes him reluctant to take a stand of his own. While he criticized common law doctrine, he does not offer many specific alternatives. In more than one place he concludes his critical articles with no recommendations for change. He leaves these to "wiser heads." Gregory, \textit{Gratuitous Undertakings}, \textit{supra} note 60, at 68 (citing Coggs v. Bernard, 2 Ld. Raym. 909, 920 (1703)).

\textsuperscript{68} Having not followed the examples of Harper and Green, who were almost exclusively concerned with rationalizing the common law, Gregory was able to investigate the
III. THE THEORY OF LOSS DISTRIBUTION

A. Third-Party Practice and Joint Contribution Among Tortfeasors

Gregory's greatest contributions to tort theory were his proposals for a new system of loss distribution based upon the abolition of the common law restrictions on third-party liability in tort and the implementation of a system of comparative negligence. All of Gregory's early writings reveal a dissatisfaction with the traditional rules of third-party practice and the common law doctrines of contributory negligence and no contribution among tortfeasors.

From the beginning, Gregory was concerned with the process of individualistic loss-shifting characteristic of the common law. Gregory proposed what he called the "both ways" test, which is a standard of reciprocity in the attribution of liability. While aspects of the law in need of change. This enabled him to look toward reforms in the system of loss distribution.

69. See Gregory, Procedural Aspects of Securing Tort Contribution in the Injured Plaintiff's Action, 47 Harv. L. Rev. 209, 209-10 (1933) [hereinafter Gregory, Procedural Aspects]. For example, Gregory focused on the liability of an infant for his agent's torts and on the procedural peculiarities of joining all of the parties. C.O. GREGORY, LEGISLATIVE LOSS DISTRIBUTION IN NEGLIGENCE ACTIONS: A STUDY IN ADMINISTRATIVE ASPECTS OF COMPARATIVE NEGLIGENCE AND CONTRIBUTION IN TORT LITIGATION (1936) [hereinafter C.O. GREGORY, LEGISLATIVE LOSS]. He was dissatisfied with the traditional judicial explanations which barred parents, for example, from recovery for loss of consortium where their children were injured as a result of defendant's negligence and their own contributory negligence but which did not bar bailors from recovery for injury to chattels where the bailor was contributorily negligent. See Gregory, The Contributory Negligence of Plaintiff's Wife or Child in an Action for Loss of Services, Etc., 2 U. Chi. L. Rev. 173 (1935) [hereinafter Gregory, Contributory Negligence]. Contrarily, Gregory found that the general rule held that a parent's contributory negligence would not be imputed to an infant plaintiff. id. at 173 and n.3. Gregory also noted a variety of inconsistent rules in different jurisdictions. See Gregory, Vicarious Responsibility and Contributory Negligence, 41 Yale L.J. 831, 842-45 (1932). These vagaries of substantive law Gregory attributed to procedural difficulties of assessing liability for negligence where more than a single defendant and a single plaintiff were involved. The common law system was so dependent on individualistic loss-shifting that it had never developed consistent, fair solutions for problems of third-party liability and third-party procedure.

70. Gregory, Contributory Negligence, supra note 69, at 173 and n.1a. See also Gregory, Vicarious Responsibility and Contributory Negligence, supra note 69. Under this test, for example, courts should not permit the contributory negligence of a child to be imputed to a parent if contributory negligence by the parent is not imputed to the child. What Gregory opposed was the apparently irrational application of contributory negligence based upon rules formulated on the basis of outmoded policy considerations to conform to old-fashioned procedure.
he recognized the common law policies supporting contributory negligence, he believed that they worked only a rough justice. In its stead he proposed a system of loss apportionment in multi-party accidents which would assess liability more accurately than the simple contributory negligence and last clear chance doctrines, which essentially defined legal fault as either entirely on one party or entirely on the other.

In the spirit of reform of "archaic" doctrines, Gregory proposed the complete abandonment of the rule of no contribution among joint tortfeasors—or at least enough of a modification to abolish contributory negligence as a defense. Underlying his proposed reforms were two fundamental purposes. First, the abolition of the old rules would enable the adjudication of liability in multi-party litigation to be accomplished in one proceeding. Second, a single overall adjudication of liability of all parties would more accurately assess the actual blameworthiness of the parties, thereby effecting a more equitable allocation of fault than had been possible under the old rules. The most obvious advantage of the procedure he proposed would be to permit defendants to join others allegedly negligent. This would remove the need for subrogation litigation and alleviate the problems of res judicata and the costs of plural litigation of single issues of liability.

Gregory's emphasis on the procedural aspects of tort doctrine was a major divergence from the abstract jurisprudence of Green and Harper. Through his realization of the effects of the rules that inhibited accurate assessment of liability, he was able to turn his attention to reform and to the legislature as a source of new and more equitable rules of loss distribution.

71. Gregory saw four policies underlying contributory negligence: 1) the difficulty of apportioning damage between plaintiffs and defendants; 2) the notion that the plaintiff's act breaks the chain of causation; 3) that it fosters prudence and due care on the part of the plaintiffs; and 4) that one who invites injury to himself should not recover. Gregory, Contributory Negligence, supra note 69, at 176.


73. Gregory, Procedural Aspects, supra note 69, at 210-11, 214.

74. Not the least contribution of Gregory's writings on this problem was the detailed criticism and industrious analysis he brought to bear.

75. E.g., C.O. GREGORY, LEGISLATIVE LOSS, supra note 69.

76. It is not insignificant that James' first article on torts was a review of Gregory's Legislative Loss Distribution in Negligence Actions. James, supra note 13, at 158. Despite James' vehement disagreement with Gregory's assumptions about certain goals of tort
pointed in a new direction for tort theory, which one commentator has called “process jurisprudence,” by way of contrast to the sociological jurisprudence of Pound and Harper and to the theoretical realism of Green.

In this context, the post-Gregorian developments become more easily comprehensible. Gregory appears, at least in retrospect and with the benefit of hindsight which the years have bestowed, to have been a turning point in the history of American tort theory. In turning from theory to procedure he was able to focus on the areas of tort law in need of reform. And once he had assumed the role of the reformer, he set not only the tone for his own proposal for comparative negligence but also for every other system of loss distribution which has since been proposed.

B. Comparative Negligence

In his 1936 book, Legislative Loss Distribution in Negligence Actions, Gregory put forth a complete summary of his proposals for legislative change in the law of negligence. He even urged that comparative negligence be extended to cases of intentional torts. His emphasis on comparative negligence, having been derived from his investigations of multi-party litigation, revealed an awareness not only of the inadequacy of the old rules as an accurate measure of individual fault, but also of the limitations of individual loss-shifting. However, by proposing a system which sought merely to perfect the procedural practice and the liability rules of the fault system, Gregory failed to realize the full implication of his own reforms.

law, he ultimately relied on Gregory for, and took from him, a significant part of his attitude toward the need for legislative reform and a new system of loss distribution, presaging the following decade's tort reform movement.

78. See C.O. GREGORY, LEGISLATIVE LOSS, supra note 69.
80. The scheme put forth in his book was an ideal technique “built upon the principles of comparative negligence and contribution between tortfeasors combined to effect an ideal spread of loss among all the parties materially connected with the accident out of which the litigation has arisen.” C.O. GREGORY, LEGISLATIVE LOSS, supra note 69, at ix. Gregory's disclaimer to the contrary notwithstanding, his treatise constituted a brief for a new system of negligence liability, one which would not be "too brittle for satisfactory adaptation to modern social conditions." id. at 3.
The book itself presents nine separate variations of a system of joint contribution and comparative negligence.\textsuperscript{81} With the political realism of a legislator, Gregory did not assert only a single system, but presented several for legislative consideration.\textsuperscript{82}

Gregory was sensitive, however, to the problems of implementing his system and elaborated in detail the procedural requirements\textsuperscript{83} which legislatures might adopt so as to minimize inconvenience.\textsuperscript{84} He included in his book a model statute;\textsuperscript{85} however, his refusal to present a single, unified system as the only possible solution reflected his realistic appraisal of the political problems in effecting such a major overhaul of the common law. He urged that even a partial change of the old rules would be beneficial,\textsuperscript{86} and he supported any reform which approached his model.

Together with the famous Columbia Report of 1932,\textsuperscript{87} Gregory’s system of loss distribution was the first attempt in modern tort theory to attempt a thoroughgoing reform of the common law. While writers like Harper\textsuperscript{88} were rationalizing the past, Gregory was planning the future. Indeed, it may be said that Gregory’s proposals went beyond even the intentions of the author. In advocating the perfection of the fault principle as the fundamental basis for civil responsibility, Gregory laid the groundwork for the principle’s destruction.\textsuperscript{89} Although loss distribution in the sense that Gregory used it remained a distribution among those

\begin{itemize}
\item \textsuperscript{81} Id. at 72-79.
\item \textsuperscript{82} The system Gregory himself preferred was one in which the negligent plaintiff would be apportioned commensurately with the party’s fault. The plaintiff would have a separate cause of action and judgment against each blameworthy party who contributed to his injury. The separate judgment would reflect the apportionment of negligence to that party. If, in a particularly difficult case, apportionment were impossible, the court would have the discretion to hold the defendants equally though severally liable. Even the latter system would be preferable to one in which the defendants were held jointly liable, for this would put the risk of insolvency of a particular defendant on the other defendants—a risk which the apportionment of their fault should not put on them. This was the law in Wisconsin in the 1930s. See Gregory, Contribution, supra note 79.
\item \textsuperscript{83} See C.O. Gregory, Legislative Loss, supra note 69, at 80-113.
\item \textsuperscript{84} Id. at 114-53.
\item \textsuperscript{85} Id. at 154-72.
\item \textsuperscript{86} Gregory, Loss Distribution by Comparative Negligence, 21 MINN. L. REV. 1, 17 (1936).
\item \textsuperscript{87} REPORT OF THE COMMITTEE TO STUDY COMPENSATION FOR AUTOMOBILE ACCIDENTS (1932).
\item \textsuperscript{88} See F.V. Harper, supra note 9.
\item \textsuperscript{89} The very notion of “loss distribution” was a new one, and one which challenged traditional common law assumptions about individual responsibility.
\end{itemize}
who had by their blameworthy actions contributed to the injury, the concept was transmogrified by James, Calabresi, and others into a system of social loss distribution whereby losses from injury would be spread throughout society either through insurance or through the market mechanism. Furthermore, Gregory's refinement of the fault principle laid bare its weaknesses and thereby provided the basis for its abandonment. For, after all, the common law had made certain assumptions about fault which were inherent in notions of causation. 90

Logically and paradoxically, then, Gregory pointed the way to the abandonment of the common law of causation. 91 Seeing the implications of Gregory's perfection of the fault system, others looked to the advantages of distribution of losses throughout society. Thus, Gregory's proposed reform emerges not as a true system of loss distribution but as a refined system of loss shifting. 92 Just as Ptolemy's excruciating mathematical perfections

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90. For example, contributory negligence and last clear chance assumed that the last single act which contributed in fact to the injury was more blameworthy than all the other contributing causes. Thus, the many rules embodied in the traditional proximate cause doctrine were inextricably linked to the fault principle. Therefore, when Gregory had demolished proximate cause, he pointed directly, even if unwittingly, to weaknesses in the fault system itself. Both Smith and Green sought to avoid confronting this relationship between fault and causation through the use of the "substantial factor" formula as determinative of legal cause. See Green, Causal Relation and Legal Liability in Tort, 36 YALE L.J. 513 (1927); Smith, Legal Cause in Actions of Tort (pts. 1 & 2), 25 HARV. L. REV. 223, 303 (1912).

91. This implication was not perceived by his early critics, such as Bohlen, Harper and James. See Bohlen, Book Review, 45 YALE L.J. 1528 (1936); Harper, Book Review, 16 TEX. L. REV. 146 (1937); James, supra note 13, at 158. Both Bohlen and James, however, were sensitive to Gregory's strong reliance on fault. Soon after his review of Gregory's book, James was writing numerous articles criticizing the way in which perfection of the fault principle through comparative negligence would only enable large insurance companies and other wealthy parties to shift the losses which they could absorb better than individual plaintiffs.

92. With the appearance of James' articles in the 1940s and 1950s, Gregory's proposal was said to belong to the "scrap heap." James, supra note 32, at 569-70. It appeared that those who, like Cincinnati lawyer and judge Robert S. Marx, had early recommended the adoption of compulsory no-fault insurance were the harbingers of the future. See Marx, Compulsory Automobile Insurance, 1 U. CIN. L. REV. 445 (1927); Marx, Compulsory Compensation Insurance, 25 COLUM. L. REV. 164 (1925). See generally Marx, Compensation Insurance for Automobile Accident Victims: The Case for Compulsory Automobile Compensation Insurance, 15 OHIO ST. L.J. 134 (1954). Indeed, Gregory's emphasis on the deterrent function of tort law over that of compensation appears today as being a step backward. James, supra note 42, at 1156. The individual's capacity to foresee and thereby to prevent injury remained central to Gregory's sense of justice with respect to civil responsibility. See also O.W. HOLMES, supra note 7, at 96.
precursed the Copernican revolution which placed the sun in the center of the solar system, Gregory's perfection of fault enabled others to go beyond it.

Today there are few who remain as attached to the fault principle as Gregory did. The jargon and scholarship of "compensation systems" has replaced that of fault and deterrence. Products liability\(^93\) and "general deterrence" through economic utility\(^94\) have now become the dominant intellectual models, refined and debated with the same ardor as fault, causation, and duty were in Gregory's day. With the death in 1975 of Harry Kalven,\(^95\) who was Gregory's brilliant student and collaborator, the last major proponent of Gregory's fault-based liability system passed from the scene.\(^96\) Now, a decade later, Gregory himself is gone. His legacy, however, is the continuing debate among torts scholars about the role of fault and negligence in any system of civil responsibility.

