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I am delighted to be here and to have the opportunity to discuss with you a subject of great importance and mutual concern. This subject is the intellectual content of law—or lack thereof. I speak against the background of general concern in the nation today with the quality of education and the intellectual tone of society. Law is not immune from this concern. Indeed, I believe that law as it is taught, studied, adjudicated, and practiced in this country today is insufficiently intellectual. I will be saying the same thing if I say that American law is too provincial, too Philistine; that it is self-satisfied; that it is intellectually isolated; that it is for the most part derivative and unoriginal; that it is becoming less intelligent, less useful, and less relevant every day; that it is a prey to fads and charlatanry; that it has low standards; that it is methodologically reactionary and compromised, politically timid, and prone to pandering; and, for good measure, that it is anticompetitive.

I can hardly sustain so sweeping an indictment in the time allotted me to this lecture—especially since I have overstated my case for the sake of dramatic emphasis. I will have to paint with a broad brush and leave to future work the filling in of convincing detail, including necessary qualification. I need hardly add that I am not criticizing this or any other law school. It is an entire professional culture that I am criticizing.

For almost a century the formal training of most American lawyers has consisted of three years in law school devoted primarily to reading and discussing English and American appellate opinions. Granted, the case method is somewhat less
dominant than it was thirty years ago, when I started law school. Today there is more emphasis both on statutes and on practical lawyering ("clinical education"). There are also some economic and other interdisciplinary perspectives. But, with a few, not necessarily happy, exceptions (most notably the Yale Law School), the core of the curriculum—at law schools large and small, national and regional, public and private—remains, in course after course—for three straight years—the study of appellate cases. What is more, a good deal of so-called "enrichment" of legal curricula comes from giving students released time for internships and externships, which in many cases amount simply to tuition without teaching.

After law school, it is true, the lawyer obtains practical experience. But increasingly it is experience of a highly specialized kind, as a litigator or counselor or negotiator in a particular corner of the law. Eventually the lawyer may become a legislator or a judge or a law professor. The lawyer who becomes an appellate judge will find himself leading a peculiarly hermetic existence in which the law, again just as in law school, is served up and dished out in the form of appellate cases, briefs, and argument. He will also find himself leaning heavily on young lawyers just out of law school—the ubiquitous law clerks who are doing more and more of the judge's job as judicial workloads expand.

The conventional training and experience of lawyers is indispensable for the practice, teaching, and administration of law. But these things are not guarantors that law will be administered with distinction, especially in a society as rich in change, conflict, and specialized knowledge (not only technical) as ours. Appellate opinions, especially those of just one legal system (in this context, the entire Anglo-American legal universe may be considered a single legal system) afford only a narrow glimpse of life; and the experience acquired by a specialized legal practitioner affords only a slightly broader one. Among the many questions that a lawyer's knowledge will not answer are: whether making it easier to declare bankruptcy has caused more bankruptcies and higher interest rates; whether the rules of evidence are necessary to prevent juries from making incorrect judgments, or effective in doing so; why, after many years of slight or even no growth, the judicial caseload exploded beginning in about 1960; whether conditions in prison affect the recidivism rate; whether changes in
the rules of accident law (e.g., substituting comparative negligence for contributory negligence, or strict liability for negligence) affects accident rates, either directly or by altering the price or availability of liability insurance; whether suits on alleged oral promises are mostly phony, implying that the scope of the Statute of Frauds should be broadened; whether reappportionment has altered public policy, and, if so, in what direction; whether activism or restraint is the better policy for modern American courts; whether a general rule requiring the losing party to a lawsuit to reimburse the winner's reasonable legal expenses would increase or decrease the settlement rate; whether the civil jury—which has virtually disappeared outside of the United States—is an anachronism; why law firms are growing in size; whether the rules on judicial conflicts of interest are too strict (too lax); whether Miranda has increased the crime rate; whether arbitration produces more or fewer errors than judicial determination; whether the Continental ("inquisitorial") system of procedure is more efficient, accurate, just, or fair than our adversarial system; whether law actually influences public opinion.

Let me pause for a moment on the last of these questions. There can be little doubt that law affects behavior by altering incentives. The criminal law, for example, makes certain kinds of antisocial behavior more costly than it would be in the absence of that law, and as a result there is less such behavior—though how much less is a profound mystery. But lawyers tend to believe that law affects behavior not only by altering incentives but also and perhaps more importantly by changing attitudes, which in turn affects behavior. Many lawyers would say, for example, that although anti-discrimination laws tend to carry weak sanctions and often are fairly easy to evade, the existence of these laws constitutes a "statement" that has changed people's attitude toward discrimination. Perhaps so, but where is the evidence? Is it more than a self-regarding professional faith that law changes the way people think? Public opinion polls suggest that courts and the legal system generally have very low saliency for the vast majority of Americans. Lawyers may have a grossly exaggerated view of the effect of law. Surely this is an urgent subject of inquiry, but the profession lacks the tools to conduct it.

Rather than continue the litany of vital unanswered and, at present, unanswerable questions about law—I could go on for days—I should like to ask, what questions can lawyers answer
out of their (our) stock of legal knowledge, supplemented by legal (and life) experience? The answer is that they can recite or look up the legal rules, predict their application in factual situations either clearly encompassed by the rule as written or formulated or not too remote from litigated cases, make arguments that are persuasive in our legal culture, and answer simple questions about the legal institutions with which they are familiar. These are valuable professional skills, but they do not produce answers to the kind of questions I have put. They do not, in other words, enable our legal rules and institutions, and proposed changes in them, to be analyzed. For that type of evaluation other skills are needed—skills not imparted at any stage in the training of a lawyer.

Let us cast our minds back over the changes in the legal system in the last quarter century. We have witnessed the advent of a new bankruptcy code and a new copyright act, the growth of the class action, an enormous expansion in civil rights litigation (especially litigation brought by prisoners), a host of judicial and statutory initiatives in the field of discrimination, a vast expansion in tort liability, a shift in the balance of legal rights from landlords to tenants, a tremendous increase in the numbers of judges and practising lawyers, a dramatic rise in the amount of litigation, an increase in the salaries of lawyers so great as to create fears that there is a national "brain drain" from the humanities and sciences to the law, a glorification of the jury, rising judicial caseloads combined with an increased delegation of the judicial function to law clerks and other judicial adjuncts, an expansion in the federal rights of criminal defendants, a vast increase in the public subsidization of legal services for indigents, an increasing politicization of law and, concomitantly, a declining consensus among legal professionals. In this period of unprecedented growth, controversy, and turmoil for the American legal system, has the legal profession been in control of events, anticipating and resolving problems as they arise, or has it been a cork bobbing on the waves of a sea whose dynamics the profession does not understand? It is the latter in my opinion.

Let me put a simple question. Which of us can state with confidence that the developments in the American legal system since 1960 have been on balance beneficial to society? Americans today have more legal rights than they had twenty-nine years ago, and many injustices that flourished in the 1950s and earlier
are, today, unlawful. But the actual impact of the rights revolution on the welfare of Americans is unclear, and the cost of that revolution may have been very great. Less than a month ago the president of Columbia University, himself a former law professor and law school dean, in an article in *The New York Times Magazine* decried the diversion of intellectual talent into law from other academic fields. He failed to consider whether this diversion is one of the consequences of a rights revolution that he enthusiastically supports. The greater the demand for legal services, the higher the wages of lawyers and the greater, therefore, the diversion of intellectual talent from other fields.

The law schools have been for the most part bystanders to the revolutionary events in law of the past quarter century (individual lawyers, of course, have been major participants). The law schools did not anticipate the revolution and have contributed little to it—especially little in the way of measurement and evaluation. Most law professors have cheered on the expansion rights; some have denounced it. The amount of actual study of its course, costs, and consequences has been small. The reason is that law professors are trained and skilled in basically one thing, and that is the analysis of legal doctrine. They do not have the tools for assessing a revolutionary social phenomenon—the explosive and unprecedented expansion in legal rights in recent decades.

Perhaps all this means is that the necessary inquiries should be conducted by other disciplines. But although other disciplines (economics, psychology, statistics, history, philosophy) have the tools, they do not have the language. Just as you cannot be a self-respecting German historian without knowing the German language, you cannot go far in the study of the legal system without knowing law, which means, without understanding a professional culture with its specialized vocabulary, its arcane sources, its folkways. This has proved a formidable barrier to most scholars who are not trained in law. Collaborative research between lawyer and social scientist is one answer; a broader legal education is another. These are not, of course, mutually exclusive alternatives.

I now wish to consider what can be done within the domain of legal education to improve the situation that I have sketched. I have a number of suggestions. The first and most radical is to make the third year of law school optional. This may seem an
inconsequent proposal—to combat Philistinism by reducing mandatory education! But consider: the requirement by state bar associations that lawyers have completed three years of law school insulates law schools from a true market test of legal education. It does not matter how worthless and irrelevant relentless pursuit of the Socratic method is; students have to endure it in order to be licensed to practice law. If the third year were optional, many law students, including many at the nation's most prestigious law schools, would leave after the second year. (Some would want to leave after the first. The logic of my proposal is that there be no educational requirements for licensing as a lawyer—that anyone who passes the bar exam, and satisfies minimal character requirements, be admitted to the bar—or indeed that there be no licensing. But I shall not attempt to develop the radical implications of my proposal.) The education that students receive in law school is subject to diminishing returns, and by the third year the costs—not only steep tuition, but the lost opportunity of being employed and paid full-time—exceed the benefits for many, perhaps most, students.

The loss of tuition income as third-year students dropped out would force law schools to rethink legal education. To keep students for a third year the schools would have to offer them more than more of the same. I would like to suggest what that more might be, in the hope that some measures of reform will be taken even without the acid bath of competition. These reforms need not be limited to the third-year curriculum, and indeed it would make more pedagogical sense to introduce many of them earlier in the student's legal education. Perhaps, as is a common pattern in business, it would be best for law students to enter practice after two years of law school and then return for their third year of law school after several years in practice. But that is another important issue that I shall not pursue here.

Here are some of the skills that I believe are important for lawyers to acquire, and that are most easily acquired in a university setting rather than in on-the-job training. I omit elementary economics because the importance of introducing law students to the rudiments of economic analysis of law is by now widely recognized.

First, lawyers ought to know the principles of statistical inference. Law deals with probabilities rather than certainties: the probability that a criminal defendant is guilty, the probability
that the plaintiff would have developed cancer even if not exposed by the defendant to some carcinogen, and so forth. Lawyers and judges therefore ought to understand how to reason from probabilities. The law of evidence is based to a large extent on intuitions about probability, and many of these intuitions may be incorrect. Every law student should be required to demonstrate a minimum proficiency in statistical analysis. If he does not have it when he comes to law school, he should be required to take a course in the use of statistics in law before he graduates.

Second, and related, law students should study psychology, in particular the psychology of perception and decision-making. Is identification evidence reliable? How are jurors apt to respond to gruesome photographs of the alleged victim of the defendant's crime? Do jurors understand instructions couched in legal jargon? Are judges competent reasoners? The relation to statistics lies in the fact that persons unacquainted with statistical principles tend to make serious mistakes in dealing with unfamiliar or low-probability events. Law students ought to learn where their intuitions are most likely to betray them and where, consequently, the science of statistics will be most useful to them. Psychology is also important to an understanding of deterrence, retribution, accident-proneness, insanity, and other important issues in legal ordering.

Third, law students ought to study the theory of social or collective choice, with particular reference to voting theory and interest groups. In the last forty years there has been a revolution in thinking about collective choice—a revolution of which most lawyers, judges, and even law professors are unaware. It is now recognized by political scientists and economists that "democratic" voting procedures often fail to reflect voters' preferences, because those procedures are manipulable by control of the agenda and by pressures from interest groups, because voting does not reflect intensity of preferences, because voters in political elections (other than at the most local level) have little incentive to become well-informed, and for other reasons. No lawyer can understand the legislative process, itself so vital a component of modern law, who lacks familiarity with modern academic thinking about social choice.

Fourth, and related, law students should be required to study the legislative process more systematically than is possible in courses that deal with a particular statutory field such as labor
or copyright or antitrust. Such a course would attempt to give the students a realistic understanding of both the legislative process and statutory interpretation.

Fifth, and still related, law students need a course in political theory. They need to go beyond bromides about democracy, majoritarianism, and judicial review, and begin to think realistically about constitutionalism and the liberal tradition from Hobbes to Rawls and Nozick and beyond.

Sixth, law students need to study jurisprudence, the field that explores the most fundamental questions about law. They need to become acquainted with the great thinkers about law, from Plato to Holmes, and with the newest fields of jurisprudence, such as feminist jurisprudence and critical legal studies.

Seventh, law students have to study the legal system—our own and that of representative foreign countries. They ought to learn about the origins of these systems, how they work in practice as well as in theory, their salient quantitative dimensions, their differences and similarities, their characteristic strengths and weaknesses, how they are perceived by lay persons, how they have weathered political crises and affected their societies, what we can learn from foreign experience. I attach particular significance to such a course. It is vital that lawyers understand how our legal system looks from the outside, and how many of its features are contingent rather than inevitable.

Eighth, law students should have a working knowledge of the theory of finance—the key to understanding a variety of commercial fields including corporations, securities, pensions, trusts and estates, corporate taxation, and bankruptcy.

I have sketched eight nondoctrinal courses that all law students should be required to take except those few who can demonstrate mastery of the subject on the basis of previous training, graduate or undergraduate, or who can pass a qualifying exam. The proposed additions to the curriculum will at some schools require more hours of instruction (some of these hours, however, merely at the “expense” of internships and externships), but at most schools merely substitution for some dispensable electives: perhaps the third course in constitutional law, or the course in admiralty, the seminar in sports law, or appellate advocacy. These are worthwhile subjects (I have written on admiralty and constitutional law, and taught appellate advocacy). But as always it is necessary to make choices; and I do not think we can afford to
be complacent about the existing curricula of law schools.

Some of the courses I have proposed are already offered at most law schools as electives, and a few Catholic schools actually require students to study jurisprudence; but most of the courses I have sketched are either not offered at all or, if offered, attract only a handful of students. No school offers a full year of required nondoctrinal training. It is possible for students at the Yale School to take more than two-thirds of their courses and seminars in nondoctrinal fields, and some students exploit this opportunity. But the school's administration (perhaps more important, the faculty and student culture) makes little or no effort to steer the student to a balanced diet of doctrinal and nondoctrinal courses, and as a result some students emerge from their three years at the Yale Law School with warped legal educations. For I want to stress not only the balance in my proposed third-year program between "soft" and "hard" subjects (political theory is soft; statistics is hard, as is voting theory), but also the balance between doctrinal and nondoctrinal courses. I do not propose to remove training in legal doctrinal analysis from the center of the law school curriculum, but I do propose to make nondoctrinal—but nonclinical—training a strong and systematic, if subordinate, emphasis of the curriculum.

This will require students to work harder. And many will balk—and not out of laziness. Law-school tuition is high, and a high fraction of law students even at the most elite schools do substantial work for private firms—often as much as twenty hours a week. But if law schools could provide truly valuable training for those twenty hours, the students would be better off deferring their entry into the workaday law-firm world.

What on the nondoctrinal side of the divide I am calling hard subjects are subjects that require mathematical or scientific reasoning. Many law students claim to have—they even flaunt—a "math block." This is a disgraceful anachronism for persons who will be practicing law well into the twenty-first century. I am greatly distressed when I see students at the University of Chicago Law School blanch at formulas (such as the Hand formula of negligence) that require no more than high-school algebra to understand. No one who is admitted to a decent law school today is incapable of mastering the rudiments of mathematical and scientific reasoning. Law students—though even more the administrators of the nation's high schools and colleges—should be
ashamed of fearing math and science. This is a scientific age, which is not to say that it must necessarily also be an anti-humanist age. The required nondoctrinal third-year curriculum that I am proposing as a partial solution to the looming crisis of the American legal profession represents a balance of scientific and humane perspectives on law. We need such a balance if we are to meet the challenges ahead. We need a system of legal education that goes beyond Langdell, without sacrificing the real, and today sometimes the unduly disparaged, merits of the Socratic method.
ARTICLES

THE 1-207 DILEMMA REVISITED

W. Jack Grosse* and Edward P. Goggin**

I. INTRODUCTION

The common law doctrine of accord and satisfaction is firmly established in American Jurisprudence. In a majority of jurisdictions, it provides an alternative method of discharging a pre-existing contract obligation. The customary and usual way that parties discharge their obligations under a contract is by the completion of the originally agreed upon performances. However, difficulties during the executory period of a contract occasionally make it necessary for the parties to adjust their performances with a view toward the complete and full discharge of existing contract obligations.¹

Under common law, accord is an offer of a substitute contract between a creditor and a debtor for the settlement of a claim by some performance other than that which was originally due. Satisfaction takes place when the debtor's offer of accord is accepted by the creditor.² An accord and satisfaction is a contract, and, as with any other contract, it must meet all the requirements for the formation and legal effect of contracts in general. Thus,

² RESTATEMENT OF CONTRACTS § 417 comment a (1932).

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under common law, every accord and satisfaction must contain sufficient consideration or an effective recognized substitute.\(^3\) In essence, this means that an accord and satisfaction requires an agreement made by parties with full knowledge and understanding of the material facts.\(^4\)

Although there are some state decisions to the contrary, the majority of states mandate that if an accord and satisfaction is to meet the requirement of consideration, it must be shown that there was a *bona fide* dispute between the parties at the time the offer of accord was made. There must be a *bona fide* dispute between the parties as to the amount due and/or the nature of the performance still due under the contract.\(^5\) In addition, the offered accord agreement must be intended to compromise the performance or claimed performance, which is unliquidated.\(^6\)

If the accord meets all the requirements of an offer, the creditor has alternative rights; if the debtor breaks a contract which is an accord, the creditor can enforce either the original contract duty or the subsequent accord which is to be satisfied by a future performance.\(^7\)

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3. Restatement (Second) of Contracts § 273 provides: Except as stated in §§ 274-77, an obligee's manifestation of assent to a discharge is not effective unless:

(a) it is made for consideration,

(b) it is made in circumstances in which a promise would be enforceable without consideration, or

(c) it has induced such action or forbearance as would make a promise enforceable.


6. The frequent distinction between liquidated and unliquidated original obligations creates substantially similar results in accord and satisfaction as in contract situations where the applicable rule is that if the original obligation is liquidated a subsequent agreement to pay a different sum is not effective as an accord and satisfaction in the absence of new or additional consideration. See Owens v. Hunter, 91 Ariz. 7, 368 P.2d 753 (1962). Eight jurisdictions do not appear to require an unliquidated or disputed debt for application of the doctrine of accord and satisfaction. (Arkansas, California, Georgia, Maine, Mississippi, New Hampshire, North Dakota, and Virginia).

A. Accord and Satisfaction and the Uniform Commercial Code

This basic legal concept of accord and satisfaction is as much alive today as it was over 165 years ago when it was first recognized. However, the development of the Uniform Commercial Code (Code) may have created a conflict and dilemma which could potentially add confusion by casting doubt on the continued viability of the common law doctrine. Forty-nine states have adopted the Code. Its stated purpose is to "simplify, clarify and modernize the law pertaining to commercial transactions." While there is some confusion as to exactly which contract cases fall squarely under it, the general tendency has been to consider the code applicable to all situations involving the transfer of goods by contract.

The Code does not specifically address the issue of accord and satisfaction in any of its sections. However, section 1-207, provides that "[a] party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as 'without prejudice,' 'under protest' or the like are sufficient." A review of the Code material illustrating the extensive drafting and re-drafting, indicates that section 1-207 did not generate a great deal of comment. In the process of adopting the Code, most states did not indicate that section 1-207 had any impact on

10. By 1968 the Code was in force in all jurisdictions except Louisiana where only certain articles have been enacted.
12. Id. at § 1-207.
the common law doctrine of accord and satisfaction. Nevertheless, in some jurisdictions the section has had a serious impact on the doctrine. One writer has commented that section 1-207 is “[o]ne of the least conspicuous yet potentially important sections of the U.C.C.”

B. The Code Affect on the Doctrine of Accord and Satisfaction

When a particular factual situation falls squarely within the Code, the question arises as to what would be the effect of section 1-207 on the common law doctrine of accord and satisfaction. Assume the following fact situation in a case where the court determined that the Code was applicable:

A party to a contract, who has received the tendered performance of the other party sends a check for less than the contract price to the other party, claiming in good faith that because the tendered performance did not meet contract standards he is not willing to pay the contract price; the check is sent in full payment of an unliquidated and disputed claim; and the check or accompanying documentation clearly indicates that the acceptance and cashing of the check by the payee will constitute full and final payment of all the obligations of the drawer to the payee under the original contract. Suppose further that the payee with full knowledge of

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13. Comment 2 of § 1-207 provides:
This section does not add any new requirement of language reservation where not already required by law, but merely provides a specific measure on which a party can rely as he makes or consents in any interim adjustment in the course of performance. It does not affect or impair the provisions of this Act such as those under which the buyer's remedies for defect survive acceptance without being expressly claimed if notice of the defects is given within a reasonable time. Nor does it disturb the policy of those cases which restrict the effect of a waiver of a defect to reasonable limits under the circumstances, even though no such reservation is expressed.
The section is not addressed to the creation or loss of remedies in the ordinary course of performance but rather to a method of procedure where one party is claiming as of right something which the other feels to be unwarranted.

U.C.C. § 1-207 comment 2 (1978).

14. Hawkland, supra note 9, at 329.


16. The payment would complete both performances called for in the contract and thus, if effective, would constitute a fully executed contract.
the drawer's notation on the check, cashes the check with an
endorsement which states "under protest," "without prejudice," or
the like and thereafter sues the drawer for the balance due on the
underlying contract. 17

What would be the outcome of the suit under common law and
alternatively under U.C.C. 1-207? It is clear under common law
that the payee of the check (the creditor) cannot cash the check
with such an endorsement and retain any right to sue the drawer
(the debtor) for the balance of the underlying contractual obliga-
tion. 18 In a Code case, (i.e. a case involving the sale of goods), the
obvious issue is, "Does section 1-207 alter the common law rule?"

The more than twenty years that section 1-207 of the Code has
existed side by side with the common law doctrine of accord and
satisfaction has provided surprisingly little conflict. 19 Until 1978,
only four jurisdictions directly focused on the issue. 20 Since 1978
an additional twenty-six jurisdictions have addressed the question
of whether section 1-207 alters the common law doctrine of accord
and satisfaction. Of the thirty jurisdictions which have addressed
the issue, nineteen have adopted the position that the section
does not alter the common law doctrine of accord and satisfac-
tion. 21 Only six jurisdictions have held that the section does alter

17. The terms "under protest" or "without prejudice" are explicitly provided for in
§ 1-207. The official comment to the section indicates that there are other comparable or
similar terms which can be used with the same effect. U.C.C. § 1-207 comment 1 (1978).
Tool Co., 26 S.W.2d 189 (Comm'n of App. of Tex. 1930); Bennett v. Federal Coal & Coke
Co., 70 W. Va. 465, 74 S.E. 418 (1912); Robertson v. Robertson, 94 Cal. App. 2d 113, 93
P.2d 175 (Cal. Dist. Ct. App. 1939); Hodges v. Daviess County, 285 Ky. 508, 148 S.W.2d
697 (1941).
19. See Rosenthal, supra note 9, at 50.
(Callaghan) 1044 (Westchester County Ct., N.Y. 1960); Kilander v. Bickle Co., 280 Or. 425,
571 P.2d 503 (1977). The first three cases are treated analytically in Rosenthal, supra
note 9, at 65-68.
v. Thermogas Co., 6 Ark. App. 402, 644 S.W.2d 292 (1982); California, Connecticut Printers,
Connecticut, County Fire Door Corp. v. C.F. Wooding Co., 202 Conn. 277, 520 A.2d 1028
(1987); Colorado, Anderson v. Rosebrook, 737 P.2d 417 (Colo. 1987); Florida, Eder v. Yvette
B. Gervey Interiors, Inc., 497 So. 2d 312 (Fla. Dist. Ct. App. 1981); Louisiana, Ingraham
Concrete Structures, Inc. v. Champion Shipyards, Inc., 423 So. 2d 752 (La. Ct. App. 1982);
Fischbach & Moore, Inc. v. Cajun Elec. Power Coop., Inc., 799 F.2d 194 (5th Cir. 1986);
Maine, Stultz Elec. Works v. Marine Hydraulic Eng'g Co., 484 A.2d 1008 (Me. 1984);
the common law doctrine.22 Four other jurisdictions have reviewed the conflict and, although the cases before them were not Code cases, have indicated that they would follow the majority view, i.e. that section 1-207 does not alter the common law doctrine of accord and satisfaction.23 One jurisdiction, which had a case where the relevant facts fell squarely under article 2 of the Code, after discussing the pros and cons, refused to take a position either way.24 However, this same jurisdiction has implicitly adopted the majority view in a more recent case.25 One state, although the case before it was not a Code case, did not reach the issue because the explicit reservation of rights requirement was not satisfied.26


Twentj jurisdictions, including Kentucky, Indiana, Tennessee, and Virginia, have not reported any cases which address the issue.²⁷

C. Arguments Supporting The Theory That 1-207 Does Not Alter The Common Law

Several arguments have been advanced by jurisdictions which hold that section 1-207 does not alter the common law concept of accord and satisfaction. One of these arguments involves the precise wording of the statute. Section 1-207 requires that the party who explicitly reserves his rights, performs or promises performance, or assents to performance in a manner demanded or offered by the other party does not prejudice the rights reserved.²⁸ If a debtor offers to compromise a claim through accord and satisfaction, the creditor who reserves his rights as provided by section 1-207 does not assent to the performance offered.²⁹ Rather the creditor refuses to consent to one of the most essential conditions of the offer, i.e. that the check payment constitutes a complete and full settlement of all obligations existing under the contract. In KCF Construction, Inc. v. Amper, ³⁰ the court stated that:

The party receiving a full payment check is neither performing nor promising performance, and by disowning the condition upon which the check was tendered, this party, according to several authorities, is not assenting to the performance in the manner demanded or offered by the other party but, to the contrary, is rejecting performance in the manner demanded or offered by the other party.³¹

Several other states have used this argument in holding that section 1-207 does not alter common law doctrine because “[t]he words of the statute are plain.”³²

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²⁷. Arizona, Delaware, Hawaii, Idaho, Indiana, Kansas, Kentucky, Massachusetts, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, South Carolina, Tennessee, Vermont and Virginia.
³¹. Id. at ___ 36 U.C.C. Rep. Serv. at 371.
³². Jahn v. Burns, 593 P.2d 828, 830 (Wyo. 1979). The court held that the language of 1-207 cannot apply to the full payment check situation because the words of the statute are plain. "Construction or interpretation — liberal or strict — is unnecessary. In construing a statute, its words must be given their plain and ordinary meaning." Id.
Another argument used to support this view is that section 1-207 speaks of performance by one party or the other but does not speak of payment. Therefore, since the Code distinguishes between payment and performance, those terms must mean different things and section 1-207 must not apply to payment.

An additional argument advanced by the jurisdictions which hold that section 1-207 does not alter the common law doctrine of accord and satisfaction is based on the official comment to section 1-207. The official comment talks in terms of "a continuation of performance" and arguably the section was not intended to apply to a fact situation where the offer of a full settlement check was intended to end and completely discharge the contractual relationship. This concept was expressed very clearly by the New Jersey court in Chancellor, Inc. v. Hamilton Appliance Co.

The Uniform Commercial Code Comments to § 1-207 do not reflect a legislative intent to change the common law rule. Comment One states that 'This section provides machinery for the continuation of performance along the lines contemplated by the contract despite a pending dispute.' An accord and satisfaction involves a new contract, not the contemplated performance of the original contract. By using the 'full payment check' the buyer is seeking to fulfill, not continue, its duty to pay.

A further argument, which is advanced by some jurisdictions, is very similar to the performance versus payment argument. This argument flatly states that section 1-207 just does not apply to a full payment check.

In Stultz Electrical Works v. Marine Hydraulic Eng'g Co., the court advanced another argument by stating that an interpretation that section 1-207 was meant to alter the common law doctrine of accord and satisfaction would make full payment checks "obsolete," a result which would "hinder the development of sound

33. As an example, in § 1-208 the drafters used the terms "payment" and "performance."
34. Apparently the intent of the drafters was to exclude cases involving payment which would negate the argument that the section was intended to cover full and final payment checks.
37. Id. at —, 418 A.2d at 1329 (emphasis added by the court).
39. 484 A.2d 1008 (Me. 1984).
commercial practices" in contravention of U.C.C. section 1-102(2).\textsuperscript{40}

The particular portion of U.C.C. 1-102, that this case refers to, is section (2) which provides that the underlying purposes and policies of the Code are:

(a) to simplify, clarify and modernize the law governing commercial transactions;

(b) to permit the continued expansion of commercial practices through custom, usage and agreement of the parties;

(c) to make uniform the law among the various jurisdictions.\textsuperscript{41}

However, the court's reliance on section 1-102(2) seems somewhat unconvincing. It is equally arguable that the alteration of accord and satisfaction is as compatible with the expansion of commercial practices as it is with the perpetuation of usage and custom.

Another argument used by the Stultz court referenced U.C.C. section 1-103. This section provides: "Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions."\textsuperscript{42}

Official Comment 1 explains that "this section indicates the continued applicability to commercial contracts of all supplemental bodies of law except insofar as they are explicitly displaced by this Act ...."\textsuperscript{43}

\textit{Stultz} in support of this argument stated that "section 1-103 provides that principles of law and equity are not to be displaced unless done so explicitly. Significantly, section 1-207 makes no mention of displacing the common law doctrine of accord and satisfaction and thus should not be interpreted to effectuate such an intent."\textsuperscript{44}

This theme has been echoed by several other jurisdictions in a general evaluation of the Code's effect on the common law. In

\begin{thebibliography}{00}
\bibitem{40} \textit{Id.} at 1011-12.
\bibitem{41} U.C.C. § 1-102(2) (1978).
\bibitem{42} \textit{Id.} at § 1-103.
\bibitem{43} \textit{Id.} at § 1-103 comment 1.
\end{thebibliography}
Theo. Hamm Brewing Co. v. First Trust & Savings Bank, the court stated "[t]he Code could have usurped the whole field of law as to commercial transactions, but it does not purport to do so." In a similar tone the court in Solitron Devices, Inc. v. Veeco Instruments, Inc. stated that "[t]he uniform commercial code does not exist in a vacuum. Existing and related rules of law and principles of equity continue to be applicable to commercial transactions, as well, it is hoped, as common sense and custom and usage."

An interesting argument was presented by the Oregon court in Les Schwab Tire Centers, Inc. v. Ivory Ranch, Inc. In that case the court noted the fact that at the time of the proposed final draft of the U.C.C. in 1950, U.C.C. section 1-207 co-existed with another provision of the Code that codified and explained the doctrine of accord and satisfaction. At that time section 3-802(3) provided: "Where a check or similar payment instrument provides that it is in full satisfaction of an obligation, the payee discharges the underlying obligation by obtaining payment of the instrument unless he establishes that the original obligor has taken unconscionable advantage of the circumstances."

Apparently section 3-802(3) expanded the common law by permitting an accord and satisfaction when the obligation was undisputed and liquidated. Because the section might have been open to abuse it was deleted in the 1957 official draft. The Oregon court stated:

The instructive value in Section 3-802(3) is that it existed entirely without reference to Section 1-207. The comments to neither section referenced the other. Similarly, the comment to Section 3-112(f), which speaks of the negotiability of checks tendered as payment in full, omits reference to Section 1-207 and instead cross-references only Section 3-802(3). This background indicates that the drafters of Sections 1-207 and 3-802(3) probably did not intend to write overlapping sections regarding accord and satisfaction but, rather, conceived of them as unrelated.

45. 103 Ill. App. 2d 190, 242 N.E.2d 911 (1968).
46. Id. at 242 N.E.2d at 914.
47. 492 So. 2d 1357 (Fla. Dist. Ct. App. 1986).
48. Id. at 1360.
50. U.C.C. § 3-802(3) (Official Draft 1952).
51. 63 Or. App. at 664 P.2d at 422 (citations and footnote omitted).
A very recent case, County Fire Door Corp. v. C.F. Wooding Co.,\(^{52}\) addressed the 1-207 issue and concluded:

[T]hat in circumstances like the present, when performance of a sales contract has come to an end, [Section 1-207] was not intended to empower a seller, as payee of a negotiable instrument, to alter that instrument by adding words of protest to a check tendered by a buyer on condition that it be accepted in full satisfaction of an unliquidated debt.\(^{53}\)

The facts in the case indicate that the defendant “debtor” ordered a number of metal doors and door frames from the plaintiff. The plaintiff took the responsibility for delivery of the goods to the work site. Alleging that the plaintiff’s delay in the delivery of the door and frames had caused additional installation expenses, the defendant back-charged the plaintiff in the amount of $2,180, for the additional expenses. At the same time, he informed the plaintiff that on the basis of the back-charge and other payments and credits not in issue, the remaining balance due the plaintiff was $416.88. The plaintiff responded by denying the validity of the back-charge, contending that the balance due on the account was $2,618.88. The defendant immediately replied in writing that it would stand by its position on the validity of the back-charge and the accuracy of its calculation of the amount owed to the plaintiff. The defendant thereafter sent the plaintiff a check in the amount of $416.88, which bore two legends. On its face was a notation:

“Final payment
Upjohn Project
Purchase Order #3302 dated 11-17-81.”\(^{54}\)

The reverse side of the check stated: “By its endorsement, the payee accepts this check in full satisfaction of all claims against the C.F. Wooding Co. arising out of or relating to the Upjohn
Project under Purchase Order #3302, dated 11/17/81. Without advising the drawer directly, the payee crossed out the conditional language on the reverse side of the check and added the following: "This check is accepted under protest and with full reservation of rights to collect the unpaid balance for which this check is offered in settlement." The payee then endorsed the check and deposited it in his account. The plaintiff (payee) thereafter brought an action to recover the remaining amount to which it claimed it was entitled.

The court, recognizing that the parties, in good faith, disputed the amount owed, outlined the elements of the common law concept of accord and satisfaction. After an analysis of the facts, the court concluded that the application of the settled principles of accord and satisfaction established that the parties had entered into a valid contract of accord and satisfaction.

The court then addressed the section 1-207 issue. Noting that there was considerable disagreement in the cases and the scholarly commentaries about the scope of transactions governed by section 42a-1-207 (section 1-207), the court held that section 1-207 "does not displace the common law of accord and satisfaction." 

The court cited several reasons for its decision. One of the reasons was that the Code in article 3, specifically, section 3-407(1), would not authorize a material alteration of the instrument "which changes the contract of any party thereto in any respect." Under that section of article 3, "[t]he effect of the material alteration of a completed instrument is either to discharge the liability, on the instrument, of 'any party whose contract is thereby changed,' or to continue the enforceability of the instrument 'according to its original tenor.'" The court concluded:

Because the check tendered by the defendant was only enforceable 'according to its original tenor,' the plaintiff, by receiving 'payment or satisfaction' discharged the defendant not only on the instrument but also on the underlying obligation. To read section 42a-1-207 to

65. Id.
66. Id. at 280, 520 A.2d at 1030.
67. Id.
68. Id. at 281-82, 520 A.2d at 1030-31.
69. Id. at 282-83, 520 A.2d at 1031.
70. Id. at 283, 520 A.2d at 1031.
71. Id. at 285, 520 A.2d at 1031 (quoting § 42a-3407(1)) (emphasis added by the court).
72. Id. at 285, 520 A.2d at 1032 (quoting § 42a-3407(2) & (3)).
validate the plaintiffs conduct in this case would, therefore, fly in
the face of the relevant provisions of article 3, which signal the
continued vitality of the common law principles of accord and
satisfaction.63

Further in its opinion the court argued that "[a]lthough [section
1-207] does not fit easily within the principles of article 3 that
govern checks, the section has a close and harmonious connection
with article 2, [which] regulates ongoing conduct relating to per-
formance of contracts for the sale of goods."64 The court then
identified a number of sections of article 2 where inferences are
drawn from "acquiescence in, or objection to, the performance
tendered by one of the contracting parties."65

The essence of these sections is the continuation of the per-
formance of the contract with the parties urged to engage in a
continuing dialogue about what will constitute acceptable perform-
ance of a sales contract.66 The court stated that "[f]rom the vantage
point of article 2, it is apparent that [section 1-207] contemplates

63. Id. at 286, 520 A.2d at 1033 (citation and footnote omitted). The court noted that
an earlier version of the UCC had contained a provision, section 3-802(3), "that would
have permitted a check tendered in full satisfaction of an obligation to discharge an
underlying obligation even when that obligation was undisputed and liquidated." The
court also noted that neither the legislative history surrounding the section nor the cross
references in the relevant Official Comments indicated that the draftsmen of article 3
contemplated that section 1-207 would be affected by section 3-802(3). Id. at 286, 520 A.2d
at 1033 n. 9.