IV. CONCLUSION

Gregory said that his "claim to fame" was that he had Kalven as a student.\(^97\) Such unassuming modesty is characteristic of Gregory's entire approach to scholarship. He was opposed to grand rationalizations and theories in an area of the law so much the product of the common law. His specific, problem-oriented methodology enabled him to seek reform rather than coherence and historical justification. His dissatisfaction with what he saw as imperfections in the fault system led him to devise rules that

\(^94\) G. Calabresi, supra note 33.
\(^97\) Letter from Charles O. Gregory to Daniel J. Hoffheimer, supra note 95.
would more adequately reflect the policy needs of modern tort law. Just as he viewed labor legislation as a practical, progressive solution to what Holmes called the “struggle for life,” Gregory looked to legislative solutions for outmoded tort doctrine to solve social problems. His practical perspective is so common today that it is easy to overlook how he revolutionized that perspective from that of his predecessors simply by declining to argue its justification. He just assumed the law’s social function was to solve problems, not to justify its own existence.

Gregory’s proposed system of loss distribution has had a great, if subtle, influence. Fifteen years after the appearance of Legislative Loss Distribution in Negligence Actions, Glanville Williams published the major British work on joint torts, a book heavily indebted to Gregory. Williams presents the American Uniform Contribution Among Tortfeasors Act, of which Gregory was a principal author, as a model for reform. Today the rule of joint contribution among tortfeasors has been adopted in over half of the states.

The emphasis on procedural reform as a means of perfecting the fault principle, however, entailed costs of which Gregory was unaware. In refusing to determine liability simply on the basis of who could best afford to pay, Gregory was defending a system of liability with substantial justice. But in seeking to apportion fault more accurately, he ignored the costs which the process of apportionment through litigation imposes on society. The modern trend toward no-fault systems may be seen as a move away from the measurement of liability in an effort to pass

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100. G. Williams, Joint Torts and Contribution Negligence (1951).
102. G. Williams, supra note 100, at 87 & n.17.
104. Gregory, A Defense, supra note 42, at 1175.
105. James and Calabresi considered one of the greatest defects in fault liability to be the expense to which society is put in making the “regulatory decision” of when to shift loss. Calabresi, supra note 49, at 671. Another torts scholar, Clarence Morris, had been one of the first writers to emphasize the costs involved in allocating liability based on the nature of the defendant’s conduct. C. Morris, Morris on Torts 9, 171-79 (1953).
the costs saved on to those in need of compensation. This trend is partly the result of the application of economic theory in legal analysis and partly of the realization that the courts have already relaxed the standards of liability based on fault in cases where the defendant can afford to pay. Gregory himself recognized this trend but refused to acknowledge that the costs of the fault system outweighed its benefits. Gregory was the fault system’s last great defender. His ultimate and unswerving commitment to the fault principle reflects our culture’s adherence to and respect for individual free will and conscious responsibility. Gregory always remained a rugged individualist, even retiring to cold New Hampshire winters for his octogenarian years. It is unlikely that economic utility or the trend toward no-fault civil liability will completely abandon fault. The modern unpopularity of fault is perhaps more the result of the tremendous social cost its administration imposes than a philosophic disagreement with it. Even Calabresi has admitted the “coalitional problem” involved in combining a system of economic efficiency in which the cheapest cost avoiders bear the loss with acceptable policy choices with respect to rules of law.

If Gregory was in some respects the last great defender of a waning tradition, he was also keenly sensitive to the continuing tension in tort law between deterrence and compensation. It is insufficient to say, as Gregory did, that his contribution was having collaborated with Kalven. When all the criticism is acknowledged, one should consider the words of Gregory’s own favorite critic, Samuel Johnson, as a reminder that such criticism


107. More recent assessments, like those of Professor Jeffrey O’Connell, Gregory’s successor at the University of Virginia Law School, argue that the inefficiency of fault-based liability insurance as a tool of either compensation or deterrence is “Kafkaesque.” O’Connell, The Frustrations of Insurance, 43 U. CIN. L. REV. 847, 848 (1974).


110. Calabresi, supra note 48, at 659 n.9, 668, 671.


112. Letter from Charles O. Gregory to Daniel J. Hoffheimer, supra note 95.
is evidence of Gregory's genius, as much as of his shortcomings:

The faults of a writer of acknowledged excellence are more dangerous, because the influence of his example is more extensive; and the interest of learning requires that they should be discovered and stigmatized, before they have the sanction of antiquity conferred upon them, and become precedents of indisputable authority.\footnote{S. Johnson, Rambler No. 93, 2 The Rambler 130 (W.J. Bate & A. Strauss eds. 1969).}

Gregory was among the first to recognize that reform of the private law of civil liability required a public law solution. He defended the place of fault in that solution against pure compensation. That neither Gregory nor his successors have come forth with a definitive and universal solution reflects the ever present dilemma, as well as genius, of the common law itself, that of accommodating community needs with the protection of individual interests.
ATTORNEYS AND ALCOHOLISM: AN ALTERNATIVE APPROACH TO A SERIOUS PROBLEM

Laurie Bilz Dowell

I. INTRODUCTION

Am I my brother's keeper?1

Alcohol, commonly referred to as society's drug, has not only been accepted, but in many cases, its consumption is encouraged. While many of us can use and enjoy alcohol, there are those to whom alcohol poses a dangerous threat, to those individuals alcohol is a living hell, for they are whom society calls alcoholics. While there are alcoholics in every walk of life, this Comment will focus on just one profession—that of the attorney. Attorneys are by no means exempt from the problems of alcoholism, in fact, there are some who feel that attorneys are more prone to alcohol problems because of the very nature of the profession.2 The danger that alcohol abuse poses in the legal profession is not only to the attorney himself, but also to the general public who suffer from attorney misconduct, i.e., the misuse of client's funds or by the misrepresentation of a client's interest.

This Comment will examine the overall problem of alcoholism with specific emphasis on the attorney, as well as the various approaches now being used to deal with alcoholism in the legal profession. A fundamental premise of this Comment is that a flexible method must be developed to deal with alcoholic members of the bar. This is necessary not only to aid the legal profession but also to protect the public. It is the purpose of this Comment to suggest an approach that may be taken and used by attorney disciplinary boards or the court system when dealing with an alcoholic attorney. To some observers, this suggested approach may seem too harsh, to others it may seem too lenient. Either way, it is an attempt to not only face the realization that something must be done, but also to stress that when dealing with

alcoholism in the legal profession a systematic approach must be taken.

II. THE PROBLEM OF ALCOHOLISM

Almost everyone will readily admit that there are some people who are alcoholics, but do we, as a society, recognize how serious and prevalent the problem really is. There are almost ten million alcoholics in the United States, of these, an estimated 50,000 are lawyers and judges. As if these statistics are not shocking enough, alcoholism is the third leading cause of death in the United States. It is evident that alcoholism is present in our society in perhaps greater numbers than we would like to admit. In fact, every one of us has probably experienced an alcoholic within our sphere of influence. More startling is the revelation that each alcoholic adversely affects at least four other people including spouses, relatives and fellow employees. As one author stated "the number who suffer from alcoholism far exceeds the number of alcoholics."

A. Alcoholism in the Legal Profession

It is estimated that nationwide there are 50,000 lawyers and judges who are alcoholic. Aside from the medical theories concerning the development of a chemical dependency, how do we as well trained professionals put ourselves in the situation of becoming dependent upon alcohol? It has been suggested that the tensions of legal work, and the compulsion to be sociable with clients and colleagues expose each of us to the dangers of alcoholism. One author even suggests the possibility that law school may play a role in an individual's development of alcoholism:

Law school, perhaps more than any other professional school, is riddled with "rites of passage." Students are always confronted with reasons to celebrate by drinking—the end of exams, a successful moot court round, a brief turned in on time, a successful job interview, making a legal journal. The stress of each passage

4. Id.
7. McGee, supra note 3, at 103.
8. Id.
9. Fales, supra note 6, at 8.
10. Id.
is great because the passages mean so much both personally and professionally—a better job and a higher salary. To students who may be $40,000 in debt due to student loans, the stakes are high.

Finally, law school is a time of marked self-deprivation. Students spend endless hours in the library preparing for class. During finals, a 16 or 18-hour study day is not unusual, nor is it unusual... to string together three or four consecutive weeks of horrendously long study days. A drink is that little reward at the end of a long day of denying oneself ordinary pleasures.

As if internal pressures are not enough, social structures of law school also encourage drinking and drug abuse. Some student bar associations and law school administrators send strong signals that drinking is an appropriate, if not necessary, survival technique. They sponsor social events that revolve around the consumption of alcohol. School parties offer free or low-priced alcohol; law firms visit during interview season and host "wine or cheese," "beer and pizza," or "margarita" parties; and drinking on certain nights of the week has become a tradition.11

Another possible factor in the development of alcoholism is stress and one's inability to handle it.12 Attorneys all too often are involved in stressful situations—winning a case could mean a large sum of money or that long sought offer of partnership. For whatever reason, it is evident that a great number of attorneys turn to alcohol for the false feelings of confidence that a few drinks seem to provide or for the relaxed feeling that alcohol gives to the individual.

Practicing attorneys are not the only members of the legal profession who suffer the problems associated with alcohol, for some judges have learned all too well that there is no "judicial immunity" from the disease of alcoholism. In 1975, the State of New York established the Commission on Judicial Conduct. Since its inception, the commission has investigated thirty-three cases involving alcoholic judges.13 The notion that a judge may be suffering from the negative effects of alcohol while he hears a case is frightening, for as one author emphasized, "an alcoholic

13. Fales, supra note 6, at 11.
judge can wreck havoc with courtroom procedure, cause undue delay and endanger the rights of all the parties.”¹⁴ No matter what causes an attorney, or judge, to first turn to alcohol, it is clear that he has embarked on a dangerous path,¹⁵ a path which may lead him into disciplinary problems and eventually out of his chosen profession.

B. Alcoholism and Disciplinary Problems

It would be an overstatement to say that the only attorneys who go before a disciplinary board are those members of the bar who are chemically dependent, but the percentage of attorneys in disciplinary trouble and who suffer from some form of chemical abuse is high. The lowest estimate is that forty percent of all disciplinary cases involve individuals who have or are abusing alcohol and/or drugs.¹⁶ While at the other extreme, the New York Bar Association estimates that the incidence of alcohol abuse among those members before their Grievance Committee is as high as seventy-five percent.¹⁷ It is quite apparent, therefore, that there is a strong correlation between the abuse of alcohol and disciplinary infraction.

What are the alcoholic attorneys doing, or not doing, to find themselves in disciplinary trouble? One of the most common disciplinary problems for the alcoholic attorney is failing to represent a client adequately, that is, taking a case and failing to follow it through to completion.¹⁸ Another common reason for sanctions against an alcoholic attorney is misappropriation or commingling of a client's funds with that of the attorney.¹⁹ Finally, criminal involvement on the part of the alcoholic attorney may also result in disciplinary actions against him.²⁰ While these examples are by no means an all inclusive list, nor are they

¹⁴. Grozier, Returning the Alcoholic Lawyer to Good Standing, 57 N.Y. St. B.J. 46 (Feb. 1985) (quoting Justice Francis T. Murphy, Jr., Presiding Judge of the New York Grievance Committee).
¹⁵. Asma, supra note 5, at 25. Alcoholics are subject to a two and one-half to three times higher than average death rate.
¹⁶. Wolfson, supra note 2, at 20.
¹⁷. Grozier, supra note 14, at 48.
²⁰. In re Ewers, 467 N.E.2d 1184 (Ind. 1987).
infractions committed exclusively by alcoholic attorneys, they are some of the general reasons that attorneys suffering from alcoholism are sanctioned.

With the percentage of alcohol involvement so high in disciplinary proceedings, it would seem that someone would reach out to help an alcoholic attorney before sanctions were instituted, unfortunately help is not often offered. As one author stated when discussing this lack of assistance, "[I]n a world frequently harsh in its judgment of the man or woman consistently out of control, all too frequently the alcoholic lawyer has been left to founder along until a breach in professional performance has made disciplinary action inevitable."21 Since help for the alcoholic attorney is often slow in coming, unless his co-workers or staff can cover for him, it is inevitable that some omission or act on his part will lead to a disciplinary hearing and at that time someone will intervene. That someone is generally the judiciary.

III. VARIOUS APPROACHES TO ALCOHOLISM IN THE LEGAL PROFESSION

At present, there are two basic approaches being implemented to address attorney alcoholism. The first is the court system approach which is used when an attorney is already in disciplinary trouble. The second is the one being used by various attorney-initiated self-help organizations. These are utilized either before an attorney is in disciplinary trouble or after he has been sanctioned. How either of these approaches is carried out depends on the result the court or various organizations (which ever intervenes) hopes to achieve.

A. The Court System Approach

Once a lawyer has committed an offense calling for disciplinary action, it is inevitable that the court system will become involved. The result of this involvement, however, may depend not only on what type of violation he has committed but also on how his state court addresses the issue of alcoholism.

1. Alcoholism not a factor to be considered.

There are state courts which do not allow alcoholism to be considered as a mitigating factor in disciplinary proceedings. The

intent of these courts is to protect the public from attorney misconduct rather than to rehabilitate the attorney. As a result, alcoholic attorneys are sanctioned just as they would have been had they not been alcoholics, and the role alcohol may have played in the violation is not taken into consideration.

For example, in the case, *In re Hayes*, the respondent, a diagnosed alcoholic, was sanctioned for misuse of a client's funds. The respondent was given money to pay a tax liability which had been assessed by the Internal Revenue Service against his client. The respondent deposited the funds in his trust account but later withdrew the money and failed to make the tax payment. The client later learned that the Internal Revenue Service had assessed additional interest penalties against him and confronted the respondent. The respondent had written two checks to the Internal Revenue Service on behalf of his client, but both were returned as a result of insufficient funds. The respondent was also charged in a second count with issuing other bad checks. The court found that the respondent had engaged in misconduct through commingling, misrepresentation, moral turpitude, and conduct which was prejudical to the administration of justice.

The court concluded that disbarment was the appropriate sanction. In so doing, the court took the opportunity to comment on its hearing officer's assessment that the respondent's "moral and professional reputation were adversely affected" by his alcoholism, when it stated:

"It is unfortunate that any person, whatever occupation or profession, suffer the personal tragedy generally associated with abuse of alcohol; this, however, does not vitiate the effects of professional misconduct. In this regard, the disease of alcoholism is not a valid basis of excuse.... Our responsibility is to safeguard the public from unfit lawyers, whatever the cause of unfitness may be."