64. Id. at 287, 520 A.2d at 1033.

65. Id. The court in discussing the various provision of article 2 stated:
A course of performance 'accepted or acquiesced in without objection' is relevant
to a determination of the meaning of a contract of sale. Section 2-208(1). Between
merchants, proposals for additional terms will be added to a contract of sale unless
there is a timely 'notification of objection.' Section 2-207(2)(c). A buyer who is
confronted by a defective tender of goods must make a seasonable objection or
lose his right of rejection. Sections 2-602(1), 2-605, 2-606(1), 2-607(2). In an installment
sale, a party aggrieved by nonconformity or default that substantially impairs the
value of the contract as a whole will nonetheless have reinstated the contract 'if
he accepts a nonconforming installment without seasonably notifying of cancellation
... . ' Section 2-612(3). A contract whose performance has become impracticable
requires the buyer, after notification by the seller, to offer reasonable alternatives
for the modification or the termination of the affected contract; the buyer's failure
to respond, within a reasonable period of time, causes the sales contract to lapse.
Section 2-616(1) and (2). In these and other related circumstances, article 2 urges
the contracting parties to engage in a continuing dialogue about what will constitute
acceptable performance of their sales contract.

202 Conn. at 287-89, 520 A.2d at 1033-34 (citations and footnotes omitted).

66. See supra note 65.
a reservation of rights about some aspect of a possibly nonconforming tender of goods or services or payment in a situation where the aggrieved party may prefer not to terminate the underlying contract as a whole."\footnote{67}{202 Conn. at 289, 520 A.2d at 1034-35.}

The court then referred to the official comment to section 1-207 which provides that the "section supports ongoing contractual relations by providing 'machinery for the continuation of performance along the lines contemplated by the contract despite a pending dispute.'\footnote{68}{Id. at 289, 520 A.2d at 1035.}"

The court devoted a substantial portion of its opinion to a review of the commentary related to section 1-207 and included citations to a number of cases which support what apparently now has become the majority view.\footnote{69}{Id. at 290-91, 520 A.2d at 1035-36.}

In its decision the court held that section 1-207 was not applicable:

[When performance of a sales contract has come to an end, § 42a-1-207 was not intended to empower a seller, as payee of a negotiable instrument, to alter that instrument by adding words of protest to a check tendered by a buyer on condition that it be accepted in full satisfaction of an unliquidated debt.\footnote{70}{Id. at 290, 520 A.2d at 1035.}]

In \textit{Hearst Corp. v. Lauerer, Markin & Gibbs, Inc.}, an Ohio court considered the section 1-207 issue and concluded that it "should not apply to negate the doctrine of accord and satisfaction."\footnote{71}{37 Ohio App. 3d 87, 91, 524 N.E.2d 193, 197 (1987).}

However, the case was not one which would fall within the Code. It involved the performance of services whereby the creditor would create and publish an advertisement for the debtor. A genuine dispute arose over the amount due for the services rendered. The debtor tendered a check in the amount of $55,040.50 which contained the following language on the back: "DEPOSIT CONSTITUTES ACCEPTANCE AS PAYMENT IN FULL FOR ALL CLAIMS AGAINST LAUERER MARKIN & GIBBS, INC."\footnote{72}{Id. at 88, 524 N.E.2d at 194.}

The creditor, upon receiving the check, added the following language: "UNDER PROTEST, ALL RIGHTS RESERVED." The creditor then endorsed and negotiated the check.\footnote{73}{Id.}
Although the transaction was not within the Code, the court addressed the 1-207 issue. The court, after carefully reviewing the case law and commentary, adopted the majority view that section 1-207 does not alter the common law doctrine of accord and satisfaction. Thus, if a case came before the Ohio court which did fall within the Code, one would predict that it would conclude that section 1-207 does not alter the doctrine of accord and satisfaction.

D. States Holding That 1-207 Does Alter The Common Law

The leading commercial state which has adopted the position that the common law concept of accord and satisfaction was changed with the adoption of section 1-207, where paid in full checks are involved, is New York. In Horn Waterproofing Corp. v. Bushwick Iron & Steel, New York elected to follow the common law alteration concept.

In the Horn case, the plaintiff (creditor) and defendant (debtor) entered into an oral agreement to repair the leaking roof in the defendant's building. After two days work, the plaintiff concluded that a new roof was needed and submitted a bill for work already done. The defendant disputed the amount charged and plaintiff revised the bill downward from $1,241 to $1,080. The defendant remained dissatisfied with the charges and sent the plaintiff a check for only $500. The check bore the following notation on the reverse side: "This check is accepted in full payment, settlement, satisfaction, release and discharge of any and all claims and/or demands of whatsoever kind and nature." Directly under the defendant's notation, the plaintiff printed the words "Under Protest," endorsed the check with its stamp,

74. Id. at 90-91, 524 N.E.2d at 196-97. One other Ohio court has obliquely addressed the section 1-207 issue. In Inger Interiors v. Peralta, a case involving a contract for specially made goods, the Ohio court applied the common law of accord and satisfaction. The court held that since the seller cashed a check which was indorsed "Paid in Full," after crossing out the indorsement and writing "partial payment" an accord and satisfaction of the entire debt resulted. 30 Ohio App. 3d 94, 95, 506 N.E.2d 1199, 1200 (1986). However, in a dissenting opinion, Judge Patton stated that in his opinion section 1-207 applied so as to remove the application of the common law doctrine of accord and satisfaction. Judge Patton cited the courts that had agreed that section 1-207 did alter the common law and then endorsed the opinions of those courts. Id. at 97-98, 506 N.E.2d at 1202-03.


76. Id. at 322, 488 N.E.2d at 56-57, 497 N.Y.S.2d at 310-11.
and deposited the $500 in his account. The plaintiff then commenced a civil action seeking $580, the balance due on its revised bill. The defendant moved for summary judgment on the ground that the plaintiff's acceptance and negotiation of the check constituted an accord and satisfaction. The motion was denied and the appellate term affirmed. The court held that the Code was applicable to the type of commercial transaction in which the parties were involved and that under the provisions of section 1-207, the plaintiff was entitled to reserve its right to recover the balance due.\(^77\)

On appeal, the appellate division reversed, granted the defendant's motion, and dismissed the complaint. The majority of the court held that the parties agreement, as a contract for services, fell outside the Code.\(^78\) The majority concluded that the common law applied and that the doctrine of accord and satisfaction precluded recovery.\(^79\) In its opinion, the court indicated that if the transaction had been within the code, section 1-207 would have preserved the plaintiff's right to recover the balance.\(^80\)

The New York Court of Appeals reversed the appellate division holding that section 1-207 was applicable to the facts of the case and that therefore, a creditor could preserve his rights to the balance of a disputed claim by including an explicit reservation of such right in his indorsement on a check tendered by the debtor in full payment.\(^81\)

In justification of its decision the New York Court of Appeals stated:

In our view, applying section 1-207 to a 'full payment' check situation, to permit a creditor to reserve his rights and, thereby, preclude an accord and satisfaction, more nearly comports with the content and context of the statutory provision and with the legislative history and underlying purposes of the Code as well, and is a fairer policy in debtor-creditor transactions.\(^82\)

The court recognized the conflict in the interpretation of section 1-207 but concurred with the view expressed in White and Sum-

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77. Id. at 322-23, 488 N.E.2d at 55-57, 497 N.Y.S.2d at 311.
79. Id.
80. Id.
81. Horn, 66 N.Y.2d at 323, 488 N.E.2d at 57, 497 N.Y.S.2d at 311.
82. Id. at 324, 488 N.E.2d at 58, 497 N.Y.S.2d at 312.
mers, *Handbook of the Law Under the Uniform Commercial Code*. In that publication White and Summers concluded "that 1-207 authorizes the payee to indorse under protest and accept the amount of the check without entering an accord and satisfaction or otherwise forsaking his claim to any additional sum allegedly due him."

The court then proceeded to discuss a variety of possible ways the section could be interpreted but recognized that the official comment, prepared by the National Conference of Commissioners on Uniform State Laws and the American Law Institute, does not specifically address the law of accord and satisfaction and how it might be altered.

Historically, the New York court has generally predicated its decisions on the Report of the State of New York Commission on Uniform State Laws which was included in the legislative history when the statute was enacted. In the Commission’s Report, there was no commentary highlighting any conflict between section 1-207 and the common law doctrine of accord and satisfaction.

Although the Law Revision Commission did not identify Sec. 1-207 as affecting the doctrine of accord and satisfaction in enacting the section the New York legislature appended “New York Annotations” which read in part:

This section permits a party involved in a Code-covered transaction to accept whatever he can get by way of payment, performance, etc., without losing his rights to demand the remainder of the goods, to set-off a failure of quality, or to sue for the balance of the payment, so long as he explicitly reserves his rights.


Prior to the Report of the New York Commission, three other jurisdictions had adopted similar comments. Delaware in 1955 (5A Del. C. 1953, § 1-207; 55 Del. Laws, c. 349); Massachusetts in 1957 (1957, 765, § 1); New Hampshire 1959 (1959, 247:1, eff. July 1, 1961). New York, which adopted the Code in 1962, was the last jurisdiction to include a special comment which indicated that the section could be construed to affect the doctrine of accord and satisfaction.

In Hawkland, supra note 9, Professor William Hawkland expressed the opinion that it is conceivable that the New York State Law Revision Commission had in mind that Sec. 1-207 was intended to apply to the conditional check case. Hawkland found support for this position in the [1961] Report of the Commission on Uniform State Laws at 19-20 which states: “The Code rule would permit, in Code-covered transactions, the acceptance of a part ... payment tendered in full settlement without requiring the acceptor to
New York Legislature was one of four states which addressed the issue through the addition of a state statutory comment to the Code section.88

In addition to its reliance upon the Commission Report, the court in Horn also held that section 1-207 applied whether the underlying agreement was inside or outside the scope of Article 2, because use of a negotiable instrument to settle a disputed claim is an Article 3 transaction and therefore covered by the Code regardless of the underlying agreement.89 In two New York cases prior to Horn,90 the lower courts had applied the common law rule of accord and satisfaction when they found that the contracts were not covered by the code because they did not deal with the sale of goods. The contracts involved in those cases involved services. The courts found that the Code had no application and that the common law doctrine of accord and satisfaction applied and not U.C.C. section 1-207. The Court of Appeals of New York has apparently implicitly overruled these cases with the Horn decision.

Rhode Island is another state that has held that section 1-207 alters the common law doctrine of accord and satisfaction. In Strauss, Factor, Hillman & Lopes, P.C. v. Kohler General Corp.,91 the court held that the payee of a check, tendered as a settlement offer for a disputed legal fee, which had a general release printed on the back, statutorily reserved his rights, and did not assent to an accord and satisfaction when he struck out the restrictive endorsement and imprinted language of reservation on the back of the check, before negotiating it. In justification for its decision

gamble with his legal right to demand the balance of the ... payment." In selecting the material for this reference Hawkland omitted the references in the report to “performance.” Id. at 332.

88. See supra note 86. Delaware, Massachusetts and New Hampshire. It should be noted that there are no reported cases from Delaware, Massachusetts or New Hampshire which have addressed the issue. And, one case cited by Massachusetts in reference to section 1-207, Baillie Lumber Co. v. Kincaid Carolina Corp., 4 N.C. App. 342, 167 S.E.2d 85 (1969), involved an undisputed and liquidated account, which under the common law rule, would not constitute an accord and satisfaction, with or without a reservation of rights.


the court cited the White and Summers, *Handbook of the Law Under the Uniform Commercial Code* and the several states that had previously adopted the alteration concept. It should be noted that the case did not involve a transaction which would fall under Article 2 of the Code.

The Alabama Court of Civil Appeals in *Bivins v. White Dairy* held that in order for section 1-207 to be applicable, one who would use the Code section to alter the common law doctrine of accord and satisfaction must reserve his rights explicitly. The court held that scratching out the full payment notation and substituting "without recourse" was not sufficient. One justice stated that he concurred in the court's decision in this case, but did not concur that section 1-207 could be applied to alter the common law principle of accord and satisfaction affecting full payment checks. A reading of the case does not indicate that the court majority took a firm position on section 1-207 but a reflection of this possibility is contained in the concurring judge's opinion.

In *Scholl v. Tallman*, a South Dakota court found that section 1-207 did alter the doctrine of accord and satisfaction and justified its opinion by citing a New York case, a North Carolina case, and the White and Summers book. The North Carolina case cited by the court, *Baillie Lumber Co. v. Kincaid Carolina Corp.*, has been cited to in a more recent North Carolina case, *Brown v. Coastal Truckways*. In Brown, the court held that section 1-207 did not alter the common law doctrine of accord and satisfaction. In referring to the *Baillie Lumber Co.* case, the court said "[t]here is some language in *Baillie Lumber Co. v. Kincaid Carolina Corp.* ... which would support a different result. That case involved a fully liquidated claim. It is not precedent for this case."

One final jurisdiction that could be counted in the alteration of the common law concept camp is Georgia. In *American Food*
Purveyors, Inc. v. Lindsay Meats, Inc., the Georgia court held that the court was precluded from reaching the question of whether the obliteration of a payment in full notation satisfied the explicit reservation of rights requirement of section 1-207, because of a precedent. However, in addressing the section 1-207 issue the court said:

We are persuaded by the language of § 1-207, by the legislative history of that section, and by the views expressed in the appellate opinions of the great majority of jurisdictions which have heretofore considered the question, that the continued adherence to the traditional rule concerning the full-payment check is questionable as a matter of legal theory.

Two findings of this case could be questioned as being no longer applicable to the section 1-207 issue. First, the court in this 1980 decision referred to the majority of courts following the rule that section 1-207 did alter the common law. However, since the court decided the case, the overwhelming majority of courts, which have considered the issue, have held to the contrary. Second, it is doubtful that mere obliteration of "payment in full" would satisfy the explicit reservation of rights requirement of section 1-207. The court apparently left that issue open for a case in which the section 1-207 issue would be squarely faced.

E. States Which Have Addressed The Issue But Have Not Reached A Decision

Georgia, as previously indicated, although not faced with a case which it felt was clearly a Code case, by way of dictum indicated that it would join the small group of jurisdictions which have held that section 1-207 does alter the common law doctrine of accord and satisfaction.

101. Id. at 384, 285 S.E.2d at 326. The facts of the case do not squarely present a 1-207 issue. Required reservation of rights such as "under protest" or "without prejudice" were not present. Therefore, the court felt it was compelled to follow Georgia Supreme Court precedent holding that the striking out of full payment in satisfaction wording was not sufficient to raise the 1-207 issue and put the decision squarely in an accord and satisfaction basis.
102. Id. at 387, 285 S.E.2d at 327.
103. See cases cited supra note 21.
104. See supra notes 100-03 and accompanying text.
Three other jurisdictions have addressed the section 1-207 issue but, because the facts in the cases did not appear to fall within the Code, delayed any final judgment on the issue.

In RMP Indus. Ltd. v. Linen Center, the Iowa court indicated that if the transaction under consideration had fallen squarely under Article 2 of the Code, it would have, in all likelihood, followed the majority rule that section 1-207 does not change the common law doctrine of accord and satisfaction. Similarly, West Virginia in Charleston Urban Renewal Auth. v. Stanley refused to apply the Code to a case which involved a lease of real property. The court did indicate that if faced with a fact situation falling squarely under Article 2, it would follow the majority and hold that section 1-207 does not alter the common law.

By its recent decision in County Fire Door Corp. v. C.F. Wooding Co., Connecticut has removed itself from the undecided category and has definitively held that section 1-207 does not alter the doctrine of accord and satisfaction. In an earlier case, Kelly v. Kovalsky, the Connecticut Supreme Court had held that the facts of the case did not place the case under the Code and determined that the court did not need to decide the question.

An Illinois court, in Nelson v. Fire Ins. Exch., though the facts under review did not fall within the code, refused to consider the section 1-207 issue. The court noted that even if section 1-207 applied to the full payment check involved the explicit reservation of rights requirement was not met. There was merely a crossing out of the full payment language without adding the appropriate words of reservation.

Currently, Michigan appears to be the only jurisdiction that has addressed the issue in an Article 2 case and failed to indicate which position it would take. In Fritz v. Marantette, the Michi-

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105. 386 N.W.2d 523 (Iowa Ct. App. 1986).
106. Id. at 527 n.3.
108. Id. at 743-44.
110. 186 Conn. 618, 442 A.2d 1355 (1982).
112. Id. at 141.
113. Id. at 138.
gan court was squarely faced with a factual situation which fell under Article 2. However, the explicit reservation requirement of section 1-207 was not met. The court in its opinion cited White and Summers and other commentary. It noted that only four cases had been reported that addressed the issue and concluded that in view of the limited precedent available at that time the court would not interpret section 1-207. The court decided the case on common law principles.

In *DMI Design & Mfg. v. ADAC Plastics, Inc.*, a Michigan court was again faced with the issue in an Article 2 case and did not explicitly indicate which position it would take. The facts fell squarely within the code. Furthermore, the explicit reservation requirement of section 1-207 was met. The court held that an accord and satisfaction was established and that the “attempted reservation of rights was ineffective as a matter of law to avoid the accord and satisfaction terms of the check.” Thus, the court has implicitly held that U.C.C. section 1-207 does not alter the common law doctrine of accord and satisfaction.

If one were to predict Michigan's future position based on the decisions in *Fritz* and *DMI Design*, one would predict that Michigan will side with the majority. Since the courts applied the common law doctrine in what were clearly Code cases it is logical to assume that the Michigan courts would maintain that position in cases it acknowledged as Code cases.

**F. State Statutory Comments**

Three states, Massachusetts, New Hampshire and Delaware, while not having cases and therefore not addressing the issue, in any form of litigation, have addressed the issue in their statutory comments to their adoption of section 1-207. The Massachusetts Official Comment states:

115. *Id.* at 273 N.W.2d at 426 (plaintiff-creditor merely crossed out the full payment notation and deposited the check without adding words of reservation).

116. *Id.* at 273 N.W.2d at 428-29.


118. *Id.* at 418 N.W.2d at 387.

119. *Id.* at 418 N.W.2d at 388-89.

120. Thirty-six states have included the U.C.C. Official Comments as part of the comment contained under 1-207. These states are: Alabama, Ala. Code § 7-1-207 (1975); California, Cal. [COM.] Code § 1-207 (West 1964); Colorado, Colo. Rev. Stat. § 4-1-207
This section permits a party involved in a code-covered transaction to "accept" whatever he can get by way of payment, performance, etc., without losing his rights to demand the remainder of the goods—set-off a failure of quality—sue for the balance of the payment etc., so long as he explicitly reserves his rights.

The only present statutory provision bearing any similarity is Sec. 49 of the Sales Act (GL c 106, Sec 38) which provides that in general the buyer's acceptance of goods shall not bar rescission or action for breach of contract so long as he gives notice to the seller of whatever it is that constitutes a breach of the contract within a reasonable time. The analogous provisions are in sections 2-607 and 2-608....

As to the common law, this section would, in code-covered situations, permit acceptance of a part performance or payment tendered in full settlement without the acceptor gambling with his legal right to demand the remainder of the performance or payment, a course impossible now save where the part tendered is either liquidated or undisputed.

Contained in the annotation was a reference to Baillie Lumber Co. v. Kincaid Carolina Corp. which was not an accord and satisfaction case and which was relegated to the position of dictum by a subsequent North Carolina case, Brown v. Coastal Truck-
ways. It is questionable whether Massachusetts should base any decision on Baillie Lumber Co. v. Kincaid Carolina Corp. Also, the reference to reasonable notice by the buyer to the seller when there is a breach of contract is more analogous to the position taken by a majority than to that of the minority.

Delaware in its Code comments states "[i]n particular it [explicit reservation of rights] makes possible avoidance of the sometimes harsh effect of cases holding that a debt is discharged in its entirety by acceptance of part payment which the debtor tenders as the full payment of an unliquidated claim." The comment also refers to section 49 of the Uniform Sales Act which did permit, at the time when that Act was still effective, acceptance of goods by the buyer and allow him to sue for damages or pursue whatever other remedies he might have by giving notice of a claimed breach within a reasonable time period. New Hampshire in its official comment also references section 49 of the Uniform Sales Act in much the same manner as Delaware.

Illinois, while not reaching the section 1-207 issue in a case which did not fall under the Code, has also addressed the issue in its statutory comment. Illinois in its Code section prior to citing the official comment included an "Illinois Code Comment" which provides:

This is § 1-207 of the 1958 Official Text without change.


123. 44 N.C. App. 454, 261 S.E.2d 266 (1980). For a discussion of this case, see supra notes 98-99 and accompanying text.
125. Section 49 of the Uniform Sales Act provided:
In the absence of express or implied agreement of the parties, acceptance of the goods by the buyer shall not discharge the seller from liability in damages or other legal remedy for breach of any promise or warranty in the contract to sell or the sale. But, if, after acceptance of the goods, the buyer fail to give notice to the seller of the breach of any promise or warranty within a reasonable time after the buyer knows, or ought to know of such breach, the seller shall not be liable therefore.

UNIF. SALES ACT § 49, 1A U.L.A. 99 (1950) repealed by adoption of the Uniform Commercial Code.
1900), the buyer's acceptance of and payment for the first 50,000 lot of an order of 300,000 chocolate wrappers, to be shipped in 50,000 lots, did not, by reason of his prompt objection as to the quality of the first lot and notification to the seller that it would accept no more, obligate it to pay for the balance of the order.

Of the jurisdictions which adopted special comments when enacting section 1-207, the Illinois comment comes closest to what the majority of jurisdictions have concluded is the intent of the section.

It will be interesting to see, in light of the overwhelming majority of recent cases which have held that section 1-207 does not alter the common law doctrine of accord and satisfaction, what position the jurisdictions, which have not yet had to face the issue, will take when they are presented with an appropriate case.

G. Authoritative and Scholarly Comment

A review of the literature indicates that most of the authoritative and scholarly commentary relating to the section 1-207 accord and satisfaction question, take a position opposed to the conclusion that section 1-207 was intended to alter the common law doctrine of accord and satisfaction. The authors of the Restatement (Second) of Contracts, have taken this position and have expressed strong opposition to the contrary view. The only prominent authoritative commentary on the side of the affirmative is expressed in the White and Summers, Handbook of the Law Under the Uniform Commercial Code. At the time the second edition of that book was published, White and Summers concluded that the majority of the states, which had considered the issue up to that time, agreed that section 1-207 did authorize the payee to endorse under protest and accept the amount of the


131. J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE § 13-21, at 452-54 (1st ed. 1972); Professor James J. White, Professor of Law, University of Michigan; Professor Robert S. Summers, Professor of Law, Cornell University.
check without entering into an accord and satisfaction or otherwise forsaking his claim to any additional sum claimed to be due. However, since the publication of that volume in 1980, a majority of the jurisdictions, which have considered the issue, have come to a contrary conclusion. And, although a majority of courts have now taken the position that the section was not intended to change the common law doctrine, White and Summers, in their third edition, continue to contend that the most obvious reading was the one tendered to the New York Legislature by Professors Hogan and Penney in 1961. It is worth noting that the same position had been taken by several jurisdictions prior to the report issued by Professors Hogan and Penney. Therefore, although White and Summers continue to adhere to the position that the Code had altered the common law doctrine, that position has not been reflected in the decisions of a majority of the jurisdictions which have considered the issue.

H. What Function Does 1-207 Perform Within The Code

If section 1-207 does not legally affect the doctrine of accord and satisfaction then a very important question needs to be addressed: "Does section 1-207 serve any function within the Code scheme?" Several arguments have been used to demonstrate that section 1-207 was not intended to alter the common law doctrine and yet still serve a purpose within the Code scheme.

The first argument is based on the concept that several Code sections have been interpreted to permit and encourage ongoing adjustments in performance or payment in order to allow for the

133. See cases cited supra note 21.
135. Id. at 609.
136. See supra note 88.
137. See Grosse & Goggin, supra note 9, at 556-59.
continued performance or completion of the contract.\textsuperscript{138} This concept will justify the use of section 1-207 in situations where a dispute occurs between the parties relating to payment for part of the performance called for under the contract. Under this concept, the acceptance of the so-called "full payment" check with explicit reservation of rights would be effective under section 1-207, since it would allow for performance of the unexecuted portion of the contract without resorting to the doctrine of accord and satisfaction, thus avoiding a rupture of the contractual relationship.\textsuperscript{139}

A second argument, which supports the theory that section 1-207 can be functional within the Code scheme, emphasizes the supplemental nature of the section. Section 2-607 permits the acceptance of nonconforming goods with proper notice without prejudicing the rights of the buyer to "any other remedy provided by this Article for non-conformity."\textsuperscript{140} In this context, section 1-207 could be construed as providing the buyer with a specific method of indicating his preservation of such "other remedy."\textsuperscript{141}

A further argument is founded on the concept that section 1-207 does not include the term payment, which is a typical accord and satisfaction situation.\textsuperscript{142} And, since section 1-208 mentions both payment and performance, it would follow logically that there is a difference between the two terms.\textsuperscript{143} This would lead one to conclude that section 1-207 was not intended to include payment. Therefore, section 1-207 would still apply to performance adjustments without affecting the payment terms.

\textsuperscript{138} U.C.C. § 2-209 official comment 2 states: "However, modifications made thereunder must meet the test of good faith imposed by this Act." See also U.C.C. § 2-607(2) and U.C.C. § 1-207 official comment 1.


\textsuperscript{140} U.C.C. § 2-607(2) (1978). See also County Fire Door Corp. v. C.F. Wooding Co., 202 Conn. at 287, 520 A.2d at 1033, explained supra at notes 64-65.

\textsuperscript{141} Id.

\textsuperscript{142} Id. at § 1-207.

\textsuperscript{143} Section 1-208 provides:

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 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 power has been exercised.

CONCLUSION

Sooner or later the remaining jurisdictions will be presented with a fact situation which will require a decision as to whether or not section 1-207 alters the common law doctrine of accord and satisfaction. When confronted with the issue, those jurisdictions can adopt the position of New York and the few other jurisdictions which have held that section 1-207 does alter the common law doctrine of accord and satisfaction.144 However, as previously indicated, the position taken by New York is predicated on special legislative considerations which are not present in most of the other jurisdictions.145 As indicated above, New York and other jurisdictions which support the affirmative have not advanced very strong arguments. Jurisdictions other than New York which have held that section 1-207 does alter the common law doctrine of accord and satisfaction have for the most part, played a follow-the-leader game. On several occasions they have cited as precedent cases which did not deal with the sale of goods and thus arguably were not properly Code cases. In view of the strong arguments advanced by the majority, the authors and most commentators believe that the jurisdictions which have yet to consider the issue should follow the majority rule and conclude that section 1-207 was not intended to alter or affect the common law doctrine of accord and satisfaction. While total uniformity is no longer possible, the balance of the jurisdictions should carefully consider what appear to be very logical reasons for the position that section 1-207 has specific applications under the Code but was not intended to alter the common law doctrine of accord and satisfaction.

144. Alabama, Georgia, Missouri, New York, Rhode Island and South Dakota. See cases cited supra note 22.

145. For example, when enacting the Code, the Kentucky General Assembly had available the LEGISLATIVE RESEARCH COMMISSION’S RESEARCH PUBLICATION No. 49, UNIFORM COMMERCIAL CODE ANALYSIS OF EFFECTS ON EXISTING KENTUCKY LAW, pt. 1, at 17-18 (1957). The Comment appended to § 1-207, by the commission, made no reference to accord and satisfaction and specifically refers to the fact that "[o]ne may reserve his rights and still attempt to complete performance."
GRANDPARENT VISITATION IN KENTUCKY

Robert M. Bratton*

"As the usages of society alter, the law must adapt itself to the various situations of mankind."


I. INTRODUCTION

Perhaps one of the best examples of the truth of Lord Mansfield's famous quotation is found in the evolution of the legal rights of grandparents to have access to their grandchildren. Against the backdrop of a legal mindset which gave them no standing whatsoever in the definition of the family unit except at the will of a child's parents, this segment of American society struggled to achieve a legal status and recognition of their importance in a family unit independent of whim or arbitrariness. As a part of the family law revolution that is occurring in a changing America, grandparents now have some form of statutory privilege to visit with their grandchildren in all fifty states.1

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It is not the purpose of this Article to engage in pointless reiteration and review of every state pronouncement— legislative and judicial—that has been published to date. That has already been adequately done by various commentators.2

The purpose of this Article is to focus on Kentucky law, both statutory and case law, pertaining to grandparents' visitation rights with grandchildren. Kentucky's experience with this subject prior to any legislative enactment was always favorable, but guarded. It was guarded because of the overshadowing effects of the Parental Rights doctrine, the constitutionally protected right of child-rearing, and the natural parents' exclusive authority to determine their children's associations. Legislative intervention coupled with a favorable judicial attitude has seen the grandparents' struggle now come to fruition.

A second purpose of this Article is to provide a survey of this development and a summary of the current Kentucky law for

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GRANDPARENT VISITATION

those persons who, while litigating in this burgeoning field, will be confronted with some of the remaining unresolved questions.

This Article is divided into four parts. First it will examine the historical bias which grandparents had to overcome. Second, it will briefly examine how time and events worked changes in attitudes which aided grandparents in their struggle. Next, and the central focus of this Article, will be an examination of the Kentucky experience and attitude regarding grandparents' rights. Finally, this article will summarize the current state of the law on grandparent visitation in Kentucky.

II. THE COMMON LAW HERITAGE

From shadowy recesses of history and the English Common Law emerged a doctrine which was to prove to be the major stumbling block for all grandparents who sought to have access to their grandchildren. This was the doctrine of Parental Rights. 3

Essentially, under the English Common Law, the power of parents over their legitimate children was derived from their duty under natural law to maintain, protect, and educate them. Children were viewed as property belonging to the parents. They possessed few rights that were not specifically given them by their parents. Also, parents were given exclusive authority to control a child’s income and property, and to make appropriate decisions which affected their discipline and custody. 4 At Common Law, intervention by the state was virtually unheard of, 5 and,

3. The initial source of the Parental Rights doctrine in English law seems to be rooted into Teutonic (German) principles under which the family was the important institution of private law, recognizing a corporate union of the family under the Mund or authority of a patriarchal chief. See Scrutton, The Influence of the Roman Law on the Law of England 40-44 (1985).

4. “By begetting them,” said Blackstone, “therefore, they have entered into a voluntary obligation, to endeavour, as far as in them lies, that the life which they have bestowed shall be supported and preserved.” 1 W. Blackstone, Commentaries 447. See also 2 Kent, Commentaries on American Law 190.

5. The Parental Rights doctrine in its strictest view meant that a parent was entitled as a matter of right to the custody and possession of his minor child as against third parties. See McGough & Shindell, Coming of Age: The Best Interests of the Child Standard In Parent-Third Party Custody Disputes, 27 Emory L.J. 209, 217-221 (1978), for a discussion of the Parental Rights doctrine in England. The authors point out, however, that the doctrine of Parental Rights was only applicable in the law courts, but its vitality had been seriously eroded by the Courts of Chancery who granted equitable relief in cases involving potential injury to a child’s property or person. See also Cogan, Juvenile Law, Before and After the Entrance of “Parens Patriae,” 22 S.C.L. Rev. 147 (1970).
unfortunately for grandparents, the Parental Rights doctrine was integrated into American law at the time of colonization.\(^6\) In 1894, the Parental Rights doctrine was held to control the question of a grandparent’s right to visitation with his or her grandchildren over the objections of the children’s custodial parent. *Succession of Reiss*\(^7\) which appears to be the first reported case on the issue in the United States represents the earliest recognition and articulation of the Parental Rights doctrine as it pertained to grandparent visitation rights. In that case, a grandparent actually sued for visitation privileges with her grandchildren. The facts of the case are relatively simple. The maternal grandmother sued the father (her son-in-law) and the custodian of two minor children, ages six and eight, for a court order to compel him to send the children to visit her at her residence and at such times as might be fixed by court order. Essentially, she sought on the appeal to modify a portion of the lower court’s order which required her to visit the children at their home (the home of the father). She sought to enforce the order insofar as it required the father to send the children to her.\(^8\) The court rejected the grandmother’s petition and made it very clear that neither grand-

\(^6\) While it is true that the foundation of American law had been the English Common Law and some states like New York had declared the Common Law to be the law of the land by an express provision of their constitution, it is equally true, and there is substantial evidence, that the colonists did not adopt the entire body of the Common Law, but only those portions which during the formative era of American law were applicable to situations that existed at that specific time on the American continent. Nevertheless, there is no indication that the Parental Rights doctrine was ever initially rejected outright; rather, the doctrine had been accepted by American law courts based upon their understanding of English Common Law at the time of the colonization of America. It is unclear why American courts chose to accept and retain the Parental Rights doctrine which had in reality only limited application in England. McGough & Shindell, *supra* note 4. There is ample evidence that the Parental Rights doctrine was adopted in the Commonwealth of Kentucky. See, e.g., *Soper v. Igo Walker & Co.*, 121 Ky. 550 (1905); *Stapleton v. Poynter*, 111 Ky. 264 (1901); *Pyle v. Cravens*, 14 Ky. (4 Litt.) 17 (1823); *Jones and Gully v. Tevis*, 14 Ky. (4 Litt.) 25 (1823) ("Parents have right to services of children.” It is a right which grows necessarily out of the reciprocal relation).  

8. *Id.* at 349-50, 15 So. at 152. To the court, it appeared that the only difference between grandmother and her son-in-law was the place of visitation, but this was only a surface issue and did not reflect the true situation that lay beneath. The court noted that “the relations between grandmother and her son-in-law was the place of visitation, but this was only a surface issue and did not reflect the true situation that lay beneath. The court noted that “the relations between the son-in-law and mother-in-law are not only strained, but acrimonious” and that the “relations of plaintiff (grandmother) with the members of the son-in-law’s family are not, it seems, of the most pleasant character.” The court summed up this evidence by concluding “ill feeling and bad blood separate the father and the grandmother."
parents nor any other nonparent had a legal right or standing to visit a child when the parents explicitly objected to the visitation. Said the court:

In truth, the ascendants have certain rights that the law, in accord with nature, gives them, but only when the father and mother are dead, or are incapable of manifesting their will. During the existence of the father and the mother, the law properly accords them no authority over the children. To permit them to intervene would occasion embarrassment and annoyance; even more, it would injuriously hinder proper parental authority by dividing it. The law gives no right of action to the grandparents. The father may have good reasons to avoid all contact between his children and their grandparents,—either that he fears that they may inculcate bad principles, or that they will unsettle the respect and affection due him. He owes no account to anyone for his motives. They may be so intimate that the honor of family requires that they shall remain a secret. . . . We refer approvingly to the French authorities only so far as they lay down the principles that there is not a vinculum juris; that the obligation ordinarily to visit grandparents is moral, and not legal.9

Thus the principle was set. Grandparents only had those rights of visitation that would be granted to them by the natural parents, and any obligation on the part of the parents to permit visitation by the children with their grandparents was moral and not legal. Because it appears to be the first reported case on the subject in the United States, Reiss is a landmark decision, which other courts in the United States would ultimately follow. It is also a starting point for the subsequent struggle by grandparents for any legal standing and social recognition of their place in the family unit. The Parental Rights doctrine would dominate.

The concepts that had been expounded in Reiss were generally followed in subsequent Common Law cases in the United States.10

9. Id. at 352-53, 15 So. at 152.
A summary of the reasons relied upon by these courts for the denial of the judicially enforced grandparent visitation rights could be readily seen in reviewing the cases from the various jurisdictions:

1. Ordinarily the parents obligation to allow a grandparent to visit the child is moral, and not legal.  
2. Judicially enforcing grandparent visitation rights would hinder parental authority by dividing it.  
3. The best interests of the child are not promoted by forcing a child into the middle of a conflict between its parents and grandparents.  
4. When a conflict exists between parent and grandparent, the parent should be the sole judge and unaccountable to anyone about his motives in denying grandparent visitation.  
5. The ties of nature are the only effective means of restoring family relationships, not the coercive means which follow from judicial intervention.  

The Reiss court acknowledged that the right of total parental authority is not absolute, and recognized that there were two exceptions to the general rule—unfitness of the natural parent and cases of "downright wrong and inhumanity demanding judicial intervention." Gradually, as the issue of grandparent visitation came before various courts, other exceptions were created. Among the most recognized exceptions were where there was an agreement or stipulation for grandparent visitation made


12. Odell, 78 Cal. App. 2d at 107, 177 P.2d at 629; Jackson, 185 A.2d at 726.
17. Reiss, 16 La. Ann. at 353, 15 So. at 152.
between divorcing parties, where the child had lived with the person seeking custody, and where the parent who sought custody was unfit. Grandparents who did not fit into the narrow exceptions used the fitness of the parent approach to gain judicially ordered visitation with their grandchildren. The courts that followed this avenue of redress approached it from the point of view that the award of visitation privileges was subject to the same standards as those applied in a divorce proceeding where custody was an issue.

In general, the exceptions to the general rule were few in number. The obstacles were formidable. But a small light at the end of the tunnel began to emerge as the courts and legal attitudes began to shift their focus from parental rights to the best interest of the child.

III. The Family Law Revolution

There are very few areas of the law that have undergone a more extensive and dynamic change than that of family law. The social changes that always take place in an upwardly mobile


19. See Mimkon, 66 N.J. at 437, 332 A.2d at 201-02; Benner, 248 P.2d at 426; Bookstein, 7 Cal. App. 3d at 222-23, 86 Cal. Rptr. at 498; and Annotation, Visitation Rights of Persons Other Than Natural or Adoptive Parents, 98 A.L.R.2d 325, 328-29 (1964).

20. See Carlson, 16 Wash. App. at 596, 558 P.2d at 837; Bookstein, 7 Cal. App. 3d at 224, 86 Cal. Rptr. at 499; Reiss, 16 La. Ann. at 353, 15 So. at 152; and Annot. 98 A.L.R.2d 325, 328-9 (1964). See also Lucchesi v. Lucchesi, 330 Ill. App. 506, 71 N.E.2d 920 (1947), where the legal relationship of beneficiary trustee existed between grandchild and grandparent in addition to regular relationship was enough to justify visitation rights. Long and meaningful relationships with the grandparent meant nothing when the parent opposed visitation with a grandparent. Additional authorities are cited in the seminal case of Mimkon v. Ford, 66 N.J. 426, 332 A.2d 199, 201 (N.J. 1975).


22. Chodzko, 35 Ill. App. 3d at 360-61, 342 N.E.2d at 124; see also Kay v. Kay, 51 Ohio Op. 434, 112 N.E.2d 562 (Ohio C.P. 1953); Jackson v. Fitzgerald, 185 A.2d 724 (D.C. 1962); Lee v. Kepler, 197 So. 2d 570, 573 (Fla. 1967). It is misleading to believe that the "best interest of the child" is a new concept. This concept was originally expounded by Mr. Justice Story in 1824 in the case of United States v. Green, 26 F. Cas. 30, 31-32 (C.C.D.R.I. 1824) (No. 15,256), but in spite of that, the Parental Rights doctrine would still continue to dominate in the law courts. But see Commonwealth ex rel. Goodman v. Dratch, 192 Pa. Super. 1, 159 A.2d 70, 71 (1960), where the court shifted its focus from parental rights to the best interest of the child and created a legal right to grandparent visitation, in the absence of a compelling reason not to allow it.
society create transformations in traditional doctrines, ideals, and attitudes. With the industrialization and urbanization of America and a rapidly changing world, profound changes have occurred in the nature of the family itself. The “typical American family” has become almost impossible to define. If there is any point in time which represents the most active period—active to the point of what can be considered a revolution—it would no doubt begin in the 1960s. Beginning with this period, Americans searched for ideas and answers, many of which would impact upon every facet of American life. The impact of the new questioning was particularly noticeable in the area of family life. In 1960, for every four marriages there was one divorce. In 1970, there was one divorce for every three marriages, and by 1980, the figure had risen to one divorce for every two marriages. Family structure had indeed changed and continues to change today.

One of the more important factors having an impact upon the social changes and structure of American life has been the modern developments in medical science, coupled with a higher level of consciousness regarding health and fitness. This has led to a general increase in the life expectancy of a nation’s people. This has resulted in the phenomenon of a “graying America.” More and more individuals have found themselves in the category of citizens known as “grandparents.”

Contemporaneous with these changes was the development of an extensive constitutional law of the family. Beginning with Commissioner v. Lester in 1961, and continuing through today in an ever increasing rate, the Supreme Court of the United States, lower federal courts, and state courts are applying constitutional doctrines to family law issues.

23. It is not the purpose of this Article to delve into the many events and factors that have led to these changes. This is best left to the sociologists of law. For a brief look at some of the factors, see Weitzman, Changing Families, Changing Laws, 5 Fam. Adv. 2 (1982); White, America in Search of Itself (1982).


25. 366 U.S. 299 (1961). This case made alimony payments to the wife fully deductible by the husband when they are “fixed” by agreement separate and apart from child support. This case has now been overruled by I.R.C. Section 71(c) of the Tax Reform Act of 1986 (26 U.S.C. § 71(c)).

26. This is not to imply that the Supreme Court or other courts did not deal with
With this expansion of legal intervention in the family, the question would naturally follow as to how grandparents would...
fare in this tide of litigation. Not very well, obviously, in states that continued to follow the Reiss reasoning. However, in those jurisdictions which did not follow Reiss and its progeny but focused more on the best interest of the child, and in those jurisdictions which, particularly in the 1970s, enacted grandparent visitation statutes, grandparents began to enjoy a legal status which had been virtually unknown to them at Common Law.

The year 1977 proved to be significant for grandparents. It was significant because the United States Supreme Court decided the case of Moore v. City of East Cleveland, wherein Justice Powell indicated that grandparents may also have interests, under certain circumstances, which can be constitutionally valid. Said the court:

Decisions concerning child rearing...long have been shared with grandparents or other relatives who occupy the same household - indeed who may take on major responsibility for the rearing of children.... Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and deserving of constitutional recognition.

While it is true that Moore did not involve child rearing, it did involve family definition. Even though no case has extended discussion on the constitutional aspects of grandparent visitation statutes, see Note, The Constitutional Constraints on Grandparents' Visitation Statutes, 86 COLUM. L. REV. 118 (1986).

27. See cases cited supra note 10.
29. By 1979 some twenty-one jurisdictions had enacted grandparent visitation statutes. For a list of those jurisdictions which had enacted such statutes, see Foster & Freed, Grandparent Visitaton: Vagaries and Vicissitudes, 23 ST. LOUIS L.J. 643, 653 n.56.
31. Id. at 504-05. The only authority cited by Justice Powell for this proposition was Prince v. Massachusetts, 321 U.S. 158 (1944). In that case the child-rearing interest was asserted by the child's guardian (aunt), and the Court held that her child-rearing right was not outweighed by the state's interest. See also Schoeman, Childhood Competence and Autonomy, 12 J. LEGAL STUD. 267, 270-72.
32. It would be important in asserting such a constitutional right that the extending of the family definition to include grandparents is only in the form of visitation and not child-rearing. It is clear that the constitutional right afforded to parents in the freedom of personal choice in matters of family life does not extend to grandparents. See, e.g., Santosky v. Kramer, 455 U.S. 745 (1982) (The Court reaffirmed its position, stated many
any such protection further than to parents or guardians who are the equivalent of parents, this recognition and protection of the family-definition interest appears to extend to grandparents a constitutional right to assert it. There would be little question, however, that an effort by grandparents to extend the boundaries of the family to include them, absent a statute, would still cause conflict when the natural parents oppose such an extended family definition. Nevertheless, this type of recognition by the highest court in the land added momentum to grandparents' struggle.

The momentum continued to build as grandparents organized into lobbying groups such as The Foundation for Grandparents, Equal Rights for Grandparents, and Grandparents'/Children's Rights. Through their organized efforts they achieved acknowledgment of their struggle, elevating it to a national level of awareness. In 1981, hearings were held before the House of Representatives Subcommittee on Human Services of the Select Committee on Aging to discuss grandparent visitation rights. The primary goal was to seek a uniform state law which would provide grandparents with adequate rights of visitation with their grandchildren following divorce, dissolution, separation, or death of the grandchild's parents. Testimony was elicited from the founders of the three major national organizations, Foundation for Grandparents, Equal Rights for Grandparents, and Grandparents'/Children's Rights. Representatives of the committees from New Jersey, New York, California, and Idaho all proffered testimony based on information provided to them by their constituents. The testimony related to the disillusionment and disappointments of grandparents in the efforts to secure visitation times, that the "historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the fourteenth amendment."; Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) (wherein the Court stated that "the primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition") In Prince v. Massachusetts, 321 U.S. 158, 166 (1944), the Court said, "[T]he custody, care, and nurture of the child resides first in the parents." Again in Bellotti v. Baird, 443 U.S. 622, 638 (1979), the Court said, "[D]eeply rooted in our Nation's history and tradition, is the belief that the paternal role implies a substantial measure of authority over one's children ...." And in Parham v. J. R., 442 U.S. 584, 602 (1979), the Court said, "Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children."

34. Id. at 12-50.
tation with their grandchildren. Psychiatrists also testified about the importance and vital connection between the grandparents and their grandchildren.

On April 19, 1983, the House of Representatives unanimously passed a resolution authored by Congressman Mario Biaggi, (D-N.Y.), Chairman of the Committee, urging the adoption by all fifty states of a uniform grandparent visitation act. On February 22, 1984, the Senate Subcommittee on Separation of Powers unanimously reported Senate Concurrent Resolution 40 requesting that all fifty states adopt a uniform grandparent act. Both the House and Senate agreed that grandparent visitation should only be awarded when it is in the best interest of the child. The resolutions passed both houses of Congress with little opposition.

IV. THE KENTUCKY EXPERIENCE

Prior to the enactment of any legislation by the Kentucky Legislature concerning grandparent visitation rights there is no evidence that Kentucky followed the holdings of Succession of Reiss. Although there is ample evidence that Kentucky had always maintained and followed the Parental Rights doctrine, the reasons for denying grandparent custody as expounded by some courts had little, if any, bearing on the attitude towards the grandparent-grandchild relationship in the Commonwealth. Quite to the contrary. A review of case law in Kentucky indicates

35. Id. at 1-11.
36. Id. at 50-73.
37. H.R. Con. Res. 45, 98th Cong., 1st Sess., 129 CONG. REC. 2127 (1983). This proposed model act was similar to many various state laws, but would not give grandparents an absolute right to visitation. Instead, it would enable grandparents to petition the court uniformly, for visitation privileges, but such rights would not accrue until a court order had issued granting the petition. Before the court would issue such an order, it had to examine all of the facts of the particular case and determine that such an order is justified. The act did not establish federal protection. It only stressed the desire of Congress that each state adopt a Uniform Grandparent Visitation Right Act. Id. at 2129-32 (1983).
40. Reiss, supra notes 7-9.
41. See cases cited supra note 6.
42. See supra notes 10-15.
that Kentucky had responded favorably to grandparents' rights of visitation, whether requested or not, prior to any legislation on the subject. As early as 1949, in the case of *Gaffeney v. Gaffeney*, the court held that the trial court had wide discretion in ordering visitation at the home of the grandparents, although the grandparents did not have any inherent right to the custody of their grandchildren. The court's reasoning was that "the child should not be reared in an atmosphere that would make it a comparative stranger to its relatives so closely related to it as are grandparents to their grandchildren." In this case the court focused on the "interest and welfare" of the child, and with regard to grandparents, the court said, "[w]e are told that grandparents are usually more interested in and entertain equal or greater affection for their grandchildren than their own children." The court cited no precedent for this proposition, indicating that the role of grandparents in the lives of their grandchildren is a commonly known, recognized value. The court noted that the grandparents in *Gaffeney* were highly respected citizens and that they, by having the child periodically with them, would instill in them principles of honesty, uprightness, and good citizenship which they might not otherwise receive.

It was twenty-three years later, in 1972, and still prior to any legislation on the subject, that the Court of Appeals of Kentucky had its next opportunity to address the issue of grandparent visitation. In the case of *Mayfield v. Haggard*, the maternal grandmother had previously been awarded custody of her grandchildren upon the death of her daughter (the natural mother). The father was in the Army at the time and, upon his return from Vietnam, sought custody of his children. The court restored custody to him, finding no evidence of unfitness, but some evidence of moral unfitness on the part of the grandmother. The father was in the Army at the time and, upon his return from Vietnam, sought custody of his children. The court restored custody to him, finding no evidence of unfitness, but some evidence of moral unfitness on the part of the grandmother. In ordering grandparent visitation, the court reaffirmed its attitude as to the value of a grandparent-grandchild relationship and said,

43. 311 Ky. 126, 223 S.W.2d 583 (1949).
44. *Id.* at 129, 223 S.W.2d at 585. It should be noted that in *Gaffeney* the grandparents had not intervened. The father (defendant) of the grandchild had brought the motion for visitation at the home of the grandparents.
45. *Id.*
46. *Id.*
47. *Id.*
48. 490 S.W.2d 777 (1972).
"[r]ecognizing the blood relationship of appellee [the paternal grandmother] to the children and the fact that she has spent long hours in tender care and devotion to them, it is fitting and proper that the court should respect her feelings to the greatest extent that is possible."\(^{49}\) The visitation ordered by the court was limited, but its ruling recognized that the courts of the Commonwealth had the inherent authority to reach such a decision when it was in the best interest of the child. It was also clear that situations where grandmothers stood \textit{in loco parentis} to the grandchildren represented a clear exception to the Parental Rights doctrine. Thus grandparent visitation was clearly favored if it was in the best interest of the child without the necessity of statutory enactment.

In 1975, the Court of Appeals of Kentucky, in \textit{Phillips v. Horlander},\(^{50}\) established the principle that in any case involving visitation rights, the governing criteria must always be the welfare and best interest of the child.\(^{51}\) This reaffirmed what the central focus of such cases should be, and remained consistent with the court's previous positions in \textit{Gaffeney v. Gaffeney} and \textit{Mayfield v. Haggard}.

As a part of the divorce reform movement of the 1970s, the Kentucky Legislature enacted Kentucky Revised Statute 405.021 in 1976. The statute read:

1. The circuit court may grant reasonable visitation rights to either the paternal or maternal grandparents of a child whose parent is deceased and issue any necessary orders to enforce the decree if it determines that it is in the best interest of the child to do so.
2. The action shall be brought in circuit court in the county in which the child resides.\(^{52}\)

Kentucky had now joined the growing list of states that had enacted "grandmother clauses" that gave formal standing to grandparents to claim visitation privileges.\(^{53}\) Unfortunately,

\(^{49}\) Id. at 780.  
\(^{50}\) 535 S.W.2d 72 (1975).  
\(^{51}\) Id. at 73-74.  
\(^{52}\) KY. REV. STAT. ANN. § 405.021 (Baldwin 1976). This was originally House Bill No. 378, sponsored by Representatives Bruce, Morris, and White. 1976 KY. ACTS 575. There appears to be no legislative history of this law.  
\(^{53}\) For a list of those states that had passed grandparent visitation statutes by this time, see Foster & Freed, supra note 10, at 653.
grandparent visitation was still derivative in nature, only granted
upon the desire of the parent until the happening of a specific
event. The Parental Rights doctrine as to visitation appeared to
be still intact, but subject to certain exceptions.\footnote{54} The statute
was extremely limited as it required that one or both of the
parents be deceased for the grandparents to be awarded any
visitation, but the focus was that such visitation should be allowed
if in the best interest of the child. The only other visitation
statute at that time was that of a noncustodial parent and child
in connection with divorce proceedings.\footnote{55}

With the statute in place, it was three years before any cases
appeared before courts dealing with the subject of nonparental
visitation. The first case decided by the Supreme Court of Ken-
tucky on July 13, 1979, was \textit{Simpson v. Simpson}.\footnote{56} The central
focus of the decision in the \textit{Simpson} case centered on whether
or not KRS 403.320 should be expanded to include the visitation
to nonparents.\footnote{57} The new grandparent visitation statute was not
mentioned in the opinion because the grandparents were not the
litigants. In this nonparent visitation case, a stepparent sought
custody of her stepson and, in the alternative, because she could
not prove that the husband was an unfit parent, that she be
awarded visitation privileges. The stepmother had stood \textit{in loco
parentis} to the child, acting as the boy's mother from the time
he had been seventeen months old until he was removed from
her care almost six years later. The court held that a trial court,
as an incident to a custody determination, may grant visitation
to nonparents if it is in the best interest of the child.\footnote{58} Justice
Lukowsky, writing for the majority, said: “It [visitation by a

\footnote{54} See supra notes 48-49 and accompanying text (the grandmother stood \textit{in loco parentis}
with the child while the father was in Vietnam, thus creating a significant relationship
with the child prior to his return).

\footnote{55} Ky. REV. STAT. ANN. § 403.320 (Baldwin 1988). That statute reads:
(1) A parent not granted custody of the child is entitled to reasonable visitation
rights unless the court finds, after a hearing, that visitation would endanger
seriously the child's physical, mental, moral, or emotional health.
(2) The court may modify an order granting or denying visitation rights whenever
modification would serve the best interests of the child; but the court shall not
restrict a parent's visitation rights unless it finds that the visitation would endanger
seriously the child's physical, mental, moral, or emotional health.

\footnote{56} 586 S.W.2d 33 (1979).
\footnote{57} Id.
\footnote{58} Id. at 35.
nonparent] should be granted to a parent or a person standing in loco parentis to a child in a jurisdictionally sound custody proceeding when it is in the best interest of the child."69 Continuing, the court said, "KRS 403.320 does not prohibit the grant of visitation to nonparents who stand in loco parentis and are jurisdictionally capable of litigating custody. It merely guarantees that a non-custodial natural parent will not be denied visitation privileges unless it would seriously endanger the child."60 The majority further reaffirmed the position that "[a] trial court as an incident to custody determination may grant visitation to such nonparents if it is in the best interest of the child,"61 and the majority buttressed its position by stating, "[v]isitation is not solely for the benefit of an adult visitor, but is aimed at fulfilling what many conceive to be a vital, or at least a wholesome, contribution to the child's emotional well-being by permitting partial continuation of an earlier established close relationship."62 This principle, as enunciated by the court, was premised on the idea that the relationship between a surrogate parent and a child can be as close as that of a child and his natural parent.63

In summary, the Simpson court holding is narrow in application. It was a custody proceeding dealing with the question of visitation by a nonparent. Thus, the applicable code section in that case was section 403.320.64 Because the stepparent was not a natural parent, but stood in loco parentis with the child, the question which the court addressed was whether, under the applicable statutory law governing visitation, a nonparent could have visitation. By centering its focus on the best interest of the child where one of the litigants who is a nonparent stands in loco

69. Id. The court cited Phillips v. Holander, 535 S.W.2d 72, 74 (Ky. 1975), which held that the governing criteria in visitation cases must always be the welfare and best interest of the child.
60. Simpson, 586 S.W.2d at 35. The court cited the Uniform Marriage and Divorce Act § 407, 9A U.L.A. 612-13 (1973) in support of this position.
61. Id.
62. Id.
63. Id. at 35-36.
64. A strong dissent was rendered in this case. The dissenters took issue with the majority view that KRS 403.320 does not prohibit the granting of visitation to nonparents who stand in loco parentis and are jurisdictionally capable of delegating custody by calling it "pure sophistry." To the dissenters the majority had ignored the statute, and their decision opened the door to "the butcher, the baker, and the candlestick maker...." Id. at 36-39 (Stephenson, J., dissenting).
parentis with the child, the answer had to be in the affirmative. This meant that any nonparent who acted in a capacity such as guardian or who had developed some standing relationship with a child that was the equivalent of exercising parental authority was the only nonparent that had standing to seek visitation with the child under KRS 403.320. A further limitation found in this relationship creating legal standing is the fact that the person seeking visitation must be, according to the court, “jurisdictionally capable of litigating custody.” Taken together, the Simpson court holdings are narrow in that only those nonparents that could be considered surrogate parents (i.e., guardians or persons who have custody and control of children) have the legal standing (i.e., are “jurisdictionally capable”) to seek visitation rights with the children pursuant to KRS 403.320. Parental rights would remain intact. The Simpson holding would encompass grandparents standing in loco parentis.

Sparks v. Wigglesworth, decided in 1979 further illustrates the continuing judicial attitude toward grandparent visitation in spite of the limitation contained in KRS 405.021. The case has no precedential value because of Court Rule, but is worth briefly noting because of its judicial attitude and focus. In this case the trial court granted visitation to the paternal grandparents whose son was in the military. The custodial mother of the child later sought to terminate the grandparents' visitation not only by failing to comply with the trial court's order, but also by court motion. The trial court overruled the motion and ordered a continuation of grandparent visitation on a limited basis. On appeal, the Court of Appeals affirmed, holding that the solution to any dilemma created by the strict reading of the grandparent visitation statute and the maintenance of a family relationship with grandparents over the objection of the custodial parent, lies in determining the best interest of the child. It is important to

65. Id. (Stephenson, J., dissenting).
66. Id.
67. Id.
68. 5 FAM. L. REP. 3173 (1979).
69. This case has no precedential value whatsoever because of Rule 76.28(4)(a) and (4)(c) of the Rules of Court. Even though discretionary review of the Court of Appeals decision was granted on November 27, 1979, and the trial court opinion affirmed on April 22, 1980, no order of publication was ever made by the Supreme Court, rendering the case of no precedential value. See Sparks v. Wigglesworth, 591 S.W.2d 372 (Ky. 1979).
note that the court looked not to a strict interpretation of the
grandparent visitation statute, but rather towards providing a
continuity of familial relationships. The court’s decision reaf-
firmed that the paramount concern should always be the best
interest of the child.

On July 13, 1984, Kentucky amended KRS 405.021 to allow
reasonable visitation rights to grandparents if the court deter-
mines that it was in the best interest of the child.\(^70\) On its face
it appeared to give grandparents unlimited access to their grand-
children. Unfortunately, it was not well worded. Its brevity left
many unanswered questions for grandparents which the courts
would have to address, such as standing, rights in adoption,
termination of parental rights, and the like.

The first case to interpret Kentucky’s new grandparent visi-
tation statute was rendered on August 28, 1987, when the Court
of Appeals in \textit{Cole v. Thomas},\(^71\) addressed the issue of standing
to petition for rights of visitation under the newly amended
statute. The court held that great-grandparents are not included
within the purview of the statute allowing courts to award
visitation rights to grandparents and, therefore, they had no
standing to petition for that right.

\(^70\) Kentucky’s amended statute concerning grandparental visitation rights reads:
(1) The circuit court may grant reasonable visitation rights to either the paternal
or maternal grandparents of a child and issue any necessary orders to enforce the
decree if it determines that it is in the best interest of the child to do so.
(2) The action shall be brought in circuit court in the county in which the child
resides. (Enact. Acts 1976, ch. 277, ... [para.] 1; 1984, ch. 138, ... [para.] 1, effective
July 13, 1984.)

The statute was introduced as S.B. 133 on January 24, 1984. It was sponsored by
Senators Karem, Wright, Meyer, and Rose. It passed in the Senate by a vote of thirty-
seven to zero, and was sent to the House of Representatives on February 7, 1984, where
it was referred to the Judicial-Civil Committee.

The committee conducted several hearings on the bill, none of which are of record.
The committee reported to the House on March 7, 1984, favoring passage of the bill. The
secretary of the Judicial-Civil Committee listed the following reasons as justifying the
passage of the bill: the ongoing national trend recognizing a right of grandparents to
visit with their grandchildren, the widespread publicity in newspapers and on television
about the plight of those grandparents who are denied visits with their grandchildren
and the attempts by other states to provide a remedy for such, and the existence of a
national group which lobbied consistently and effectively for passage of bills granting
the right of visitation to grandparents. The existence of any counterarguments to the
grandparents visitation bill was not recorded, nor were counterarguments reported by
the Judicial-Civil Committee in its message to the House.

\(^71\) 735 S.W.2d 333 (1987).
The case arose when a great-grandmother filed a petition for visitation with her great-grandson, pursuant to KRS 405.021. The trial court dismissed her petition stating that "[i]t is the opinion of this court that the statute presently limits the court to visitation between grandparent and grandchild. In the absence of specific statutory authority or appellate case authority, a trial court should not unilaterally extend the right to great-grandparents." In affirming the trial court, the Court of Appeals unanimously agreed with the trial court and its reasoning. Recognizing that visitation in and of itself is a limitation on exclusive custody awarded to a party, it was apparent to the court from a review of the statutes dealing with the care and custody of children that the Kentucky Legislature "sought to limit the right of visitation only to those involved in a 'jurisdictionally sound custody proceeding,' when it is in the best interest of the child to do so and to a child's grandparents under the Kentucky grandparent visitation statute." Clearly," said the court, "a review of these statutes represents the legislature's desire to leave, for the most part, the total custody, care, and upbringing of a child in the hands of the custodial parent." The court acknowledged that this question had arisen in other jurisdictions where the courts had struggled to create a legal right of visitation in favor of various relatives and interested third parties. Despite the number of conflicting views, the court, consistent with the Parental Rights doctrine, acknowledged that it was commonly held that in the absence of some specific legislative fiat that provides for the grant of visitation to any person having an interest in the welfare of the child, "the parents' prerogative in freedom of choice in matters of family life must be maintained."

The court acknowledged an erosion of the Parental Rights doctrine and the constitutionally protected rights of parents when it said that while maintaining the integrity of the custodial parents' rights to control family matters is one of paramount importance, "our legislature has attempted to sharply limit those rights with the right to file such petitions to four people, the child's four grandparents."
Here, the court did not concern itself with the best interest of the child standard. The focus was the strict interpretation of the statute. The court concluded by observing that, while it would not be adverse to allowing other relatives, third persons standing in loco parentis, or any person having an interest in the welfare of the child to file "petitions for visitation," thus adhering to the precedent of Simpson v. Simpson,77 “[w]e do not believe that this [is] the intention of the legislature.”78 The court further stated:

To allow great-grandparents to be included within KRS 405.021(1) would open the door to aunts, uncles, and great-grandparents.... Therefore, while we agree that the more familial bonds that a child has is generally better for the child, this court is not in a position to add words and meaning to a statute that is clear on its face.79

For grandparents, the decision in Cole v. Thomas revealed several important aspects. First, the court acknowledged that the Parental Rights doctrine has been modified to the extent that the legislature has still left child rearing for the most part to parents, but that grandparents, and the immediate grandparents only, have a right to request visitation with their grandchildren under KRS 405.021 outside a custody proceeding. Any other person, beginning with grandparents on down the family tree, would have to be standing in loco parentis or be a person having an interest in the welfare of the child and be a litigant in a jurisdictionally sound custody proceeding in order for the court to entertain such requests for visitation. Thus, standing is narrowly limited to the four grandparents only. Other issues of standing, such as those arising in cases of adoption or termination of parental rights, were not addressed, but would soon be.

Further litigation presented questions involving the effect of adoption and termination of grandparent visitation privileges under the statute.80

77. 586 S.W.2d 33 (Ky. 1979).
78. Cole, 735 S.W.2d at 335.
79. Id.
80. The courts of the Commonwealth had previously dealt with the effect of adoption on parental rights and visitation. See, e.g., Jouett v. Rhorer, 339 S.W.2d 865 (1960) (The Court of Appeals of Kentucky held in a termination case based on neglect that the best interest of the child would be best served if the child was permanently separated from all influence and contact with the natural father and his family; therefore the grandparents were not entitled to visitation with their grandchild.); Hill v. Garner, 561 S.W.2d 106 (1977).
The first of three cases dealing with KRS 405.021 was Howton v. Branson.\textsuperscript{81} In this case, the paternal grandparents sought visitation with their grandchild who had been adopted by her stepfather. The trial court granted visitation to the grandparents because the evidence revealed that there had been a pattern of continual contact between the grandparent and grandchild. This had been terminated when the natural mother remarried and the new husband sought to adopt the grandchild. After the adoption, while the grandparents' suit was pending, the mother moved to dismiss the complaint, arguing that after adoption, all legal relationships with the adopted child are cut off.\textsuperscript{82} The trial court held that the new Kentucky grandparent visitation statute was more applicable to the case than the adoption statute\textsuperscript{83} which provides for the termination of all ties to the natural parents. In using the best interest of the child standard, the court held that the interest of adoptive parent could be overcome if the child would receive substantial and beneficial attention from its grandparents.\textsuperscript{84} This decision was later affirmed by the Supreme Court of Kentucky.\textsuperscript{85}

Soon to follow was the case of Hicks v. Enlow,\textsuperscript{86} which involved the claims of the paternal grandparents of two children, formerly of Alabama, whose parents were deceased. After the death of the parents, a custody war broke out between both the maternal and paternal grandparents in the courts of Alabama. In the first skirmish, the maternal grandparents won, but in a subsequent contested adoption proceeding, the Enlows, maternal first cousin and spouse, were victorious. Alabama’s grandparent visitation

\textsuperscript{81} 764 S.W.2d 68 (1989) (The appellate court opinion in this case has not been published. This case was brought up on discretionary review by the Kentucky Supreme Court to be decided with Hicks v. Enlow, 34 Ky. L. Summ. 14, p. 7 (Nov. 20, 1987) (Ky. Ct. App.), and Siegel v. Cabinet for Human Resources, 35 Ky. L. Summ. 2, p. 5 (Jan. 22, 1988) (Ky. Ct. App.). The facts and lower court findings cited herein were obtained from the recitation of these cases in the Kentucky Supreme Court’s opinion.)

\textsuperscript{82} Id. at 74.

\textsuperscript{83} Ky. Rev. Stat. Ann. § 199.520(2) (Baldwin 1988) provides:

Upon entry of the judgment of adoption, from and after the date of the filing of the petition, the child shall be deemed the child of the petitioner’s and shall be considered for purposes of inheritance and succession and for all other legal considerations, the natural child of the parents adopting it the same as if born of their bodies.

\textsuperscript{84} Howton, at 74.

\textsuperscript{85} Id. at 75.

\textsuperscript{86} 34 Ky. L. Summ. 14, p. 7 (Nov. 20, 1987) (Ky. Ct. App.).
statute\textsuperscript{87} was exactly like Kentucky's statute,\textsuperscript{88} with the exception that visitation rights would not apply if the minor child had been adopted by a person other than stepparent. Because this was not a stepparent adoption, the plaintiffs (paternal grandparents) had been completely cut off from their grandchildren in the Alabama proceeding.

The adoptive parents then moved to Kentucky and the grandparents followed them. The legal battle continued as the paternal grandparents sought standing under Kentucky's grandparent visitation statute.\textsuperscript{89} The trial court summarily dismissed their complaint, holding that the grandchildren had no legal relationship with their paternal grandparents after the entry of the judgment of adoption in Alabama. Thus, the Kentucky grandparent visitation statute did not apply. The Court of Appeals reasoned, "It follows that if a child's legal relationship with his or her biological parents terminates at adoption, his or her legal relationship with biological grandparents must terminate as well, since the later relationship legally exists only by virtue of the child's relationship with the biological parents."\textsuperscript{90}

The question of involuntary termination procedures and their effect upon grandparent visitation was addressed in the case of \textit{Siegel v. Cabinet for Human Resources},\textsuperscript{91} wherein the Court of Appeals reversed a trial court's summary dismissal of a grandparent's petition for visitation under KRS 405.021. In \textit{Siegel}, the parental rights of the natural parent had been previously terminated. The Court of Appeals held that grandparents' rights were not terminated as a matter of law by the involuntary termination of the parental rights. The court reasoned that the right of grandparents to visitation was not explicitly or implicitly contingent on the continuing legal relationship between parent and child, but was based solely on a finding that the visitation sought by the grandparent is in the child's best interest.\textsuperscript{92} The

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\textsuperscript{87} \textit{ALA. Code} § 30-3-4 (1987) reads: "At the discretion of the court, visitation rights for grandparents of minor grandchildren shall be granted in the following cases: A) Divorce proceedings, whether granted previously or subsequently to February 28, 1983, and B) Situations concerning the death of a parent related by blood to the grandparents. (Acts, 1983, 2d Ex. Sess. No. 83-176 § 1)."


\textsuperscript{89} Hicks, 34 Ky. Law. Summ. 14, at 7.

\textsuperscript{90} Id.


\textsuperscript{92} Id. at 6.
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court distinguished *Hicks v. Enlow* noting that the court's conclusion that grandparents were not entitled to visitation under the grandparent visitation statute because adoption severed all legal relationships between grandparents and grandchildren had been based on the premise that the grandparent relationship legally exists only by virtue of the child's relationship with the biological parent. "While this may be a correct statement of the common law," said the Court of Appeals, "a majority of this panel believes that the legislature's passage of KRS 405.021 elevated grandparents' rights to a status no longer dependent on the rights of the biological parent." 94

In summary, the three cases *Hicks v. Enlow, Siegel v. Cabinet for Human Resources,* and *Howton v. Branson* had all made definitive decisions about the effects of adoption and termination upon grandparent rights of visitation under Kentucky's grandparent visitation statute. The Supreme Court granted discretionary review in all three cases and heard all three cases together because of common questions of law involved.

On January 19, 1989, the Supreme Court of Kentucky rendered its decision in these cases. 95 The court held that the grandparent visitation statute did not apply in a case where the grandchild had been adopted by someone other than a stepparent, thus affirming the lower court's decision in *Hicks v. Enlow.* 96

Continuing, the Supreme Court affirmed *Howton v. Branson* and held that in a stepparent adoption case, grandparents have the right to continued access to their grandchildren through the Kentucky grandparent visitation statute using the best interest of the child as its standard. To the court, the interest of the adoptive parent can be overcome if a child will receive substantial and beneficial attention from their grandparents. 98

Finally, the Supreme Court of Kentucky reversed the court of appeals in *Siegel v. Cabinet for Human Resources,* holding that in a case of involuntary termination of parental rights, grandparents have no right of visitation under the Kentucky grandparent

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95. 764 S.W.2d 68 (1989).
96. *Id.* at 73.
97. *Id.* at 75.
98. *Id.* at 74.
visitation statute. The reason for the reversal was that, unlike the adoption statute which has an exception in cases of stepparent adoption, no such exception exists in the case of termination of parent rights under the termination statute. To the court, the overriding consideration expressed in the adoption and termination statutes is to serve the best interest of the child. Under termination, the complete severance of all ties to the natural parent is in the best interest of the child according to legislative fiat. Said the court: “The termination and adoption procedures are domestic relations considerations of overriding importance, and no exceptions for grandparents to the terms of the termination order required by statute should be implied where none are provided.” 99

In the case of stepparent adoption the court said:

Unlike cases where there has been legal termination of parental rights, in the cases involving only stepparent adoption, there is no reason to interpret the Adoption Act restrictively. To do so will permit the surviving natural parent and stepparent to circumvent the grandparent visitation statute and cut off grandparents’ rights by effecting a stepparent adoption. 100

The courts’ decisions in these cases are important in that they not only clarify grandparents’ rights of access under Kentucky’s grandparent visitation statute, but they also state Kentucky’s position as it relates to the Parental Rights doctrine versus grandparents’ accessibility to grandchildren.

While acknowledging that the legislative enactments granting grandparent visitation were “an appropriate response to the change in the demographics of domestic relations...” 101 the court made it clear that the existence and extent of those rights were strictly a matter for the legislature and the courts were only going to interpret and apply the statute as written. In other words, no rights would be created where none existed. Any erosion of the Parental Rights doctrine as it related to accessibility to others outside the immediate family was only a proper subject for legislative, not judicial, action.

The court also acknowledged that the grandparent visitation statute intended to give grandparents standing to obtain visita-

99. Id.
100. Id. at 72.
101. Id. at 70.
tion if they can prove that it is consistent with the best interest of the child even though the natural parent objects.102

V. SUMMARY AND CONCLUSION

As we have seen, the struggle for grandparents' rights of visitation has been long and arduous. As a result of their persistence, patience, and changes in the demographics of the American family, their struggle has been brought to fruition. As the changes occurred in demographics, the number of victims grew. The victims were the children. Their trauma was exacerbated by the chaos engendered by the breakdown of the family. The law had to respond with some effort to alleviate a growing problem. It meant, however, that an ancient doctrine which had been considered a fundamental right afforded to natural parents needed to be altered in order to offer support in alleviating the emotional trauma resulting from events beyond the victims' control. The creation of grandparent visitation rights was but a small effort in this process of attempting to restore civility and stability to these victims of change.

Kentucky can be and should be proud of its response. Prior to legislation on the subject, the courts were sympathetic to grandparent visitation. Even though the Parental Rights doctrine has always been a part of the fundamental law of the Commonwealth, the judiciary did recognize that, under certain limited circumstances, the courts did have inherent authority to order grandparent visitation if it was in the best interest of the child.103

Kentucky's initial legislative recognition of the value of the grandchild-grandparent relationship was extremely limited in its operation, leaving the Parental Rights doctrine essentially intact.

By its 1984 amendment, the Kentucky Grandparent Visitation Act opened the door to allow judges to consider all facts and circumstances surrounding a request for visitation with grandchildren by their grandparents and to decide on a case-by-case basis what was actually in the best interest of the individual child. The amendments may seem overly inclusive and demeaning of parental rights, but they do not discriminate because they apply to parents who are single, divorced, or still living together.

102. Id. at 72.
103. See supra text accompanying notes 56-69.
From a purist's standpoint the statute seemed to be poorly worded and vague, leaving many questions open for grandparents, their attorneys, and the courts. But on the other hand, and in all fairness, the statute as written has permitted the courts to develop standards and definitive statements for its use in the various situations which develop in the course of family law litigation.

From the case law that has developed since its enactment, we have learned that grandparents now have an independent right of action to legally seek visitation with their grandchildren even if the natural parent objects. The Parental Rights doctrine, as it relates to the parents' right to decide who the children shall visit without a custody proceeding, is still the protected right of the parent. Visitation via the grandparent visitation statute constitutes a court-ordered exception to that right.

Grandparent visitation outside a custody proceeding is strictly limited to four people—the child's four grandparents. Any other person—such as great-grandparents, aunts, uncles, cousins, butcher, baker, or candlestick-maker—can only have standing to seek visitation if (1) there is a "jurisdictionally sound custody proceeding" and they allege and prove that they stand in loco parentis or have an interest in the welfare of the child, and (2) that such visitation is in the best interest of the child. In that situation and under those allegations, the trial court has the inherent authority to grant visitation. The visitation statute applicable to that situation would be KRS 403.320 and not the Kentucky grandparent visitation statute.

The Kentucky grandparent visitation statute permits the grandparents to petition for visitation with their grandchild even where the grandchild has been adopted by a stepparent. In such a case there is still a link in the familial chain between a child and a natural parent. This link was recognized by the legislature when it created an exception in the adoption statute KRS 199.520(2). Such an exception reflects the overriding impor-

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104. Hicks v. Enlow, 764 S.W.2d 68 (Ky. 1989).
105. Id.
106. Cole v. Thomas, 735 S.W.2d 333 (Ky. 1987).
108. KY. REV. STAT. ANN. § 403.320 (Baldwin 1988).
110. Hicks, 764 S.W.2d 68.
GRANDPARENT VISITATION

1989]

The importance of the statute as to the welfare of the child. Grandparent visitation under the grandparent visitation statute cannot be defeated by the device of stepparent adoption.\textsuperscript{111} However, the grandparent's right of visitation does not extend to situations involving adoptions by strangers. It logically follows that when the entire natural familial chain has been broken, all ties and connections whatsoever should be severed between the child and biological relatives to aid in the emotional adjustment and future well-being of a child with its new family.