The court specifically noted that the respondent had sought treatment for his affliction and had made the appropriate restitution of all funds. However, despite this, the court determined

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23. Id. at 21
24. Id.
25. Id. at 22.
26. Id.
that the respondent's conduct demeaned the legal profession and posed a potential harm to unsuspecting clients and thus his conduct warranted the "strongest sanction available."27

The Supreme Court of New Jersey has also given little consideration to alcoholism as a mitigating factor in disciplinary proceedings. In the case of In re Crowley,28 the respondent was charged with misappropriation of a client's funds. The respondent was reviewed by the state's Alcohol Advisory Committee (AAC) and was found to be suffering from alcoholism at the time the misconduct occurred. The AAC determined that alcoholism was a factor in his conduct.29

The Disciplinary Review Board (DRB) recommended that the respondent be placed under indefinite suspension until he could demonstrate recovery from his alcoholism and, in addition, that he make reasonable restitution for the losses.30 The court, however, decided that disbarment would be the appropriate sanction despite the recommendation of the DRB. In so holding, it noted that in order to consider alcoholism as a mitigating factor, the attorney must show that, as a result of the alcoholism, he lacked the capacity to understand the wrongdoing of his actions.31 The respondent, in the eyes of the court, failed to meet this burden.32 In dicta, the court hinted that alcoholism will continue to have difficulty being considered as a mitigating factor:

We realize that these psychological states are extremely difficult to understand. The alcoholic attorney who appears to be able to function may in fact be masking the dysfunction. We do not dispute that there is a clear relationship between the ... alcoholism and the unethical behavior. There may even be a 'but for' relationship between the disease and the conduct.... But, as we have noted ..., a similar effect on character and perception may be caused by financial reverses and hardship in one's family. For now, we shall continue to adhere to our belief that disbarment is the appropriate sanction in such matters.33

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27. Id. The Supreme Court of Indiana has noted in the past that it finds "little merit in any argument that an attorney should somehow be excused of misconduct by reason of the disease of alcoholism." In re Vincent, 268 Ind. 101, 110-11, 374 N.E.2d 40, 44 (1978).
29. Id. at ----, 519 A.2d at 362.
30. Id.
31. Id. at ----, 519 A.2d at 363.
32. Id.
33. Id.
It is apparent that some courts will continue to discipline alcoholic attorneys in the same manner as they would those attorneys who, although not alcoholics, committed the same unethical conduct. The court's refusal to take into consideration the alcohol problems of the attorney does not appear to result from its desire to punish the attorney for not being a "strong individual" or a "good person" but rather it seems to be an unquenching desire on the part of the court to protect the unsuspecting public from attorney misconduct. However, it seems illogical to recognize that there may be a "but for" situation in which the attorney's alcoholism was a significant part of the misconduct and yet ignore this as a possible mitigating factor. Some courts do agree with this proposition and stress that the public can still be protected even if the attorney's disabilities are considered in mitigation of the sanction.

2. Alcoholism as a mitigating factor

Courts that consider alcoholism as a mitigating factor do not ignore their duty to protect the public from unethical conduct, rather they tend to consider a number of questions. Why did the attorney engage in the unethical conduct? Is he seeking treatment? Has he made restitution to the client? And what is the likelihood that he will engage in further misconduct? In reaching their decision, as to the appropriate sanctions, the courts take into account all relevant circumstances, and in appropriate situations, allow alcoholism to mitigate the severity of the sanctions.

A case illustrative of this point is In re Fay.\textsuperscript{34} In Fay, the respondent was charged with failure to pursue postconviction remedies on behalf of his client and making misrepresentations concerning the matter. The respondent argued that he should not be disciplined since at the time of his misconduct, he was suffering from a medical incapacity, alcoholism.\textsuperscript{35}

The court wisely rejected this argument noting that even though alcoholism may be a disease, "[i]t does not afford a defense to charges of unprofessional conduct."\textsuperscript{36} The court went on to say

\textsuperscript{34} 365 N.W.2d 13 (Wis. 1985).
\textsuperscript{35} Id. at 14.
\textsuperscript{36} Id. (citing Disciplinary Proceedings Against Swartwout, 116 Wis. 2d 380, 383, 342 N.W.2d 406, 407-08 (1984)).
that "in appropriate cases it will be considered a factor in mitigation of the severity of discipline to be imposed for misconduct." 37 In determining the appropriate sanction, the court specifically noted that Fay had sought treatment for his alcoholism and had successfully been rehabilitated for two years. 38 Thus the court believed that a stay of Fay's suspension would be appropriate so long as he continued his rehabilitation, made restitution for his actions, and maintained a professional level of responsibility. 39 Should Fay have violated any of the conditions set forth by the court, his suspension would have, by order of the court, gone into effect. 40

It is interesting to note that in Fay, a group known as Lawyers Concerned for Lawyers (LCL) argued on behalf of Fay. 41 The group stressed that a stay of Fay's suspension would still protect the public, since Fay would be treated and he would continue his rehabilitation in the process. The court, while never formally recognizing the arguments of the LCL, apparently accepted its position since it did, in fact, stay the suspension of Fay. 42

A similar result was reached in the case of In re Crisel. 43 In Crisel, the respondent, following his filing of a false police report, 44 was charged with conduct tending to bring the legal profession into disrepute. 45 In his defense, Crisel argued that he was mentally ill at the time of the misconduct, and presented evidence which supported his position. 46 The court accepted Crisel's argument that his mental condition should be considered, and stated, "[a]s this court has stated in attorney discipline cases involving alcoholism, where there is evidence linking the impairment to the misconduct, the impairment will be considered in mitigation ...." 47 Because Crisel was able to show that his mental impairment was related to his misconduct, his sanction was stayed for three years. 48

37. Id. (citing Disciplinary Proceedings Against Wood, 122 Wis. 2d 610, 363 N.W.2d 220, 223 (1985)).
38. Id. at 15.
39. Id.
40. Id.
41. Id. at 14.
42. Id.
44. Id. at 336, 461 N.E.2d at 995.
45. This would be a violation of Disciplinary Rule 1-102 of the Model Code of Professional Responsibility (1970) [hereinafter DR].
46. 101 Ill. 2d at 338-39, 461 N.E.2d at 996.
47. Id. at 344, 461 N.E.2d at 999.
48. Id.
Perhaps, the most helpful case concerning the use of alcoholism in mitigation of sanctions is *In re Weyhrich*. In *Weyhrich*, the respondent was charged with a variety of ethical violations including gross neglect of client affairs, failing to make scheduled court appearances without excuse, engaging in bad-faith litigation and failing to cooperate with the Lawyers Professional Responsibility Board. In response to these charges, the respondent argued that his conduct was the result of his severe depression and his prior alcoholism. The court set forth a comprehensive test to be used in determining whether a psychological disability, including alcoholism, should be considered as a mitigating factor:

[W]e hold that in a case where a respondent attorney raises psychological disability as a mitigating factor, he must prove that he indeed has a severe psychological problem, that the psychological problem was the cause of the misconduct, that he is undergoing treatment and is making progress to recover from the psychological problem which caused or contributed to the misconduct, that the recovery has arrested the misconduct, and that the misconduct is not apt to recur. Finally, the accused attorney must establish these criteria by clear and convincing evidence.

The court in *Weyhrich* adopted the earlier findings of the referee and concluded that, in this case, the respondent failed to show by clear and convincing evidence that he suffered from a psychological disability, and as a result Weyhrich was disbarred from the practice of law.

What is clear from the decisions in which the alcoholic attorney is disciplined by the court system is that the attorney will be sanctioned for violating disciplinary rules, even by those courts which will consider alcoholism in mitigation. What is not clear is whether the attorney will receive help for his dependency. Help appears to be left to the attorney’s discretion. For those attorneys who find they want to conquer the problem of alcohol, there is help available even within the legal profession itself.

49. 339 N.W.2d 274 (Minn. 1983). See, e.g., Louisiana State Bar Ass'n v. Mundy, 423 So. 2d 1126 (La. 1982) (failure to act on behalf of clients after accepting fees, resulting from alcoholism, warrants public reprimand rather than suspension where clients are not seriously prejudiced and alcohol problem is subsequently overcome).
50. 339 N.W.2d 274.
51. Id. at 278.
52. Id. at 279 (emphasis added).
B. The Self-Help Approach

Attorneys, partly in response to the disbarment of alcoholic attorneys, and also in concern for the integrity of the legal profession, have instituted numerous self-help programs across the United States. These programs are aimed at not only dealing with existing alcoholic attorneys but also in preventing other attorneys from developing alcohol and other drug related problems. California was the first state to institute a formalized program for alcoholic lawyers. Since that time twenty-one states have developed some kind of program for alcoholic attorneys. The functions of the programs varies with each state but the purpose is always the same, to recognize, aid, and support alcoholic attorneys and to prevent others from becoming chemically dependent.

1. Recognition of Alcoholism in Attorneys

In order for the legal profession to be able to grasp the problems associated with the abuse of alcohol, attorneys within the profession must have guidelines which will enable them to recognize an alcoholic. With this in mind, the self-help programs have set forth various warning signals by which someone could recognize an attorney suffering from alcoholism or even by which the alcoholic attorney, himself, could recognize his problem. These warning signals may include very general behaviors such as constant applications for adjournments, contemptuous conduct and failure to follow court orders, or very specific behaviors including dozing at the counsel table, using inappropriate language and appearing in the court while under the influence of alcohol. While all of these warning signs are open to various interpretations, they do serve to provide some guidelines to one already suspecting an alcohol problem.

53. Fales, supra note 6, at 10.
54. Grozier, supra note 14, at 49.
55. "Lawyers have all the infirmities of the general populace. They suffer from all the problems other people do. Discipline is not always the answer. The better solution is to find the causes of the problems and then deal with the effects. Organizations ... can intervene before attorneys are subject to discipline and can save tremendous costs to the disciplinary system." Wolfson, supra note 2, at 21 (quoting Carl Rolewick, Administrator of the Attorney Registration and Disciplinary Commission, June 14, 1984).
56. Fales, supra note 6, at 10.
57. Grozier, supra note 14, at 47.
Many bar journals have included an extensive list of questions designed to help an attorney recognize that he may be experiencing a problem with alcohol. These questions generally include:

1. Have you failed to show up at the office or court because of a hangover?
2. Have you neglected to process mail promptly, failed to return telephone calls or to keep appointments?
3. Are you drinking in the office?
4. Have you commingled, borrowed or otherwise misused clients' trusts funds or escrow funds?
5. Do you have "blackouts" i.e., are there drinking hours or days you cannot remember?
6. Do you regularly drink at lunchtime, and is your ability to perform diminished in the afternoon?
7. Do you frequently blame your secretary unjustly for the things that go wrong?
8. Is your relationship with your clients, staff, and friends deteriorating?
9. Are you missing deadlines for performance, such as allowing the Statute of Limitations to run?
10. Do you wish people would mind their own business about your drinking—stop telling you what to do?58

If an attorney answers yes to even one of the above questions he is encouraged to contact the local self-help organization. As mentioned earlier, a yes answer to any of these questions could be the result of a non-alcohol related problem, but these signs generally indicate the possibility that a problem does exist and indicate a need for the individual to seek help.

2. Confronting the Alcoholic Attorney

Once it becomes obvious to an outsider that the attorney is experiencing a problem, the next important step is to confront the attorney. The self-help group suggest various ways to intervene and in some circumstances will actually aid in the intervention, if requested.

a. Individual Intervention

If someone, whether it be a spouse, friend or partner of the alcoholic decides to confront him without the assistance of a

58. See, e.g., Abrams, Helping the Alcoholic Attorney, 8 DISTRICT LAWYER 18 (July/Aug. 1984).
trained chemical dependency therapist, the self-help groups offer the following suggestions:

1. *Act immediately.* The longer the time between a drinking escapade and confrontation, the more likely it is that the alcoholic will have some excuse....

2. *Stick to facts that you personally know.* Be specific and stick only to the actions or facts that you are personally aware of....

3. *Get several people to join you.* It is harder to refute several people....

4. *Don’t allow the conversation to be side-tracked.* There are at most only three matters to be discussed: a) [t]he behavior, b) the need to seek diagnosis and treatment, and (only if required), c) what you will be compelled to do if he or she fails to do so.

5. *Avoid an adversarial role*... [t]he discussion is not a trial nor a debate. It is a statement of fact, and—although the person may not appreciate it at the time—it is an act of compassion and concern.

6. *Try to be loving.* It is much harder to oppose one who sincerely gives evidence of being sympathetic, concerned and warm.

7. *Don’t back the person into a corner.* A “trapped” creature may fight more fiercely. [You only need the person to agree that he or she will see an expert].

These suggestions are offered to those individuals who choose to intervene on their own. The self-help organizations are always willing to answer any questions an individual may have before he confronts an alcoholic. But intervention does not have to be undertaken alone, most self-help groups have intervention teams which will go with the confronting individual when he or she faces the alcoholic.

b. *Team Intervention*

Because of the complexity of the disease and the reluctance of friends and family to approach the alcoholic about his perceived problem, various intervention programs have been created to assist family or friends when confronting the alcoholic. An intervention team generally consists of at least three individuals, with the members of the team tailored to the needs of the particular case. At least one member of the team will be a recovering


alcoholic and another might be a judge. After the team has been initially contacted, it will make preliminary plans concerning the approach to be taken, and then make contact with those who may have information regarding the affected attorney.

The individuals who are contacted are those who care about the troubled lawyer. "They are the ones who can tell him or her how his illness has affected their lives." They are asked to list specific events that display how the individual's drinking has affected their lives. As one author explains, "[t]hese will be the alcoholic episodes, the broken promises, the missed appointments, absenteeism, declining productivity, ruined family events, and all the other kinds of behavior that have caused concern and pain." Eliciting this information is often painful and difficult, since those who have lived with a chemical abuser have often fallen into the same trap as the abuser—denial of the problem.

Before the alcoholic attorney is confronted, an actual rehearsal of the encounter will be carried out. There is a discussion of what will be said, who will say it and how it will be said. It is up to those whose lives have been directly affected by the alcoholic to present the facts and to show him how his drinking has affected them. The confrontation is not designed to be merely a series of accusations, rather, it is a presentation of the facts in a manner "that might cause the lawyer to accept his problem and the need for help."

Once the intervention team determines that everyone is ready for the confrontation, contact is made with the lawyer. The intervention team decides who will be the best person to convince the attorney to attend the meeting. There is never a surprise or ambush meeting. When the lawyer appears, as he almost always does, he is asked to just listen, and later he is given an
opportunity to speak. If at the end of the meeting, the lawyer recognizes his problem, treatment alternatives are discussed and plans are made immediately. If the attorney refuses to recognize his problem, the team does not force treatment, but rather hopes that the intervention at least helped family members and friends by directing them to available programs that will enable them to better deal with the situation.

Even when the intervention does not result in a request for treatment, the process is not considered a failure since the intervention allowed discussion of the problem and possibly planted the seeds of progress. Why would someone intervene when there is a strong possibility that the problem will once again be denied? As one author pointed out:

We intervene because we care about our profession and the people in it. We know we do not have to wait for alcohol or drug abusers to hit bottom, where devastation becomes total. We want to intervene before the destruction takes place.

We know how to do that and we have done it. We have seen the sick get well. We have seen lives turned around. People are helped and the law, as a profession, is strengthened.

Intervention, whether it be by an individual or with the intervention team, promises no magical solution. But through people trying and intervening, success is being achieved and attorneys are being helped. What is next and perhaps most needed by the alcoholic attorney in this chain of events, is support, and this service, the self-help group is more than willing to provide.

3. Supporting the Alcoholic Attorney

One of the major services offered by the self-help organizations is referral to various treatment centers. The most common referral is made to the seminal group known as Alcoholics Anonymous (AA). The presence of AA has been felt since 1935 and continues to grow stronger every year. The AA program now

71. Id. Confidentiality in this initial confrontation meeting is extremely critical and must be guaranteed. Illinois has preserved this confidentiality by the enactment of S. Ct. Rule 4-101(f). See infra note 84.
72. Id. at 22.
73. Id.
74. Asma, supra note 5, at 25.
offers in many states a lawyer's division, which provides attorneys the unique opportunity to share with each other, not only their alcohol problems, but also the other problems that may be common to them in the legal profession.

Referral is not the only service offered by the self-help groups. In many states, they serve as friend and advisor to an attorney who has found himself in front of a disciplinary board. These groups stress that they are not in any way condoning the actions of an alcoholic attorney and emphasize that the groups are "not in the business of defending alcoholic lawyers against grievance charges; however, in deserving cases, where it is clear that no disciplinary infraction would have occurred but for the respondent's alcoholism, the ... chairman has appeared as an expert witness on the subject of alcoholism."

It is apparent that the self-help groups have made a commitment to helping the alcoholic attorney, a commitment that is not taken lightly, and it does not stop with only attorneys who have already felt the wrath of alcoholism. Now the self-help groups have directed their energy toward another purpose, recognizing those that have embarked on a path towards chemical dependency, and stopping other attorneys from beginning the journey.

One of the new areas focused on by these organizations is the law school. As already mentioned, there are those who feel that law schools may play a role in the onset of problems related to alcohol abuse. With this in mind, the groups have started to provide law students with information about the symptoms of alcoholism and drug addiction which may be extremely helpful in identifying the dependent student. The group provides students with lists of treatment programs and encourages alcoholic attorneys to speak to students about how alcoholism and drug abuse has affected their lives and careers. Law school administrators are also involved in the group's activities and are

75. Id. at 25.
76. Report to the President by the Special Committee on Lawyer Alcoholism and Drug Abuse, 56 N.Y. St. B.J. 15 (Jan. 1984).
77. Sereda, supra note 11, at 47.
78. Id.
79. Id.
80. Id.
encouraged to deal with the issue of alcoholism in professional ethics classes.\textsuperscript{81}

All of these efforts are aimed at stopping the development of alcoholism in the legal profession; however, some attorneys will continue to abuse alcohol and will subsequently find themselves in front of disciplinary boards awaiting sanctions for violations of disciplinary rules. It is with this realization that this Comment turns towards establishing a new approach, one that does not abandon any of the approaches developed by the self-help groups. Rather, this proposed approach is made with temperament towards protecting the public from lawyer misconduct but also with the notion that alcoholic attorneys can be rehabilitated and can practice their profession without endangering their clients.

IV. A MEDIUM APPROACH TO ALCOHOLISM IN THE LEGAL PROFESSION

This medium approach derives from two basic premises, first that alcoholism is a disease\textsuperscript{82} and second that an alcoholic attorney can be rehabilitated. With these basic premises in mind, this Comment advocates the approach that would allow the probation of sanctions when disciplinary violations are shown to be a result of the attorney’s abuse of alcohol. While it is recognized that some courts already allow probation in certain situations, this author believes that a uniform approach must be taken that would provide probation by court rule. Furthermore, the court rule must provide confidentiality for communications between an alcoholic attorney and the self-help organization. This codification is necessary in order for attorneys to have some guidance, and also to allow the courts flexibility in sanctions when faced with a chemically dependent attorney.

A. Communication with a Self-Help Group Must be Confidential

One of first rules necessary, in order to encourage alcoholic attorneys to seek help, is that confidentiality between a lawyer

\textsuperscript{81} Id.

\textsuperscript{82} The United States Supreme Court has dealt with dependency in the classic cases of Robinson v. California, 370 U.S. 660 (1962) (prosecution for being addicted to narcotics is unconstitutional) and Powell v. Texas, 392 U.S. 514 (1968) (prosecution for public intoxication of a chronic alcoholic); compare Traynor v. Turnage, 108 S. Ct. 1372 (1988) (Court’s role not to decide whether alcoholism is a disease).
and a self-help group must be guaranteed. How can an attorney be expected to seek help if he feels that what he says may be used against him in a disciplinary proceeding? For this reason, confidentiality must be secured so that an attorney will feel safe to discuss his or her problem. A recent supreme court rule for the state of Illinois embodied this argument and provides:

The relationship of trained intervenor and a lawyer or judge who seeks or receives assistance through the Lawyer's Assistance Program, Inc., shall be the same as that of attorney and client for the purposes of the application of Rules 1-103, 4-101, and 7-102(b).

With confidentiality guaranteed, the self-help group and the attorney can have an open working relationship in order to deal with the problem and initiate treatment without the concern of his misconduct being reported. With confidentiality preserved, the next rule which must be codified is that probation for disciplinary violations involving alcoholism is an appropriate sanction.

B. Probation for Alcoholic Attorneys may be Granted

The Illinois Supreme Court, in a landmark disciplinary case, recognized that the legal profession must compassionately deal with the problem of alcoholic attorneys noting "[w]e must find ways to help them and induce them to rehabilitate themselves." The Driscoll court suggested that the rules of court be revised to allow for probation and supervision of impaired attorneys. The result of the court's request was Illinois Supreme Court Rule 772 which was adopted on August 8, 1983 and became effective October 1, 1983. Rule 772 provides that, if certain conditions are met, an attorney may be placed on probation for disciplinary infractions. For attorneys to come under the purview of Rule 772, they must demonstrate that they are success-

83. DR 1-103(A) provides that "a lawyer possessing unprivileged knowledge" of professional misconduct must report that knowledge "to a tribunal or other authority empowered to investigate or act upon" such misconduct. It is likely that evidence of attorney misconduct will be discovered during the confrontation stage.
84. S. Ct. Rule 4-101(f) for the State of Illinois (effective July 1, 1984).
86. Id. at 315, 423 N.E.2d at 874.
87. Id. at 318, 423 N.E.2d at 875.
89. Id.
fully recovering from alcoholism prior to the initiation of disciplinary proceedings. 90

Pursuant to the confines of Rule 772, alcoholism is not a defense to charges of misconduct. Rather, it is a mitigating factor to be considered. In order to qualify for probation under the rule an attorney must meet four explicit conditions, and must demonstrate that he:

(1) can perform legal services and [that] the continued practice of law will not cause the courts or profession to fall into disrepute;
(2) is unlikely to harm the public during the period of rehabilitation and the necessary conditions of probation can be adequately supervised;
(3) has a disability which is temporary or minor and does not require treatment and transfer to inactive status; and
(4) is not guilty of acts warranting disbarment. 91

When the supreme court grants probation, it will set down the conditions to which the attorney must adhere in order to continue the practice of law. 92 The structure of the probation takes into account the facts and circumstances of each case. 93 In a typical case “suspension is imposed for the acts of professional misconduct; however, the suspension is stayed, in whole or in part, in conjunction with [the] probation.” 94 If the attorney fails to follow the conditions of his probation, a show cause hearing will be held to hear arguments as to why the probation should not be revoked and the stay of the sanction vacated.

The approach adopted by the Illinois Supreme Court is an understanding and wise one. It considers alcoholism in mitigation of the sanction and still provides protection to the general public. 95 Why should not alcoholic attorneys be permitted to help themselves overcome their dependency and practice their chosen profession at the same time? The danger to the public would be minimal since the attorneys would be closely supervised and they

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92. Id.
93. Id.
94. Carroll and Feldman, supra note 90, at 15.
95. See, e.g., Louisiana State Bar Ass’n v. Mundy, 423 So. 2d 1126 (La. 1982) (attorney discipline should be protective rather than punitive).
would be seeking treatment for the problem which preceded the disciplinary infraction in the first place. Should the attorney violate the conditions of his probation he could be appropriately disciplined.

With the benefits to the attorney outweighing the risk of innocent clients being injured, a rule similar to Rule 772 should be adopted in every state. It is time that the court system take an enlightened view of the problem of alcoholism and create the flexibility that is necessary for a case by case approach. Alcoholic attorneys have waited too long and the public has lost too many competent attorneys, all because the court system has failed to consider alcoholism as a mitigating factor. Not all alcoholic attorneys are bad lawyers, they simply suffer from a disease. A disease that can be treated so that the attorney can go on living and practicing law.

Perhaps, by publicizing the fact that attorneys may receive probation for their infractions, another common concern in the legal profession may be alleviated. It is a recognized problem that attorneys are not reporting misconduct as they are required to do,96 and this could be for legitimate reasons. No attorney wants to see another lawyer disciplined, especially if the person suspects that the attorney is suffering from a disease. But what if the person knew that he could report the misconduct and the attorney may not only receive help but could also continue practicing law? Is not it more likely that the misconduct would be reported? Would not this make for a better legal profession?97

V. CONCLUSION

Alcoholism is with us today and will be with us tomorrow. We, as a society, must learn to deal with the effects of alcohol and we, as a legal profession, must learn to deal with the impact of alcoholism on our court system. Where we go from here depends on how we react to the problem and how we will punish those

96. See DR 1-103 which requires an attorney to disclose violation of DR 1-102 to the proper authorities.
97. “[T]he reluctance of most lawyers to report incompetent or impaired work has been cited as the ‘greatest obstacle to better regulation of the legal profession’ and is referred to as the ‘conspiracy of silence.’” Wolf, Alcoholism and the Legal Profession, 62 Mich. B.J. 873 (Oct. 1983).
who suffer from alcoholism. Is not it time we realize the effect of the disease and offer aid to those who are afflicted?

Alcoholic attorneys need compassion and understanding, but most of all they need help; help to recognize that they have a problem, help to solve the problem, and help from a court system which understands that alcoholism is a disease. Once an attorney is rehabilitated, he is the same competent lawyer that he was before the affliction. Until that point, the legal profession should support the attorney while he is being treated and allow him to practice his livelihood. We can still protect the public and help the alcoholic attorney by giving him a second chance.

Am I my brother's keeper? Only if I love enough. 

NOTES
Hazelwood School District v. Kuhlmeier

Stuart Walters Belt

I. INTRODUCTION

Over the years, a conflict has evolved between the educators' first amendment restraints and the students' right to freedom of speech. While educator's claim that school boards have broad discretion in the supervision of student affairs, students struggle to assert their constitutional guarantees to freedom of speech. This freedom has been described as "the matrix, the indispensable condition of nearly every other form of freedom." This dependency of other freedoms upon first amendment values is confirmed in the area of academic freedom.

In addition, the Supreme Court has found that "matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment." Justice Brennan writes, "[o]ur nation is deeply committed to safeguarding academic freedom . . ." and "[t]hat freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." Furthermore, he states, "[t]he classroom is peculiarly the marketplace of ideas" and as such, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."

On the other hand, however, the Supreme Court has recognized that "the right of free speech is not absolute at all times and under all circumstances." Recent opinions from the Supreme Court emphasize that student rights should be analyzed and applied in light of the special characteristics of the school environment. The battle lines are drawn between those who endorse

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4. Id.
5. Id.
6. Id. (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).
a continuing deferential attitude by the Court and those who invoke a more protective approach of first amendment values. There evolves a balancing approach between the long-recognized tenet that "local school boards have broad discretion in the management of school affairs"9 and that students in the public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."10

This conflict between the application of educator's first amendment restraints and student's constitutional guarantees is addressed in Hazelwood School District v. Kuhlmeier.11 According to the Court, "[t]his case concerns the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum."12 The Court applied a nonpublic forum analysis and held "that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."13 This Note will discuss the Supreme Court's historical treatment of the first amendment rights of high school students. The Court's decision in Hazelwood will then be analyzed in light of its previous decisions.

II. BACKGROUND

The starting point for any discussion of the first amendment rights of high school students is Tinker v. Des Moines School District.14 In Tinker, the Court squarely addressed for the first time the students' right of freedom of expression.15 A group of students and adults in the Des Moines, Iowa area decided to publicize their objections to the hostilities in Vietnam and their support for a truce by wearing black armbands.16 Schools in the

12. Id. at 565.
13. Id. at 571.
15. Id. at 506.
16. Id. at 504.
Des Moines area learned of the plan and formulated a prohibition against the practice of wearing the armbands, "and adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused, he would be suspended until he returned without the armband." Although the students were aware of the prohibition, they chose to nonetheless violate the policy which resulted in their suspension from school.