In the case of termination of parental rights, the grandparent visitation statute will not be applicable. No rights of visitation are afforded to grandparents. No exception is created in the termination statute and none will be created unless enacted by the legislature.\textsuperscript{112} This is justified because the termination of parental rights by the state is a drastic procedure that is resorted to when the conduct of the natural parents is so egregious towards the child that the state must step in for the child’s welfare and protection. The natural parents have forfeited their rights because they have abandoned, neglected, or abused the child. No distinctions are drawn between the voluntary and involuntary termination process, and no exception is made by statute or court. Legal adjudication of the termination severs all past relationships, as it should. The child is entitled to a new start, free of any link to past ties that might inhibit the healing process.

With these guidelines, it is now left to the trial courts as fact finders, to garner all of the facts that will bear on whether the requested grandparent visitation is in the best interest of the child. Although this means more work for the courts on an already crowded docket, the mandate has been made. It is the law's way of adapting to mankind's new and perplexing situation.

\textsuperscript{111} Id.

\textsuperscript{112} Id.
THE STRUCTURED JUDGMENT AS AN ALTERNATIVE TO CAPS ON PERSONAL INJURY DAMAGES

Henry M. Brown*

I. INTRODUCTION

Since the early 1970s, volumes have been written on the malpractice insurance crisis with its ever-increasing insurance rates, which allegedly could make medical care for the public unavailable. The insurance companies have argued that the number of malpractice suits and the size of plaintiffs' awards have forced the cost of premiums to a prohibitively high level. Many insurance companies and physicians insist that the biggest factor in bringing about the crisis was the traditional tort system with its long delays, expenses, and speculative recoveries.1 It has been argued that the public lacks both the wherewithal and the patience to bear the economic burden of our present tort law.

Plaintiffs' lawyers contend that the crisis is illusory and that physicians and insurance companies are attempting to win the sympathy of legislators to assure the passage of special-interest legislation.2 Some commentators have blamed the increase in insurance rates on speculative insurance company investments that have resulted in the need for higher premium costs.3

The traditional tort system has long served the social policy of compensating a person injured through the fault of another while discouraging conduct that is unacceptable to society. The public seems to desire that this policy continue while, at the

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2. Cunningham & Lane, Malpractice: The Illusory Crisis, 54 Fla. B.J. 114 (1980).
same time, it seeks some alternative to the present system of risk spreading with its rising insurance costs. Additionally, the efficacy of the present tort compensation system (the common law practice of awarding damages in a lump sum) can be seriously questioned. The practice of awarding a lump sum payment to injured persons fails in its essential purpose (compensating the injured person) if that sum is quickly dissipated. The desire to lower insurance costs combined with securing compensation for the injured person should be sufficient to compel legislators to act.

The bar and the insurance industry continue to debate the insurance crisis issue; however, they are in accord in asserting that all too frequently the lump sum award is squandered away in a short time due to the client's ignorance in investing funds. The person who has suffered a debilitating injury will seldom be in a position mentally, physically, or emotionally to manage a large sum of money. Studies related to windfalls have indicated that most windfalls are dissipated within five years. The dissipation of the damage award would be devastating to the injured person. It is not difficult to imagine that such a person could quickly become a ward of the state. The squandering of lump sum payments, by itself, seems to compel legislative action to facilitate the compelling interest in compensating the tort victim.

In the past ten years, virtually all states have enacted tort reform legislation ranging in scope from assuring the availability of insurance to the controversial overall limits on intangible damages. At least twelve states have now adopted provisions that limit damages in the malpractice area. On the national level, as early as 1975, Senator Edward Kennedy noted that the federal government should resolve the reform problems by becoming a medical malpractice insurer on a no-fault basis. In 1986, Senator

7. Tyler, supra note 3, at 300 (citing Subcommittee on Health and the Environment of the Commission on Interstate and Foreign Commerce, 94th Cong., 21st Sess., Report of the National Conference on Medical Malpractice (1975)). During the conference, physicians and representatives of insurance companies cited skyrocketing costs of insurance premiums and increasing unavailability of malpractice insurance for physicians as critical and in need of resolution.
Mitch McConnell introduced two bills designed to address tort reform: Senate Bill 2038 was proposed to amend the Federal Rules of Civil Procedure in an effort to encourage alternatives to traditional litigation, and Senate Bill 2046 was designed to place caps on the size of judgments as well as limits on attorney fees in tort litigation. The presently enacted state statutes limit recovery in several different ways: a flat limitation of liability to a specific dollar amount; a limit on physician’s personal liability; or an absolute limit on recovery for pain and suffering. These statutes have been criticized as discriminating against plaintiffs who have, perhaps, suffered the greatest injuries. Placing a legislatively imposed cap on damages forces those who have suffered the greatest injury to bear the burden of society’s desire to keep liability insurance rates at acceptable levels. This burden is unacceptable as long as there are more creative and equitable means to achieve the desired goal.

Any change in the present tort compensation system would require legislative action since the common law requires damage awards to be paid in a single lump sum. Legislative reform of the compensation system would be more desirable than a judicial altering of the lump sum system because legislators are in a
better position to react to the social policy questions at issue. The proposal suggested in this paper would require action by Congress to amend certain sections of the Internal Revenue Code as well as legislation addressing procedural issues. Without prior action by Congress on these issues, the state legislatures are severely handicapped in their efforts to fully address state problems because reform of the Internal Revenue Code is a necessary precondition to some of the more creative alternatives. In addition, it would appear that national as well as state legislation should address the issue in the context of tort reform, avoiding a narrow application limited solely to medical malpractice. A tort reform approach could address similar problems in areas such as products liability while avoiding potential constitutional problems related to equal protection. The alternative suggested by this Article is intended to apply to virtually any civil action in the federal courts alleging negligence, strict or product liability, or malpractice by any professional where damages for physical injury or physical or mental pain or suffering are sought. This proposal attempts to provide a system of recovery that:

1. assures the availability of insurance at reasonable rates;
2. adequately compensates an injured person for his damages;
3. provides a reasonable attorney fee; and
4. allows juries to continue the practice of assessing an injured person's damages.

The proposal involves payment of past damages in a lump sum with the payment of future damages in the form of a structured judgment. “Past damages” means losses which the injured person has experienced prior to the judgment including: medical expenses, wages, pain, suffering, inconvenience, physical impairment, disfigurement, and other pecuniary and non-pecuniary losses. “Future damages” would include all of the above noted damages subsequent to the date of the judgment.

The plan is dependent on certain presently enacted sections of the Internal Revenue Code, including the 1986 Tax Reform Act.

13. The present controversy seems to center on a medical malpractice insurance crisis; however, large recoveries are not uncommon in other areas of tort compensation. The litigation, length of time, and amount of recovery is often greater in products liability cases than in medical malpractice. A bill enacted to resolve the issues of the malpractice insurance crisis should be sufficiently comprehensive to deal with all areas of tort reform.
Most of the Code sections and Revenue Rulings discussed are related to structured settlements. The adoption of this proposal would require amendment of those sections so that they would be specifically applicable to structured judgments.

II. PROPOSAL

1. In personal injury cases, the trial court would bifurcate the issues of liability and damages.

2. Upon a finding of liability, the defendant's insurer would be given the election of adopting this plan or a damage award based on a lump sum. Such election would be binding on the parties.

3. Upon election of this plan, the jury would be instructed to award damages to the plaintiff based on the evidence as presented. The jury would complete a set of special interrogatories as follows:

   (A) The jury is to award the plaintiff a lump sum to fairly compensate him for his past damages to the date of judgment. These damages are to be itemized into subgroups: medical and health care costs, other economic losses, and noneconomic losses.

   (B) The jury is to assess the future damages in the same three subgroups in the manner described below.

      1. As to future medical and health care costs the jury shall determine whether the plaintiff will require additional medical care. If no additional medical care is required, there will be no damages awarded.

      2. As to economic losses and non-economic loss the jury is to assess the amount that would adequately compensate this plaintiff for one year, considering the evidence related to these aspects of future damages.

A. Bifurcation of Liability and Damages

Personal injury cases that progress to the trial stage usually do so because the question of liability is highly contested. In trials involving extensive personal injuries, jury verdicts with respect to liability are likely to be influenced by evidence relevant to the issue of damages. At the present time, the decision to grant a motion for bifurcation of liability and damages is committed to the sound discretion of the court. 14 Separate trials on

14. Fed. R. Civ. P. 42(b); Lis v. Robert Packer Hospital, 579 F.2d 819, 824 (3d Cir. 1978).
liability and damages would, however, promote judicial economy because adjudication of the contested liability question would obviate prolonged presentation of evidence related to damages. If the liability issue is resolved in favor of the plaintiff, the central disputed issue would be resolved, facilitating the ultimate resolution of the case by voluntary settlement.

This proposal would require a short period of time (perhaps 30 days) between the determination of liability and the trial of issue of damages. This time period is necessary to provide defendant's insurer with a period in which to study the present investment market thus enabling him to make an informed election as to a lump sum payment or structured judgment of future damages. Moreover, the short period would provide an opportunity for voluntary settlement by the parties subsequent to a determination of liability but prior to trial of damages.

Should the trial continue to a determination of damages, a new jury would focus solely on that issue. Such directed focus should require the attorneys to present evidence intended to inform the jurors as to the true extent of the injury. The bifurcation would benefit all parties by providing the jury an opportunity to fairly assess damages free of extraneous influences.

B. Election by Defendant's Insurer

It is important to allow the liability insurer the option of electing to pay an award in a lump sum or adopting the proposed structured judgment. Because the advantages of opting for the structured judgment are primarily intended to benefit the insurer, it is appropriate to provide him that election. Many commentators on structured settlements note that where the projected damages are small, the structuring of settlements loses much of its appeal.\(^{15}\) The time and cost involved in investment and administration could outweigh any savings to the insurer; additionally, the payments from a small annuity might be insignificant to the plaintiff.\(^ {16}\) It seems more appropriate to provide this election to the insurer since he is the intended beneficiary of the proposal and, typically, would be more skilled in the actuarial determinations necessary to assess the economics of such an election.

\(^{15}\) Hilliard, supra note 5, at 241.
\(^{16}\) Id.
After the insurer's election, the jury should be given the appropriate instructions to award a lump sum or a structured plan. Upon the election of a lump sum payment of the judgment, the trial on the issue of damages would proceed in the usual manner. The parties would present evidence to be considered by the jury in assessing damages. If the insurer elects a structured judgment, then the procedure outlined in this plan would be followed. Under either election the jury would be permitted to assess the damages related to the plaintiff without limitations or caps legislatively imposed.

C. Assessment of Damages by the Jury

In the assessment of a lump sum award, the court would reduce all future damages to present value using a mandated discount rate. Moreover, future damages paid in a lump sum are not to be adjusted for inflation, because (1) the plaintiff is expected to prudently invest that amount, and (2) inflation is anticipated and reflected in the market rates of interest paid to prudent investors who invest in secure investment plans.

If the defendant's insurer has elected the structured judgment, the jury would be provided with special interrogatories. The jury would first award the plaintiff a lump sum to fairly compensate him for his past damages to the date of judgment. This is necessary because the plaintiff will have incurred a variety of expenses that require immediate payment. These damages are to be itemized into three subgroups: medical and health care costs, other economic losses, and noneconomic losses.

The special interrogatories related to future damages would be divided into the same three subgroups. As to future medical and health care costs, the jury would not assess a dollar amount, but would decide solely whether the plaintiff will require additional medical care.

As to future economic and noneconomic damages, the jury would assess the compensation that would be necessary to ad-

17. The 1986 Tax Reform Act limits the tax deduction for insurance companies for unpaid losses to the amount of discounted unpaid losses. A formula for discounting including rates is provided in the new Code provisions. See Tax Reform Act of 1986, Conference Report, Vol. 73, No. 41, Sept. 21, 1986, CCH Extra Edition, Part II, at 360. The provisions of the new Code seem to favor a position that takes into account the time value of money. The same or similar discounting of future damages to be paid to a plaintiff would seem in line with the present reasoning of Congress.
dress the plaintiff’s future losses on an annual basis in each of the foregoing two areas. The jury is to determine a dollar amount per year to compensate the plaintiff for these losses. The yearly determination provides a more concrete basis for the jurors—eliminating the need for jurors to speculate as to the life expectancy of the injured person and requiring attorneys to address their presentation of evidence on damages to the specific needs necessary to provide compensation and peace of mind to the injured person.

III. FUNDING OF FUTURE DAMAGES

A. Medical and Health Care Costs

In this area the jury does not assess damages using a dollar figure. This is to assure that the societal interests in compensating the injured party and assuring that his future medical attention are secured while eliminating any possibility of dissipation of this portion of the award. Because future medical expenses are often unforeseeable, impossible to estimate, or such that plaintiff may or may not require further treatment, a reversionary medical trust would be purchased by the insurer to fund future medical needs proximately related to the injury. The functioning of the reversionary trust has been described as follows:

The insurer creates a fund for the express benefit of providing for the medical needs of the injured party. Should the trust be depleted prior to the death of the plaintiff, the insurance company can add to it. In the event plaintiff dies before the funds are exhausted, the remaining interest and principal reverts back to the insurance company rather than unjustly enriching the plaintiff’s heirs.18

B. Noneconomic Damages

In this area of future damages the jury has assessed an annual compensation figure to be awarded to the plaintiff. The defendant’s insurer would be required to fund this annual compensation figure through the purchase of an annuity. This annuity would

18. Hilliard, supra note 5, at 245 (citing 3 Modern Trials 2d at 313 (Belli ed. 1982)).
be a life annuity specifically designed for the catastrophically injured annuitant. 19 Several life insurance companies are currently offering nonstandard life annuities based on the decreased life expectancy of the seriously injured annuitant. 20 These companies analyze medical data to determine the approximate life expectancy, their actuaries basing the premium costs on this medical information. 21 These nonstandard annuity rates are available whenever the annuitant has a less than normal life expectancy. 22 The medical conditions producing potential candidates for nonstandard rating include: serious head injuries; spinal cord damage; loss of limbs, sight or hearing; serious internal injuries; serious burns; or any other serious problem that might reduce one's life expectancy. 23

To assure the savings to the insurer and tax free annuity payments to the plaintiff the annuity would need to comply with specific sections of the Internal Revenue Code. Furthermore, to provide annual compensation adequate to compensate the plaintiff, the annual payments would need to include a factor to counterbalance a potentially rising cost of living. The amount payable each year (with distribution on a monthly basis) should be keyed to some external factor such as the Consumer Price Index. 24 Security to the plaintiff, the paramount concern of this proposal, mandates that the annuity be assigned to a life insurance company with at least a Best's "A" rating. 25

C. Economic Damages

The jury has determined a dollar figure that would annually compensate the plaintiff for his economic damages, including lost future wages. This portion of the future damage award is to be funded with an annuity; however, the annuity purchased would

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19. Id.
20. Id.
22. HINDERT, supra note 12, at § 3.05[6][b].
23. Id.
24. Hilliard, supra note 5, at 257 (citing GROSSMAN & NORTON, STRUCTURED SETTLEMENTS: A NEW APPROACH, SETTLEMENT AND PLEA BARGAINING 184, 189 (Edwards ed. 1981)).
25. HINDERT, supra note 12, at § 5.03[4][a][i]. A.M. Best Company evaluates the stability of life insurance companies. Their letter ratings include: A+ and A (Excellent); B+ (Very Good); B (Good); C+ (Fairly Good); and C (Fair).
be a straight life annuity based on the plaintiff's life expectancy just prior to the injury. The use of an annuity based on nonstandard life expectancy would be inappropriate since the measure of economic loss is more appropriately based on the work life expectancy that the victim would have had, but for the injury.

D. Effect of Plaintiff's Death on Future Damages

1. Medical Care and Noneconomic Damages

Upon the plaintiff's death, all liability for payment not yet due under the reversionary trust and the nonstandard life annuity would terminate. The reversionary trust is designed to assure the availability of medical care specifically related to the injured person's needs—plaintiff's death terminates such need. A similar reasoning is applicable to termination of benefits under the nonstandard life annuity. This monthly payment is designed to compensate for pain, suffering, disfigurement and other noneconomic damages specifically suffered by the plaintiff. The plaintiff's death terminates the need for such benefits thus rendering continued payment of such benefits to the estate a windfall.

2. Economic Damages

The annuity funding the economic losses would not terminate at death because the award of these damages to the plaintiff's estate would constitute compensation for losses suffered and not a windfall. This aspect of the damages would be computed using a straight life annuity based on the injured person's pre-injury life expectancy. Payments still due upon death would be distributed as directed by the plaintiff in a will or according to state intestacy statutes.

Adequate compensation to the injured person should not be designed to provide a windfall to the estate. It should, however, assure that the estate of the injured person is not damaged by the acts of the defendant. The injuries and reduced life expectancy of the plaintiff will most certainly influence his ability to adequately plan for his estate. Many persons value the lifetime opportunity to accumulate an estate and to benefit their children and family by such planning. The catastrophically injured person will certainly have a reduced opportunity for such planning. As a result, a comprehensive plan to compensate the plaintiff should
not provide a windfall to the estate but should reasonably com-

censate the plaintiff for his lost opportunity for estate planning

and, at a minimum, should ensure that the estate is not financially

injured. It is for this reason that payments still due on the

annuity funding the economic losses should be paid to the plain-
tiff's estate.

IV. BENEFITS FROM THE USE OF THE STRUCTURED JUDGMENT

A. Use of Annuities

The major savings element incorporated in this plan is the use

of the annuity as a value extender. The annuity provides a dollar

benefit for the plaintiff equal to the value of a lump sum payment

(reduced to present value) prudently invested by the plaintiff. Fur-

thermore, it achieves this result at a lower cost to the
defendant's insurer while eliminating the potential dissipation of

the award. An annuity used to finance a structured settlement,

when in compliance with Internal Revenue Code sections 104 and

130, can produce $1.00 in real value to the benefit of the plaintiff

at a cost of $.75 to the defendant.\footnote{\textit{Conason, Damages in Tort

Actions}, vol. 7, § 82.03 (Matthew Bender, N.Y., 1985).} If the plaintiff receives a

lump sum judgment and then purchases his own annuity or other

investments, only the original award is tax free with all interest

thereon taxed as ordinary income.\footnote{\textit{I.R.C.} § 61(a)(4) (1954).} If the annuity is held by a

life insurer as a result of an assignment in compliance with the

Internal Revenue Code, all payments to the plaintiff will be

received tax free. A taxable portfolio is converted into a tax free

portfolio for the duration of the annuity; the Treasury is brought

in as a third party contributor since it is foregoing the taxes

that would have been collected on the income generated by the

investment.\footnote{\textit{Conason}, supra note 26, at § 82.03.} An estimated twenty-five to thirty percent savings

could be generated to the benefit of the defendant's insurer.\footnote{\textit{Id.}}

Additional savings result from the use of a nonstandard annuity

instead of a standard annuity to fund the noneconomic damages.
The cost of an annuity for a catastrophically injured person would

be significantly less than the cost of a standard annuity.\footnote{\textit{Hilliard, supra note 5, at 254.}} Such
savings have been estimated at twenty to forty percent.\textsuperscript{31}

\textbf{B. Savings Through Competitive Bidding}

The use of annuities to fund the two elements of the future damages package generates additional cost savings through the competitive bidding of life insurance companies.\textsuperscript{32} When the annuity funding is in compliance with the Internal Revenue Code, the casualty insurer is required to assign the liability for future annuity payments to a life insurance carrier.\textsuperscript{33} This proposal provides a period of time between the trial of liability and damages during which the casualty insurer has an opportunity to seek competitive bids for annuity funding. For example, if carrier \textit{A} estimates that the life expectancy of the plaintiff is thirty years, while carrier \textit{B} estimates the life expectancy at forty years, carrier \textit{A} will offer the casualty insurer the same investment benefits at a significantly lower price.\textsuperscript{34} The life carriers who underwrite annuities become contributors to the cost of the plaintiff's future damages package. Through the contributions of the Treasury and the life carriers adequate compensation can be achieved for the plaintiff at a lower cost to the defendant's insurer.\textsuperscript{35}

\textbf{C. Potential for Savings in the Reversionary Trust}

Funding of future medical costs through the reversionary trust could result in substantial savings to the defendant's insurer. If the plaintiff were to die (as a result of the injury or due to causes not related to defendant's acts) prior to incurring the needed medical expenditures, the remaining principal and accumulated interest would revert back to the insurance company rather than to the plaintiff's heirs. Insurers would favor this method of compensation for future medical expenses because it avoids the windfall to plaintiff's heirs while assuring that the funds are used solely for plaintiff's future medical needs.\textsuperscript{36} It would appear that

\begin{itemize}
\item \textsuperscript{31} Id. (citing \textit{Vandervoort \& Karzan, The Role of the Settlement Specialist in Settlement and Plea Bargaining}, (Edwards ed. 1981)).
\item \textsuperscript{32} CONASON, supra note 26, at § 82.03.
\item \textsuperscript{33} I.R.C. § 130(c) (1954).
\item \textsuperscript{34} CONASON, supra note 26, at § 82.03.
\item \textsuperscript{35} Id.
\item \textsuperscript{36} Id. at § 84.10(5).
\end{itemize}
the reversionary trust would result in savings to the insurer in every case. If, however, the trust fund were exhausted before the plaintiff dies, the carrier would be required to add to the corpus. Therefore, in individual cases there is a potential for the insurance carrier to pay out a greater sum as a result of the trust.

In the case of the catastrophically injured person, the insurance carriers would most likely assume the risks inherent in such trusts. In *Aetna Insurance Co. v. Springsteen*, a structured settlement included a reversionary trust with a corpus of $600,000. The plaintiff was hospitalized in 1975 for surgery to correct a cervical derangement. After surgery, he remained comatose until his death in 1978. Upon his death, $510,000, or eighty-five percent of the corpus reverted back to the insurers with fifteen percent paid to plaintiff's widow pursuant to the agreement. Under the same fact situation, the plan herein proposed would have resulted in a profit to the insurance carrier since the entire $600,000 corpus plus the accumulated interest would have reverted back to the insurance carrier. The cost savings to the defendant's insurer would depend on individual fact situations. It would appear that insurers would prefer this result rather than lump sum judgments which often result in windfalls to the plaintiff's heirs.

**D. Potential for a Decrease in the Insurance Carrier's Surplus Reserves**

The required assignment of the annuity by the casualty company would establish the actuarial value of the liability and create a right to claim a current deduction for its obligation to pay. The purchase of the annuity would be evidence of the present value of the obligation to make payments in the future so that the casualty company would receive a present deduction up to the amount of the present cost of the annuity.

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39. Id.
40. Id.
When the liability insurer establishes a loss reserve for a given claim, this amount would result in an immediate tax deduction.\(^\text{42}\) It is most likely that the immediate deduction, under the structured judgment, would be less than if the insurer paid out a lump sum due to the lower cost of funding future damages. The lower cost of funding would result in a decrease in the insurer’s statutorily mandated surplus reserves.\(^\text{43}\) Since the surplus would determine the amount of new business the company could write, the company would be in a position of greater potential profitability. The ability of the liability insurer to elect this plan or the lump sum payment would provide the insurer with the option of greater present tax advantage or greater potential for new business.

**E. Benefits to the Plaintiff and Society**

The greatest share of cost savings generated by this proposal would go to the defendant’s insurer because one of the primary purposes of the proposal is to assure adequate compensation while making liability insurance available at reasonable rates. The cost savings, in turn, should be reflected in lower liability rates. This proposal is not intended to benefit insurance carriers; it is intended to benefit society by reducing rates. Moreover, it provides society with an improved tort compensation system which assures that tort victims are cared for without concern for the dissipation of lump sum awards, thus avoiding the greater societal costs inherent in the present system.

The proposal provides adequate compensation to the plaintiff in its assessment of the damages by a jury. The plaintiff is benefited in several ways. He will be assured funds for future medical expenses. The monthly compensation for economic and noneconomic losses will be made on a tax-free basis. The future payments will be stable and secure without the managing and safeguarding associated with the investment of lump sum judgments. Finally, the payment of economic benefits to plaintiff's estate provides compensation for his lost estate planning opportunities while assuring that the estate will not have been injured by the defendant's acts.

\(^{42}\) Hindert, supra note 12, at § 4.02[3] (citing I.R.C. § 446(b), (c)).

\(^{43}\) Id.
V. Federal Income Tax Principles

The applicable Code sections and rulings, addressed herein, were intended to apply specifically to structured settlements. Application of these principles to this proposal would require legislative action to specifically make those sections applicable to the proposed structured judgment.

Section 104 of the Internal Revenue Code provides an exception to the general rule of Section 61 that "all income from whatever source" is to be included in the recipient’s gross income. The relevant portion of Section 104 provides that "gross income does not include ... the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries ...."44

The Service analysis of structured settlements centers upon the plaintiff's control over the recovery proceeds. If the plaintiff has actual or constructive receipt of the recovery proceeds he would need to report them as income. In regard to the tax free status of annuity payments, Revenue Ruling 79-220 states:

[W]here damages are to be paid periodically and the injured person has no right to the discounted present value of the payments or any control over investment of the present value, the entire amount of cash periodic payment is excludable, including earnings on the fund. When a single payment annuity contract is purchased by the party obligated to make the damage payments, and the person receiving payments has no interest in the contract and can rely only on the general credit of the payor, the entire amount of each periodic payment is excludable from taxation.45

To further protect the availability of the annual payments, it is necessary to require the casualty company to assign the annuity to a third party, highly rated insurance company who will accept liability for the payments and purchase United States Government securities to fund them.46 Code section 130 deals with the tax treatment of the assignee of such obligations. This section provides that if a qualified assignment is made and the amount received on account of the assignment is used to purchase

46. Structured Settlements, supra note 44, at 564.
an annuity or United States obligation, and all the requirements of the section are met, then the amount received and the income generated and used to make payments to the plaintiff will not be subject to income tax.\textsuperscript{47} Qualified assignments must meet the following requirements:

(1) the assignee assumes such liability to make periodic payments as damages (whether by suit or agreement on account of personal injury or sickness), and

(2) (A) such periodic payments are fixed and determinable as to amount and time of payment,

(B) such periodic payments cannot be accelerated, deferred, increased, or decreased by the recipient of such payments,

(C) the assignee does not provide the recipient of such payments rights against the assignee which are greater than those of a general creditor,

(D) such periodic payments are excludable from the gross income of the recipient under section 104(a)(2).\textsuperscript{48}

The assignment would provide security to the injured person while allowing the liability insurers to remove such claims from their books. Several life insurance companies are actively accepting such assignments.\textsuperscript{49}

Section 104 and Revenue Ruling 79-220 illustrate the tax benefit made available by Congress to parties participating in structured settlements. A plaintiff's annual payments from an annuity would be tax free income. The Code additionally offers savings for the insurance company. In reference to structured settlements involving annuities, it has been said:

It's as if the Treasury holds out buckets full of money (tax savings) and tells insurance companies and plaintiffs that they can have that money if they can agree to adopt a particular (not unattractive) mode of recovery (and can agree on how to divide the benefit of doing so).\textsuperscript{50}

Recent legislation related to structured settlements and the 1986 Tax Reform Act suggest that Congress and the President are willing to forego tax revenue in exchange for judicial economy and the assurance of adequate compensation to a deserving

\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} Id. at 565.
\textsuperscript{50} BITTKER, supra note 41, at 239.
plaintiff. This proposal recommends the extension of those principles to personal injury cases that go to trial.

In January of 1983, the President signed into law H.R. 5470—an enactment specifically designed to encourage structured settlements. The legislation amended IRC section 104 to exclude periodic payments from the recipient's gross income. Moreover, the same legislation created IRC section 130 which, if complied with, makes the assignment of an annuity to a life carrier a nontaxable event. In such an assignment, the assignee has no taxable event because he has received income that is offset by the new obligations. The Tax Reform Act of 1986 has amended Section 130 so that it is no longer applicable to all tort actions. Under the new Act, the section applies to tort actions that result in personal injuries which involve physical injury or physical sickness of the claimant. The adoption of this proposal would require the extension of these sections to include the structured judgment.

This proposal would reduce the tax payable to Treasury due to the subsidization of personal injury awards; however, the structured judgment so subsidized would provide a broad base for spreading the risks associated with tort litigation.

VI. ATTORNEY FEES

Most personal injury cases are handled on a contingent fee basis with counsel receiving a percentage of the recovery. The contingent fee facilitates the availability of legal services to injured persons who otherwise could not afford them. Because the required structured judgment involves so many variables, the setting of contingent fees creates a serious problem.

The state legislatures that have adopted periodic payment of judgments have computed attorney fees through deferred payment plans, sliding scales, and fee caps. These methods of computing fees have not been readily accepted by the plaintiffs' bar. A reasonable calculation of contingent fees as if the total structured judgment were received as a lump sum would be more

51. CONASON, supra note 26, at § 82.22.
52. Id.
53. Id.
likely to satisfy the bar and preserve the availability of legal services to injured persons. That could be achieved by computing the present cost to the insurer of the judgment package. This, in turn, would require the defendant's insurer to provide present cost information to the plaintiff. The cost of future medical expenses financed through the reversionary trust would not be a part of the calculation of present costs of the future damages package, since at the time of judgment it cannot be determined if any payments will be made. The total cost of the recovery package for purposes of computing the contingent fee would include the lump sum attributable to past damages plus the costs of securing the annuities. The plaintiffs' bar will most likely be dissatisfied with this computation because the cost of providing adequate recovery will be greatly reduced by the methods discussed; however, the fee will still be sufficient to encourage the bar to provide the needed services to plaintiffs—and probably more desirable than some of the legislatively imposed fee caps, deferred payments, or sliding scales.

The contingent fee would respect any recovery percentage negotiated between the attorney and his client. Unless the parties have otherwise contracted the fee would immediately be paid in a lump sum. The contingency percentage applied to the past damage recovery would fund that portion of the fee. The plaintiff's personal resources would be the first source of payment of that portion of the fee related to the purchase of the annuities funding future damages. If the resources of the plaintiff are deemed by the court to be insufficient, the present cost of the annuities would be computed, that figure being reduced by an amount necessary to pay the fee. The balance would be used to fund two similar annuities, but with a reduced monthly payment to the plaintiff.

VII. COLLATERAL ISSUES

A. Adjustment to Personal Injury Damages

The law applicable to adjustments to personal injury damages would remain in force including: comparative negligence, remit-
titur, additur, apportionment of damages between tortfeasors, and other adjustments. These would be applied to the damage recovery after damages have been determined but before the annuities are purchased. Due to the inability to value the costs associated with a reversionary trust, that item of recovery would not be affected by such adjustments.

B. Policy Limits

At the time future damages are entered, the total of future damages payable cannot be determined. The present cost of the future damages package is to be added to the lump sum attributable to the past damages. If this sum is within the policy limits, all future benefits will be within the policy limits. If the sum exceeds policy limits, the lump sum is to be paid first with remaining amounts up to the policy limit allocated proportionally toward purchase of the future damage investments.

VIII. Conclusion

If a liability insurance crisis threatens the availability of medical care, there are meaningful ways to address the problem without legislatively imposing caps on damages that discriminate against those who are most deserving. If the foregoing proposal is implemented, the basic concepts of tort compensation can be preserved while assuring liability insurance at reasonable rates. Finally, plaintiffs can be adequately compensated (with their losses assessed by a jury) and protected from the dissipation of their awards, thus providing the peace of mind so necessary to those catastrophically injured.
IN SEARCH OF A PLAGIARISM POLICY

Patsy W. Thomley*

I. INTRODUCTION

Law schools should provide their law students with "clearly defined and explained" policies on plagiarism. While most law schools have some type of plagiarism policy statement, few have clearly defined and explained those statements. This Article will report on a survey of existing law school plagiarism policies and statements. It will then make a recommendation.

During the past year, the issue of plagiarism has seemed to be a recurring one. Always a concern in education circles, the plagiarism issue became a matter of public concern, or at least a topic of conversation, when the news media reported the story of United States Senator Joseph Biden's plagiarism of British Labor Party leader Neil Kinnock's campaign speeches. This publicity was responsible for Biden's subsequent withdrawal from the 1988 presidential campaign.¹

Plagiarism made the headlines statewide in Alabama newspapers² when the star quarterback of a major state university was accused of plagiarism in an assignment for a psychology class. Fans and rival team supporters followed the reports of the disciplinary procedures which threatened the

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1. Mawdsley, Legal Aspects of Plagiarism, 1985 NATIONAL ORGANIZATION ON LEGAL PROBLEMS OF EDUCATION 52 (concluding that "it is reasonable for the school to have a clearly defined and explained plagiarism policy.")

2. Sen. Biden Drops His Presidential Bid In Wake of Plagiarism, Wall St. J., Sept. 24, 1987, at 60, col. 2. (Among other things, Biden admitted being disciplined for plagiarism in law school also.) In addition to its prominence in television newscasts, plagiarism also appeared in less serious television fare. At least one popular prime time television situation comedy chose plagiarism as the subject of one of its episodes. The TV listings read: "The Hogan Family features Willie ... getting an A-plus in English. But did he plagiarize?" Best Bets, The Birmingham News, June 13, 1988, at 6C, col. 1.

young man's participation in his sport during his senior year and thus threatened his professional football draft possibilities and, ultimately, his career.4

Such examples underscore the need to provide a plagiarism policy statement to entering law freshmen. Providing the Legal Research and Writing classes with a plagiarism policy statement became a locally perceived need at Cumberland School of Law, Samford University. A search of the files, archives, and available sources had produced nothing more than this one-sentence statement: "Work submitted in any Law School matter must be the result of one's individual efforts or noted otherwise."5

The suspicions that law schools other than Cumberland lacked specifically stated policies on plagiarism was confirmed at a regional legal research and writing conference attended by representatives of six law schools.6 Responding to inquiries about a plagiarism statement, the host school offered to share its plagiarism policy statement. When copies of this excellent discussion of plagiarism were distributed, they were eagerly snatched up by the representatives of the five other law schools.

In an effort to determine how law schools handle plagiarism policies, an informal written survey was directed to the directors of legal writing of 169 ABA approved United States law

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5. The writer's personal experience in writing classes in undergraduate school and law school caused the suspicion that a clear definition and explanation of plagiarism was needed. That experience included only the warning that plagiarism was unacceptable, but never a discussion of what constitutes plagiarism nor instruction on how to avoid committing the offense.

6. Legal Research & Writing Conference held at University of Florida, August, 1987. An excellent and helpful program produced by the legal writing staff of the University of Florida. The six schools participating were University of Florida College of Law, Florida State University College of Law, St. Thomas University School of Law, Nova University Center for the Study of Law, Stetson College of Law, and Cumberland School of Law.
schools in mid-March, 1988. The Survey results will be analyzed in detail below after some preliminary paragraphs on the need for clearly defined and explained plagiarism policies in law schools.

I. PLAGIARISM IN LAW SCHOOLS

The idealistic and the naive might conclude that law schools are immune from the problem of plagiarism. After all, should not those who aspire to membership in the legal profession be those of irreproachable behavior, imposing upon themselves the highest standards of ethics? Reality forces the recognition that plagiarism does occur in the law school setting. The responses to the Survey questionnaire confirm that dealing with incidents of plagiarism is a fact of law school life. While most plagiarism

8. 88 responses to the survey were received. A copy of the survey is reproduced here:

Plagiarism Policy Questionnaire

1. NAME ____________________________________________
   TITLE ____________________________________________
   LAW SCHOOL ____________________________

2. Does your law school have a clearly defined and explained plagiarism policy. A school policy is one which is defined and explained in a student handbook, Honor Code, catalogue, or bulletin.

   YES __________ NO __________

3. If yes, please include a copy of the plagiarism policy with this questionnaire.

4. My school has a plagiarism policy, but it is not clearly defined and explained. For example, the school catalogue or Honor Code may make a statement to the effect that "Work submitted in any Law School matter must be the result of one's individual efforts or noted otherwise."

   YES __________ NO __________

5. If yes, please include a copy of the policy or statement.

6. My school has no plagiarism policy.

   YES __________ NO __________

7. Although my school has no plagiarism policy, the legal writing class has a policy. A class policy is one which is defined and explained in a class syllabus or set of materials containing class requirements.

   YES __________ NO __________

8. If yes, please include a copy of the class policy.

9. Other classes or individual faculty members have a plagiarism policy.

   YES __________ NO __________ DON'T KNOW __________

10. Comment (Any comment is welcome. In particular, describe the plagiarism policy at your school if it does not fit any of the above categories.)


Id.).
cases are handled internally, some cases come to the attention of the public. The discovered and the reported cases of plagiarism cause the uneasy feeling that they may be just the tip of the iceberg. No doubt many plagiarism cases go undetected.

Speculating about why a law student (or anyone) plagiarizes is an interesting exercise. However, such speculation will be profitable only if it suggests a way for law schools to deal with the problem. With the goal of identifying what law schools can do toward eliminating plagiarism, some possible "why's" will be set out here.

Some theorists have blamed a "confused educational system," which fails to teach basic values and skills, for fostering plagiarism. Others have suggested psychological causes. While the foregoing reasons could explain why any person plagiarizes, the following reasons, which apply specifically to law students' plagiarism, have been suggested: "law students do not fully understand the meaning of plagiarism"; "law school's extreme grade, peer, emotional, time and deadline pressures"; "the competitive job market, a success syndrome, sloppiness, laziness, and efforts to save time and analysis."