The district court and circuit court of appeals held that there was no constitutional violation, but the Supreme Court reversed, holding that the wearing of armbands in these circumstances was "closely akin to pure speech which ... is entitled to comprehensive protection under the First Amendment." The Court forged a standard that "official censorship of student expression ... is unconstitutional unless the speech 'materially disrupts classwork or involves substantial disorder or invasion of the rights of others.'" In order to justify imposing a prohibition against the exercise of some form of speech under this standard, the school official must be able to show that the prohibition was urged by something more than a desire to avoid an unpleasant and unpopular viewpoint. The wearing of the armbands by the students did not meet the espoused standard and was therefore held violative of their first amendment right of free speech.

Although the Court firmly asserted the constitutional rights of students in Tinker, and also formulated a stalwart standard necessitating a "material disruption" before a prohibition will be upheld, the Court only a year earlier in Ginsberg v. New York held "that the First Amendment rights of minors are not coextensive with those of adults." In Ginsberg, a statute forbidding the sale of soft-core pornography to minors was upheld. While

17. Id.
18. Id.
19. Id.
21. Tinker, 393 U.S. at 505, 506.
23. Tinker, 393 U.S. at 509.
24. Id. at 513.
the magazines were not obscene for adults, the Court held that a state could legally bar their sale to minors, citing the state's interest in protecting the welfare of minors. The rationale in Ginsberg is still valid after Tinker because the Court in Tinker recognized that orderly schools may serve a compelling interest and, therefore, regulation of speech which in the adult context would be inviolable, would be permitted at the student level.

Although these standards were adopted by 1969, the Court has not subsequently applied them in similar situations. As one commentator has noted,

[j]since promulgating these standards in 1969, the Supreme Court has refused to apply them to other student speech cases. Five cases raising the issue of high school students' first amendment rights have been brought to the Court on petitions for certiorari: four times the writ has been denied, and the court dismissed the fifth case as moot...

However, the Court finally addressed the issue again in the 1986 case of Bethel School District No. 408 v. Fraser.

In Fraser, the Court held that "a student could be disciplined for having delivered a speech that was 'sexually explicit' but not legally obscene at an official school assembly...." The student, Matthew Fraser, delivered a speech at a high school assembly nominating a fellow classmate for student council president. "During the entire speech, Fraser referred to his candidate in terms of elaborate, graphic, and explicit sexual metaphor[s]." In accord with Tinker, the Bethel school district had a disciplinary rule which provided that "conduct which materially and substantially interferes with the educational process is prohibited, in-

27. Ginsberg, 390 U.S. at 634.
28. Id. at 639, 640.
29. Note, supra note 26, at 626.
31. Note, supra note 26, at 626.
32. 106 S. Ct. 3159 (1986).
34. Fraser, 106 S. Ct. at 3162.
35. Id.
cluding the use of obscene, profane language or gestures." 36 As a result of his speech, Fraser was suspended from school for three days.

The district court held that the sanction levied by the school had violated his right to freedom of speech under the first amendment, 37 and the circuit court 38 affirmed, "holding that Fraser's speech was indistinguishable from the protest armband in [Tinker]." 39 The Supreme Court reversed. 40

In reversing the court of appeals, the Supreme Court distinguished the facts of Fraser from those in Tinker. The Court declared that there is a "marked distinction between ... [the] nondisruptive, passive expression of a political viewpoint in Tinker ... [and] speech or action that intrudes upon the work of the schools or the rights of other students." 41 The Court held that to permit the vulgar and lewd speech of Fraser would undermine the school's basic educational mission and, that the first amendment does not afford Fraser such protection. 42 In his dissent, Justice Marshall concluded that the school district did not demonstrate a material disruption as required under Tinker, and therefore he would have upheld the lower courts. 43

One year later, the Court in Hazelwood 44 aligned itself with the school board by allowing it to censor student's speech even though the student objected, arguing that his first amendment right of speech had been violated. However, rather than applying the Tinker requirement that there be a "material disruption" of the classroom or an invasion of the rights of others before the students' speech can be prohibited, the Court opted to use a reasonable standard of review.

III. FACTS

The plaintiffs in Hazelwood were staff members and reporters of a high school newspaper, Spectrum. 45 They were also students
who attended Hazelwood East in St. Louis County, Missouri.\textsuperscript{46} Spectrum has been described as a "school sponsored newspaper,"\textsuperscript{47} which "was written and edited by the Journalism II class at Hazelwood East."\textsuperscript{48}

The newspaper, published six times a semester, had more than 4,500 copies distributed over the course of a year to students, teachers, and members of the community.\textsuperscript{49} Although the paper sold for twenty-five cents a copy, the proceeds generated from its sale during the year could not even account for one-fourth of the printing costs.\textsuperscript{50} As such, the remainder of the printing costs, plus supplies, textbooks and a part of the journalism teacher's salary were paid from funds allocated by the board of education.\textsuperscript{51}

The district court found that Mr. Stergos, the students' journalism instructor, "was the final authority with respect to almost every aspect of the production and publication of Spectrum, including its content."\textsuperscript{52} The final proofing and editing, however, was done by the high school principal.\textsuperscript{53} This review of the newspaper by the principal was the standard operating procedure\textsuperscript{54} and "the district had previously prevented the publication of articles in the district's school newspapers based on their content."\textsuperscript{55}

When the final issue of Spectrum for the spring semester of 1983 was submitted to the principal for review,\textsuperscript{56} he objected to two of the articles scheduled to appear in the edition.\textsuperscript{57} The basis for his objection revolved around the content of the articles in that "[o]ne of the stories described three Hazelwood East students' experience with pregnancy; the other discussed the impact of divorce on students at the school."\textsuperscript{58} The principal's concern

\textsuperscript{46}. Id.
\textsuperscript{48}. Hazelwood, 108 S. Ct. at 565.
\textsuperscript{49}. Id.
\textsuperscript{50}. Id.
\textsuperscript{51}. Id.
\textsuperscript{52}. Kuhlmeier v. Hazelwood, 607 F. Supp. at 1453.
\textsuperscript{53}. Id.
\textsuperscript{54}. Id.
\textsuperscript{55}. Id.
\textsuperscript{56}. Hazelwood, 108 S. Ct. at 565 (Mr. Emerson had replaced Mr. Stergos as supervisor of the newspaper two weeks before the end of the semester.).
\textsuperscript{57}. Id.
\textsuperscript{58}. Id.
over the article dealing with pregnancy was twofold: one, that the girls were identifiable even though false names were used;\textsuperscript{59} and second, that the mention of sexual activity and birth control was inappropriate for the younger students at the school.\textsuperscript{60} The principal's concern over the article addressing divorce was that the divorced parent of one of the interviewed students was not provided with the opportunity to respond to the allegations\textsuperscript{61} made that he was never at home and always out late.\textsuperscript{62}

Since school was about to recess for the summer and, therefore, there was no time to remove only the allegedly offensive articles, two pages were deleted from the newspaper.\textsuperscript{63} The students "contend[ed] that school officials violated their First Amendment rights by deleting [these] two pages of articles from the May 13, 1983 issue of \textit{Spectrum}."\textsuperscript{64}

The district court concluded that the newspaper was part of the curriculum and an integral part of the school's educational function.\textsuperscript{65} As such, the court concluded, the school officials may impose restraints on students' speech so long as their decision has a substantial and reasonable basis.\textsuperscript{66} The court found that the school district acted reasonably.

The Court of Appeals for the Eighth Circuit reversed and found that \textit{Spectrum} was not only part of the school curriculum, but also that it was a public forum meant to be a vessel for students' viewpoints.\textsuperscript{67} The public forum status caused the court to apply the standard in \textit{Tinker}\textsuperscript{68} and find that the articles would not have materially disrupted the classroom or have interfered with students' rights.\textsuperscript{69}

The Supreme Court granted certiorari and reversed the decision of the court of appeals.\textsuperscript{70}

\textsuperscript{59} Id.
\textsuperscript{60} Id. at 565-66.
\textsuperscript{61} Id. at 566.
\textsuperscript{62} Id.
\textsuperscript{63} Id.
\textsuperscript{64} Id.
\textsuperscript{65} Kuhlmeier v. Hazelwood, 607 F. Supp. at 1466.
\textsuperscript{66} Id.
\textsuperscript{67} Kuhlmeier v. Hazelwood, 795 F.2d 1368, 1373 (8th Cir. 1986).
\textsuperscript{68} Id. at 1374.
\textsuperscript{69} Id. at 1375.
\textsuperscript{70} Hazelwood, 108 S. Ct. at 567.
IV. HOLDING

The Supreme Court's holding is trifurcated. First, in contravening the court of appeals, the Court found that the paper was not a public forum.\(^71\) Second, the Court reasoned, that when a school lends its name and provides resources for dissemination under a defined curriculum, educators may exercise editorial control as long as their "actions are reasonably related to legitimate pedagogical concerns."\(^72\) Thirdly, the Court held, in applying the espoused standard to this situation, the principal had acted reasonably.\(^73\)

The entire holding is premised on the Court's public forum analysis. The Court's unambiguous reliance on this concept of public forum classification requires an understanding of its evolution into a fully viable doctrine. Professor Tribe notes "the concept of 'public forums' was spawned in a series of decisions in the 1930's and 1940's, went through a troubled period of gestation in several decisions in the 1960's, and emerged as a fully viable creation in the 1970's."\(^74\) According to Tribe, "[i]n its principal attempt at a comprehensive doctrinal synthesis,"\(^75\) the Court has established three categories of forums: (1) quintessential public forums,\(^76\) (2) limited public forums,\(^77\) and (3) nonpublic forums.\(^78\)

The quintessential public forums are those places such as streets and parks that "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."\(^79\) These are "places which by long tradition or by government fiat have been devoted to assembly and debate..."\(^80\) To enforce a content-based regulation in this quintessential public forum, the state "must show that its

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71. Id. at 568.
72. Id. at 571.
73. Id.
75. Id. at 987.
77. Id.
78. Id. at 46.
80. Perry, 460 U.S. at 45.
regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”

In limited public forums, the state has designated for use by the public, a place for expressive activity. Although the state may not have been required to create the forum, once created, the state cannot enforce content-based exclusions unless it meets the standard in a traditional public forum. Examples of such limited forums are university meeting facilities, school board meetings, and municipal theatres.

Nonpublic forums are those places that are not by tradition or designation a forum for public communication. The Court in Hazelwood concluded that the Spectrum fell into this category of forums. This classification is of utmost importance because the extent to which the government can control depends on the nature of the relevant forum. In other words, whereas a traditional or limited public forum requires a compelling purpose that is narrowly tailored to accomplish those ends, a nonpublic forum only requires restrictions that are reasonably related to the forum.

The Court in Hazelwood concluded that the school district had not by "policy or practice" opened the school "for indiscriminate use by the general public," or for use by student organizations. Certainly, the Court declared, "[t]he government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."

81. Id.
82. Id. See also Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788 (1985).
84. Widmar, 454 U.S. at 263.
87. Perry, 460 U.S. at 46.
89. Perry, 460 U.S. at 45.
90. Id. at 49.
91. Hazelwood, 108 S. Ct. at 569.
92. Id.
93. Id.
94. Id. at 568 (quoting Cornelius v. NAACP Legal Defense and Educ. Fund, 473 U.S. 788, 802 (1985)).
The Court viewed the school district as not having intentionally created an open forum, but rather, by school board policy and practice, the school district had limited the forum to a supervised learning experience. According to the Court, the fact that the school newspaper's supervisor retained control over the publication and that the content of the articles to be published were subject to the principal's approval, indicated that it was the intent of the school district to reserve this forum for its intended purpose. "Accordingly," the Court declared, "school officials were entitled to regulate the contents of Spectrum in any reasonable manner [and] [i]t is this standard, rather than our decision in Tinker, that governs this case."

As noted earlier, the Court found the topics of the articles sensitive enough to warrant their being eliminated from the publication. As such, the school's action was reasonably related to legitimate pedagogical concerns. "Accordingly, no violation of First Amendment rights occurred."

V. Analysis

The impact of this decision turns on the Court's determination that the school newspaper was not a public forum. Confusion prevailed in the Court's mind as well as in the minds of scholars attempting to define what constitutes a "public forum." There were those who thought that in the arena of students' first amendment rights, only Tinker should be applied with its standard of "material disruption." One scholar concluded that Tinker meant that school newspapers were public forums, thereby limiting restrictions only to speech that substantially interfered with other students' rights. The Fourth Circuit held in Gambino v. Fairfax County School Board that a school could not prohibit an article from being published in the school newspaper because of the school newspaper's status as a public forum.