Very few of the above suggested causes of law students' plagiarism can be eliminated or even affected by the law schools. The schools will continue to assign grades and students will continue to compete for the top grades. The competition for jobs can only increase as the market becomes tighter. The sheer volume of the subject matter will continue to require all the time a student has to give to mastering "the law." Deadlines will continue to be a fact of the law student's life. The one cause of plagiarism listed above that law schools can affect is

11. See Comment, Plagiarism, supra note 9, at 250.
12. Id. at 249.
13. Id. at 252-53.
"that law students do not understand the meaning of plagiarism." To eliminate or reduce plagiarism, all law schools should provide their students with a clearly defined and explained policy on plagiarism. The policy should include a definition of plagiarism with specific examples accompanied by comments showing why the examples constitute plagiarism and what constitutes proper conduct under the circumstances presented.

III. WHY LAW SCHOOLS NEED CLEARLY DEFINED PLAGIARISM POLICIES

Law schools and their faculties must be concerned that their students fully understand what plagiarism is and how to guard against committing it. The profession to which the students aspire—the legal profession—is an honorable one and should be composed of honorable men and women. Plagiarism by a member or future member of the profession dishonors the legal profession.14 This important reason for educating law students about plagiarism is reflected in representative statements of purpose found in the Honor Codes and like documents of the law schools responding to the Survey.15

Plagiarism by law students not only will dishonor the legal profession but will also adversely affect the reputation of the

14. "By its very nature plagiarism ... touches not only upon matters of research and scholarship but upon the matter of integrity of those producing works of scholarship." Mawdsley, supra note 1, at 1.

15. The following statements are taken from Honor Codes, etc. provided by respondents to the Survey. The individual schools are not identified since these are representative statements. Note that plagiarism would be only one of the several areas of conduct and attitudes covered by the purpose of the code.

"A law student shall act all times in a manner consistent with the highest ideals of the legal profession."

"Profession demands of its members the highest degree of professional competence, ethics and morality."

"To promote ideals of honor and integrity that are germane to the practice of law."

"To insure that there is no gap between the students' mores in the conduct of their work at the Law School and that standard of integrity expected of future members of the bar."

"To develop in the students a full appreciation of, and conformity to, the high degree of honor and integrity that characterizes the legal profession."

And the aim of protecting the honor of the legal profession was perhaps best expressed by this statement: "The law school trains for a profession not only learned but honorable, in whose members the utmost faith and confidence can be reposed. Adhering to professional standards is an obligation which begins in law school...."
law school the students attend. Therefore, another reason a law school and its faculty should be interested in clearly explaining plagiarism to its students is the school’s concern for protecting its own academic reputation.

Finally, this problem threatens not only the law school's reputation but also those of individual faculty members. Researching faculty often have students to assist them. Seminar paper assignments are often made in faculty members’ research interest areas. These papers may be used as a basis for a faculty-written product. A faculty member may co-author an article with a law student. In each of these cases, plagiarism by a student raises not only the question of embarrassment but also the question of copyright infringement. Properly educating law students about plagiarism will reduce the likelihood of its effect on the profession, the law school, and the faculty member.

IV. THE PLAGIARISM POLICY SURVEY

Most law schools have recognized that plagiarism should be identified to the law students as a type of misconduct for which disciplinary sanctions may be imposed. Many law schools have attempted to define plagiarism, but most of these definitions are inadequate. Concern has been expressed “as to whether students adequately understand the institution’s definition of plagiarism.” An insightful statement of the problem was made

16. See Mawdsley, supra, note 1, at 2. The question of copyright infringement and the issues of liability, both institutional and individual, are noted here but not delved into further.

17. A plagiarism policy should include not only the clear definition and explanation of plagiarism, but also the consequences of committing plagiarism. Indeed, one respondent to the Survey noted that while plagiarism was not defined in that law school's policy (merely listed as an offense), the consequences were listed. The focus of this Article and the report of the Survey will be on the definition of plagiarism because the definition is where the deficiency usually is.

Typically, the sanctions listed are for any violation of an Honor Code, with plagiarism being just one of the possible infractions. One responding school had sanctions listed with its statement on plagiarism. In the Codes returned with the questionnaire the most frequent sanctions listed ranged from oral reprimand to temporary or permanent dismissal. Other sanctions include probation, failing the course, reduction of grade, dismissal from office, report to State Bar, unreimbursed public service work to law school, monetary assessment, warning, censure, loss of privileges and exclusion from activities, exclusion from areas of campus, restitution, revocation of degree, loss of services (e.g. computer), withdrawal of credit in a course, retake exam or repeat work.

18. Mawdsley, supra, note 1, at 2. Indeed Mawdsley questions “whether all faculty members at the same school have fairly consistent understanding of what constitutes plagiarism.” Id.
by Charles A. Marvin, Associate Dean at Georgia State University College of Law:

"Although plagiarism is prohibited under the Code of Student Conduct of the Georgia State University College of Law, the definition of plagiarism therein is skeletal and the interpretation and application of the term have been sources of great frustration in practice, particularly with regard to legal research papers. Some students have never done serious research papers at the secondary school or undergraduate school level, and do not have a clue as to what conduct would amount to plagiarism aside from the non-cited lifting of entire texts or units of texts.

Problems in establishing and implementing plagiarism policy would appear in our experience to be chronic on the law school scene.\textsuperscript{19} Defining plagiarism, however, is more easily said than done.\textsuperscript{20} The results of the Cumberland Plagiarism Policy Survey confirm the difficulty of constructing a clearly defined plagiarism policy. The results of the Survey reported here derive from an analysis of eighty-six responses\textsuperscript{21} to 169 questionnaires.\textsuperscript{22} The inquiries were addressed to Directors of Legal Writing at the ABA approved law schools. However, in addition to the thirty-nine Directors of Legal Writing responding there were twenty-nine associate or assistant deans, thirteen professors, two registrars, one Library Director, and, in one case, a student, the Chief Justice of the Honor Court.\textsuperscript{23}

The Survey questionnaire contained three possible basic categories for plagiarism policies: (1) clearly defined and explained, either for the entire school or a particular class;\textsuperscript{24} (2) not clearly

\begin{footnotesize}
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\begin{enumerate}
\item \textsuperscript{19} Letter from Associate Dean Charles A. Marvin of the Georgia State University College of Law to Professor Patsy W. Thomley, Cumberland School of Law, Samford University (March 16, 1988).
\item \textsuperscript{20} "Satisfactory definitions and explanations, however, have proved to be more elusive in practice than one might have imagined." Comment by Survey respondent Judith Leonie Miller, Legal Writing, Reasoning, & Research instructor at Lewis and Clark College, Northwestern School of Law.
\item \textsuperscript{21} Actually 87 return envelopes were received but one of those was empty. Because three others did not include examples of a plagiarism policy, they were not categorized, but they were considered in the statistics relating to respondents' perception of their category.
\item \textsuperscript{22} See supra note 8 for reproduction of questionnaire.
\item \textsuperscript{23} One respondent did not furnish a title or position.
\item \textsuperscript{24} See supra note 8, Survey questions 2 and 7.
\end{enumerate}
\end{footnotesize}
defined, and (3) no plagiarism policy. No guidelines for determining whether plagiarism was clearly defined were provided. The omission of guidelines was deliberate because the perception of the respondent was of interest. The Survey results indicate that the perception of a plagiarism policy as being clearly defined depends on the reader's understanding of plagiarism. The reader's clear understanding of plagiarism seemed to make the most skeletal of definitions clear to him. Forty-five respondents indicated that plagiarism policies at their schools were clearly defined and explained, while thirty-five indicated that their school's policies were unclear. Six law schools responded that they had no plagiarism policy. Most of the respondents provided copies of their policies. The policies were studied and then recategorized according to specific guidelines. That recategorization, which yielded five major categories, will be discussed below along with representative examples of each of the categories. For reference purposes, the categories are labeled "No," "Word," "Dictionary," "Dictionary Plus," and "Good."

A. The "No" Plagiarism Policy Schools

Six of the law schools responding to the Survey indicated that they have no policy on plagiarism. The lack of a written or formal statement on plagiarism does not imply a lack of concern. One of the "No" respondents added the assurance, "We are opposed to plagiarism." Another noted that "[t]here is an implicit assumption that plagiarism is wrong ...."

25. See id. question 4.
26. See id. question 6.
27. Three did not.
28. The guidelines are given as the categories are discussed below.
29. Plagiarism Policy Categories

<table>
<thead>
<tr>
<th>Category</th>
<th>Number of Responding Law Schools in Category</th>
<th>Perceived Clear?</th>
</tr>
</thead>
<tbody>
<tr>
<td>&quot;No&quot;</td>
<td>6</td>
<td>N/A</td>
</tr>
<tr>
<td>&quot;Word&quot;</td>
<td>7</td>
<td>0</td>
</tr>
<tr>
<td>&quot;Dictionary&quot;</td>
<td>48</td>
<td>1</td>
</tr>
<tr>
<td>- Straightforward</td>
<td>2</td>
<td>18</td>
</tr>
<tr>
<td>- Paraphrased or Nutshell</td>
<td>21</td>
<td>16</td>
</tr>
<tr>
<td>- Emphasis Tacked On</td>
<td>25</td>
<td>5</td>
</tr>
<tr>
<td>&quot;Dictionary Plus&quot;</td>
<td>17</td>
<td></td>
</tr>
<tr>
<td>&quot;Good&quot;</td>
<td>5</td>
<td></td>
</tr>
</tbody>
</table>
Still another included a fine statement on paper writing which that law school evidently distributes to its students. On the front page is the dean's note to the students that the statement does not have "official" status because it has not been approved by the faculty. However, the dean goes on to express agreement with the discussion in the statement and stresses the gravity of plagiarism.

B. The "Word" Plagiarism Policy Schools

Seven responding law schools merely name plagiarism as an offense without defining it. These schools were placed in what has been labeled the "Word" category. Not surprisingly, each of the seven schools in the "Word" category responded that its plagiarism policy was unclear.

C. The "Dictionary" Plagiarism Policy Schools

The largest category, made up of forty-eight responding schools, is the "Dictionary" category. A "Dictionary" plagiarism policy is "a brief declarative summary statement of varying lengths defining plagiarism in dictionary fashion." Webster defines the word "plagiarize" as "to steal and pass off (the ideas or words of another) without crediting the source." Implicit in this definition is that the use of ideas, or words of another with proper attribution is not plagiarism. One might assume that a dictionary's definition of "to plagiarize" would alert a reader to all elements of the offense. However, all of

30. The individual schools from which the following representative statements are taken will not be identified because the statements are offered as examples of how that class of schools define plagiarism.

1. "Examples of such prohibited conduct include ... Plagiarism...."
2. "A student shall not knowingly: ... plagiarize ...."
3. "Conduct subject to sanction: ... Plagiarism ...."

A single variation included in this category is:
4. "All scholastic dishonesty is forbidden."

31. See supra note 8, Survey question 4.
32. Mawdsley, supra, note 1, at 3. Identifying this type as "the most basic explanation" of plagiarism, Mawdsley points out that "[t]he adequacy of such definitions ... depends upon agreement in the minds of everyone who reads them. Because such agreement is not possible, more exhaustive explanations are necessary." Id.
33. WEBSTER'S NEW COLLEGIATE DICTIONARY 877 (1973).
34. See Comment, Plagiarism, supra note 9, at 234-35.
the elements of plagiarism are neither explicit nor implicit in a
dictionary's definition.\footnote{See \textit{id.} at 235-38 for discussion of intent and paraphrasing as "common misconceptions" about plagiarism.} Examples of some of the components of
plagiarism missing from a dictionary definition are the following:

1. Intent is not a requirement of plagiarism.
2. Paraphrasing may be plagiarism.
3. A writing is not necessary for plagiarism.

Some law schools have recognized these deficiencies in the
dictionary definition of plagiarism and have tried to compensate
for them with varying degrees of success. These efforts will be
noted in the examples below.

An example of the "Dictionary" plagiarism policy is a straight-
forward statement such as:

Plagiarism is not tolerated.... "Plagiarize" should be given its
usual dictionary meanings: to steal and pass off (the ideas or
words of another) as one's own; to use (a created production)
without crediting the source or to commit literary theft, pre-
senting as new and original an idea or product derived from an
existing source.

A variation in the "Dictionary" category is produced when the
definition of plagiarism is put in a nutshell or paraphrased.
Some such definitions avoid even using the word "plagiarism."
Twenty-one law schools have adopted such statements. The
resulting statement is often more unclear than the straightforward
example above. A prime example is Cumberland's\footnote{Cumberland was not counted in the statistics which are provided herein. The recognition that Cumberland's plagiarism statement was not clearly defined and explained provided part of the impetus for the Survey. Counting Cumberland raises the total schools in the "Dictionary" category to 49.} own:

"Work submitted in any Law School matter must be the result
of one's individual efforts or noted otherwise.\footnote{Cumberland School of Law Bulletin 1986-87 at 18. Other statements representative of this variety of the "Dictionary" statements are: 1. "Knowingly representing work of others as one's own." (Respondent judged this statement as clearly defined.) 2. "To submit as one's own work the work of another." (Respondent judged this statement as not clearly defined.) 3. "Representing another's work, words, or ideas as one's own in any written assignment...." (Respondent judged this statement as clearly defined.) 4. "Offenses are ... [plagiarism, in connection with any project for which academic or extracurricular recognition may be given, with the intention of repre-}
Most of the respondents in this category recognized that the rules derived from a nutshell or paraphrased definition were vague. Seventeen of the twenty-one schools so indicated.

A second variation emerged in the “Dictionary” category. This variation included a statement of emphasis or elaboration added on to the straightforward or paraphrased definition of plagiarism. The element of plagiarism most frequently emphasized was the “giving credit to” element. These schools seemed to need to make explicit what the definition of plagiarism implies: that the use of ideas, words, or the like of another with proper attribution is not plagiarism. In the statement typical of this variation the emphasis or elaboration was added without regard to whether the word “plagiarism” was used.

Note that statement number one and statement number four refer to the intent of the writer. While intent is not required for the offense of plagiarism as defined in a dictionary, these statements make intent necessary.

Some examples from this category follow:

1. “If you substantially adopt the language of any source, you must provide a citation crediting the source referenced. It is not permissible to submit the work of any other person as your own.” (Respondent judged this statement as not clearly defined.)

2. “Prohibited Conduct ... Appropriating passages or ideas of another, in any formal written work, without proper use of quotation marks, citations or other explanatory language.” (Respondent judged this statement as clearly defined.)

3. “Plagiarism. A student shall not represent the work of another as his or her own, or use a passage or idea from the written work of another without proper quotation marks, citation, or other explanatory insert.” (Respondent judged this statement as clearly defined.)

4. “Plagiarism is defined as the intentional, negligent, or careless act of incorporating into one’s own work the work of another without indicating the source. Not-indicating the source is appropriate only when incorporating an idea which is common knowledge.” (Respondent judged this statement as clearly defined.)

5. A student may not incorporate into work the student offers for credit passage taken either word for word or in substance from work of another person unless the student credits the original author’s work with quotation marks and footnotes or with an appropriate written explanation. ... A student may not offer for credit as the student’s work any work prepared by another person. (Respondent judged this statement as clearly defined.)

An example of other statements of elaboration is:

6. Plagiarism, according to Webster’s New Collegiate Dictionary is “[the] stealing and passing off (of) the ideas or words of another as one’s own,” or the “use (of) a created production without crediting the source.” Note well that this provision applies to materials both published and unpublished, including the work of your fellow students. (Respondent judged this statement as clearly defined.)

Note that statement number four incorporates a position on intent as an element of plagiarism.
More respondents whose statements were of this elaborated variety of "Dictionary" statement considered their statements more clearly defined than not. Twenty-five schools had elaborated "Dictionary" plagiarism statements. Of the twenty-five respondents, eighteen, or almost three-fourths, judged their statements to be clear ones. The effect of the elaboration or added emphasis seems to be that the definition is perceived to be a clear one. However, analysis of the statements in both variations of "Dictionary" plagiarism statements shows little difference in the substance of the statements.

D. The "Dictionary Plus" Plagiarism Policy Schools

Seventeen law schools, or twenty percent of those responding, were placed in the "Dictionary Plus" category. A "Dictionary Plus" plagiarism policy is one that defines plagiarism in one of the "Dictionary" variations and then adds a description of the elements of plagiarism, positive statements about how to keep from plagiarizing, or a combination of description and positive statement. The better plagiarism statements in this class used the combination approach. Examples of the three possibilities follow.

1. An Example of "Definition Plus Description":

   Plagiarism is a major form of academic dishonesty involving the presentation of the work of another as one's own. Plagiarism includes but is not limited to the following:

   The direct copying of a written source, whether published or unpublished, in whole or in part, without proper acknowledgment that it is someone else's.

   Copying of a written source in whole or in part with minor changes in wording or syntax even with acknowledgments.

   The paraphrasing of another's work or ideas without proper acknowledgment.

   Submitting as one's own work a report, examination, paper or other assignment which has been prepared by someone else. This includes research papers purchased from any other person or agency.

   Submitting as one's own work the contents of a computer file prepared by another person.

2. An Example of "Definition Plus Positive Statements":

   Plagiarism is the use of words or ideas of another person without giving the appropriate credit....
To avoid plagiarism, always cite to the source of quotations, paraphrased material, and ideas. Quotations: Any significant group of words from a source, whether published or unpublished, must be placed in quotation marks, or blocked in the case of a long quotation. The quotation is usually preceded or followed in the text by a phrase identifying the author of the quote. Always cite to the source by a textual citation in a brief or memorandum, or by a footnote in a case note or other essay. A significant group of words could be as few as two or three in some circumstances. Paraphrasing: Any paraphrased material must be cited to the source and must usually be preceded or followed by a phrase identifying the source. To avoid plagiarism, either paraphrase completely or use quotation marks on pieces of unaltered source language. Ideas: Any ideas from a source must be cited to the source and also must usually be preceded or followed by a phrase identifying the source of authority.

Guard against inadvertent plagiarism by careful notetaking. Remember that citations serve the dual purpose of identifying legal authority and giving credit for language or ideas derived from cases and other authorities. When in doubt, cite to the source.

3. An Example of “Definition Plus a Combination of Description And Positive Statements”:

Plagiarism

All academic work, written or otherwise, submitted by a student to his instructor or other academic supervisor, is expected to be the result of his own thought, research, or self-expression. In any case in which a student feels unsure about a question of plagiarism involving his work, he is obligated to consult his instructor on the matter before submitting it.

When a student submits work purporting to be his own, but which in any way borrows ideas, organization, wording or anything else from another source without appropriate acknowledgment of the fact, the student is guilty of plagiarism.

Plagiarism includes reproducing someone else’s work, whether it be published article, chapter of a book, a paper from a friend or some file or whatever. Plagiarism also includes the practice of employing or allowing another person to alter or revise the work which a student submits as his own, whoever that person may be. Students may discuss assignments among themselves or with an instructor or tutor, but when the actual work is done, it must be done by the student, and the student alone.

When a student’s assignment involves research in outside sources or information, he must carefully acknowledge exactly
what, where and how he has employed them. If he uses the words of someone else, he must put quotation marks around the passage in question and add in appropriate indication of its origin. Making simple changes while leaving the organization, content and phrasing intact is plagiaristic. However, nothing in these Rules shall apply to those ideas which are so generally and freely circulated as to be a part of the public domain.

The policy statements in the “Dictionary Plus” category, as the above examples illustrate, give a student a better explanation of plagiarism than those statements in the previously examined categories. While the statement used as an example of “definition plus description” above was judged by the respondent to be unclear, sixteen of the seventeen “Dictionary Plus” respondents judged their own statements to be clearly defined and explained.

The “Dictionary Plus” policy statements are more fully developed than the more briefly stated ones previously examined. Because they are more fully developed and, therefore, longer, many in this category included elements of plagiarism and issues related to plagiarism omitted from the shorter versions. Notice in the examples above that using the ideas of another without crediting the source is prohibited. While most of the statements discuss plagiarism in the context of written work, a few refer to plagiarism in oral expressions. Some of the statements speak to the “term papers for sale” problem. Example one above refers to “papers purchased” and example three refers to “employing” another. Some schools have eliminated inadvertent plagiarism by inserting an element of intent such as “knowingly” or “intentionally,” into the policy. Many of the schools have tailored the definition of plagiarism to fit their own requirements. For example, many of the schools have confined plagiarism to “work done for credit.” Others have categorized incorrect or improper attribution as plagiarism.

A “Dictionary Plus” plagiarism statement generally provides a clearer explanation. The schools with such statements could go all the way to clear definition and explanation by adding examples and explanatory comment.

E. The “Good” Plagiarism Policy Schools

Of the eighty-six schools responding to the Survey, five were placed in the “Good” category. The five respondents were unan-
imous in judging their statements to be clearly defined and explained. The five statements ranged from being clearly defined to being clearly defined and explained. A clearly defined plagiarism policy statement sets out examples of the offenses that are plagiarism or examples demonstrating proper attribution. A statement that is clearly defined and also explained is one that provides comments to the examples explaining why plagiarism has occurred.\textsuperscript{39}

The five law schools placed in the “Good” category include University of Bridgeport School of Law, Campbell University School of Law, Creighton University School of Law, University of Florida Law School, and University of Virginia School of Law.\textsuperscript{40} The “Good” statements will not be reproduced here. A clearly defined and explained plagiarism policy statement is set out in Part V of this Article and recommended for the reader’s consideration. Some observations about the five “Good” schools follow.

The Campbell University School of Law Statement is clearly defined but not explained. The statement provides brief descriptive examples of plagiarism.

The Creighton University School of Law statement is also clearly defined but not explained. The statement gives two examples showing proper attribution and the description of plagiarism but no examples of plagiarism.

The University of Bridgeport School of Law provides its students with a clearly defined and explained statement on plagiarism. The statement, which contains definitions, descriptions, examples, and comments explaining the examples, is part of a handout distributed to students in the Communications Skills Institute at the beginning of Fall semester.

The plagiarism statements from the University of Florida Law School and the University of Virginia School of Law are both excellent. Each is clearly defined and explained, containing

\textsuperscript{39} See Mawdsley, supra, note 1, at 4. Mawdsley notes the advantages of this type of plagiarism policy statement: “The school has not only clarified its dictionary-type definition of plagiarism and given better notice of school expectations but it has also demonstrated an attitude of willingness to perform an education service that goes beyond course content.” \textit{Id.}

\textsuperscript{40} The names of the schools in the “Good” category are provided since each is commented on individually and not in a representative fashion.
examples and explanatory comments. Law students studying these statements should be fully aware of what acts constitute plagiarism and how to avoid it. The Florida statement was developed by the Director of Legal Research and Writing for that program, who stated that "[s]ince the course is required, it is intended to clarify plagiarism for the school." Virginia's statement is in the form of a truly excellent booklet on academic fraud and is distributed to the students.

V. RECOMMENDATION

The results of this informal Survey indicate that many law schools do not have clearly defined and explained plagiarism policies. Statements made by several Survey respondents indicate that there is a clear need for such policies. In some cases the schools were in the process of revising their Honor Codes and requested suggested policies. Others expressed interest in knowing how other schools handle the problem of defining and explaining plagiarism. Law schools wishing to adopt a written plagiarism policy and those revising existing policies can benefit from those of the above five schools in the "Good" category. Louis J. Sirico, Jr., Professor of Law at Villanova Law School, recently wrote "A Primer On Plagiarism." The primer is one example of a clearly defined and explained statement on plagiarism and can be considered as a model. Permission has been obtained to include it here.

PRIMER ON PLAGIARISM


Law school honor codes and disciplinary rules normally forbid submitting the work of another as one's own work in any academic pursuit, whether or not with the consent of the author of the work. Plagiarism violates this rule.

Types of Plagiarism.

1. quoting the words of another without attribution.

41. Information provided by Survey respondent Iris A. Burke who is Director of Legal Research & Writing at Florida and developer of the plagiarism statement.

42. The article was published in Second Draft Vol. 4, No. 1, May 1988, (Newsletter of the Legal Writing Institute). Professor Sirico is co-author of LEGAL WRITING AND ORAL ADVOCACY (Matthew Bender, to be published in 1989).
2. paraphrasing the words of another without attribution.
3. using the ideas of another without attribution.
The underlying rule is simple: Do not use the words or ideas of another and represent them as your own. Give credit where credit is due. Avoid plagiarism by including a citation to the source.

How Plagiarism Applies to Memos, Briefs, and Other Law School Projects.

1. Quotations. When you quote, give a citation to the source.
2. Paraphrasing. If you take another's sentence and change a few words, you still must give a citation. If you paraphrase, do not use quotations, but use a signal, usually see. There is a grey area between paraphrasing and putting something in your own words. You must decide whether or not a citation is necessary. Err on the side of caution. Usually you will want to include a citation, because a citation to authority increases the persuasiveness of what you are saying.
3. Original Ideas. Closely following the structure of another person's written work falls into this category. For example, taking a few pages from a law review article or treatise and rewriting them in your own words constitutes plagiarism. Debatable cases arise when the structure of another's argument is not particularly original. Again, err on the side of giving credit. A citation increases persuasiveness.
4. Legal Work Outside Law School. There, the rules are much looser with regard to paraphrasing and using original ideas. Nonetheless, ignoring one's resources or relying on them too heavily may evidence poor lawyering. In law school, writing legal documents is an academic endeavor, and students must give attribution to sources.
5. A Sense of Proportion. You need not place a citation after every sentence you write. Excessive cites are unattractive and break the flow of the sentences and your argument. They also suggest that you have avoided thinking and instead have pasted together the words of others. This sort of cut-and-paste product rarely is effective. In deciding when to cite, use your common sense. If you have questions, ask them before your deadline for submission. Avoid putting yourself and others in an embarrassing position.
Illustration

The left hand column is an excerpt from a fictitious law review article. The right hand column is a plagiarized version.

The classic cases on the law of lost and found property are worthless guides for a principled court. Authorities frequently cite Armorie v. Delamirie as the major finder's case. The case, however, is about the rights of a finder against those of a subsequent possessor who wrongfully converted the property. The court's brief discussion of the comparative rights of the finder and true owner is dictum. The case really is about the rights of a finder against those of a subsequent possessor who wrongfully converted the property. South Staffordshire Water Company v. Sharman concerns workers who found gold rings on their employer's property. Though the court could have rested its opinion on an uncontroversial rule—employees who, in the course of their employment, find personal property act on behalf of their employers—it chose to rely on a rule that is accurate only as a generality—the owner of a locus in quo presumptively possesses items on the land—when it could have relied on an uncontroversial rule—employees who find things in the course of their employers. In reaching its holding, the court entirely misread Bridges v. Hawkesworth, another traditional case. In Hannah v. Peel, the court offered a thorough discussion of the law and then ignored it to reach a curious result.
Comment On The Illustration

The first two sentences in the right-hand column are the clearest examples of plagiarism. The writer copied them verbatim without quotation marks and without citation. The next two sentences are virtually verbatim, but in reverse order, perhaps to mislead the reader who is familiar with the original article. In the remaining sentences, the writer has rearranged parts of sentences and changed a few words here and there. Throughout, the writer has employed the organizational structure and substantive ideas of another without giving credit.

By failing to give proper attribution, the writer has reduced the persuasiveness of the argument. Citations to the article would have demonstrated that a published authority shared the writer's view and thus made the argument stronger.

VI. A Final Note

Professor Sirico's example does an effective job of demonstrating the more blatant forms of plagiarism. In a more complete and comprehensive plagiarism policy, other practices, ones which are recommended as well as those which are prohibited, should also be demonstrated. For example, proper use of direct quotations should be demonstrated with examples and commented upon. Examples of improperly attributed paraphrases of ideas should also be included with appropriate comments. In short, all elements that are considered an offense under the heading of "plagiarism" should be explained by giving an illustration with comments. In providing law students with such clear plagiarism policies, law schools will more effectively protect the integrity of the legal profession.
HAZELWOOD V. KUHLMEIER: SOUND
CONSTITUTIONAL LAW, UNSOUND PEDAGOGY

W. Wat Hopkins

While the ruling by the United States Supreme Court in January of 1988 that officials in public schools may censor publications produced by their students may have disappointed free speech advocates,¹ it should have come as no surprise. Hazelwood School Dist. v. Kuhlmeier² was the Court’s entry into the free speech rights of students who write and edit high school publications. The ruling was not the Court’s first foray into the first amendment rights of public school students, however. Since 1940³ the Court has been balancing the first amendment rights of students against the right of the state, through its local school boards, to operate efficient, effective schools. Even when the Court ruled against school boards, it was laying the groundwork for Hazelwood’s denial to students of full free expression rights.

The Hazelwood ruling, then, was grounded in solid precedent. The opinion, however, is a paradox: While legally sound, it is philosophically flawed and promotes a stilted view of public education. The Court has legitimized censorship as a pedagogically sound method of teaching high school journalism. Instead, the Court should recognize that while editing is an acceptable teaching tool, prior restraint is not.

I. BACKGROUND

While the Court had faced the free press issue on the university level,⁴ Hazelwood was the first case in which the Court examined

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the free press rights of journalists in elementary or secondary public schools. It is only the fourth opinion involving the free expression, as opposed to free press, rights of such students. The previous cases are dissimilar. Two involved state-mandated flag salutes; one involved personal opinions expressed at school; and one involved a speech at a school-sponsored assembly. A fifth case is tangentially related to student expression rights; it involved removing books from a public school library.

The Court ruled in 1940 in Minersville School District v. Gobitis that a mandatory flag salute was constitutional, but Justice Felix Frankfurter's opinion for the 8-1 Court was based more on the importance of cohesiveness than on First Amendment expression rights. The opinion was followed almost immediately with a wave of persecution against Jehovah's Witnesses, who had protested that the flag salute required them to violate the command to worship only God and to make no "graven image" before Him. Soon justices who had joined Frankfurter were indicating that the decision may have been wrongly decided.

The Court so ruled three years later in Board of Education v. Barnette, focusing on free expression rights. Following the Gobitis ruling, West Virginia passed a law requiring all students to salute the flag and make the Pledge of Allegiance. Jehovah's Witnesses brought suit in district court asking an injunction to restrain enforcement of the law against the Witnesses, on the same grounds argued in Gobitis. A three-judge district court restrained enforcement, and the West Virginia Board of Education appealed directly to the Supreme Court.

The Court found that a flag salute is "a form of utterance."

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11. Id. at 12.
12. Id. at 13.
14. See, e.g., id. at 632-34, 642.
15. Id. at 625-629.
16. Id. at 630.
17. Id. at 632.
HAZELWOOD v. KUHLMEIER

that was a "compulsion of students to declare a belief," and that the compulsion was unconstitutional. "The freedom asserted by these appellees," the Court wrote, "does not bring them into collision with rights asserted by any other individual. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of individuals." Censorship, the Court noted, can be tolerated only when there is "a clear and present danger of action that the state could prevent and punish." An involuntary affirmation, therefore, can be commanded

only on even more immediate and urgent grounds than silence .... To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.

Such a compulsion would allow students to "discount important principles of our government as mere platitudes." The Court concluded:

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 work or act their faith therein. If there are any circumstances which permit an exception, they do not occur to us.

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

The Court did not directly address the free expression rights of students until twenty-six years later when it issued its

18. Id. at 631.
19. Id. at 630.
20. Id. at 633.
21. Id. at 633-634.
22. Id. at 637.
23. Id. at 642.
landmark opinion in *Tinker v. Des Moines School District.*

*Tinker* began when three students were suspended from school because they wore black armbands to school in violation of policy. In December 1965, a group of adults and students in Des Moines had decided to wear the armbands through the holidays to demonstrate their objections to the Vietnam War and their support for a truce. School officials learned of the plan and adopted a policy of suspension for any student who did not remove the armband when asked. John Tinker, 15; Mary Beth Tinker, 13; and Christopher Eckhardt, 16, were suspended for violating the newly implemented policy. The students' parents brought suit.

The district court dismissed the complaint, upholding the constitutionality of the school authorities' action on grounds that it was reasonable to maintain school discipline. The *en banc* Eighth Circuit Court was equally divided on the case, and the district court ruling, therefore, was affirmed without opinion.

The Supreme Court, however, found that students have the first amendment right to express their personal opinions while at school. The Court noted that school officials have the "comprehensive authority . . . to prescribe and control conduct in the schools . . . [but] . . . our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities." The Court decided that the case was not related to a dress code or to aggressive or disruptive action. Instead, it involved "direct, primary First Amendment rights akin to 'pure speech.'" School officials may have been justified in their fears that the armbands would cause a disturbance, and, indeed, they could have taken action if they could show that the speech would have "materially and substantially" interfered with school operations or if it collided with the rights of others. The Court ruled:

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26. Id. at 504.
27. Id. at 504-5.
28. Id. at 505.
29. Id. at 512-13.
30. Id. at 507.
31. Id. at 507-08.
32. Id. at 508.
33. Id. at 512-13.
[Undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression ....] Our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, open, disputatious, society.  

The Court found that the action of the school board was apparently based upon a desire to avoid controversy. Other symbolic forms of political expression were allowed, and the armbands were singled out. State-operated schools, the Court held, "may not be enclaves of totalitarianism," and students are persons under the Constitution who have fundamental rights. They do not shed those rights at the schoolhouse gate.

Justice Stewart concurred and wrote separately to emphasize that the rights of school children are not co-extensive with those of adults.

There were two dissents. Justice Hugo Black argued that the school officials had the right to ban the armbands, particularly since the armbands distracted attention from regular lessons. Justice John Marshall Harlan would require the complainants in such cases to show that a measure adopted by school authorities was motivated by other than legitimate school concerns.

The next opportunity the Court had to examine the first amendment rights of public school students was in Bethel School District v. Fraser. The Court made a distinction between personal opinions expressed at school—as in Tinker—and speech that was part of a school-sponsored program. In the latter case, the Court held school officials may exercise more control.

The case began when Matthew Fraser delivered a nominating speech for a fellow student at an assembly at Bethel High School in Bethel, Washington. In the speech, Fraser "referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor." He had been advised by two teachers not to deliver

34. Id. at 508-09.
35. Id. at 511.
36. Id. at 506.
37. Id. at 514-15.
38. Id. at 523-24.
39. Id. at 518, 524.
40. Id. at 526.
42. Id. at 677-78.
the speech. Fraser delivered the speech unchanged and was suspended for three days under a school rule prohibiting obscene profane language or gestures. He appealed through the school district grievance procedure, and, when his appeal was denied, brought suit. The district court held that the rule was overbroad, and the Ninth Circuit Court affirmed.44

The Supreme Court, however, overturned the ruling. The Court found a “marked distinction” between the political message of the armbands in Tinker and the sexual content of the speech in Bethel.45 Offensive speech may be controlled under the first amendment, the Court noted,46 and “it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.”47 The Court also noted that it had previously recognized an interest in protecting minors from exposure to vulgar and offensive language48 and concluded:

The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent’s would undermine the school’s basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students.49

Justice Brennan concurred in the judgment, noting that school officials were only ensuring that the assembly proceed in an orderly manner.50 The case did not involve censorship of views with which the officials disagreed or a ban on inappropriate written materials, but only with disruptive language.51

Finally, the Court recognized that students have a first amendment right to receive information in Board of Education v. Pico.52 The case did not directly involve student expression, but it did involve the removal of books by the board of education from school libraries.53

43. Id. at 678.
44. Id. at 679.
45. Id. at 680.
46. Id. at 681-82.
47. Id. at 683.
48. Id. at 694 (citing FCC v. Pacifica Found., 438 U.S 726 (1978)).
49. Id. at 685.
50. Id. at 687-88, (Brennan, J., concurring).
51. Id. at 689, (Brennan, J., concurring).
53. Id. at 858-58.
For the Majority, Justice Brennan noted that school officials may claim "absolute discretion in matters of curriculum by reliance upon their duty to inculcate community values," and school boards have "a legitimate role to play in the determination of school library content." That role, however, is limited, Brennan wrote, and the Constitution "does not permit the official suppression of ideas." Whether the removal of books from school libraries is constitutional depends upon the motivation of the school officials. He concluded: "We hold that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."

II. HAZELWOOD v. KUHLMEIER

In May 1983, the principal of Hazelwood East High School in St. Louis unilaterally cut two pages from an issue of The Spectrum, the school's student-produced newspaper. Reynolds objected to two articles. The first described three students' experiences with pregnancies. While the students were not identified in the article, Reynolds believed they would be recognized, apparently because of the low number of pregnant students in the school. He also believed references to sexual activity and birth control would be inappropriate for younger students at the school. The second article discussed the impact of divorce on students. One student, who harshly criticized her parents, was identified by name, and Reynolds believed the student's parents should have been given the opportunity to respond. Though Reynolds objected only to these two articles, he apparently believed that his only option was to remove the two pages on which the articles appeared, making the paper a four-page rather than a six-page edition, or to publish no paper at all.