95. Id. at 569.
96. Id.
97. Id.
98. Id.
99. Id. at 571.
100. Id. at 572.
101. Tinker, 393 U.S. at 509.
103. 564 F.2d 157 (4th Cir. 1977).
the paper was a public forum.\textsuperscript{104} Even more pertinent, the decision of the Eighth Circuit, from which Hazelwood School District appealed, held that the school newspaper was a public forum and thus \textit{Tinker} was applicable.\textsuperscript{105} The Supreme Court’s holding in \textit{Hazelwood} is exactly opposite of these conclusions.\textsuperscript{106}

For the first time, the Supreme Court analyzed students' first amendment rights without utilizing the rationale and standards of \textit{Tinker}.\textsuperscript{107} Only a year earlier in \textit{Bethel},\textsuperscript{108} the Court had proceeded under the \textit{Tinker} analysis\textsuperscript{109} and had implicitly found that the student's speech was materially disruptive.\textsuperscript{110} Although the Court in \textit{Hazelwood} does not abandon \textit{Tinker}, its reasoning certainly limits \textit{Tinker} by distinguishing its question from the issue in \textit{Hazelwood}.\textsuperscript{111} The distinction that the Court found dispositive was that "between school sponsored [activities] and incidental student expression."\textsuperscript{112} It is important to recognize the effect of this distinction. In effect, \textit{Tinker} is limited to those times when students are expressing their own personal opinions (incidental student expression). \textit{Tinker} still applies in these situations.\textsuperscript{113} But when the student speech is linked with school-sponsored expressive activities that "members of the public might reasonably perceive to bear the imprimatur of the school,"\textsuperscript{114} then the standard becomes one of a reasonable relationship to pedagogical concerns.\textsuperscript{115}

The heart of the distinction seems to be that \textit{Tinker} was applied under a quasi-limited public forum analysis,\textsuperscript{116} whereas \textit{Hazelwood} was dissected under a nonpublic forum analysis.\textsuperscript{117} The problem that this distinction presents is stated as such: "[C]lassifying [a

\textsuperscript{104} Id. at 158.
\textsuperscript{105} Kulhmeier v. Hazelwood, 785 F.2d at 1374.
\textsuperscript{106} Hazelwood, 108 S. Ct. at 570.
\textsuperscript{107} Id.
\textsuperscript{108} Fraser, 106 S. Ct. at 3159.
\textsuperscript{109} Id. at 3163.
\textsuperscript{110} Id. at 3168 (Brennan, J., concurring).
\textsuperscript{111} Hazelwood, 108 S. Ct. at 569.
\textsuperscript{112} Id. at 576 (Brennan, J., dissenting).
\textsuperscript{113} Id. at 569.
\textsuperscript{114} Id.
\textsuperscript{115} Id. at 571.
\textsuperscript{117} Hazelwood, 108 S. Ct. at 569.
medium of expression] as something other than a public forum may lead courts to ignore the incompatibility of the challenged regulation with first amendment values." 118 Constitutional scholars, Farber and Nowak, rigorously argue that public forum analysis "distracts attention from first amendment values at stake in a given case." 119 The purpose of this Note is not to act as an apologist or as an assailant of public forum analysis. However, the classification of a forum as nonpublic substantially impedes first amendment rights. Point in fact is Hazelwood, whereupon by classifying the newspaper as a nonpublic forum, the Court was able to apply the "reasonableness" test, thereby finding that there was no impermissible censorship. 120 Had the Court applied the Tinker standard it is arguable that it would not have been able to conclude that the articles dealing with the topics of pregnancy and divorce were "materially disruptive." 121

Although Bethel did not rely on a nonpublic forum analysis, it also approached the students' first amendment rights with a deferential temperament. 122 It found, and the Court confirmed it in Hazelwood, that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board." 123 This statement can only retain its truthfulness to the extent that students' first amendment rights are not violated. The approach the Court has taken today expends students' first amendment rights to further the pedagogical concerns of educators. This expense is questioned by Justice Brennan when he writes "[i]f mere incompatibility with the school's pedagogical message were a constitutionally sufficient justification for the suppression of student speech, school officials could ... [convert] our public schools into 'enclaves of totalitarianism' that 'strangles the free mind at its source.'" 124 His conclusion is that the balance between first amendment rights

118. Id.
119. Farber and Nowak, The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication, 70 VA. L. REV. 1219, 1224 (1984). As the authors also note, "[c]lassifying a medium of communication as a public forum may cause legitimate government interests to be thoughtlessly brushed aside."
120. Hazelwood, 108 S. Ct. at 571.
121. Id. at 574 (Brennan, J., dissenting).
122. Fraser, 106 S. Ct. at 3165.
123. Id.; Hazelwood, 108 S. Ct. at 567.
and the legitimate concerns of schools is to be found in the line of analysis of *Tinker*. In *Tinker* the Court recognized that students' first amendment rights are not coextensive with those of adults, yet the decision avoids total usurpation by requiring a "material disruption" before a punishment or prohibition can be applied. With this, the balance is struck. Movement to either side of the scale disrupts its balance and ends in disharmony. The result of that movement in *Hazelwood* is the first amendment rights of students being severely checked.

The uncertainty of this Court's analysis is its possible application to the college and university level. The Court expressly states in footnote seven that "we need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level." The statement in the text correlated to that footnote asserts that censorship, which has no educational purpose, sharply implicates the first amendment, thereby requiring judicial intervention. These statements, taken in conjunction, suggest the Court's belief that student expression at the university level may more readily implicate the first amendment as the "educational purpose" may be more suspect. However, it seems that universities may have interpreted this opinion as opportunizing them greater discretion in controlling student expression. If tested, the Court could protect its reasonable standard at the secondary level by classifying the university level as a limited public forum. In this way, the Court could contain its holding in *Hazelwood* to the boundaries of secondary and lower education.

VI. CONCLUSION

The holding in *Hazelwood* supports Farber and Nowak's concern that by proceeding under a public forum synthesis, first amendment rights may be simply overlooked. Educators have a legitimate interest in preserving order in the classroom, a concern which *Tinker* addresses. *Tinker* prevents a "pall of orthodoxy

125. *Id.* (Brennan, J., dissenting).
126. *Id.* (Brennan, J., dissenting).
127. *Id.* at 571 n.7.
128. *Id*.
130. Farber and Nowak, *supra* note 118.
over the classroom,"¹³² yet prevents students from materially disrupting or invading the rights of other students.¹³³ This is an effective balance and preserves the legitimate first amendment rights of students with more integrity than the Court's "reasonableness" approach in Hazelwood. Justice Brennan sapiently concludes, "[t]he young men and women of Hazelwood East expected a civics lesson, but not the one the Court teaches them today."¹³⁴

¹³². Keyishian, 385 U.S. at 603.
¹³³. Tinker, 393 U.S. at 513.
The Medical Malpractice Crisis: *Hardy v. VerMeulen*

*Meryl Gibbons*

I. INTRODUCTION

The United States is currently suffering from what has been perceived as a medical malpractice crisis, manifested by sharply increased medical malpractice insurance premiums.\(^1\) This significant increase in malpractice insurance premiums has resulted in an equally significant increase in health care costs.\(^2\) Consequently, while some physicians are refusing to see "high risk" patients because they cannot afford the cost of insurance,\(^3\) other physicians are opting to seek alternative professions rather than pay outrageous premiums.\(^4\) Another effect of the liability crisis can be measured by the decrease in medical school enrollment.\(^5\) Apparently, there is a perception that medicine is no longer a desirable career choice due to the constant threat of malpractice suits and government regulations.\(^6\)

While this crisis is largely attributable to immense jury verdicts,\(^7\) Ohio case law lends credence to the conclusion that the decisions of the judges, themselves, may be a significant influence. In June of 1987, the Ohio General Assembly passed House Bill 327 as an emergency measure in an effort to stabilize insurance premiums and health care costs.\(^8\) The Bill reaffirmed the four year statute of repose contained in Ohio's malpractice statute, which bars a plaintiff from filing suit later than four years after the alleged malpractice occurred.\(^9\) Thus, the purpose of the Bill was to lessen the adverse effects of the liability crisis by decreasing the number of cases that actually reach the jury.\(^10\) Only one month after the Bill was passed, the Ohio Supreme Court in

\(2\) Id.
\(3\) Id.
\(6\) Id. at 681.
\(7\) Rieselman, *supra* note 1, at 26.
\(8\) OHIO REV. CODE ANN. § 2305.11 (Anderson Supp. 1987).
\(9\) Id.
\(10\) Id.
Hardy v. VerMeulen\textsuperscript{11} held that the four year statute of repose, which was reaffirmed by the House Bill, is unconstitutional when applied to plaintiffs who “did not know and could not reasonably have known of their injuries” within the four year period.\textsuperscript{12}

The aims of this Note are to examine the developments in the Ohio medical malpractice cases in this area and the perceived medical malpractice crisis in light of the corresponding legislation. In addition, this Note will explore the court’s decision in Hardy, as compared with past medical malpractice cases, and assess the potential impact of the Hardy decision on the liability crisis.

II. THE STATUTE

The Ohio Revised Code section 2305.11 is Ohio’s Medical Malpractice Statute. When it was originally enacted on May 18, 1874, it essentially provided that an action for malpractice against a physician, podiatrist, or a hospital, or upon a statute for a penalty or forfeiture, shall be brought within one year after the cause of action accrues.\textsuperscript{13}

In response to what the General Assembly perceived as a malpractice crisis, Ohio’s malpractice statute was amended on July 28, 1975. The amendment left the original statute intact and labeled it “2305.11(A)” and added to it “2305.11(B)” which provides in the pertinent part: “In no event shall any medical claim against a physician, podiatrist, or a hospital be brought more than four years after the act or omission constituting the alleged malpractice occurred.”\textsuperscript{14}

The purpose of the amendment was to place an absolute time limit on when a malpractice suit may be brought, and therefore, to prevent indefinite exposure to potential liability in cases where the cause of action may not “accrue” until several years after the alleged malpractice occurred.\textsuperscript{15}

III. THE CASE HISTORY

Under Ohio’s medical malpractice statute, a cause of action for medical malpractice accrues and the statute of limitations com-

\begin{itemize}
\item \textsuperscript{11} 32 Ohio St. 3d 45, 512 N.E.2d 626 (1987), cert. denied, 108 S. Ct. 1029 (1988).
\item \textsuperscript{12} Id.
\item \textsuperscript{13} OHIO REV. CODE ANN. § 2305.11(A) (Anderson 1976).
\item \textsuperscript{14} OHIO REV. CODE ANN. § 2305.11(B) (Anderson 1976).
\item \textsuperscript{15} Id.
\end{itemize}
mences to run when the patient discovers, or in the exercise of reasonable care and diligence should have discovered, the resulting injury. However, the statute fails to place a time limit on when an action for malpractice may accrue. Originally, an action was said to accrue at the time the malpractice occurred. As early as 1902, however, the Ohio Supreme Court adopted the "termination rule" as an absolute bar on when an action for malpractice may be brought.

A. The Termination Rule

The termination rule was first adopted in *Gillette v. Tucker* and the rule was subsequently adopted in *Bowers v. Santee*, *Amstutz v. King*, *De Long v. Campbell*, *Lundberg v. Bay View Hospital* and *Wyler v. Tripi*. In the case of *De Long v. Campbell*, the Supreme Court of Ohio set forth the termination rule as follows:

As to a cause of action for malpractice by a physician, the statute of limitations begins to run at the latest upon the termination of the physician-patient relationship whether, within the time limited by the statute, the act constituting malpractice is known or unknown by the one upon whom it was committed.

In the case of *Gillette v. Tucker*, the Ohio Supreme Court held that the statute of limitations for a medical malpractice claim does not begin to run until the physician-patient relationship is terminated. In *Gillette*, the plaintiff alleged that the physician had negligently forgotten to remove a sponge which he had placed in her abdominal cavity during an operation to remove a tumor. The plaintiff complained that she was experiencing severe pain

16. *Hardy*, 32 Ohio St. 3d at 45, 512 N.E.2d at 626.
17. Id.
19. Id.
20. 99 Ohio St. 361, 124 N.E. 238 (1919).
21. 103 Ohio St. 674, 135 N.E. 973 (1921).
22. 157 Ohio St. 22, 104 N.E.2d 177 (1952).
25. 157 Ohio St. 22, 104 N.E.2d 177 (1952).
26. Id.
27. 67 Ohio St. 106, 65 N.E. 865 (1902).
28. Id. at 106, 65 N.E. at 865.
and that an infection persisted for one year following the operation. The doctor repeatedly assured her that the infection would heal if she would patiently wait. Finally, the plaintiff told the doctor that "if he had done his work right, she would have been well." The doctor told her to leave his office and never to return. Two months later, the plaintiff sought advice from a different doctor. The subsequent doctor reopened the original incision and discovered that a surgical sponge had been left in her abdomen and was the cause of the infection.

The court reasoned that as long as the physician-patient relationship continues, the surgeon is in a position to repair the damage he has done and if during that time, he fails to do so, he is liable for negligence. Therefore, the cause of action against him arises at the conclusion of this contractual relationship. It was determined that the physician-patient relationship ended when the doctor ejected the patient from his office. Therefore, the court remanded the case in order to allow the plaintiff to demonstrate that she filed suit within one year after this time.

Seventeen years later, in Bowers v. Santee, the Ohio Supreme Court applied the termination rule and held that the plaintiff's cause of action against her physician for negligently failing to repair her fractured foot, was not barred by the statute of limitations. In Bowers, the plaintiff's claim was not barred because she filed her cause of action within one year after the physician-patient relationship had terminated. The Bowers court set forth the rationale underlying the adoption of the termination rule as follows:

The surgeon should have all reasonable time and opportunity to correct the evils which made the operation or treatment necessary, and even reasonable time and opportunity to correct the ordinary and usual mistakes incident to even skilled surgery. The doctrine announced here is conducive to that mutual confidence that is highly essential in the relation between surgeon and patient.

29. Id. at 120, 65 N.E. at 868.
30. Id. at 126-27, 65 N.E. at 870.
31. Id.
32. Id.
33. 99 Ohio St. 361, 124 N.E. 238 (1919).
34. Id.
35. Id.
36. Id. at 368, 124 N.E. at 240.
In contrast, in the subsequent case of *De Long v. Campbell*, the plaintiff did not discover that the surgeon had negligently left a sponge in her wound until more than one year after the physician-patient relationship had been terminated. Although the plaintiff was unable to discover the sponge until after the statute had run, the court reasoned that "[t]he fact that plaintiff did not know of her right of action did not prevent the statute from running . . . ." Therefore, the court held that the action was barred by the statute of limitations. The court acknowledged the persuasiveness of the plaintiff's argument that it was a gross injustice to allow a statute of limitations to bar an action when the injured patient could not, by the exercise of reasonable diligence, know that he had a cause of action for the injury done to him. However, the court's response to this argument was that the legislative branch had determined the policy of the state and therefore, the plaintiff's argument addressing the time when the statute of limitations begins to run, should properly be made to the General Assembly. The court stated that "[o]ur sole function is to interpret and enforce the legislative enactment and it is not our function, as we have said so many times, to disregard, by legislating, a legislative enactment."

Nineteen years after *De Long*, the court in *Wyler v. Tripi*, again adopted the termination rule, but for the first time, expressed its concern over the inequities and harshness which resulted from the application of this rule in medical malpractice actions.

In *Wyler*, the plaintiff alleged that the physician had incorrectly interpreted her X-rays and therefore, had unnecessarily performed surgery upon her. She claimed that this improper treatment necessitated the replacement of her right hip and the subsequent removal of her right leg. However, the plaintiff did not file her suit against the doctor until two years after the physician-patient relationship had terminated.

37. 157 Ohio St. 22, 104 N.E.2d 177 (1952).
38. *Id.* at 27, 104 N.E.2d at 179.
39. *Id.*
40. *Id.* at 26, 104 N.E.2d at 179.
41. *Id.* at 27, 104 N.E.2d at 179.
42. *Id.*
43. 25 Ohio St. 2d 164, 267 N.E.2d 419 (1971).
The court pointed out that construing a statute of limitations for medical malpractice claims presents a conflict between two basic policies of law. These policies are the policy of discouraging the fostering of stale claims and the policy of allowing meritorious claimants an opportunity to present their claim. The court's concern was that the termination rule would discourage plaintiffs from pursuing meritorious claims. The court highlighted the fallacies of the termination rule when it stated:

Although the termination rule is a marked departure from the general rule, and is designed to avoid the harsh results of that rule, it affords little relief in cases where the injury is one which requires a long developmental period before becoming dangerous and discoverable. In those situations, the termination rule extends to the period of time at which the statute of limitations commences to run, but does so by a factor which bears no logical relationship to the injury occurred. The termination rule is further fallible in that it requires the patient to determine, at the time the relationship is terminated, that the malpractice has taken place, when in fact he may have relied upon the very advice which constitutes malpractice.

Despite the court's concerns, it reluctantly adopted the termination rule and declined to adopt the "discovery rule," which would place no absolute bar on when a malpractice claim may accrue under Ohio's malpractice statute. Pursuant to the discovery rule, a cause of action accrues when the patient discovers or should have discovered the alleged injury.

The court stated that if it was to adopt the "discovery rule," it would place itself in the "obvious and untenable position of having not only legislated, but having done so directly in the face of a clear and opposite legislative intent." The court reasoned that:

[Statistics of limitations are designed to assure an end to litigation and to establish a state of stability or repose. It must be assured that when the General Assembly enacts a statute of limitations it is aware that, although a stale claim may be meritorious, the statutes will operate without reference to merit and will cut off

44. Id. at 166, 267 N.E.2d at 420.
45. Id. at 168, 267 N.E.2d at 421.
46. Id. at 166, 267 N.E.2d at 420.
47. Id. at 171, 267 N.E.2d at 423.
the claim.48

The court determined that the declination of the General Assembly to amend the malpractice statute implied the existence of a legislative intent that the discovery rule should not apply in malpractice cases.49

Subsequent to the Wyler decision, the Ohio Supreme Court recognized two exceptions to the termination rule. One year after Wyler, in Melnyk v. Cleveland Clinic,50 the court held that the discovery rule applies in medical malpractice actions arising from situations where objects have been left in the patient’s body and have subsequently caused injuries.51 Eleven years later, in O’Stricker v. Jim Walter Corp.,52 the court reasoned that a “latent disease [is] analogous to a hidden instrument left in the body of an unsuspecting patient.”53 Therefore, the court held that an action for asbestos-related bodily injury claims accrues when the patient “is informed by competent medical authority that he has been injured, or upon the date on which, by the exercise of reasonable diligence, he should have become aware that he had been injured, whichever date occurs first.”54

B. Oliver v. Kaiser Community Health Foundation: The Discovery Rule

In 1983, in Oliver v. Kaiser Community Health Foundation,55 the Ohio Supreme Court adopted the discovery rule and overruled those cases which had followed the termination rule. In Oliver, the court concurred with the Wyler court’s concerns over the inequities of the termination rule and reasoned that the use of the discovery rule would ease the unconscionable result to innocent victims “who by exercising even the highest degree of care could not have discovered the cited wrong.”56 The court further reasoned that “[b]y focusing on discovery as the element

48. Id.
49. Id.
50. 32 Ohio St. 2d 198, 290 N.E.2d 916 (1972).
51. Id.
52. 4 Ohio St. 3d 84, 447 N.E.2d 727 (1983).
53. Id. at 90, 447 N.E.2d at 732.
54. Id.
55. 5 Ohio St. 3d 111, 449 N.E.2d 438 (1983).
56. Id. at 114, 449 N.E.2d at 441.
which triggers the statute of limitations, the discovery rule gives those injured adequate time to seek relief on the merits without undue prejudice to medical defendants. 57 The court rejected the Wyler majority's assertion that it would be improper to adopt the discovery rule because the legislative history demonstrates legislative disapproval of such a rule. In criticizing the Wyler court's rejection of the rule, the court expressed the opinion that legislative inaction is an unsatisfactory means by which to determine legislative intent. 58 The court quoted O'Stricker v. Jim Walter Corp. 59 which held that, "[a]bsent legislative definition, it is left to the judiciary to determine when a cause ... [of action accrues]." 60 The court also pointed out that Ohio's malpractice statute left the time of accrual undetermined. 61 In referring to the Oregon case of Berry v. Branner, 62 the court stated that:

[t]he contention is made that a decision ... [to adopt the discovery rule] amounts to judicial legislation. The legislature, however, did not provide that the time of accrual was when the physician performed the negligent act. This court did. The legislature, left the matter undetermined. A determination that the time of accrual is the time of discovery is no more judicial legislation than a determination that it is the time of the commission of the act. 63

Therefore, the court concluded that it was within its power to adopt a discovery rule and held that "under R.C. 2305.11(A), a cause of action for medical malpractice accrues and the statute of limitations commences to run when the patient discovers, or in the exercise of reasonable care and diligence should have discovered, the resulting injury." 64

The Oliver majority's assertion that the discovery rule would abrogate some of the inequities of the termination rule may be accurate; however, their contention that their holding is not contrary to legislative intent is rather inappropriate. Perhaps at

57. Id.
58. Id. at 115-16, 449 N.E.2d at 442.
59. 4 Ohio St. 3d 84, 447 N.E.2d 727 (1973).
60. Id.
61. 449 N.E.2d at 442 (quoting Wyler v. Tripi, 25 Ohio St. 2d at 176, 267 N.E.2d at 426).
63. Oliver, 5 Ohio St. 2d at 116, 449 N.E.2d at 442 (quoting Berry v. Branner, 245 Ore. at 313, 421 P.2d at 999).
64. Id. at 116-17, 449 N.E.2d at 443, 444.
the time when Wyler was decided in 1971, the court would have been correct in its assertion that Ohio’s malpractice statute says nothing about the termination of the statute of limitations. In 1975, however, subsequent to the Wyler decision and prior to the Oliver decision, the General Assembly modified the malpractice statute by adding a four year statute of repose which bars the filing of a malpractice claim later than four years after the act of malpractice has occurred. The legislative intent behind this amendment was to lessen the detrimental effects of what the Assembly perceived to be a malpractice crisis.\(^6^5\) The Oliver majority literally ignored this amendment. Referring to the statute of limitations, Justice Holmes, in his dissent, pointed out this fallacy in the majority’s reasoning.

\[\text{charging that the General Assembly has determined as a matter of law that such tolling shall not continue indefinitely. With the enactment of R.C. 2305.11(B), the General Assembly again declared a public policy of the state of Ohio which was to the effect that the increase in malpractice actions created a public concern and, in keeping with such concern, enacted as an emergency measure the absolute four-year statute of limitations, regardless of when the action occurred.}\]

In 1983, the Oliver decision made it clear that the termination rule had been overruled, however, it was not as clear whether the court in subsequent decisions should strictly adhere to the four year statute of repose set forth in the amended version of Ohio’s malpractice statute, or whether it had the freedom to adopt the unlimited discovery rule set forth in Oliver. Following the Oliver decision, the courts seldom applied the four year statute of repose in malpractice cases;\(^6^7\) however, courts applied the discovery rule in several cases, without referring to the four year time limit set forth in the statute.\(^6^8\)

This lack of uniformity, exemplified by the foregoing cases, lends credence to the conclusion that the Oliver decision signifi-

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65. Vance v. St. Vincent Hospital, 64 Ohio St. 2d 36, 414 N.E.2d 406 (1980).
66. Oliver, 50 Ohio St. 2d at 119, 449 N.E.2d at 444 (Holmes, J., dissenting).
cantly diluted the effectiveness of the 1975 amendment.

IV. House Bill 327

In June, 1987, the General Assembly passed House Bill 327 as an emergency measure. It was a response to the perceived medical malpractice crisis and the lack of agreement as to the applicable statute of limitations. In its relevant part, the Bill reaffirmed the four year statute of repose in Ohio's malpractice statute and emphasized its importance.69

The General Assembly stated that their goal in enacting this Act was to "stabilize the marketplace for medical, dental, optometric, and chiropractic professional liability insurance in [the] state [of Ohio] and [to ensure] the availability of necessary medical ... services for all of the citizens in [Ohio]."70 The General Assembly considered the Bill of such importance that it appointed a select committee to ensure that the Act would effectuate its intended purpose, to monitor the extent to which the goal of the Bill is being achieved by the act, and to determine whether future statutory changes are necessary to achieve that goal.71

V. Hardy v. VerMeulen

On June 12, 1987, just one month after the Assembly passed HB 327, the court in Hardy v. VerMeulen72 held that the four year statute of repose was unconstitutional as applied to the facts in that case.

A. Facts

In Hardy, surgical procedures were performed on appellant Carl E. Hardy's right ear in 1973 and 1974. In addition, it was determined that the physician-patient relationship had ended in 1974. The appellant claimed that on April 15, 1984, he discovered the injury which resulted from the appellee's alleged malpractice in performing the surgery.73 In April, 1985, the appellant sent notice in order to extend the statute of limitations by 180 days.

69. Rieselman, supra note 1, at 1.
70. Id.
71. Id.
73. Id. at 45, 512 N.E.2d at 627.
Subsequently, the appellant filed within the 180 day period his malpractice action against appellees, Victor R. VerMeulen, M.D. and Victor R. VerMeulen, Inc. on October 1, 1985.\footnote{74. Id.}

The appellees moved to dismiss the action on the basis that the appellant failed to file suit within four years following the act or omission constituting the alleged malpractice, as required by R.C. 2305.11(B).\footnote{75. Id.}

The trial court sustained the appellee’s motion to dismiss and the court of appeals affirmed.\footnote{76. Id.} However, the supreme court reversed the decision of the court of appeals and held that Ohio Revised Code section 2305.11(B), “as applied to bar claims of medical malpractice plaintiffs who did not know or could not reasonably have known of their injuries, violates the right-to-a-remedy provision of Section 16, Article I of the Ohio Constitution.”\footnote{77. Id. at 46, 512 N.E.2d at 627.} The supreme court remanded the case to the trial court for further proceedings in accordance with its opinion.

\section*{B. The Court’s Reasoning}

The court determined that the effect of section 2305.11(B), when applied to malpractice plaintiffs who do not discover their injury until four years after the act of malpractice, is to deny such plaintiffs a remedy for the wrong.\footnote{78. Id. at 46, 512 N.E.2d at 627.} The court quoted Section 16, Article I of the Ohio Constitution, which provides: “All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.”\footnote{79. Id.}

The court relied on \textit{Kintz v. Harlinger}\footnote{80. 99 Ohio St. 240, 247, 124 N.E. 168, 170 (1919), overruled, Taplin-Rice-Clerkin Co. v. Hower, 124 Ohio St. 123, 177 N.E. 203 (1931).} in interpreting Section 16, Article I to read that “all courts shall be open and every person, for an injury done him in his land, person or reputation shall have remedy.”\footnote{81. Hardy, 32 Ohio St. 3d at 46, 512 N.E.2d at 627.} Therefore, the court reasoned, under Ohio’s malpractice statute, “the courts of Ohio are closed to those who
are not reasonably able, within four years, to know of the bodily injury they have suffered.”82 Thus, the court held that since the appellant had no remedy for his injury because his claim was extinguished before he knew of it or could have reasonably discovered it, the four year statute of repose violates Section 16, Article I of the Constitution as applied to the facts in the instant case.83

In order to support its conclusion the court quoted Lafferty v. Shinn84 which, in reference to Section 16, Article I, stated that “[i]t is not within the power of the legislature to abridge the period within which an existing right may be asserted as that their shall not remain a reasonable time within which an action may be commenced.”85

Relying on the foregoing proposition, the court concluded that “[i]f the legislature may not enact an unreasonable statute of limitations, it follows that the legislature cannot deprive one of a right before it accrues.”86

Finally, the court acknowledged that the four year statute of repose was enacted in response to what the General Assembly perceived to be a medical malpractice crisis. Nonetheless, the court justified its holding by stating that the legislature may not deny a legal remedy to one who has suffered bodily injury, even if it acted with a rational basis.87

C. Dissenting Opinion

Justice Wright, concurring in judgment only, and dissenting in part, criticized the majority for misinterpreting Section 16, Article I, to mean “every person for an injury done to him ... shall have remedy,”88 instead of his interpretation that every such person “shall have remedy by due course of law.”89 The dissent determined that the flaw in the majority’s reasoning lies in the fact that the Ohio Constitution “only affords access to the courts

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82. Id.
83. Id. at 46, 512 N.E.2d at 627-28.
84. 38 Ohio St. 46 (1882).
85. Hardy, 32 Ohio St. 3d at 47, 512 N.E.2d at 628.
86. Id.
87. Id., 512 N.E.2d at 629.
88. Id. at 52, 512 N.E.2d at 632-33 (Wright, J., dissenting in part).
89. Id. (Wright, J., dissenting in part) (emphasis original).
to seek remedies by *due course of law*, not access to seek any and all remedies for perceived injuries . . . [E]ven appellant concedes that . . . Section 16, Article I, is functionally equivalent with ‘due process of law’ under the federal Constitution and *nothing more.*”90 Therefore, Justice Wright referred to *Opalko v. Marymount Hospital, Inc.*,91 in which three members of the majority agreed that the four year statute of repose in Ohio’s malpractice statute “affords plaintiffs a reasonable time in which to seek redress for alleged malpractice, and hence the statute does not violate due process of law.”92