Review of The Spectrum by the principal was routine at Hazelwood East. The newspaper was produced by the Journalism

54. Id. at 869.
55. Id.
56. Id. at 871.
57. Id. at 872 (quoting West Virginia Bd. of Educ. v. Barnette, 319 U.S. at 642).
59. Id. at 566.
II class and was published about every three weeks. More than 4,500 copies were produced and distributed to the community as well as to students. About one-fourth of the production cost of the paper was raised through advertising. The remainder was paid by the school system.60

Suit was filed by some of the student journalists seeking injunctive relief and damages. The district court ruled there was no first amendment violation.61 The court found that school officials may impose restraints on speech activities that are "an integral part of the school's educational function," including the publication of a newspaper produced by a journalism class, so long as the decision has "a substantial and reasonable basis."62

The Eighth Circuit Court of Appeals reversed, finding that, in addition to being "a part of the school adopted curriculum," the school paper was a public forum because it was "intended to be and operated as a conduit for student viewpoint."63 Therefore, the circuit court held that under Tinker the paper could be censored only when necessary to avoid material and substantial interference with school work, discipline, or the rights of others.64 There was no evidence that the principal could forecast a danger of interference with school work, and there was no evidence that tort liability would result from the publication. Therefore, the court held that the first amendment rights of the students were violated.65

The Supreme Court disagreed. Writing for five members of the Court,66 Justice Byron White began his opinion by restating the oft-quoted portion of Tinker. Students, he wrote, "do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate'" and cannot be punished for "expressing their personal views on the school premises" unless officials believe such expression will substantially interfere with the work of the school or impinge upon the rights of others.67

60. Id. at 565.
61. Id. at 566.
63. Id. at 567 (quoting Kuhlmeier v. Hazelwood School Dist., 795 F.2d 1368, 1372-1373 (8th Cir. 1986)).
64. Id.
65. Id.
66. There were three dissenting votes, see id. at 573; when the opinion was delivered Justice Kennedy had not joined the Court, so the Court consisted of eight justices.
67. Id. at 567 (quoting Tinker v. Des Moines School Dist., 393 U.S. at 506).
But, White continued, quoting Fraser, the first amendment rights of students "are not automatically coextensive with the rights of adults in other settings .... A school need not tolerate student speech that is inconsistent with its 'basic educational mission,'" even though the government couldn't censor similar speech outside the school. The determination of what speech is appropriate in school settings, he noted, rests with school officials rather than with federal judges.

The Court ruled that the student newspaper was not a public forum and, indeed, was an integral part of the curriculum. The paper was published during class time, and students received academic credit. The Journalism II teacher exercised great control over the paper. In addition, school board policy indicated that school officials "retained ultimate control over what constituted 'responsible journalism' in a school-sponsored newspaper." The policy does not intend to expand the first amendment rights of students by "converting a curricular newspaper into a public forum." The newspaper was published "as a supervised learning experience," the Court held, and, therefore, "school officials were entitled to regulate the contents of Spectrum in any reasonable manner .... It is this standard, rather than our decision in Tinker, that governs this case." The distinction between the cases, the Court noted, is that Tinker allows the expression of individual opinions at school; Hazelwood addresses whether schools must affirmatively promote certain student speech.

The Court held that educators are entitled greater control over curricular activities—even if those activities are not in the traditional classroom—to ensure that "participants learn whatever lessons the activity is designed to teach" and that recipients are not exposed to inappropriate material.

Hence, a school may in its capacity as publisher of a school newspaper or producer of a school play "disassociate itself" not only from speech that would "substantially interfere with (its)
work ... or impinge upon the rights of others" ... but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences.\(^{76}\)

A school may, therefore, set standards higher than those of the "real world" and refuse to disseminate speech that does not meet those standards. And it may take into account the emotional maturity of its students in the discussion of sensitive topics, ranging from "the existence of Santa Claus in an elementary setting to the particulars of teenage sexual activity in a high school setting."\(^{77}\)

As a result, educators do not violate 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 .... It is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the First Amendment is so "directly and sharply implicated" as to require judicial intervention to protect students' constitutional rights.\(^{78}\)

Justice William Brennan, joined by Justices Thurgood Marshall and Harry Blackmun, wrote a biting dissent, arguing that the administration at Hazelwood East "breached its own promise" by censoring the newspaper.\(^{79}\) The balance between student expression and school control of student expression was struck in Tinker, Brennan wrote,\(^{80}\) and the majority is offering "an obscure tangle" of excuses for allowing educators more control over student expression.\(^{81}\)

Brennan agreed that educators may "censor" poor grammar, writing or research, but censorship like that practiced by the principal at Hazelwood East supports the notion that "the purpose of the school newspaper is to teach students that the press ought never report bad news, express unpopular views, or print a thought that might upset its sponsors."\(^{82}\) According to Brennan,

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76. Id.
77. Id.
78. Id. at 571 (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968)).
79. Id. at 573.
80. Id. at 575 (Brennan, J., dissenting).
81. Id. at 576 (Brennan, J., dissenting).
82. Id. (Brennan, J., dissenting).
the case demonstrates how school officials "can camouflage viewpoint discrimination" as the protection of students from sensitive topics.\textsuperscript{83} In his opinion the officials were practicing unconstitutional "thought control."\textsuperscript{84} Brennan concluded that the Court's decision "teaches youth to discount important principles of our government as mere platitudes."\textsuperscript{85}

III. THE HAZELWOOD OPINION IN LAW AND PRACTICE

A. The Constitutional Rationale

The legal rationale for the Hazelwood decision is woven throughout the Court's opinions in previous student expression cases. Beginning with Barnette, the first case in which the Court found in favor of students on first amendment grounds, and continuing through Fraser, the Court has never wavered from two guiding principles. First, the state, through its school boards, had absolute authority over curricular matters in public school systems. And, second, only when the first amendment rights of students are obviously violated should the courts become involved in the operations of the schools. In addition, the concept that student rights are not coextensive with the rights of adults, while not overtly expressed until later cases, has been implied through much of the Court's work in this area.

In Barnette, the Court was careful to note that the first amendment issues involved did not challenge the authority of the school board in curricular matters. The mandate for schools in West Virginia to "prescribe the courses of study" implemented "for the purpose of teaching, fostering and perpetuating the ideals, principles and spirit of Americanism, and increasing the knowledge of the organization and machinery of the government"\textsuperscript{86} was not challenged by the refusal of students to salute the flag. Indeed, the Court noted, school systems have the legitimate right to "require teaching by instruction and study of all in our history and in the structure and organization of our government, includ-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{83} Id. at 578 (Brennan, J., dissenting).
\item \textsuperscript{84} Id. at 577-78 (Brennan, J., dissenting).
\item \textsuperscript{85} Id. at 580 (Brennan, J., dissenting) (quoting West Virginia Bd. of Educ. v. Barnette 319 U.S. at 637).
\item \textsuperscript{86} Board of Educ. v. Barnette, 319 U.S. at 625-26.
\end{itemize}
\end{footnotesize}
ing the guaranties of civil liberty, which tend to inspire patriotism and love of country.” 87

Barnett, however, the Court ruled, did not involve teaching or instruction. Instead, it involved “a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means.” 88

The Court used language that was even more direct in Tinker. While upholding the rights of students to express opinions at school, the Court noted that school officials have “comprehensive authority ... to prescribe and control conduct in the schools,” 89 to the point of establishing dress codes 90 and stifling speech that might be aggressive and disruptive. 91

Again, however, the Court used clear language in narrowly drawing the boundaries of the issue involved. The speech protected in Tinker was the expression of personal opinions while at school; 92 it was not speech that was sponsored by the school, nor was it speech that was required as a part of school-sponsored activities. Implicit in Tinker was the notion that school officials had more authority over speech that was part of the curriculum or that was school-sponsored than it had over the expression of a student’s personal opinions. This notion became explicit in Bethel School District v. Fraser, 93 which foretold of what was to come in Hazelwood.

In Fraser, the Court noted that there was a difference between the political speech that was the subject of Tinker and the sexual message that was the subject of Fraser 94 and found that school officials could rightly regulate offensive speech. 95 The Court also recognized, however, the different settings of the speech in the two cases. Fraser made his speech as part of a school-sponsored program that most students in the school attended, 96 giving school officials, with their responsibility for the education of young people, more authority to control content.

87. Id. at 632 (quoting Minersville School Dist. v. Gobitis, 310 U.S. at 604).
88. Id.
89. Tinker v. Des Moines School Dist., 393 U.S. at 507.
90. Id.
91. Id. at 508, 512-13.
92. Id.
94. Id. at 680.
95. Id. at 683.
96. Id. at 680, 685.
Indeed, Fraser demonstrates in some detail the attitudes of members of the Court toward school officials. The purpose of the public school system, the Court noted, includes teaching fundamental values of “habits and manners of civility,” which must take into account the sensibilities of others in the school. “The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society’s countervailing interest in teaching students the boundaries of socially appropriate behavior.”

While an adult may have a right in certain settings to use offensive terms, students in public school do not necessarily have the same right. Therefore, the Court held, quoting a circuit court judge, “[T]he First Amendment gives a high school student the classroom right to wear Tinker’s armband, but not Cohen’s jacket.”

Just exactly what a student can wear, or say, in school may be determined by school officials: “The determination of what manner of speech in the classroom or in the school assembly is inappropriate properly rests with the school board.”

But the Court went further. School board controls do not apply just to the classroom—they apply to the entire school setting:

The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order .... The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.

Justices Blackmun and Brennan concurred in the outcome of the case. Brennan noted that the speech in question might have been allowed in school under different circumstances, but that

97. Id. at 681.
98. See Cohen v. California, 403 U.S. 15 (1971), in which the Supreme Court reviewed a California conviction for disturbing the peace where the defendant’s jacket proclaimed, “Fuck the Draft.” The Court decided that these words were not obscene and, therefore, the state could not punish Cohen.
99. See Bethel School Dist. v. Fraser, 478 U.S. at 682, where the Court wrote, “The constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”
100. Id. (quoting Thomas v. Board of Educ., 607 F.2d 1043, 1057 (2d Cir. 1979)) (Newman, J., concurring).
101. Id. at 683.
102. Id.
school officials were legitimate in their concerns that the speech was inappropriate for a school assembly.\textsuperscript{103} Officials were regulating the speech because they found it to be disruptive rather than because they disagreed with the views being expressed.\textsuperscript{104}

Justices Marshall and Stevens dissented. Marshall agreed with the principles stated in Brennan's concurrence, but dissented on grounds that the speech was not disruptive.\textsuperscript{105} Stevens agreed with the Majority that school officials can regulate student speech but argued that Fraser was not given fair notice of the possible consequences of his action.\textsuperscript{106}

The language in the Fraser opinion translated nicely into the language of the Hazelwood opinion. It was, after all, the school sponsorship of the student newspaper The Spectrum that allowed for its censorship. The Court ignored appellate court rulings that student newspapers operate as open forums for ideas\textsuperscript{107} and that university funding of student-operated newspapers does not grant to the university administration the right to control the content of the paper.\textsuperscript{108} Citing Fraser, the Court reiterated that the first amendment rights of students are not coextensive with the rights of adults; that a school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government couldn't censor the same speech outside the school; and that the determination of what types of speech are appropriate in the school setting shall most often be left to school officials.\textsuperscript{109}

Educators, the Court ruled, are entitled to greater control over matters directly related to the educational experience—whether in the classroom or out—in order “to assure that participants learn whatever lessons the activity is designed to teach” and that recipients are not exposed to inappropriate material.\textsuperscript{110} School officials may therefore act as publishers of the student-produced

\textsuperscript{103} Id. at 688-89 (Brennan, J., concurring).
\textsuperscript{104} Id. at 688 (Brennan, J., concurring).
\textsuperscript{105} Id. at 690 (Marshall, J., dissenting).
\textsuperscript{106} Id. at 691, 696 (Stevens, J., concurring).
\textsuperscript{107} See, e.g., Kuhlmeier v. Hazelwood School Dist., 795 F.2d 1368 (8th Cir. 1986); Gambiino v. Fairfax County School Bd., 564 F.2d 157 (4th Cir. 1977).
\textsuperscript{110} Id. at 570.
HAZELWOOD v. KUHLMEIER

newspaper and censor inappropriate material. Only when there is no valid educational purpose for the censorship may the courts intervene to protect the first amendment rights of students. The Court, in Hazelwood, first reestablished its longstanding holding that educators have absolute control over curricular matters. Then, the Court ruled that a student newspaper produced by a class is part of the school curriculum.

Based on those findings, the Court's ruling in Hazelwood tracks directly from previous Supreme Court rulings involving student expression. Only by breaking from longstanding findings on the role of educators in public schools could the Court have ruled against the school system in Hazelwood.

The problems with the Hazelwood ruling, therefore, come not from its constitutional precedent; they come from the Court's finding that the action of the censorship in the case was a legitimate pedagogical function. The finding is fatally flawed.

B. The Pedagogy of Hazelwood

A review of some of the facts of the case is necessary in light of the Court's finding that censorship by school officials is acceptable only when the censorship has a direct, valid educational function.

The new advisor of The Spectrum, Howard Emerson, dutifully delivered to Principal Reynolds the page proofs of the May 13 edition of the newspaper for Reynolds' approval. When Reynolds objected to two of the articles in the paper, he apparently believed he had one of two choices: He could halt publication of the newspaper, or he could remove the two pages on which the articles appeared, reducing the number of pages published from six to four. He decided to remove the two pages, without consultation with the students or the advisor.

The Court described Reynolds' action as a pedagogical lesson. Brennan, however, in his dissent, wondered how there can be a pedagogical lesson when the principal never consulted the students before the censorship. The lesson that was learned,

111. Id. at 571.
112. Id.
113. Id. at 565-66.
114. Id.
115. Id. at 576-77 (Brennan, J., dissenting).
therefore, Brennan noted, was that youth are to "discount important principles of our government as mere platitudes." 116

Brennan's point, which has generally been overlooked, might be the most important in the opinion. It demonstrates that while the school board in Hazelwood won the case, public education in general suffered a devastating defeat. The Hazelwood opinion pushes the job of educating about the first amendment and a free press out of the schools.

The decision, after all, gives the power of censorship to school officials, but only gives those officials censorship power over school-produced newspapers. They have no censorship power over underground newspapers. They may ban those newspapers from campus, of course, but such bans do not stop students from reading the papers. And the opinion leaves open the question of whether school officials may censor student newspapers that are extracurricular activities and receive no financial support from the school system.

To escape censorship, therefore, student journalists may eschew school sponsorship in favor of producing their own product. In such a case, the result would almost certainly be lower quality of high school journalism. The paper would be produced without a faculty member to encourage the students and to teach the essentials of good journalism: reporting and writing skills.

The purpose of high school journalism, however, is more than learning newsgathering, writing, and editing skills. It is also to learn of the role of the press in society; it is to teach responsibility as well as freedom.

Certainly, the students who produced The Spectrum should have been guided away from unfairly identifying pregnant students who did not want to be identified or unfairly publishing criticisms by a student of the student's divorced parents. To censor the stories, however, violated the very pedagogical rationale that the Court hoped to encourage in its decision. The ruling legitimizes censorship as a pedagogical tool, which it is not. Censorship teaches that the first amendment works only when school officials are willing for it to work. It also places off limits to student journalists the responsibility of learning the difference between good journalism and bad journalism, except

116. Id. at 580 (Brennan, J., dissenting).
The better path for Principal Reynolds to have taken would have led him back to the journalists, where he could have addressed his concerns and some resolution could have been reached. Had he taken such a path, he would have learned, for example, that the name of the student who criticized her divorced parents in print had been removed from the final version of the story, eliminating the identification problem in at least that instance.117

His path would have been pedagogically sound, and it would have taken into account the unique relationship between the school administration and the faculty advisor to the student newspaper, and between the advisor and the student journalists. It is a relationship that the Court should draw into clearer focus in future cases.

IV. Conclusion

Justice Brennan acknowledged that educators, under the *Tinker* ruling, may "censor" poor grammar, writing or research, because to reward such expression would materially disrupt the newspaper's curricular purpose.118 And the circuit court recognized that material may be "censored" if it were to cause tort liability,119 because, using the language of *Tinker* and Brennan's reasoning, a lawsuit would materially disrupt the operations of a school and its journalism class.

Brennan argues that censorship of speech that addresses sensitive topics is impermissible,120 but school officials see as part of their *in loco parentis* task the protection of young people from inappropriate material, and the Court has recognized that certain types of speech that might be appropriate for adults can be restricted from young people.121

117. *Id.* at 566.
118. *Id.* at 576 (Brennan, J., dissenting).
The problem, then, is how to balance freedom of student expression against the dissemination of material educators believe to be inappropriate. In achieving the balance, the Court recognized a relationship between the school system and student newspapers as that of publisher and publication. The state—through the school board—was seen as the publisher of the student newspaper. Since the primary function of the newspaper was as an educational tool rather than as a disseminator of ideas, the paper was not seen as a public forum.\textsuperscript{122}

As an educational tool, however, with a faculty member as advisor, the student newspaper can be pedagogically sound only if it is considered part of the press and, therefore, due first amendment protections. The appropriate syllogism is not that of school board as publisher, but is that of the advisor, with academic freedom, as publisher and the school board as part of the state. The faculty advisor, therefore, should have final authority over what is journalistically sound—grammatically, ethically, and legally. When the student newspaper, therefore, publishes material that is inappropriate, for the newspaper to be pedagogically sound, the students should take the responsibility for the errors in judgment. The faculty advisor has the responsibility for discouraging decisions that are journalistically unsound, particularly in cases of possible tort liability.

The Court has recognized the importance of academic freedom for teachers.\textsuperscript{123} And, in \textit{Hazelwood}, the Court noted that school board policies stating that publications would not be restricted "within the rules of responsible journalism" could be read granting school officials ultimate control over what constituted "responsible journalism."\textsuperscript{124} To leave decisions about "responsible journalism" to a member of the school board, however, would be as pedagogically sound as allowing that school board member to teach band, or math, or drama, or English without the proper training.

Under the Court's own ruling, editorial control is allowed only so long as the control is "reasonably related to legitimate peda-

\textsuperscript{122} \textit{Hazelwood}, 108 S. Ct. at 569.
\textsuperscript{124} \textit{Hazelwood}, 108 S. Ct. at 569.
And, in *Hazelwood*, the Court may have found that Principal Reynolds' unilateral action was pedagogically sound because the Court agreed with that action. To grant a principal blanket censorship rights, however, is not pedagogically sound, and the Court needs to say so as soon as possible to halt the thought-policing about which Brennan has concerns.\(^\text{126}\)

125. *Id.* at 571.
126. *Id.* at 577 (Brennan, J., dissenting).
A MANDATE FOR THE PROCEDURAL MANAGEMENT OF MASS EXPOSURE LITIGATION

Sherrill P. Hondorf*

I. INTRODUCTION

The big case phenomenon engendered by the capability of toxic agents to reach so many victims took us all by surprise. The result has been chaos in the judicial system. Consequently, a pressing need has arisen to develop an expeditious, just, and efficient method of dealing with this type of litigation. The tried and true methods of case management simply will not work because we are confronted with litigation of a scope and complexity which could not have been imagined before the advent of our mass-marketed, mechanized, and computerized society. We need not, however, throw our hands up in despair. Existing procedural machinery can be adapted to avoid this tedious and repetitious litigation, while at the same time protecting the competing interests of the plaintiff and defendant. Solutions to what appear to be intractable problems posed by mass exposure litigation can be formulated by an expansion of the existing procedural rules.

Management of litigation of this magnitude is not an impossible task. Case consolidation and management at the pretrial stage must be followed by a flexible use of Civil Rule 23 for the purpose of reaching a final and binding determination as to the toxic agent’s ability to cause harm and whether the defendant should bear the responsibility for that harm. A way must be found to formulate settlements which bind the entire class of plaintiffs—present and future. In this way, we can shift the enormous transaction costs of this type of litigation to the private

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sector and relieve the courts and the public of the burden posed by such massive litigation.

II. THE NECESSITY FOR A REPRESENTATIVE APPROACH TO THE MANAGEMENT OF MASS EXPOSURE LITIGATION

Our complex and sophisticated society has spawned a new type of lawsuit: the case involving hundreds, perhaps thousands of persons injured by exposure to a toxic agent.1 Toxic agents are chemical, biological, radioactive, or biochemical materials possessing the capability of causing injury to people, animals, or the environment.2 However, toxic agents do not cause immediate harm; exposure to a toxic agent causes what is known as insidious disease.3 Insidious diseases are dormant, not manifesting any symptoms until many years after the initial exposure.4 Actions based on disease caused by exposure to a toxic agent can probably be correlated with the increasing awareness of the American consumer that certain types of corporate behavior are unacceptable and will not be tolerated.5 Injuries stemming from a single, nationally marketed product have caused a virtual explosion of mass filings by individual plaintiffs, each seeking compensatory and punitive damage awards.6

This consumer awakening has not been accompanied by a similar awakening in the court system.7 Appellate courts regu

3. “Insidious disease” is any carcinogenic, mutagenic, or teratogenic condition. Id. at 852 n.3.
4. The diseases are insidious in that they appear only after long periods of undetectable dormancy or progression periods that frequently span two or more decades following the critical toxic exposure. Id. The onset of insidious disease is gradual or almost imperceptible. Blackiston’s Gould Medical Dictionary 681 (4th ed. 1979).
5. “[Mass exposure torts are frequently products of the deliberate policies of businesses that tailor safety investments to profit margins.” Rosenberg, Mass Exposure Cases, supra note 2, at 855.
7. Judge Williams wrote this article in response to what he perceives as the “unarticulated antipathy and aversion” displayed by appellate courts toward the use of the class action in a mass tort context. Id. at 381.
larly vacate orders certifying mass tort class actions,\(^8\) even though this type of litigation, by its very nature, is repetitious, involves many identical issues, and, as currently managed, is a tremendous waste of time and money.\(^9\) The Honorable Carl B. Rubin\(^10\) estimated that the time necessary to conduct full trials of the approximately 700 pending Bendectin\(^11\) cases would consume 21,000 trial days, the equivalent of 105 judge years.\(^12\) Thus, the big cases,\(^13\) when handled on a traditional case-by-case basis, can consume more resources, both public and private, than is eventually recovered in compensation.\(^14\)

The time has come to recognize that the fairest and most efficient way to manage mass exposure litigation is on a representative basis.\(^15\) The task, however, remains to define and refine an orderly, just, and efficient method for doing so.

Even a simple study of the manner in which these gargantuan cases are proceeding through the system shows that the courts are totally unprepared for the task of administrating them. DES\(^16\)

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8. Abed v. A.H. Robbins, 693 F.2d 847 (9th Cir. 1982), decertifying a nationwide Dalkon Shield punitive damages class certified by Judge Williams, supra note 7; In re Bendectin Products Liability Litigation, 749 F.2d 300 (6th Cir. 1984); In re Federal Skywalk Cases, 680 F.2d 1175 (8th Cir. 1982), and see cases cited infra note 42.

9. Mass filings "have snared thousands of courts in costly and repetitive litigation that threatens to last well into the next century." Williams, Mass Tort Class Actions, supra note 6, at 324.

10. Chief Judge, United States District Court for the Southern District of Ohio, Western Division.

11. Bendectin was a prescription morning sickness drug manufactured by Merrell Dow Pharmaceuticals, Inc.; in utero exposure to Bendectin is alleged to cause various types of birth defects. In re Bendectin Products Liability Litigation, 749 F.2d at 301-302.


13. See, e.g., Williams, Mass Tort Class Actions, supra note 6, at 324. "[C]ertain products have achieved such national notoriety due to their tremendous impact on the consuming public, that the mere mention of their names—Agent Orange, Asbestos, DES, MER29, Dalkon Shield—conjugates images of massive litigation, corporate stonewalling, and infrequent yet prevalent, 'big money' punitive damage awards." Dalkon Shield Litigation, 526 F. Supp. 892.


15. See generally Williams, Mass Tort Class Actions, supra note 6.

16. DES is an acronym for diethylstilbestrol. It is a synthetic hormone that was at one time prescribed for the treatment of pregnancy-related complications. Note, Diethylstilbestrol: Extension of Federal Class Action Procedures to Generic Drug Litigation, 14 U.S.F. L. Rev. 461 (1980) [hereinafter Note, DES Class Actions].
litigation is proceeding piecemeal through various state courts.\textsuperscript{17} Agent Orange,\textsuperscript{18} though ostensibly settled, is still the subject of bitter debate at the appellate level.\textsuperscript{19} After an unsuccessful attempt to settle the Bendectin litigation,\textsuperscript{20} a trial limited to the issue of causation resulted in a defense verdict and was appealed.\textsuperscript{21} Some of the 260 defendants\textsuperscript{22} involved in the asbestos litigation are currently enjoying the protection given by the automatic stay provisions of the Bankruptcy Code.\textsuperscript{23} A. H. Rob-

\begin{enumerate}[17.]

\item Agent Orange is a herbicide used during the Vietnam War to defoliate forested areas in an effort to deny cover to forces opposing the United States. It is alleged to have contained dioxin as a by-product of the manufacturing process. G. NOTHSTEIN, TOXIC TORTS: LITIGATION OF HAZARDOUS SUBSTANCE CASES, § 20.03 (1984) [hereinafter TOXIC TORTS].

\item In re "Agent Orange" Product Liability Litigation, 506 F. Supp. 762 (E.D.N.Y. 1980) (conditional class certification); 100 F.R.D. 718 (E.D.N.Y. 1983) (class certification for trial and/or settlement); 597 F. Supp. 740 (E.D.N.Y. 1984) (tentative approval of settlement); 611 F. Supp. 1296 (E.D.N.Y. 1985) (final approval of settlement); 1398 (E.D.N.Y. 1985) (distribution plan for settlement funds). Note that Judge Weinstein retained jurisdiction to oversee distribution of funds and stayed distribution pending completion of all appeals. In re "Agent Orange" Product Liability Litigation, Brief for Defendants - Appellees at 3, appeal docketed #84-6273. See cases cited at 597 F. Supp. 876, listing published opinions in the Agent Orange Litigation to that date, and note that there are, at best estimate, 50 appeals currently pending in this litigation.

\item See cases cited supra note 12.

\item In re Bendectin Products Liability Litigation, 857 F.2d 290 (6th Cir. 1988).

\item Rosenberg, Mass Exposure Cases, supra note 2, at 832 n.4. Defendants in bankruptcy include the following: In re Johns-Manville Corp., Nos. 82-B-11866-11876 (Bankr. S.D.N.Y., filed Aug. 26, 1982); UNR Industries and 10 of its subsidiaries and affiliates, In re UNR Industries, BR-82-B9841 and 82-B-9851 (N.D. Ill., filed July 29, 1982).

\item Protection, in the form of halting pending litigation and preventing future litigation, is given to the debtor by the automatic stay provisions contained in 11 U.S.C.A. § 362(a)(1) (1988):

[A] petition filed ... operates as a stay, applicable to all entities, of the commencement or continuation, including the issuance of employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.
bins, after years of litigating the Dalkon Shield cases on an individual basis, has also made use of the Bankruptcy Court as a method to forestall litigation.

The enormous number of persons involved in this particular type of mass tort case demonstrates the folly of adhering to the notion that mass exposure litigation can be fairly and efficiently managed in the traditional case-by-case manner. DES was prescribed to several million women between 1945 and 1971. DES litigation is further compounded by the fact that the majority of injuries are not manifested by the women who ingested DES, but rather by their sons and daughters, ten to twenty years after in utero exposure. Estimates put the number of American service personnel exposed to Agent Orange at between 2.4 and 2.9 million. The Dalkon Shield was on the market for only four years, but during that time the A. H. Robbins Company, through vigorous promotion and distribution efforts, managed to convince 2.2 million women to use it. The potential number of individual suits that could result from such mass exposure is enormous; individual litigation by just one percent of an exposed

24. The Dalkon Shield is an intrauterine contraceptive device (IUD) alleged to have caused various injuries including uterine perforations, infections, pregnancy, spontaneous abortion, fetal injuries, and hysterectomies. Dalkon Shield Litigation, 626 F. Supp. at 893.

25. Following decertification of the nationwide punitive damages class in California, supra note 1, A.H. Robbins made a last ditch effort to certify the same class in a Virginia court. In re Dalkon Shield Punitive Damages Litigation, 613 F. Supp. 1112 (E.D. Va. 1985). The court recognized the fact that the financial resources of A.H. Robbins were being rapidly depleted but felt bound by law to deny the certification on the basis of collateral estoppel. A.H. Robbins filed for Chapter 11 protection less than one month later. In re A.H. Robbins Co., BR 85-01307-R (E.D. Va. filed Aug. 21, 1985).

26. Case by case adjudication subjects the defendants to numerous and conflicting damage awards, subjects a judge to the tedious and frustrating task of presiding over identical lawsuits and may deny late-filing plaintiffs any recovery. Williams, Mass Tort Class Actions, supra note 6, at 325.

27. See supra note 16.


29. Id. at 466. DES litigation is a plaintiff's nightmare. DES was an unpatented drug manufactured by hundreds of companies and, as a result of the latency period, most injured persons cannot identify the particular manufacturer of the DES ingested. Id.


population of 2 million would result in 20,000 individual filings. Thus, individual litigation by each and every injured person has the potential to bankrupt both the state and federal court systems.32

Mass tort litigation can arise in two ways, as a result of a mass accident or by widespread individual exposure to a toxic agent.33 Though based on the same procedural rule,34 the approach to management of the two types of cases is different because the underlying facts which give rise to the litigation are dissimilar.35

A mass accident case is, for the purposes of class certification, on a different plane than mass exposure litigation. A mass accident is a single, traumatic event36 that causes physical harm or property damage to a large and readily identifiable group of people.37 Liability is premised on a single set of operative facts.38 Therefore, the chances that individual defenses will be raised are minimal.39 Even so, historically the courts have been reluctant to certify mass accident classes, using the Committee Notes to the 1966 amendment to Rule 2340 as a crutch to prop up their

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32. Williams, Mass Tort Class Actions, supra note 6, at 324.
33. Mass torts can be categorized into 3 types: mass accidents, toxic environmental torts and products liability. 3 H. Newberg, NEWBERG ON CLASS ACTIONS § 17.06 (2d ed. 1985) [hereinafter Newberg].
34. FED. R. CIV. P. 23.
35. Rule 23 does not distinguish between various categories of mass tort, but the application of the rule may be affected by the particular type of mass tort involved. Newberg, supra note 33, at § 17.06.
38. Id.

A 'mass accident' resulting in injuries to numerous persons is ordinarily not
refusal to certify such classes. However, a few creative courts have recently stopped relying upon the Committee caveat because experience has shown that representative adjudication of a single set of operative facts makes for a speedy and efficient resolution of the entire matter. Experience has also shown that the fear expressed by the Advisory Committee that mass accident class actions will degenerate into "multiple lawsuits separately tried" has not materialized. In fact, once all cases are marshalled into one arena, class certification becomes an almost magical inducement to settle.

The typical mass exposure case does not present a single set of operative facts because the circumstances, duration, and times of the exposure differ for each individual injured. If the case

appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

Note that nothing on the scale of Agent Orange, Dalkon Shield or the DES litigation had been encountered prior to 1966, therefore, Judge Williams asserts that this caveat does not even apply in a products liability context. Williams, Mass Tort Class Actions, supra note 6, at 324 n.1.


43. See supra note 40 and 7B WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 1783 (1986):

This floodgates-of-litigation concern overlooks the fact that whenever there is a possibility that more than one class member would have brought suit in different federal courts on an individual basis, the class action device, regardless of its ability to engender lawsuits of great size, still may produce an overall economy for the judicial system.

44. Despite appellate courts' continuing refusal to acknowledge the benefits of class adjudications, trial judges know that class certification, even on limited issues, has a great influence on the parties' willingness to settle. Williams, Mass Tort Class Actions, supra note 6, at 328.

45. Exposure over an extended period of time, individualized nature of proof and
arises from an atypical situation, it is possible for both a single set of operative facts and the complexity of the individual fact pattern to be present. An atypical mass exposure case is characterized as a "hybrid case": the combination of the single event or mass accident, coupled with the long-term effect of a toxic tort. In such a situation, there are the immediate injuries to contend with and the possibility that latent or future manifested injury will result from the same exposure.

A typical mass exposure case is premised on a single pattern of misconduct by one or more defendants which results in identical types of disease or injury in the exposed population. The actions or inactions of the manufacturer in allowing a toxic agent to reach the consumer form the basis of the single pattern of misconduct. Because the consequences of the exposure are not immediately apparent and the exposure period normally spans a number of years, the group of injured persons is not readily identifiable. Nevertheless, the premise remains that affirmative defenses and the absence of a single event causing the injury, result in a multiplicity of issues. In re Tetracycline Cases, 107 F.R.D. 719, 724 (W.D. Mo. 1986). See also Yandle v. P.P.G. Industries, Inc., 65 F.R.D. 566 (E.D. Tex. 1974).

46. NEWBERG, supra note 33, at 17.06.
47. Id.
49. See Friends for All Children, Inc. v. Lockheed Aircraft Corp., 87 F.R.D. 560, 563 (D.C. 1980), diagnostic services and continuing medical treatment necessary because the effects of explosive decompression suffered by victims may not manifest symptoms for eight or nine years.
51. The type of injuries caused by DES rarely appear in the unexposed population, Note, DES Class Actions, supra note 16, at 473. A drug (MER29) developed to lower cholesterol levels caused cataracts, primarily, and hair loss in exposed population, Roginsky v. Richardson-Merrell Inc., 378 F.2d 832 (2d Cir. 1967).
52. See supra note 50. The misconduct involves the manufacture of a defective product by "huge multi-national corporations peddling their mass-produced consumer goods and drugs by instantaneous satellite communication." Williams, Mass Tort Class Actions, supra note 6, at 324.
53. Supra note 4.
54. There is an implied requisite of Rule 23 that there must be a class capable of
there is a single pattern of misconduct that has placed the victim in harm's way. The misconduct of another in allowing an unsuspecting consumer to be subjected or exposed to something which is detrimental can, therefore, form the basis for a class certification.

The length of time the product remains on the market, coupled with the latency of the injury manifestation, are commonly cited stumbling blocks to class certification. However, an understanding of how mass exposure litigation evolves may help to overcome these stumbling blocks and aid in making the most efficient use of available procedural mechanisms.

If the individual exposure cases filed were graphically represented, the evolutionary process would resemble a bell curve. Because insidious disease takes time to appear fullblown in the exposed population, early defendants, plaintiffs, and the courts may not be aware that they are dealing with the "tip of a massive products liability iceberg." The process begins with a

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55. "Accidents in the course of the production, distribution, marketing, consumption and disposal of toxic agents can have catastrophic consequences." Rosenberg, Mass Exposure Cases, supra note 2, at 851-52. A person is subjected to a toxic agent if any of the foregoing has occurred.

56. Expose means to place in a position where the object spoken of is open to danger, or where it is near or accessible to anything which may affect it detrimentally; as to expose another to danger or hazard of any kind, BLACK'S LAW DICTIONARY 520 (5th ed. 1979). Exposure is subject to some condition or influence that may affect detrimentally, BLACKISTON'S MEDICAL DICTIONARY 479 (4th ed. 1979).


58. A bell curve is a graph shaped like a bell; as cases are increasingly filed the graph line rises, the top of the bell represents the most cases filed, and the line tapers back down as the latency period ends.

59. In 1975, there were 286 pending Dalkon Shield actions, A.H. Robbins Co., Inc. "Dalkon Shield" IUD Products Liability Litigation, 406 F. Supp. 540 (J.P.M.L. 1975). In 1981 there were 1,573 pending actions and by 1984 a total of 9,450 cases had been disposed of and 6,000 were still pending, see infra notes 73-75 and accompanying text. More than 300,000 claims were filed in response to the notice sent by Judge Robert R. Merhige, who is supervising Robin's Chapter 11 reorganization, OB/GYN LR 5/14/86, P. 5927.

60. TOXIC TORTS, supra note 18, at § 20.21.
few instances of disease or injury accompanied by sporadic litigation. The injury rate begins to increase and more litigation ensues, but usually the legal community does not, as yet, perceive a pattern or the injury’s massive scale. At some point the injury rate will increase dramatically; the apex of the injury manifestation may correlate with the apex of the promotion and distribution efforts of the manufacturer. Victims become aware of a causal link between their exposure and their injury or disease, and, predictably, the state and federal courts are overwhelmed by massive numbers of individual lawsuits. Thus, mass exposure litigation, at first unnoticed, explodes full force on the system. The sudden influx of cases will usually prompt the manufacturer to remove the drug or product from the market. High disease or injury rates will continue for a time, then taper off as the latency period nears an end. What appeared, at first, to be an uncomplicated personal injury case has evolved into the big case that so astounds and confounds the system.

Procedural mechanisms to streamline the handling of these cases must be put into operation when the influx of cases begins or any hope of effective and efficient management will be lost through delay. The necessary procedural machinery is not new. The foundation has been laid and is ready and waiting to be built on. However, an unimaginative approach to the scope of the available mechanisms results in disjointed and scattered litigation and the possible bankruptcy of the defendant. The problems posed by mass exposure litigation are not insurmountable; successful management requires only that the parochial approach be abandoned. Although mass exposure litigation is

61. See supra notes 26-32 and accompanying text.
62. The Dalkon Shield was removed from the market on June 28, 1974, Dalkon Shield Litigation, 526 F. Supp. at 893; Bendectin was removed from the market in 1983, In re Bendectin Litigation, 749 F.2d at 302 n.1; DES, though still available for certain medical conditions, is no longer prescribed during pregnancy, Note, DES Class Actions, supra note 16, at 416 n.1.
63. See supra notes 16-25 and accompanying text.
64. Disjointed and scattered litigation results in inconsistent verdicts which can have a dramatic effect on both the plaintiff and defendant. See generally Toxic Torts, supra note 18, at § 20.19.
65. "Must there be a dollar-by-dollar liability accumulated by society’s producers until the business, or even an entire industry, is forced into bankruptcy or, is it more sensible to have a forum in which all potential ramifications upon workers, owners, and the future course of product development are ... aired?" Williams, Mass Tort Class Actions, supra note 6, at 325.
different from anything encountered before, a rethinking of the function of the procedural rules and a new approach to their scope will go far toward solving the problems posed by repetitive mass tort litigation.

Experience being the best teacher, events in the asbestos and Dalkon Shield litigations can be seen as the result of the narrow approach taken toward expanding the scope of the procedural rules. When the Johns-Manville Corporation filed bankruptcy on August 26, 1982, it stated that it was currently a defendant or codefendant in approximately 16,500 asbestos related suits and anticipated at least 30,000 individual filings in the future. Defense of all the asbestos related claims could eventually cost the approximately 260 defendants several hundred billion dollars. A. H. Robbins, in 1981, estimated that there were 1,573 pending Dalkon Shield suits involving claims for compensatory damages in excess of $500 million and punitive damages in excess of $2.3 billion. By the time Robbins filed bankruptcy four years later, it had paid out $530 million on approximately 9,450 cases and 6,000 cases were still pending.

The lesson to be learned is that when the liability of the defendant extends to thousands or even millions of persons, the traditional methods of litigation break down under the weight

66. "The latter half of the twentieth century has witnessed a virtual explosion in the frequency and number of lawsuits filed to redress injuries caused by a single product manufactured for use on a national level," Dalkon Shield Litigation, 526 F. Supp. at 892. Since 1974 there has been a steady increase in the number of products liability suits filed, Williams, Mass Tort Class Actions, supra note 6, at 324 n.2. The big case phenomenon is a by-product of contemporary American society. A. Miller, Of Frankenstein Monsters and Shining Knights: Myth, Reality and the "Class Action Problem," 92 HARV. L. REV. 664, 668 (1979).

67. Williams, Mass Tort Class Actions, supra note 6, at 392; see Judge Heaney's dissent in In re Federal Skywalk Cases, 680 F.2d at 1184-93.

68. See cases cited supra at notes 8 & 42.

69. Now called The Manville Corporation.

70. See supra note 22.


72. Rosenberg, Mass Exposure Cases, supra note 2, at 852 n.4.

73. Dalkon Shield Litigation, 526 F. Supp. at 893 n.4.

74. Id. at 893.

75. See supra note 25.


77. See supra notes 27-32 and accompanying text.
of the burden on the defendant and the court system. If procedural mechanisms are utilized when the scope of the litigation becomes clear, it would not be necessary for the mass exposure defendant to use the bankruptcy court as a makeshift, but effective, means to halt the litigation. Class certification is the only way to subdue the “monster-like qualities of that special type of repetitive litigation so much the result of our modern technological society."

When mass exposure litigation is allowed to proceed on a case-by-case basis, it becomes nothing more than a race to the money. The potential for the constructive bankruptcy of a manufacturer facing liability for a “product run amok” raises the unconscionable possibility that large numbers of plaintiffs who are not first in line at the courthouse door will be deprived of a practical means of redress. The first big winner sets in motion the law of diminishing returns: as the number of plaintiffs increases, the amount available for recovery decreases. Amounts available for compensation from a defendant facing such massive liability are necessarily finite. As the scope of the defendant's liability widens, the alternative of bankruptcy is a welcome refuge. Since tort cases do not belong in the Bankruptcy Court, class certification, at the earliest possible stage, holds the most

78. “Manville's decision to take all its tort troubles to a single court for treatment symbolizes a phenomenon apparent in all litigation involving allegedly harmful products or substances which are widely distributed and used. In such big cases, there is an almost irresistible force compelling their removal from the arena of traditional products liability litigation. Mass tort cases are so huge, so complex, and are becoming so frequent that the resulting pressure on the judicial system has forced it to take radical steps to reduce such litigation to manageable proportions.” TOXIC TORTS, supra note 18, at § 20.01.

79. See supra note 23.

80. Dalkon Shield Litigation, 526 F. Supp. at 921.

81. Plaintiffs seeking separate actions believe that a race to quick recovery may be necessary because the defendant's assets may be limited or that multiple punitive damages may be barred. Note, Class Certification in Mass Accident Cases Under Rule 23(b)(1), 96 HARV. L. REV. 1143, 1148 (1983).

82. Bankruptcy is defined as claims in excess of the total assets of the defendants. See discussion in Dalkon Shield Litigation, 526 F. Supp. at 897.

83. Williams, Mass Tort Class Actions, supra note 6, at 325.

84. Dalkon Shield Litigation, 526 F. Supp. at 893.

85. The Bankruptcy Code was not set up to provide refuge for a solvent defendant involved in a massive tort suit. See generally, Manville Bankruptcy, supra note 71.

86. FED. R. CIV. P. 23(c)(1) requires that class certification be determined “as soon as is practicable after the commencement of an action.”
promise as an effective tool to prevent the eventual bankruptcy of the beleagured defendant and to accommodate the competing interests of plaintiff and defendant.  

III. MANAGEMENT OF MASS EXPOSURE LITIGATION IN THE PRETRIAL STAGES

Housing far flung cases under one judicial roof for centralized management is the first step. The Judicial Panel for Multidistrict Litigation, established by 28 U.S.C. § 1407, is authorized, either on its own or on motion of the parties, to draw together geographically dispersed cases in the federal system for the purposes of coordinating and consolidating pretrial proceedings. Requisites for a transfer by the Multidistrict Panel are similar to, but less restrictive than, the guidelines used for class action determinations. The transferred cases must contain one or more common questions of fact, transfer must promote the just and efficient conduct of the action, and serve the convenience of the parties and witnesses. Plaintiff's attorneys sometimes raise the objection that a § 1407 transfer benefits only the common defendant. This argument has been laid to rest in several complex cases, where experience has shown that when plaintiffs cooperate with each other, the result is an overall reduction in cost and an increase in the quality of trial preparation.

The time for a § 1407 transfer does not necessarily depend upon the stage of the proceedings; in mass exposure litigation the sudden influx of cases filed should signal that a § 1407 transfer has become warranted. The Manual For Complex Litigation should signal that a § 1407 transfer has become warranted.

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87. Williams, Mass Tort Class Actions, supra note 6, at 325.
88. Hereinafter referred to as the Multidistrict Panel.
94. 28 U.S.C.A. § 1407(a) (1982); and see MANUAL FOR COMPLEX LITIGATION, SECOND § 31.12 (6th ed. 1986) (Clark-Boardman) [hereinafter MANUAL].
95. McDermott, supra note 89, at 220.
96. See, MANUAL, supra note 94, at § 33.22.
97. Id. § 31.121.
igation implicitly recognizes that the posture of individual cases may change radically when the complexity of the litigation comes clear. However, a § 1407 transfer will not automatically sweep every pending case into another court; an individual case's nearness to trial or the amount of discovery already completed may prompt the Multidistrict Panel to exclude it from the transfer order.

To satisfy the commonality requirement, the Multidistrict Panel must find that the cases will require similar investigation and discovery. Once the scope of discovery is determined, transfer must then promote the just and efficient conduct of the litigation by avoiding the duplication of discovery. A transfer under § 1407 requires careful consideration, but the presence of a number of geographically dispersed cases, all involving several complex common questions of fact, will almost preordain transfer. Products liability suits that involve as few as two or three actions could be transferred because the common question requirement harkens back to the theory of the litigation, a single pattern of misconduct in designing, testing, manufacturing, labeling, inspecting and warning.

Cases involving the same common question, but filed after the transfer order is issued, are called "tag-along cases." Tag-along cases are summarily dealt with by conditional transfer orders: the clerk determines that the action falls within the definition of the original transfer order and enters the appropriate transfer order. Summary disposition is based on the rationale, borne out by experience, that the majority of conditional transfers will be unopposed. The tag-along cases automatically become part

98. Id.
100. NEWBERG, supra note 33, at § 9.15.
101. Id.
102. McDermott, supra note 89, at 220.
104. McDermott, supra note 89, at 224-27.
105. Id. at 225.
106. For instance, there were approximately 400 tag-along cases in the Bendectin trial litigation.
107. McDermott, supra note 89, at 222-27.
of the centralized proceedings; discovery already completed is made available to the parties and all rulings previously made on the common issues are deemed to have also been made in the tag-along actions.108

Related proceedings that are pending in both the state and federal courts can also be brought under one roof. Removal from the state to the federal court under 28 U.S.C. § 1441109 and subsequent transfer, either as part of the initial transfer order or as a tag-along case, is an avenue open to the defendant.110 An individual plaintiff involved in mass exposure litigation is at the mercy of the "legal juggernaut"111 assembled by the defendant; economic considerations alone112 should be enough to precipitate a decision to participate in the consolidated and coordinated proceedings that a § 1407 transfer will provide.

The Manual suggests, for cases that cannot participate in the § 1407 transfer, that a proceeding akin to that accomplished by a § 1407 transfer be utilized for cases that are simultaneously pending in the state and federal courts.113 It is not as farfetched as it sounds at first blush to coordinate state and federal proceedings. Such coordination, with an eye toward the goal of providing uniform rulings on common questions, has been successfully carried out by way of joint pretrial conferences, parallel orders, and a single management plan to cover all cases.114 For instance, in the early stages of the Beverly Hills Supper Club Fire Litigation115 the judge in the Circuit Court of Campbell County, Kentucky116 worked side-by-side with the judge of the

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110. "The fact that the cause of action is in the district court by removal from a state court has no bearing on a motion to transfer.... Once removed, the action proceeds as if it had been brought in the federal court originally." In re Professional Hockey Antitrust Litigation, 369 F. Supp. 1117 (J.P.M.L. 1974); In re Air Crash Disaster at Florida Everglades on December 29, 1972, 368 F. Supp. 812 (J.P.M.L. 1973). See also In re Antibiotic Drugs, 299 F. Supp. 1403, 1405 (J.P.M.L. 1969).
111. Williams, Mass Tort Class Actions, supra note 6, at 329 n.19.
112. "[T]he cost of retaining experts, collecting medical or technical data and collecting hundreds of depositions and affidavits preclude[s] the vigorous maintenance of a complex product liability suit by an individual plaintiff." Id.
114. See id. § 41.5 (Sample Orders Coordinating Multiple Litigation), see also In re Air Crash Disaster near Silver Plume, Colorado on October 2, 1970, 352 F. Supp. 968 (J.P.M.L. 1972).
115. On the evening of May 28, 1977, fire destroyed the Beverly Hills Supper Club in
Federal District Court for the Eastern District of Kentucky.\textsuperscript{117} The judges held joint hearings on pretrial motions and cooperated in establishing discovery and trial schedules, thus "coordinating their activities so as to avoid conflict between the two judicial systems."\textsuperscript{118} Another instance of cooperation between the state and federal system occurred in the MGM Grand Hotel Fire Litigation:\textsuperscript{119} "In a spirit of cooperation often not seen between federal and state courts, it was agreed between the respective courts in Nevada and the parties that the discovery developed in [the MDL transfer proceedings] could be used in suits pending before the Nevada state courts."\textsuperscript{120}

Multidistrict transfers serve to wrap pretrial proceedings into a tidy package for all the parties involved. The purpose in enacting 28 U.S.C. § 1407 was to provide for just such a contingency: coordination of pretrial proceedings for the purpose of conducting discovery on a unified national basis in an effort to avoid delay, repetition, and duplication, and to insure that the litigation is processed as efficiently and economically as possible.\textsuperscript{121} Mass exposure cases are exactly the type of litigation that can best be served on a unified national basis. A transfer pursuant to § 1407 has the effect of easing the burden on plaintiffs and defendants alike by coordinating the monumental task of discovery and aiding in the formulation of a workable plan for trial.\textsuperscript{122}

Southgate, Kentucky. One hundred sixty-five patrons and employees perished in the fire and many others were injured. In re Beverly Hill Fire Litigation, 695 F.2d 207 (6th Cir. 1982).

\textsuperscript{116} The Honorable John A. Diskin.

\textsuperscript{117} The Honorable Carl B. Rubin, sitting by designation.

\textsuperscript{118} Union Light, Heat and Power Co. v. U.S. District Court, 588 F.2d 543, 544 (6th Cir. 1978).

\textsuperscript{119} On Friday, November 21, 1980, at approximately 7:00 a.m. a fire broke out in the delicatessen at the MGM Grand Hotel and Casino in Las Vegas, Nevada. As a result of the fire and heavy smoke and gases, eighty-four persons died; over one thousand persons suffered smoke inhalation and hundreds of others suffered sprains, broken bones and lacerations in escaping the fire. In re MGM Grand Hotel Fire Litigation, 570 F. Supp. 913 (D. Nev. 1983).

\textsuperscript{120} Id. at 917.

\textsuperscript{121} McDermott, supra note 89, at 217.

\textsuperscript{122} See generally MANUAL, supra note 94, at § 33.2, (Mass Disaster and Other Complex Tort Cases).
Cases consolidated and transferred under § 1407 are assigned to a single judge, who then has plenary authority over all pretrial proceedings. Transfers under § 1407, however, are limited strictly to pretrial matters, so that unless the action has been terminated in the pretrial stages, the transferred actions are subject to remand to the transferor districts at the close of the pretrial proceedings. However, a remand after a § 1407 transfer sets up the danger that multiple and possibly simultaneous trials could lead to inconsistent verdicts on the same issue.

Federal courts are directed by Rule 23 to make a class determination as soon as is practicable after commencement of a suit brought as a class action. If several class action motions are pending in the geographically dispersed cases, transfers pursuant to § 1407 can be made to facilitate the resolution of overlapping or conflicting class action motions. Because a major purpose of a § 1407 transfer is the promotion of just and efficient litigation management, the Multidistrict Panel stresses that "uniformity of class action treatment is facilitated by transferring all competing class actions to a single transferee forum." Delay of transfer until class action motions are decided is generally not granted because class determinations are properly a part of pretrial proceedings. The transferee court, when all the parties are properly assembled before it, is in the best

124. The transferee judge may vacate, modify or expand orders made by the transferor court, can terminate or dismiss actions and make rulings on settlement, MANUAL, supra note 92, at § 31.122.
126. See generally TOXIC TORTS, supra note 18, at § 20.19.
127. FED. R. CIV. P. 23(c)(1).
128. NEWBERG, supra note 33, at § 9.15.
129. McDermott, supra note 89.
130. NEWBERG, supra note 33, at § 9.15.

"Section 1407 does not authorize the separation of issues [] and the retention of
position to make class determinations.\textsuperscript{132} A finding of commonality by the Multidistrict Panel is not binding on the transferee court in a later class determination, "but experience shows that such a finding by the Judicial Panel on Multidistrict Litigation often supports a finding of commonality in later class action rulings."\textsuperscript{133}

The transferee judge, like any district judge, also has the power to transfer any case for trial to any district, including the transferee district, if the criteria of either 28 U.S.C. § 1404 or § 1406 can be met.\textsuperscript{134} The location of the transferee court will obviously play a part in whether that court can in fact retain all the cases transferred to it. The Multidistrict Panel is not bound by the venue limitations of § 1404(a)\textsuperscript{135} or § 1406;\textsuperscript{136} it is given a wide latitude in that it can transfer the action to "any district."\textsuperscript{137} The transferee court, however, is limited by venue restrictions to transferring to itself only those cases that might have been brought there.\textsuperscript{138} The venue limitation will rarely be a problem because venue can be voluntarily waived by a failure to object\textsuperscript{139} and the Multidistrict Panel will try to minimize venue problems by taking into consideration the possibility of a later trial at the transferee forum.\textsuperscript{140} Additional factors weighed in the forum selection decision are transfer to a forum where a class action is currently pending or to a location that is central but national in scope.\textsuperscript{141}

\textsuperscript{132} NEWBERG, supra note 33, § 9.15, ("Another major purpose of § 1407 transfers, to promote the just and efficient conduct of the litigation, focuses on facilitating the resolution of overlapping or conflicting class actions.")

\textsuperscript{133} NEWBERG, supra note 33, § 9.15.

\textsuperscript{134} MANUAL, supra note 94, § 31.122.

\textsuperscript{135} 28 U.S.C. § 1404(a) (Change of Venue).

\textsuperscript{136} 28 U.S.C. § 1406 (Cure or Waiver of Defects).

\textsuperscript{137} 28 U.S.C. § 1407(a) (1968).

\textsuperscript{138} See supra notes 135 & 136.

\textsuperscript{139} FED. R. CIV. P. 12(h).

\textsuperscript{140} In re Yarn Processing Patent Validity Litigation, 341 F. Supp. 376, 381 (J.P.M.L. 1972).

The authority of the transferee court to transfer the consolidated cases to itself exists, and in a mass exposure case the complexity of the case and the interests of judicial efficiency make it "highly desirable that the judge who conducted the pretrial proceedings continue as trial judge ...."

The Multi-district Panel has frequently noted that the provisions of §§ 1404(a) and 1407 are not mutually exclusive so that, when appropriate, they should be used "in concert to effect the most expeditious disposition of multidistrict litigation."

In fact, settlement of the MGM Grand Hotel fire litigation was facilitated when Judge Bechtle ordered a change of venue for all cases filed outside the State of Nevada. Judge Bechtle noted that the transferred cases could be retransferred to their original districts for the purposes of damage trials if it became necessary after a finding of liability. This is precisely the type of judicial flexibility that is necessary for the resolution of those cases which possess such a marked propensity to grow into "Frankenstein monsters" set loose in the court system.

At or near the close of the pretrial management phase, the transferee judge encounters a fork in the road: allow a remand or retain all or a portion of the consolidated cases. As already established, the transferee judge may take complete charge of the entire litigation. From this it follows that the transferee

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142. 28 U.S.C. §§ 1404, 1406, Fed. R. Civ. P. 42(a). See Manual, supra note 94, § 21.631: ("Utilizing Fed. R. Civ. P. 42(a), the court should consider consolidating all cases pending in (or transferrable to) the court for joint trial of those issues on which essentially the same evidence probably will be presented.").

143. Pfizer, Inc. v. Lord, 447 F.2d 122, 125 (2d Cir. 1971). See, In re San Juan Dupont Plaza Hotel Fire Litigation, Pretrial Order No. 130, Order Consolidating All Cases Filed in This Litigation—Including Transferred Cases— for Trial in This District. (Docket No. 7400, December 21, 1988).


146. Sitting by designation.

147. In re MGM Grand Hotel Fire Litigation, MDL 453, Memorandum and Order, #244, December 23, 1982.

148. Id. at 3.

149. The term "Frankenstein monster" was originally coined by Judge Lumbard in his dissent to Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 572 (2d Cir. 1968) to describe the procedural nightmare involved in that particular litigation. However, we have come full circle and now encounter the same sort of procedural nightmare when classes are not certified.

150. See generally Manual, supra note 94, at § 31.123.
judge may make a further determination that management of the litigation will proceed most efficiently if a class is certified. A single class-wide determination on the issue of causation and liability will prevent the possibility of conflicting determinations made by different juries, thus serving the interests of all parties in arriving at a fair allocation of the financial burden. And in the final analysis, the competing interests at stake in mass exposure litigation are reduced to matters of finance. Every injured person is entitled to reasonable compensation for his or her injuries. However, the competition among thousands of plaintiffs for a piece of the finite pie represented by the assets of the defendant will be fierce. Mass exposure litigation places a very real financial burden on the defendant, who has a consonant interest in receiving a final and binding determination as to his liability.

IV. PRELIMINARY REQUISITES FOR CLASS CERTIFICATION AND THE SCOPE OF THE CLASS TO BE CERTIFIED

The preliminary requisites for class certification: numerosity, commonality, typicality, and adequacy of representation, are easily satisfied in mass exposure litigation.

Numerosity is obviously not a problem; mass exposure litigation, by definition, will always involve parties "so numerous that joinder of all members is impracticable." 

Commonality is found in plaintiffs' assertions that their injuries are the result of a common cause, each one having used or been exposed to the same product or drug. Central to each claim there will also be at least one, if not more, common

151. See supra note 131 and accompanying text.
155. There were 167 pending Agent Orange suits when the class was certified, In re "Agent Orange" Product Liability Litigation, 506 F. Supp. at 787; 700 pending in the Bendectin Litigation, 102 F.R.D. 239 (S.D. Ohio 1984); and a minimum of 2,339 readily identifiable women who had been exposed to DES in Massachusetts, Payton v. Abbott Labs, 83 F.R.D. at 387.
157. "Since all plaintiffs allege injuries from the use of Bendectin, the questions of law as to liability at least would be common to all such persons." In re Bendectin Product Liability Litigation, 102 F.R.D. at 241.
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questions of liability such as negligence, strict liability, breach of warranty, or adequacy of warnings.\textsuperscript{158} An answer to the common question need not necessarily end the entire action;\textsuperscript{159} the commonality requirement is intended only to ascertain that there is a benefit to be derived from the common treatment of the whole or severable parts of the litigation.\textsuperscript{160} In mass tort class actions the commonality requirement can be satisfied either by a showing of common liability or a common cause of the injury.\textsuperscript{161}

The typicality\textsuperscript{162} requirement presents a different problem, however, careful definition of the class, either by the court or class counsel, can show typicality.\textsuperscript{163} The definition must be posed in such a way that each member of the class shares a claim that is characteristic of the claims of other class members, \textit{e.g.}:

The plaintiff class included all women:
1) who were exposed to diethylstilbestrol ("DES") \textit{in utero};
2) whose exposure occurred in Massachusetts;
3) who were born in Massachusetts;
4) who are domiciled in Massachusetts when they receive notice of this action; and
5) who have not developed uterine or vaginal cancer.\textsuperscript{164}

Typicality has been characterized as overlapping both the commonality requirement and the adequacy of representation requirement.\textsuperscript{165} The implication is that the parties’ claims and defenses must not be adverse to one another. They are in harmony because they stem from a single event or are based on the same legal theory.\textsuperscript{166} The fact that individual damages may

\textsuperscript{158} Dalkon Shield Litigation, 526 F. Supp. at 901.
\textsuperscript{159} See generally NEWBERG, supra note 33, at § 17.09.
\textsuperscript{160} In re "Agent Orange" Products Liability Litigation, 506 F. Supp. at 787.
\textsuperscript{161} "A common question is one which arises from a 'common nucleus of operative facts' regardless of whether the underlying facts fluctuate over the class period and vary as to individual claimants." In re Asbestos School Litigation, 104 F.R.D. 422, 429 (E.D. Pa. 1984) and cases cited therein. See also In re Three Mile Island Litigation, 87 F.R.D. 433, 439 (M.D. Pa. 1980).
\textsuperscript{162} FED. R. CIV. P. 23(a)(3).
\textsuperscript{163} See generally NEWBERG, supra note 33, at §§ 17.09 & 17.10.
\textsuperscript{164} Payton v. Abbott Labs, 83 F.R.D. at 386.
\textsuperscript{165} See In re Tetracycline Cases, 107 F.R.D. at 729 (W.D. Mo. 1985) and cases cited therein; and In re Asbestos School Litigation, 104 F.R.D. at 429-30.
\textsuperscript{166} See generally 7A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 1764 (1986).
differ should be of no import. Total identity of claims is unnecessary so long as the legal and factual postures of the parties remain similar. The court must be convinced that the representative party will not work at cross-purposes by advancing his or her own claim to the expense of others. A rough benchmark of typicality is a comparison showing that the proof necessary for the representative claim is similar to the proof of the class claims.

Adequacy of representation refers to the representative party's protection of the interests of the entire class. This requirement can be broken into two component parts: the attorneys representing the class must be qualified, experienced, and able to conduct the litigation, and the class representative must not have interests that are antagonistic to fellow members of the class. The second part of this requirement would be satisfied by a hard look at the interests of the class representative, which would function as a "safeguard against interclass conflicts." A showing that the representative will offer evidence which is identical or similar to the fundamental liability issues common to the defined class is indicative that the interest of the representative is properly aligned with those of the class members.

The court generally determines the adequacy of counsel for the class by asking competing counsel to submit resumes. Several options are open to the court when choosing representative counsel; it has become common practice to appoint lead counsel, a steering committee, and a liaison counsel, thereby creating a structure to coordinate the entire litigation.

167. Id.
168. Id.
170. FED. R. CIV. P. 23(a)(4).
171. In re Asbestos School Litigation, 104 F.R.D. at 430. "The burden is on the defendant to demonstrate that the representation will be inadequate." Id.
173. Id. at 430. See generally Newberg, supra note 33, at § 17.11.
174. The court will request counsel to submit curriculum vitae in an effort to review the qualifications of those who are nominated to serve in various capacities; see In re Air Crash Disaster at Gander, Newfoundland on December 12, 1985, MDL 683, First Pretrial Order, dated June 23, 1986 (W.D. Ky. 1986).
175. Id. See generally Manual, supra note 94, at § 20.22, Coordination in Multi-Party
fied counsel will have experience in the type of litigation before the court, will have demonstrated professional competence in briefing and arguing the early stages of the case, and may have to show that available financial resources are adequate to the task of conducting extensive discovery and covering the cost of any notice that may be required. The importance of the adequacy of the representation can never be overstressed; persons who are not before the court can be conclusively bound by an action that is prosecuted in their names.

A vital aspect of the decision to certify a class is a determination of the scope of the action. Class certification in mass exposure litigation can never encompass every issue involved in the litigation because the individual fact patterns are too diverse. However, the certification of a mass exposure class can be based solely on the common issues of generic causation and liability. The usual argument that plaintiffs' claims are too diverse factually will fail when class issues are phrased in this manner. Subdivision (c)(4) of Rule 23 permits creation of a class for determination of discrete issues and authorizes subclassing as necessary for management of the case. Use of this section to segregate common issues, leaving individual issues for sub-

Litigation: Lead/Liaison Counsel; Committees; and Newberg, supra note 33, at §§ 9.30-9.38 for a discussion of the function and duties of counsel and the committees. This structure has been utilized in the Agent Orange Litigation, Bendectin Litigation, Bhopal Gas Plant Disaster Litigation, Hyatt Regency Skywalk Collapse Litigation, the MGM Grand Hotel Fire Litigation, and the San Juan Dupont Plaza Hotel Fire Litigation, among others.


177. Id. The resources of the attorneys who appear on behalf of potential class members is a factor to be considered when choosing a class representative, Manual, supra note 94, at § 30.15.

178. Hansberry v. Lee, 311 U.S. 32 (1940); and see note 279 infra.


180. Fed. R. Civ. P. 23(c)(4)(A): "an action may be brought or maintained as a class action with respect to particular issues."

181. Fed. R. Civ. P. 23(c)(4)(B): "a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly."

182. MANUAL, supra note 94, at §§ 30.16 and 30.17; and Williams, Mass Tort Class Actions, supra note 6, at 333.
sequent trial, has been overlooked, underutilized, and largely unnoticed since the 1966 revision of Rule 23. Use of subdivision (c)(4) enables the court to "restructure complex cases to meet the other requirements for maintaining a class action."

A threshold determination of general causation and liability is a prerequisite to the ultimate verdict in any tort action. The concept of generic causation and liability entails an initial class-wide finding that ingestion of or exposure to the drug or product can in fact cause the injuries complained of. Thus, every pending or potential action will share "common factual issues relating to what [the defendant] did or did not do, knew or did not know and told or did not tell with respect to the design, testing, manufacture, inspection, distribution, promotion and labeling of the [drug or product]." A single class-wide determination of causation and liability, or the lack of it, will resolve the similar claims of a large number of persons in a speedy, efficient, and inexpensive manner. Structure of the case in this manner will save the system from thousands of "litigation

183. Williams, Mass Tort Class Actions, supra note 6, at 326.
185. 7B WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2 § 1790, at 298 (1986).
186. "The concept of 'general causation' embraced by the plaintiffs would ... involve a determination of whether the ingestion of tetracycline could, under any circumstances, cause tooth discoloration or structural damage to teeth. By way of contrast, 'specific causation' would entail a finding of whether the ingestion of tetracycline caused a particular plaintiff to suffer tooth discoloration or structural damage to his teeth." In re Tetracycline Cases, 107 F.R.D. at 728 n.6.
187. Id.
188. This characterization of the potential for liability is from the horse's mouth; it is defendant A.H. Robbins' argument for multidistrict consolidation of the Dalkon Shield cases then pending at the federal level. In re A.H. Robbins Co., Inc. "Dalkon Shield" IUD Products Liability Litigation, 406 F. Supp. 540, 541 (J.P.M.L. 1975).
189. "[T]he prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the parties opposing the class." Hernandez v. Motor Vessel Skyward, 61 F.R.D. 558, 561 (S.D. Fla. 1974).
190. "Amended Rule 23 is also intended to provide, in a single proceeding, inexpensive and speedy relief to large numbers of claimants who have suffered individual damages in large amounts." Becker, The Class Action Conflict: A 1976 Report, 75 F.R.D. 167, 169 (1976).
191. See supra notes 26 and 112.
re-runs" of the identical issues of causation and liability. In the real world of dispute resolution, a clear-cut finding of causation and liability has a great influence on the parties' willingness to settle.

A finding in favor of the defendant; as a practical matter, ends individual litigation. However, presuming that class-wide causation is established and the parties do not reach a settlement, each case is sent back to its originating district for trial of the uncommon individual issues. There, the individual plaintiff bears the burden of proving specifically that exposure was the cause of his or her own injuries. Juries in the subsequent trials would be informed of the class-wide determinations and advised that their duty encompasses only the specific or proximate cause of injury and individual damages. The option of consolidating specific types of injury or damage claims into one proceeding can be utilized as a further time and energy saver.

The seriousness of the particular injury is frequently cited as an impediment to class certification. The argument goes that the more severe the injury, the greater the interest in individual litigation. The variance in the factual patterns of the individual exposures is another frequently cited problem.

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192. Williams, Mass Tort Class Actions, supra note 6, at 328 and note the discussion of the time and money to be saved if a class is certified for common issues.
194. Supra note 44.
195. See infra notes 267-281 and accompanying discussion.
196. Fed. R. Civ. P. 42(b) permits separate trials when found to "be conducive to expedition and economy;" and see In re Air Crash Disaster at John F. Kennedy International Airport on June 24, 1975, 479 F. Supp. 1118 (E.D.N.Y. 1978).
197. See supra note 186. "After the verdict, as to the representative plaintiffs the court would send the other members of the class back to their own courts for subsequent trial on any individual issues of causation, affirmative defenses and compensatory damages." Williams, Mass Tort Class Actions, supra note 6, at 327. See generally 7B Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d §§ 1783 and 1790 (1988).
198. Williams, Mass Tort Class Actions, supra note 6, at 328.
199. This is presuming that the commonality requirement of Rule 42(a) can be met. It is also quite possible that the economies gained by class adjudication of the liability issues will be lost if some aggregation of similar injuries is not attempted. See particularly Rosenberg's discussion of the defendant's natural advantage in case-by-case litigation, Rosenberg, Mass Exposure Cases, supra note 2, at 902-05.
202. This is a frequently cited reason for denial of class certification to asbestos claimants because there are approximately 260 individual defendants in the asbestos litigation. E.g., Sanders v. Tailored Chemical Corp., 570 F. Supp. 1543 (E.D. Pa. 1983).
termination of generic causation and liability solves both of these problems because individual issues are either negotiated in the settlement\textsuperscript{203} or left for subsequent trial.\textsuperscript{204} Thus, the retention of the right to litigate or negotiate individual issues should mollify the naysayers who argue that this right\textsuperscript{205} is paramount.\textsuperscript{206} Moreover, protection of such interests is written into Rule 23 by the inflexible requirements that the adequacy of the representation must be superior and that scrupulous protection must be given to the rights of absent members.\textsuperscript{207} Issues-only certification is a workable compromise for all parties; the court is relieved of individual case congestion, the defendant receives a final and binding determination of liability, and the plaintiff retains a measure of individual control over the litigation.

V. THE TYPE OF CLASS TO CERTIFY
UNDER SUBDIVISION (b) OF RULE 23

After satisfying itself that the preliminary requisites have been met, the court turns its attention to the question of the type of class to certify under subdivision (b) of Rule 23.\textsuperscript{208} Cer-

\footnotesize{203. See infra notes 289-344 and accompanying text.}

\footnotesize{204. Class-wide determination of total harm to a community of plaintiffs, In re "Agent Orange" Product Liability Litigation, 597 F. Supp. at 838, has the added effect of enabling "mass exposure victims to litigate both in the numbers and with the adversarial strength necessary to achieve the tort system's utilitarian and rights-based deterrence objectives as well as its compensation goals." Rosenberg, Mass Exposure Cases, supra note 2, at 908.}

\footnotesize{205. The right is couched in terms of every person's right to control her own litigation and not be bound by the acts of others. But as noted by Judge Weinstein [then a Professor of Law at Columbia]: "The class action constitutes an exception to two important principles of our procedural law: each person is free to determine whether, when, and how to enforce his substantive rights; each person is entitled to his day in court before his rights are affected by a judgment." Weinstein, Revision of Procedure: Some Problems in Class Actions, 9 Buffalo L. Rev. 433, 433 (1960).}

\footnotesize{206. "Almost everyone who has had contact with plaintiffs of tort litigation at the trial court level would admit that, ultimately, everyone and everything but the injured plaintiff controls the litigation." Williams, Mass Tort Class Actions, supra note 6, at 330 n.23.}

\footnotesize{207. Due process is protected by a procedure which "fairly insures the protection of the interests of absent parties who are to be bound by it." Hansberry v. Lee, 311 U.S. 32, 42 (1940). Note also that under Fed. R. Civ. P. 23(e), once a class is certified the action cannot be dismissed or compromised without approval of the court.}

\footnotesize{208. This discussion centers on certification under 23(b)(1) or 23(b)(3). Certification of a class under 23(b)(2), in the context of this discussion, is clearly inappropriate because it is designed for those instances where the class is seeking something other than
tification under subdivision 23(b)(3),\textsuperscript{209} while the most frequently used subdivision of Rule 23 for mass accident cases,\textsuperscript{210} is inappropriate for certification on the narrow issues of generic causation and liability when the goal is to provide a single, final, and binding determination of those issues. Subdivision (b)(3) is structured to protect those individuals who are aware that they have a claim by affording them an opportunity to opt out of the litigation.\textsuperscript{211} The opt out requirement permits a plaintiff the choice of remaining in the class or taking affirmative action to separate his or her case from it. Prior to the exercise of the opt out provision, the best practicable notice under the circumstances must be given to every member of the class that can be identified.\textsuperscript{212} The notice requirement relates to the unwritten rule that there must be at least an identifiable class.\textsuperscript{213} The large number of potential members of a mass exposure class would

\textsuperscript{209} FED. R. CIV. P. 23(b)(3).
\textsuperscript{210} E.g., NEWBERG, supra note 33, at § 17.16 and 7A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 1775 (1986).
\textsuperscript{211} FED. R. CIV. P. 23(c)(2) requires the court to direct notice to members of a 23(b)(3) class stating that they may be excluded from the class if they request it (emphasis added). It follows that a person must first be aware that he or she has a claim before the right of exclusion can have any relevance. See infra note 219.
\textsuperscript{212} Id. The best practical notice under the circumstances means personal notice must be sent to every class member who can be identified through reasonable effort, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). The notice required by 23(c)(2) for a 23(b)(3) class is not discretionary, it is mandated, and, moreover, the cost of such notice must be borne by the plaintiff class, Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). Problems in giving notice to a class, the size of which is discussed here, can result in the court refusing to certify the class. If the class cannot afford the cost of the notice or is unable to manage the task of identification, a refusal to certify may be based on an inability to manage the action, which leads the court to determine that class treatment is not superior to other methods of adjudication. Management and superiority are both requirements for certification of 23(b)(3) classes.
\textsuperscript{213} That a class be identifiable relates to the description of the class, see discussion at supra notes 162-169, and can generally be satisfied, if, from the description, the court can determine that a particular individual is a member, 7A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 1760 (1986). The requirement of an identifiable class remains unwritten because the existence of a class turns on the circumstances of each case, making the formulation of a test to cover all contingencies extremely difficult. Id. See generally In re Federal Skywalk Cases, 93 F.R.D. 415, 421 (W.D. Mo. 1982).
necessitate that the notice be given nationwide, via publication in newspapers and on television and radio.\textsuperscript{214} Since there is no requirement that every member of the class be identifiable,\textsuperscript{215} this type of notice passes muster as the best possible under the circumstances.\textsuperscript{216} While the opt out provision may be ideal for the plaintiff in a mass accident class, there is an intrinsic unfairness to any potential future plaintiff in a mass exposure action when the definition of the class encompasses every person who was exposed to the toxic agent.\textsuperscript{217} Any person who does not

\textsuperscript{214} The notice must be "calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. at 314 (citations omitted). \textit{But see} Johnson v. Robinson, 296 F. Supp. 1165 (N.D. Ill. 1967), aff'd, 394 U.S. 847 (1969) and Snyder v. Board of Trustees of The University of Illinois, 288 F. Supp. 927 (E.D. Ill. 1968): "Under the circumstances the best practicable notice to members of the class represented by plaintiffs is the coverage by the news media which will result from the filing of this decision." Johnson v. Robinson, 296 F. Supp. at 1169; "[W]e note from the record the extensive publicity that has been given this case, both in the newspapers and through various channels of communication around the University of Illinois, and find that the notice requirements of Rule 23 are satisfied simply by the widespread notoriety this case has been given." Snyder, 206 F. Supp. at 931. While the foregoing type of notice would never pass muster to deny a future plaintiff his or her day in court, it does point out that where the notice is a discretionary requirement (i.e., for the class proposed in this paper), the standard is much less stringent. However, as pointed out \textit{infra}, every effort should be made to notify those who presently manifest injury and there should be some provision made for periodic notification to the class of potential claimants that their claims have been adjudicated and/or a settlement has been reached.