Justice Wright also believed that the majority misinterpreted the holding in *Lafferty*.93 He argued that, “the passage in *Lafferty* relied on by the majority stands for the well-established principle that the General Assembly may not retroactively destroy a vested right . . . *not* that the Legislature is precluded from modifying a former common law right.”94 In addition, Justice Wright accused the majority of failing to recognize the distinction between vested and non-vested property rights. He explained that, “where an injury occurs giving rise to a *recognized cause of action*, that cause of action becomes a *vested property right* entitled to due process protections.”95 However, if the injury has yet to occur, it has not vested and it will not similarly be afforded due process protections.96 Therefore, the dissent determined that not every injury sustained “necessarily enjoys redress in courts.”97

To support his conclusion, Justice Wright quoted *Hartford Fire Insurance Company v. Laurence, Dykes, Goodenherser, Bower S. Clancy*.98

The Ohio courts have never held that the “open court” provision in its Constitution prevents the legislature from abolishing a cause of action. In *Lafferty v. Shinn*, the Ohio Supreme Court stated that, under the provision, “it is not within the power of the legislature to abridge the period within which an existing right

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90. Id. (Wright, J., dissenting in part) (emphasis original).
91. 9 Ohio St. 3d 63, 458 N.E.2d 847 (1984).
92. Hardy, 32 Ohio St. 3d at 52, 512 N.E.2d at 633.
93. Id. (Wright, J., dissenting).
94. Id. (Wright, J., dissenting).
95. Id. (Wright, J., dissenting).
96. Id. (Wright, J., dissenting).
97. Id. (Wright, J., dissenting).
98. 740 F.2d 1362 (6th Cir. 1984).
may be so asserted as that there shall not remain a reasonable time within which an action may be commenced." This reasoning, however, applies only to "existing" rights; state law determines when rights exist. Section 16 guarantees a "remedy by due course of law for an injury done," but state law determines what injuries are recognized and what remedies are available.99

According to Justice Wright, the majority neglected to discuss the abolition of a vested right and therefore, found that under Section 16 there is a right of access by the courts for any claim. However, it was clear to him that "unless the right is vested or the claim involves a fundamental right, access to the courts may be limited and/or regulated by the General Assembly if a rational basis exists for the limitation."100

Therefore, the dissent concluded that "because the majority disagrees with the time constraints under R.C. 2305.11(B), it has, under the guise of judicial interpretation, abrogated the function of the General Assembly and the electorate by amending the Constitution of Ohio by judicial fiat."101

VI. ANALYSIS

A. Right to a Remedy

It is unclear whether the majority's holding in 

Hardy v. VerMeulen will subsequently be applied as a limited exception to the four year statute of repose in Ohio Revised Code section 2305.11(B), or if it will cause the demise of the availability of affordable, quality, healthcare in Ohio.

Justice Wright reminds us that "[a] regularly enacted statute of Ohio is presumed to be constitutional and is therefore, entitled to the benefit of every presumption in favor of its constitutionality .... We have consistently held enactments of the General Assembly to be constitutional unless such enactments are clearly unconstitutional beyond a reasonable doubt."102 It is difficult, if not impossible, to conclude that the majority applied the above

99. Id. at 1370.

100. Hardy, 32 Ohio St. 3d at 54, 512 N.E.2d at 584 (Wright, J., dissenting) (emphasis original).

101. Id. at 55, 512 N.E.2d at 635 (Wright, J., dissenting).

102. Id. at 51, 512 N.E.2d at 632 (quoting State ex. rel. Do Dickman v. Defenbacher, 164 Ohio St. 142, 147, 128 N.E.2d 59, 63 (1955).
standard in determining that the four year statute of repose in Ohio’s malpractice statute is unconstitutional as to the facts in Hardy. The majority held that the statute of repose violates the “right to remedy” provision in the Ohio Constitution because the appellant had no remedy for his injury. That is, since his claim was extinguished before he knew of the injury or could have reasonably discovered it, he was not afforded a remedy. However, the court failed to demonstrate that the appellant in this case, a plaintiff who does reasonably discover his injury within four years, has a vested right which is protected under the “right to remedy” provision of the Ohio Constitution.

The dissent pointed out that the appellant conceded that Section 16 of the Ohio Constitution is equivalent to due process under the federal Constitution and therefore, only protects vested rights. According to Justice Wright, a vested right arises where there is an injury which is recognized as a cause of action and not an injury which has not yet occurred. Accordingly, as was concluded in Hartford Fire Insurance Company, “state law determines when rights exist. Section 16 guarantees a ‘remedy by due course of law’ for ‘an injury done’ but state law determines what injuries are recognized and what remedies are available.”

It seems that this is precisely the purpose of a statute of limitations—to determine what injuries are recognized. Thus, an injury which is barred by the statute of limitations is not recognized, and therefore, no right to a remedy for that injury exists. The majority seems to have ignored the purpose of a statute of limitations, as stated by the court in Wyler v. Tripi. The court in Opalko v. Marymount Hospital specifically held the four year statute of repose to be constitutional and clarified the distinction between an unconstitutional and a constitutional statute as the difference between a statute of limitations “which totally obliterates an existing substantive right and one which merely shortens the period of time in which the remedy can be realized.”

103. Id. at 53, 512 N.E.2d at 633.
104. Id. at 54, 512 N.E.2d at 634.
105. 25 Ohio St. 2d 164, 287 N.E.2d 419 (1971).
106. 9 Ohio St. 3d 63, 458 N.E.2d 847 (1984).
Therefore, as Justice Wright pointed out in his dissent, the majority misconstrued the “right-to-a-remedy” provision of the Ohio Constitution to mean a plaintiff has the right of access to the court for any claim. However, the more accurate interpretation seems to be that unless a right is vested or is a fundamental right, access to the courts may be limited by the General Assembly. 108

In determining that the four year statute of repose is unconstitutional, the majority relied on the Lafferty court’s interpretation of Section 16, Article I of the Ohio Constitution. 109 It is apparent from the very language relied on by the court in Lafferty that a statute only violates Section 16 if it does not provide “a reasonable time within which an action may be commenced.” 110 Therefore, only an unreasonable statute of limitations is unconstitutional. Justice Wright pointed out that the Ohio Supreme Court held in Opalko that the four year statute of repose was constitutional. However, he failed to point out that the statute was only held constitutional as to the facts of that case. Although it could be argued that the facts in Opalko can be distinguished from those in Hardy, it seems that if the majority had applied the appropriate standard of proof for determining whether a statute is unconstitutional, they would have been forced to conclude that the statute is reasonable under the present circumstances and therefore, is constitutional.

Justice Wright suggested that the majority construed the statute to be unconstitutional simply because they disagreed with the time constraints it imposed. 111 Perhaps Justice Wright meant that the majority disagreed with the statute’s time constraints because it believed them to be unreasonable and therefore, to be unconstitutional. However, reasonableness is generally determined in light of the surrounding circumstances. In deciding that the statute is unreasonable and thus, is unconstitutional, the majority considered a plaintiff’s right to a remedy for his alleged injury without ever determining whether that right is recognized by law. Thus, in deciding whether the statute is reasonable, the majority failed to consider the plaintiff’s right to the availability

108. Hardy, 32 Ohio St. 3d at 54, 512 N.E.2d at 628.
109. Id. at 47, 512 N.E.2d at 628.
110. Id. (quoting Lafferty v. Shinn, 38 Ohio St. at 48 (1882)) (emphasis added).
111. Id. at 55, 512 N.E.2d at 635.
of affordable, quality, health care in light of the perceived malpractice crisis. It seems that a statute of limitations which allows a plaintiff four years, after the alleged act of malpractice occurred, to discover and therefore, to have his injury recognized by the General Assembly, is a reasonable statute, in consideration of the potential, tragic consequences of an indefinite “discovery period.”

B. Hardy's Impact on House Bill 327

The fact that the majority in *Hardy* did no more than elude to the purpose of the four year statute of repose is striking, when one considers that *Hardy* was decided less than two months after the General Assembly enacted House Bill 327, reaffirming the four year statute of repose. While Ohio's malpractice statute was originally amended as a response to the perceived malpractice crisis, House Bill 327 was specifically enacted as an emergency measure, the purpose of which was “to stabilize the marketplace for medical professional liability insurance in this state, with the concomitant effects of slowing down the upward spiral of medical care costs in this State and [to] ensur[e] the availability of medical services for all of the citizens in this state.”

Thus, it is difficult to overlook the fact that the majority failed to demonstrate the unconstitutionality of the statute beyond a reasonable doubt. Instead, the court narrowly construed the statute as unconstitutional, without considering the effect of its decision on what has been described as a growing malpractice crisis.

It is almost impossible not to conclude, as was suggested by Justice Wright, that by its holding, the majority has essentially informed the General Assembly “that it has no power to meet what it perceives as an epidemic crisis with responsive legislation.” In his dissent Justice Wright concluded that,

> [t]he present predicament that the medical profession and health care facilities have in obtaining malpractice insurance at reasonable cost will rapidly spread to other professions ... Today we have simply taken the insurance industry “out of play” in many areas

113. *Hardy*, 32 Ohio St. 3d at 55, 512 N.E.2d at 635.
of professional malpractice. Suffice it to say, I am deeply disappointed with the accumen foresight of my brethren in the majority.114

VII. CONCLUSION

It is uncertain how the holding in *Hardy* will affect the malpractice crisis. At best, the majority's holding in *Hardy* will be applied as a remote exception to the four year statute of repose. At worst, courts will adopt the limitless discovery rule, physicians may be open to liability for indefinite periods of time, insurance premiums may continue to rise, and only the very wealthy may be able to afford health care from the few physicians left who can afford to pay the malpractice insurance premiums. Perhaps the four year statute of repose is not the ideal solution to the malpractice crisis; however, unless the court considers the plaintiff's right to a remedy in a particular suit, coextensively with his right to affordable health care, there may be no plaintiffs left to bring malpractice suits. Potentially broad holdings which contravene legislative objective are not a solution to a crisis. Until the court is willing to work with the General Assembly to strike a balance between a plaintiff's right to a remedy and his right to affordable health care, a sufficient solution to the malpractice crisis will not be forthcoming.

114. *Id.*
BOOK REVIEW


Reviewed by Jeremy M. Miller*

Professor Shapiro, using a sophisticated Shepard-based statistical analysis, has discovered the twenty-four most cited law review articles ever written. In essence, the method documents which articles are most cited by other law reviews.

The obvious assumption of this is that these twenty-four articles are thus the most influential law review pieces ever written. The assumption, though not unfounded, is nevertheless suspect. Law professors often live in their own cloistered world. Would not a better measure of the influence of a law review article (on the development of the law) be which articles are most cited by appellate courts?

Furthermore, the reprinting of law review articles in books, casebooks, and journals is another ignored measure of the influence of the given article. These forums teach law students what the law is and thus the influence is tremendous—it shapes a whole generation of lawyers!

Finally, although such is not within the scope of this book, a different kind of selection—one which reprints the "best" or "favorite" law review articles ever written, would also be an enjoyable selection.1 The fact that, for example, Fuller's classic, The Case of the Speluncian Explorers2 is not included is an obvious flaw.

Nevertheless, the previous minor criticisms notwithstanding, I could not help but like Shapiro's book. The book will prove to be a fine and worthwhile addition to any small library. Of course, any large library really has no need for the book. Shapiro's own

* Professor of Law, Western State University College of Law. B.A. 1976, Yale; J.D. 1980, cum laude Tulane University; LL.M. 1981, University of Pennsylvania.
2. 62 Harv. L. Rev. 616 (1949).
listing is available in 73 California Law Review 1540 (1985), and the articles themselves will obviously be present in a library having a complete section of law reviews.

Although I do not believe it has been done by anyone, Shapiro's anthology could provide a welcome change to law students and professors alike. It could comprise the source book for a very interesting seminar on the development of legal theory in America.

The book begins with the Warren and Brandeis ground-breaking classic on development of the concept of privacy as a protected legal interest. It works its way through the development of the jurisprudence of American realism by Holmes and Llewellyn and finally winds its way into the impact of poverty on our constitutional system.

All of the good things which have been written about these much-cited articles can also be said about Shapiro's book. I am glad to own a copy and can fully recommend the book to others.
ERRATUM

The following errors appeared in the book review by Dale M. Cendali titled "In Search of Truth: A Review of Renata Adler's Reckless Disregard," which appeared in Volume 15, number 1. These errors were made by the editor and not by Ms. Cendali.

On pages 234, 248, 249, 252, 253, 254, 260, 272, 273, 277, and 278 Renata Adler's name was incorrectly spelled "Alder."

On page 235, the last sentence of the second paragraph should read, "had their ... campaign themes been revealed as mirages, or, worse yet, magician's tricks."

On page 238, the last paragraph, second sentence, should read, "such lack of motive and opportunity could have led the jury to infer that the estimates had not been, in fact, reduced."

On page 246, the last paragraph, second sentence, should read, "Yet, she persists in the view that the side-bar conference with Judge Leval proves that Westmoreland's decision to settle did not result from Colonel Hawkin's testimony."

On page 256, the second paragraph, last sentence, should begin, "Adler questions why Barr ...."

On page 266, the second paragraph, last sentence, should read, "In sum, Sullivan was well-reasoned and a fair expression of many of the ideals we hold important."

On page 268, the second paragraph, first sentence, should read, "Adler also insists that the current 'monolithic structure' and power of the press was something unforeseen at the time of New York Times v. Sullivan in 1964." The third sentence in this same paragraph should read, "This contention is curious since 1964 was not that long ago."

On page 274, the first paragraph, third sentence, should read, "In his article, A Declaratory Judgment Alternative to Current Libel Law ...."

Footnote 182 should read, Franklin, A Declaratory Judgment Alternative to Current Libel Law, 74 CALIF. L. REV. 74, 809 (1986) [hereinafter Franklin, Declaratory Judgment].
The following words or phrases should not have appeared in italics: "possible" (p. 231), "significance" (p. 236), "moral basis" (p. 237), none of the words on page 240, "expectation" and "newscast" (p. 241), "impose" (p. 242), "just before," "should have been," "credibility," and "reluctance" (p. 243), "personally" (p. 245), "unlikely" (p. 246), "discounted" and "her" (p. 253), "conceding" (p. 254), "chief," "defendant," and "special damages" (p. 275), and "how" and "clear" (p. 276).