\textsuperscript{215} "In keeping with the liberal construction to be given [Rule 23] it has been held that the class does not have to be so ascertainable that every potential member can be identified at the commencement of the action." \textit{7A Wright, Miller & Kane, Federal Practice and Procedure: Civil} 2d § 1760 (1986) and cases cited at n.5 therein.

\textsuperscript{216} Although every member need not be identified at the outset, every effort must be made (under 23(b)(3)) to identify specific individuals so that they may be given the opportunity to exercise the opt out right. See the notice disseminated to both known members and the notice calculated to reach potential members of the Agent Orange class at \textit{In re "Agent Orange" Product Liability Litigation}, 100 F.R.D. at 729-36.

\textsuperscript{217} For instance, see id. at 729: "The plaintiff class is defined as those persons who were in the United States, New Zealand, or Australian Armed Forces at any time from 1961 to 1972 who were injured while in or near Vietnam by exposure to Agent Orange .... The class also includes spouses, parents and children of the veterans born before January 1, 1984, directly or derivatively injured as a result of the exposure." The defendants made the objection that this definition was too subjective because it required the potential class member to believe he had an injury at the time the notice was received. This would, presumably, allow future claimants, those manifesting injury at a later date, to bring an individual suit based on the fact that they did not believe they
request exclusion cannot maintain a separate action and is bound by any final determinations made in the action.\textsuperscript{218}

While notice should always be disseminated to alert any persons currently manifesting injury,\textsuperscript{219} fairness requires that no opportunity to opt out should be given in mass exposure cases.\textsuperscript{220}

had an injury when they received notice of the class action. The potential for individual future filing defeats the class action device.

Contrast the above with the nationwide notice disseminated by the Bankruptcy Court for the Eastern District of Virginia in the Dalkon Shield litigation. If you:
(a) may have been injured because you used the Dalkon Shield; or
(b) may have used the Dalkon Shield but have not as yet experienced an injury; or
(c) may have been injured because of another person's use of the Dalkon Shield.
This notice is calculated to include every person who was exposed to or used the Dalkon Shield, without regard to the individual's subjective belief that an injury is presently manifested.

\textsuperscript{218} See the \textit{Advisory Committee Notes to the Proposed Amendments to the Rules of Civil Procedure}, 39 F.R.D. at 105 for an explanation of the finality provision of \textit{Fed. R. Civ. P. 23(c)(3)}: "The judgment in a class action maintained as such to the end will embrace the class, that is, in a class action under subdivision (b)(1) or (b)(2), those found by the court to be class members; in a class action under subdivision (b)(3), those to whom the notice prescribed by subdivision (c)(2) was directed, excepting those who requested exclusion or who are ultimately found by the court not to be members of the class. The judgment has this scope whether it is favorable or unfavorable to the class. In a (b)(1) or (b)(2) action the judgment 'describes' the members of the class, but need not specify the individual members; in a (b)(3) action the judgment 'specifies' the individual members who have been identified and describes the others."

\textsuperscript{219} Notice is mandated if a 23(b)(3) "opt-out" class is certified but is discretionary if a class is certified under 23(b)(1) or 23(b)(2); \textit{Fed. R. Civ. P. 23(d)(2)}.

\textsuperscript{220} It is necessary at this point to distinguish a recent Supreme Court case, Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985), which at first glance appears to negate the possibility of certifying the mandatory class suggested here. \textit{Shutts} was a multistate class action brought in the Kansas state courts for the recovery of interest on suspended royalty payments. Note, at the outset, that all members of the plaintiff class were known and were sent notice of the action and the opportunity to opt out via first-class mail. The holding in \textit{Shutts} "bars a mandatory class action under state law for most claims that are wholly or predominately for monetary damages where most members of the class reside outside the state, because due process requires that absent class members be afforded the right to opt out before their claims can be foreclosed by a class action judgment." \textit{In re Jackson Lockdown/MCO Cases}, 107 F.R.D. 703, 713 (E.D. Mich. 1985). However, the Supreme Court very specifically limited this holding to the particular issues presented in the case: "Our holding today is limited to those class actions which seek to bind known plaintiffs concerning claims wholly or predominately for money judgments. We intimate no view concerning other types of class actions, ...." Phillips Petroleum v. Shutts, 472 U.S. at 811 n.3 (emphasis supplied). Thus, the class action suit as presented by this proposed model, involving prolonged latency periods, is a feasible mandatory class. \textit{Shutts} can be distinguished because this plaintiff class will consist of persons who manifest injury either before or after the binding adjudication of causation and liability is made, and because monetary issues are left for individual trials or negotiated in a class wide settlement. Additionally, it appears that the \textit{Shutts} concern
Notice of a pending action and an opportunity to exclude oneself are of no value to a person who receives such notice but is unaware that he or she has a claim. Thus, the laudable aim of protecting individual interests means nothing to the person who knows of his or her exposure but has not yet manifested an injury, or is unaware of exposure because he or she has not yet manifested an injury.\textsuperscript{221}

Women who meet the criteria for membership in the plaintiff class may not know that they were exposed \textit{in utero} to DES. Notice of this action, by publication, posting or otherwise, will not inform them of their having been exposed, though other events may. Women who do not know now of their DES exposure will not have the opportunity to opt out of this action.\textsuperscript{222}

The personal notice solution suggested by one court\textsuperscript{223} works is directed principally to the “potential for absent class members being foreclosed without their consent from bringing future claims by virtue of the forum state using its long-arm jurisdiction to conclusively adjudicate the claims of class members living predominately in other states.” \textit{In re} Jackson Lockdown/MCO Cases, 107 F.R.D. at 714, and \textit{see} NEWBERG, supra note 33, at § 20.14 (Supp. 1986) for a discussion of how \textit{Shutts} may affect a limited fund class or a mandatory class involving monetary damages in Chapter 11 proceedings.

\textsuperscript{221} Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), states that the notice and opportunity to opt out are the minimal due process requirements before resolution of the class action can bind any plaintiff. Assuming that the individual who has not yet manifested injury or who has no knowledge of exposure has received the notice and opportunity to opt out, a class resolution is theoretically binding on that person before he or she may even be aware that a cause of action exists. I use the word “theoretically” because the \textit{res judicata} effect of a class resolution cannot be determined by the court conducting the action; the \textit{res judicata} effect can only be tested in a subsequent action, \textit{Advisory Committee Notes to the Proposed Amendments to the Rules of Civil Procedure}, 39 F.R.D. at 106 (citing Restatement of Judgments § 86, comment (h), and § 116 (1942)).

"The court, however, in framing the judgment in any suit brought as a class action, must decide what its extent or coverage shall be, and if the matter is carefully considered, questions of \textit{res judicata} are less likely to be raised at a later time, and if raised will be more satisfactorily answered." \textit{Id}. The other extreme of the notice and opt out requirement is that when notice is found to be deficient the class determination cannot bind anyone. And note, because all the asbestos injuries have not yet been manifested, the effect a 23(b)(3) class would have in the Manville bankruptcy: "This provision would exclude future plaintiffs from the class and would result in a proliferation of classes by requiring the court to certify new classes periodically as new injuries manifested themselves." \textit{Note}, \textit{Manville Bankruptcy}, supra note 71, at 1135.

\textsuperscript{222} Payton v. Abbott Labs, 83 F.R.D. at 393. In response to this concern the court was very careful to define the class as including, and thus binding, only those women who receive individual notice by first-class mail and who are recorded as having \textit{actually} received such notice by return receipt or some equivalent. \textit{Id}. (emphasis supplied). The class as defined for notice purposes is given at note 184 supra.

\textsuperscript{223} \textit{Id}.
at cross-purposes to the intended goal of making a single, binding determination. As people manifest injury, individual lawsuits will continue, and the economies gained in the single action will have been lost. The single, binding causation and liability determination is intended to protect both present and future rights. The happenstance that a person has manifested an injury or disease at an earlier date should not operate to give that person greater rights.

The predominance of common issues over the individual issues requirement of 23(b)(3) generally cannot be met in the mass exposure context. Facts peculiar to each victim will present an inherent obstacle if 23(b)(3) is considered for mass exposure actions. Therefore, the superiority of class treatment over individual litigation will always remain questionable. Individual circumstances of exposure and amount of damages, types of injuries, the application of differing statutes of limitations and choice of law concerns all militate against a finding that common issues predominate. A single set of operative facts going to the issue of proximate cause makes mass accident classes ideal for certification under 23(b)(3). The fact that no single event, but rather a single pattern of misconduct caused the mass exposure injury, operates to preclude the use of subdivision (b)(3) for mass exposure classes.

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224. See supra notes 179-194 and accompanying discussion.
225. See supra note 221 for a discussion of why 23(b)(3) class certification thwarts the intended goal.
226. See infra notes 266-277 and accompanying discussion.
227. See supra note 221.
228. Fed. R. Civ. P. 23(b)(3) requires that common issues must predominate over any questions affecting only individual class members. The initial 23(a)(2) commonality analysis does not require that common issues "predominate," only that they be present. See supra notes 156-161 and accompanying discussion.
230. Fed. R. Civ. P. 23(b)(3) requires, in addition to predominance, that the class action be superior to other available methods of adjudication.
231. See the discussion in Dalkon Shield Litigation, 693 F.2d at 852.
233. Class action treatment is appropriate where: "(1) the class action is limited to the issue of liability; (2) the class members support the action; and (3) the choice of law problems are minimized by the accident occurring and/or substantially all plaintiffs residing within the same jurisdiction." Id. at 397.
For mass exposure litigation, certification of the narrow issues of generic causation and liability can be made under the provisions of Rule 23(b)(1)(A). Certification of the generic causation class under Rule 23(b)(1)(B), the limited fund provision, is not a viable alternative because this model presupposes that plaintiffs will try monetary issues separately. Subdivision (b)(1)(A) is designed to prevent the possibility of varying or inconsistent adjudications in identical fact situations, thus making it the best procedural tool available for mass exposure class actions.

One person may have rights against, or be under duties toward, numerous persons constituting a class, and be so positioned that conflicting or varying adjudications in lawsuits with individual members of the class might establish standards to govern his conduct. The class action device can be used effectively to obviate the actual or virtual dilemma which would thus confront the party opposing the class.

Mass tort classes have historically been considered inappropriate for certification under subdivision (b)(1)(A) on the basis that the provision is not triggered merely because of the risk

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234. Fed. R. Civ. P. 23(b)(1)(A): An action may be maintained if the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class.

235. Fed. R. Civ. P. 23(b)(1)(B): An action may be maintained if the prosecution of separate actions by or against individual members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.


237. However, though under the supposition that individual trials on the issue of monetary damages would be held after the liability and causation trial, Judge Williams certified a nationwide 23(b)(1)(B) class for punitive damages, based on the threat of the constructive bankruptcy of A.H. Robbins, Dalkon Shield Litigation, 526 F. Supp. at 896-900. And see note 25 supra, A.H. Robbins did file for Chapter 11 protection. A 23(b)(1)(B) punitive damages class was certified in the Agent Orange litigation for 2 reasons: there must be a limit on the amount of times the defendant can be punished and the fact that opt out members, depending on when their cases were completed, could receive all the punitive damages or none at all. In re “Agent Orange,” 100 F.R.D. at 728.

that some claimants will win and some will lose.\textsuperscript{239} It is generally held that the only result of multiple individual trials for monetary damages is merely that the defendant must pay the winners and not the losers.\textsuperscript{240} This has never been considered such a conflict to the defendant as to establish an incompatible standard of conduct to individual class members.\textsuperscript{241} However, the magnitude\textsuperscript{242} of the potential liability facing the mass exposure defendant should justify the use of 23(b)(1)(A). Otherwise, the competition among thousands of plaintiffs in each individual case-by-case determination will inevitably result in varying adjudications which will impose inconsistent standards of conduct on the defendant.\textsuperscript{243} The defendant is faced with more than merely paying the winners, the transaction costs alone are enough to justify class certification.\textsuperscript{244} "[R]ule 23 really must be thought of as a procedural skeleton requiring fleshing out by judges and lawyers experimenting with it in an ever-increasing range of circumstances and in a variety of innovative ways."\textsuperscript{245}

\textsuperscript{239}In re Bendectin Products Liability Litigation, 749 F.2d 300, 305 (6th Cir. 1984); In re "Agent Orange" Product Liability Litigation, 506 F. Supp. 762, 789 (E.D.N.Y. 1980), rev'd, 635 F.2d 987 (2d Cir. 1980); McDonnell Douglas Corp. v. United States District Court, Central District of California, 523 F.2d 1083, 1086 (9th Cir. 1975).

\textsuperscript{240}Id.

\textsuperscript{241}Except as applied to the limited fund situation embodied in subdivision 23(b)(1)(B); see Advisory Committee Notes to the Proposed Amendments to the Rules of Civil Procedure, 39 F.R.D. at 101 and cases cited supra at note 238.

\textsuperscript{242}See supra notes 28-32 and accompanying discussion.

\textsuperscript{243}In re Bendectin Products Liability Litigation, 102 F.R.D. 239, 241 (S.D. Ohio 1984); mandamus granted, 749 F.2d 300 (6th Cir. 1984).

\textsuperscript{244}"The transaction costs of obtaining a remedy are a proper consideration in determining substantive law. If much of a recovery will go to attorneys and experts rather than to those injured, then traditional tort remedies may be so ineffective as to put in doubt their utility in particular types of cases. Punishment of defendants who cause harm and deterrence of future harmful conduct is a by-product of the traditional tort system, but it should not independently furnish the rationale for private civil litigation. Where, therefore, the transaction costs of obtaining a remedy for a class are much less per dollar recovered than they would be in a case-by-case recovery, the class action may, as a matter of policy, be the only reasonable route to recovery. Added to the costs to defendants and plaintiffs must be the cost to the public and the courts in burdening the system with large numbers of private, individual claims. Thus, while the class action is deemed procedural and distinct from substantive considerations for most purposes, it may become, in a case like 'Agent Orange,' the only practicable way to secure a remedy." In re "Agent Orange" Product Liability Litigation, 597 F. Supp. 740, 842 (E.D.N.Y. 1984).

If various factfinders reach inconsistent conclusions about the same set of facts, the defendant "... is left without any guidance concerning the legality of its conduct," especially its future conduct with respect to the development, testing, and distribution of new drugs or products. Our society relies on the tort system for the redress of wrongdoing and for its deterrent effect on the future conduct of defendants.

Past adjudications can have a considerable effect on a defendant's future behavior. Indeed, deterrence of antisocial behavior, a major objective of tort law, depends on potential defendants' understanding of evolving legal norms. If inconsistent adjudications are tolerated, deterrence will be reduced because a potential or actual defendant can gamble on losing only a portion of the cases arising from his conduct.

A denial of class certification on the basis that the defendant can simply pay any adverse judgment is belied by the fact the Bankruptcy Court has become a refuge for the mass exposure defendant. When financial pressures drive a mass exposure defendant to bankruptcy, the defendant is obviously suffering from the results of inconsistent adjudications. Because there is no single determination, for or against it, the defendant cannot chart a course of future conduct.

A dramatic turnaround in the courts' approach to mass exposure litigation is necessary; traditional methods simply will not work. The Manual, in recognition of the bold strokes made by

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247. "Because thorough premarket testing of toxic agents is impractical, and because industry has little incentive to investigate and report mass exposure accidents, the number and variety of accidents that have recently come to light leave one with the disturbing sense that many hazards have yet to be created, let alone discovered." Rosenberg, Mass Exposure Cases, supra note 2, at 853-54.
248. See supra note 246, at 1154 n.47.
249. See cases cited supra note 229.
250. See discussion supra notes 22-25 and accompanying discussion.
251. See supra notes 66-87 and accompanying discussion. See also notes 303 and 304 infra.
252. District court judges recognize that the traditional methods are unsuited for this type of litigation: "The traditional court system is simply unequipped to handle such litigation in a conventional manner without materially depleting the judicial resources available for all other litigation." In re Bendectin Products Liability Litigation, 102 F.R.D. 239, 240 (S.D. Ohio 1984); mandamus granted, 749 F.2d 300 (6th Cir. 1984); "Traditional models of litigation, pitting one plaintiff against one defendant, were not
Judges Williams, 253 Rubin, 254 and Weinstein, 255 states: "special procedures may be needed to cope with ... complex tort cases, particularly those involving numerous claims ... arising from discrete, though similar, uses of (or exposure to) one or more widely distributed products ...." In the future, courts should take this advice to heart and make flexible use of Rule 23, the central judicial tool to cope with mass exposure claims. 256

There is a curious paradox in the Dalkon Shield litigation which points up the ready amenability shown by the courts to certification of issues-only securities litigation and their refusal to do the same in personal injury actions. 257 Based on A. H. Robbins' "unwarranted optimism for the efficacy and safety of the Dalkon Shield," 258 a class of aggrieved investors sought, and was granted, class status. 259 Conversely, injured women who based their decision to use the Dalkon Shield on the same...
Tort law has expanded into accepting that a mass tort can be the result of a single event or a gradual, cumulative set of circumstances, but some courts persist in a refusal to acknowledge it. Seeking protection in the Bankruptcy Court will lose its utility if there is class certification based upon the limited issues of causation and liability. The single binding determination will allow a defendant to assess, with certainty, what its real position is. The fact that the threat of bankruptcy pervades the mass exposure case cannot be argued. The actions of the Manville Corporation and the A. H. Robbins Company prove that the ability of the defendant to make use of constructive bankruptcy as a means to halt the litigation should be considered in the initial class certification decision.

The defendant may initially view class certification as a threat because the collective power wielded by a plaintiff class is a greater coercive force than any that an individual litigant can bring to bear. However, the prospect of obtaining a final and binding determination as to its potential liability should convince the defendant that certification as proposed by this model will work to its benefit.

Subdivision (b)(1)(A) classes are mandatory classes; there is no provision for opting out of the class. Any person described in the class definition as a member of the class is bound by any final judgment, favorable or unfavorable, that pertains to the

262. Newberg, supra note 33, at § 17.05.
263. See supra note 82.
264. "Despite the heavy cost of litigating on a case-by-case basis, ... the traditional thinking is that certification of a class increases the overall risk to a defendant by including claims which would not otherwise be brought, and by presenting the possibility of a class wide determination of liability by a single court or jury. When the stakes are high, as in most mass tort litigation, a defendant is normally unwilling to place all his or her eggs in one basket." Toxic Torts, supra note 18, at § 20.14.
265. "These considerations do not necessarily apply with equal force to the potential for punitive damages. Absent class action treatment, a defendant faces the distinct possibility of being punished many times over for the same wrong, with the threat of bankruptcy as a result. To the extent the class action device holds out the possibility of a limited fund to cap liability for punitive damages, it has an attraction for a mass tort defendant." Id.
class.267 It has been stated that the long latency period associated with a mass exposure or products liability action justifies a refusal to certify a non opt out or mandatory class.268 This reasoning contains a fatal flaw—the right to opt out has no meaning for a future plaintiff.269 The opt out provision protects a right which is not yet in existence.270 Certification of a mandatory class on the narrow issues of generic cause and liability is intended to gain the class action economies while protecting the person who may later manifest an injury.271 That person, by fitting into the definition of "persons exposed to the toxic agent," is bound by class judgments,272 and is, therefore, considered a party273 to the prior action. If the future plaintiff is bound by an adverse determination,274 he is also entitled to reap the benefits

267. "The absent parties would be bound by the decree so long as the named parties adequately represented the absent class and the prosecution of the litigation was within the common interest." Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 808 (1985), and see supra note 220.
269. See supra notes 208-227 and accompanying discussion.
270. Id.
271. Id.
272. See supra note 218.
273. The Supreme Court, in American Construction Co. v. Utah, 414 U.S. 538, 552 (1974), characterized absent class plaintiffs as "mere passive beneficiaries" of the action brought in their name. Thus, an absent class member is not required to do anything; "[H]e may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection." Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810 (1985). See also Keene v. United States, 81 F.R.D. 653, 657 (S.D. W. Va. 1979): "[I]n order to hold unnamed, absent class members bound by a judgment in a prior class action the Court must determine whether the class representative's conduct of the entire action was such that due process would not be violated by giving binding effect to the judgment in that prior action." Also, see generally NEWBERG, supra note 33, at §§ 1.07 and 1.08.
274. "[A] valid adverse judgment may extinguish any of the plaintiff's claims which were litigated." Phillips Petroleum v. Shutts, 472 U.S. at 810. "Successive individual actions by different plaintiffs against the same defendant are proper. In contrast, an adverse class judgment will bar, on res judicata grounds, a subsequent suit by an absent class member against the same defendant on the same cause of action previously litigated." NEWBERG, supra note 33, at § 5.08. However, a class judgment which is not dispositive of the individual claims of the class members will not bar a subsequent action on the uncommon, individual issues, see Cooper v. Federal Reserve Bank of Richmond, 467 U.S. 887 (1984). An adverse judgment to the putative plaintiff class can also work to the disadvantage of the defendant. A.H. Robbins was denied a motion to certify a nationwide punitive damages class on the basis of the collateral estoppel effect of a decision by the Ninth Circuit Court of Appeals decertifying the same class. See In re Northern District of California Dalkon Shield IUD Products Liability Litigation, 693 F.2d 847 (9th Cir. 1983) and In re Dalkon Shield Punitive Damages Litigation, 613 F. Supp. 1112 (D.C. Va. 1985).
of a favorable class determination by the assertion of *res judicata*. The future plaintiff can make use of offensive collateral estoppel by asserting the prior judgment establishing generic causation and liability, and then conduct his or her own action on the issue of specific causation and damages only.

A judgment adverse to the plaintiff class will allow the defendant to raise the issue of *res judicata* or make use of defensive collateral estoppel against a future party attempting to raise the identical issues of causation and liability. This is a disad-


276. "When it is clear that a specific issue has been resolved against a party who had a full and fair opportunity to litigate the matter, he or she and those in privity with him or her are precluded by the doctrine of collateral estoppel from relitigating that issue in a subsequent action. The purpose of the doctrine is to promote judicial economy by foreclosing repetitious litigation of previously decided questions." Toxic Torts, supra note 18, at § 20.16 et seq.

277. "The doctrine of collateral estoppel is devoted to issue preclusion. The party asserting estoppel must show, *inter alia*, that the issue to be concluded is identical to the one litigated in the prior action. The critical ultimate issue in any products liability action is whether the product is defective or unreasonably dangerous. The potential application of collateral estoppel to mass tort cases thus has tremendous significance, for it presents the theoretical possibility of eliminating the central liability questions in hundreds of subsequent cases once an adverse verdict on that issue is rendered against the manufacturer." Id. at § 20.18 (emphasis in original). However, the admonition in Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 331 n.14 (1979) (citing Professor Currie's railroad collision example) to the effect that offensive collateral estoppel should not be automatically applied to allow recovery in the mass tort situation should be kept in context. A class wide adjudication of causation and liability presents none of the problems cited in Parklane because the defendant has had a full and fair opportunity and has also had an incentive to exhaustively litigate the issues. Thus, the finding in favor of the class should be applied automatically to preclude those issues when the action is one brought by a person who was expressly included as a member of the class but whose injury manifested itself later in time.

278. "Defensive use [of collateral estoppel] occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant." Parklane Hosiery, 439 U.S. at 326 n.4. "Under the doctrine of *res judicata*, a judgment on the merits in a prior suit bars a second suit involving the same parties ... based on the same cause of action." Id. at 326 n.5. Thus, depending on the situation, i.e., whether there are multiple defendants as in the DES and Agent Orange litigation, or only one, as in the Bendectin and Dalkon Shield litigations, the future plaintiff, by virtue of having been a party to the class wide determination in favor of a particular defendant can be bound by it, and a "valid adverse judgment may extinguish any of the plaintiff's claim that was litigated." Phillips Petroleum Co. v. Shutts, 472 U.S. at 810.
vantage for the future plaintiff because, unless he can attack the adequacy of the representation, he has been effectively foreclosed from his own litigation by the adverse effect of the prior judgment. Consider, however, that "the doctrine of collateral estoppel was not developed to cure the problems inherent in mass tort cases. Its application to this kind of litigation has proven to be a difficult problem which is beginning to generate its own body of law."

VI. SHIFTING THE BURDEN TO THE PRIVATE SECTOR BY A SETTLEMENT WHICH WILL ENCOMPASS ALL CLASS MEMBERS

Class certification issues are equally significant to any settlement that may be reached in mass exposure litigation. In the real world of dispute resolution, it is obvious that the magnitude of a causation and liability trial, followed by the prospect of

279. "It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present...." Hansberry v. Lee, 311 U.S. 32, 42 (1940). "A primary purpose of Rule 23 is to establish the binding effect of class action judgments on absent class members so that they cannot burden opposing parties or the courts with claims similar to those which have been previously adjudicated." Freeman, Current Issues in Class Action Litigation, 70 F.R.D. 251, 286 (1974). "[T]he judgment in a class action will bind only those members of the class whose interests have been adequately represented...." Sam Fox Publishing Co., Inc. v. United States, 366 U.S. 683, 691 (1961) (citing Hansberry v. Lee, 311 U.S. 32 (1940)).

280. "[T]he binding force of a particular action cannot be determined accurately by the court which hears the class suit, for that court is ill-equipped to test the adequacy of the representation of absent class members, the sufficiency of notice given, or even the general fairness of the proceeding. Since these questions can best be answered realistically with respect to a particular person, the ultimate effect of the class action judgment will be determined when it is introduced in a subsequent action to bind persons not parties to the original action." Note, Binding Effect of Class Actions, 67 Harv. L. Rev. 1059, 1060 (1954). See generally Annotation, Res Judicata Effect of Judgment in Class Action Upon Subsequent Action in Federal Court, 48 A.L.R. Fed. 675 (1980). Generally, res judicata may be said to apply to class judgments when the following conditions are met: 1) the parties or members of the class are the same in both actions; 2) the description of the class in the first action accurately describes those who are parties to the second action; 3) notice, if required, was sufficient in the first action; 4) the representation in the first action was adequate to meet due process requirements; and 5) the relief sought in the two suits is the same. Id.

281. TOXIC TORTS, supra note 18, at § 20.24. "At least one court has taken note of the fact that the inquiry necessary to determine whether estoppel should apply may undermine the goal of judicial economy which the doctrine is meant to foster." Id. The case is Goodson v. McDonough Power Equipment, Inc., 2 Ohio St. 3d 193, 443 N.E.2d 978 (1983). See generally NEWBERG, supra note 33, at § 17.45.
thousands of individual damage trials, makes it more economical for all parties to negotiate a settlement. Indeed, the judge is under a duty to at least suggest the possibility of settlement, if not actively encourage it.\textsuperscript{282} Class certification, alone, is sometimes enough to induce settlement negotiations, and the prospect of settlement becomes more and more attractive as the date of trial draws near.\textsuperscript{283} The cost of prosecuting the case and the difficulty of proving or disproving causation would appear to dictate a global resolution.\textsuperscript{284} If the defendant chooses to gamble on the outcome of the trial, then certainly a binding determination of liability, to perhaps millions of persons, is a compelling reason to negotiate a global settlement.\textsuperscript{285}

Can a settlement be formulated which will bind each and every person who may ever manifest an injury? The necessity to the defendant of resolving all claims and ending all litigation requires that provisions of the settlement cover every affected

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\textsuperscript{282} \textit{Fed. R. Civ. P. 16(a)(5)} gives discretionary authority to the trial judge to facilitate settlement of the action. The \textit{Manual}, supra note 94, at § 23.11, characterizes the judge as a "catalyst" for settlement discussions. Users of the \textit{Manual} are advised that: "Beginning with the first conference, and from time to time throughout the litigation, the court should encourage the settlement process. The judge’s first effort should usually be light-handed—perhaps merely an inquiry whether the parties have discussed settlement. As the case progresses and both the judge and counsel learn more about it, the court should urge the parties to consider—and reconsider—the possibility of settlement in the light of what has occurred and, perhaps more important, what may be ahead if the litigation is pursued." Id.

\textsuperscript{283} "The imminence of the [Agent Orange] trial date forced each party to evaluate its case to determine whether the case should be settled. In the end, the parties settled on the eve of trial. Thus, Judge Weinstein’s approach [in setting a firm trial date] placed the parties under the kind of pressure that forced a realistic appraisal of their likelihood of success at trial and promoted the settlement." Practicing Law Institute, \textit{Litigation and Administrative Practice Series}, Course Handbook #306: \textit{Management of Complex Mass Tort Litigation}: Chesley, \textit{Strategy and Tactics, Settlement and Attorneys Fees}, 455 (April 14, 1986).

\textsuperscript{284} The \textit{Manual}, supra note 94, at § 33.27 advises the parties involved in complex litigation to attempt a resolution of the entire matter in a single settlement, i.e., a "global settlement" should be achieved if at all possible. And note that in the MGM litigation "a global settlement" was expressed by defendants and third-party defendants as being the "only type of settlement which [they] would be willing to enter because of the need to resolve all claims and end all litigation, both in the federal and state court." \textit{In re MGM Grand Hotel Fire Litigation}, 570 F. Supp. at 917.

\textsuperscript{285} A single class wide finding of causation and liability will encourage settlement of the entire matter because "[i]n a situation where there are potentially tens of thousands of plaintiffs, the defendants may naturally be reluctant to settle with individual claimants on a piecemeal basis." \textit{In re "Agent Orange" Products Liability Litigation}, 100 F.R.D. at 721.
The competing concern of class members is their interest in the uncommon issues of individualized and unliquidated claims, which for the future plaintiff are not yet in existence. As of this writing, there have been attempts to arrive at global settlements in the mass exposure context, but a method that is universally agreed upon has not been devised.

Because mass tort class actions and related settlements are relatively recent arrivals in modern class action jurisprudence, one can reasonably expect various novel and creative methods to try to resolve what are often thousands or tens of thousands of related tort claims arising from a mass disaster, a widely distributed defective or toxic product, or a toxic workplace or environment affecting numerous employees, invitees or residents.

The class representative is the appointed watchdog of the rights of persons not before the court. During settlement negotiations the representative is under a duty to actively discuss and provide for a settlement that encompasses future victims.

286. "A class action would also facilitate settlement by allowing [the] defendants to buy their peace with all of the plaintiffs at once." In re “Agent Orange” Products Liability Litigation, 597 F. Supp. at 842.

287. In re Bendectin Products Liability Litigation, 102 F.R.D. 239 (S.D. Ohio 1984), mandamus granted, 749 F.2d 300 (6th Cir. 1984). In re “Agent Orange” Product Liability Litigation, 597 F. Supp. 740 (E.D.N.Y. 1984), 611 F. Supp. 1396 (E.D.N.Y. 1985); and see supra note 19. A notable success, although in a different context, but applicable because of the creation of a common fund from which to settle claims, is the settlement reached in the MGM litigation. In re MGM Grand Hotel Fire Litigation, 570 F. Supp. at 924. Note also, in current litigation involving exposure to the pesticide DDT, a tentative settlement, which appears to take into consideration the latency period inherent in exposure to a toxic agent, (see supra note 4) has been reached. Notice of the settlement sent to potential class members states: “The class specifically includes persons who have not yet manifested injury.” In re Redstone Arsenal DDT Litigation, D.C. Ala. (BNA) No. 86-C-5313 NE, 1 Toxic Law Rptr. No. 7 at 159 (July 2, 1986).

288. Newberg, supra note 33, at § 17.18.

289. “The attorneys and parties seeking to represent the class assume fiduciary responsibilities to the class; and to a degree the court also is called upon to protect the interests of the class.” Manual, supra note 94, at § 30.

290. However, Newberg asserts that a mandatory class can never bind a future claimant: “Anytime a mass tort gives rise to injuries that occur over a period of time, in contrast to those arising from a mass accident or other disaster, inevitably there will be claims that arise in the future after an action for this mass tort has been permitted to be maintained and adjudicated as a class action. These future claims will not and cannot be bound by the class action litigation. Toxic torts giving rise to latent illnesses and defective products with latent risks are two examples. Therefore, any mandatory class certification in a mass tort context that involves future claims not yet matured or filed which are not encompassed in the litigation is potentially arbitrary and prejudicial to the members of the class.” Newberg, supra note 33, at § 17.38.
A plan may be devised which is fair enough to withstand due process concerns if certain contingencies are provided for. First, presuming the product has been taken off the market, the settlement funding must last at least as long as the latency period.\(^{291}\) If the product is not removed, the funding must last indefinitely.\(^{292}\) Second, there must be provision for the replenishment of the fund in the event claims exhaust it before the latency period ends.\(^{293}\)

A combination of the course set in the Agent Orange litigation\(^{294}\) and the reasoning followed in the attempt to facilitate a global settlement of the Bendectin litigation\(^{295}\) will provide a workable model.

The court is given the authority to settle a class action by subdivision 23(e)\(^ {296}\) and can create classes for the purpose of settlement only.\(^{297}\) Certification of the settlement class can be

\(^{291}\) Most manufacturers are prudent enough to remove the particular problem-causing product from the market when the influx of mass filings begins, if they have not already done so. See supra notes 58-62 and accompanying text.

\(^{292}\) Members of the class who are presently manifesting injury can, in addition to the liability and causation action, seek class certification under the provisions of the FED. R. CIV. P. 23(b)(2) for declaratory or injunctive relief in an effort to have the product removed from the market.

\(^{293}\) See infra notes 309 and 326 and accompanying text.


\(^{296}\) FED. R. CIV. P. 23(e): "A class action shall not be dismissed or compromised without the approval of the court and notice ... given of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs."

\(^{297}\) At one point in time the MANUAL FOR COMPLEX LITIGATION, § 1.46 (5th ed. 1982), advised against the formation of settlement classes for the sole purpose of approving or disapproving a settlement negotiated by the parties in advance of a formal class certification. The concerns expressed by the Board of Editors are sound ones: "the risk of a premature, inadequate settlement, and the possibility that class members may be induced to accept such an improvident settlement in the absence of sufficient information to make a reasoned choice" and prevention of the possibility of "collusion, individual settlement, [and] 'buy-offs' where the class action is used to benefit some individual at the expense of absent members, and other abuses." In re Baldwin-United Corp., 105 F.R.D. 475, 479 (S.D.N.Y. 1984). The current edition of the MANUAL, supra note 94, at § 30.45, while not foreclosing the possibility, nevertheless advises that great caution be used when considering a settlement in advance of the formal class certification. However, "[i]f the settlement agreement is found to be fair, reasonable and adequate—both in its substantive provisions and in the process of its creation—then the policy reasons behind the Manual's admonition become inapplicable." In re Baldwin-United Corp., 105 F.R.D. at 481. In the context of this proposed model, the use of such a settlement class before
made under 23(b)(1)(A) for the same reasons as certification of the trial class, the prevention of a multitude of individual trials.298 For settlement purposes, a class could also be certified under 23(b)(1)(B) if available funding may be limited. Certification, with no opportunity to opt out under either of these provisions, is intended to draw every conceivable claim into the orbit of the settlement. However, certification of a limited fund settlement class should be avoided, if at all possible, in this context.299 The logistical problems are magnified because it may be that the less serious injuries would, of necessity, go uncompensated.300 If there truly is a limited fund,301 the settlement plan can define designated kinds of injuries and degrees of disabilities and limit compensation accordingly.302 This may violate the due process rights of future victims because an effective means of seeking a remedy may have been foreclosed.303 However, in mass exposure

the parties and the court can adequately apprise themselves of the strengths and weaknesses of the case and the real scope of the defendant's potential liability would subject the settlement, if finally approved, to a successful collateral attack. However, after a formal class certification has been made and the case has progressed to a point where the parties can assess the true litigational posture and thus determine the benefits to the class in settling, these concerns should not arise.

298. See supra notes 239-245 and accompanying text.

299. See infra notes 303 and 304 and accompanying text.

300. "It is not possible for all class members to receive significant individual compensation from the settlement funds. To the extent practicable, simple criteria for eligibility should be established to assure acceptable targeting of limited settlement funds and to provide adequate notice of eligibility to class members." In re "Agent Orange" Products Liability Litigation, 597 F. Supp. at 859. Toward this end, the distribution plan provides that "only totally disabled veterans ... will receive individual cash awards." In re "Agent Orange" Products Liability Litigation, 611 F. Supp. at 1410. However, "[a]lthough a meaningful individual cash award cannot be paid to every claimant, a class assistance foundation will be created to fund services to meet the needs of the entire class. Every class member will be eligible to benefit from this aspect of the distribution plan." Id. at 1411.

301. See supra note 236.

302. See supra note 300. "[T]he settlement fund, though large in absolute terms, is not sufficient to satisfy the claimed losses of every class member." In re "Agent Orange" Products Liability Litigation, 611 F. Supp. at 1411. An equitable allocation of the large settlement fund must be made among the even larger claims of the various class members." Id. at 1411 (quoting In re Equity Funding Corp. of America Securities Litigation, 603 F.2d 1353, 1363 (9th Cir. 1979)).

303. "It is conceivable ... that the claims of the named plaintiffs would be so large that if the action were to proceed as an individual action the decision would 'as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.' Fed. R. Civ. P. 23(b)(1)(B). This would be the case where the claims of all plaintiffs
litigation, "courts must choose between compensating large numbers of demonstrably injured people in an imperfect manner or not compensating them at all."\(^{304}\)

The creation of a subdivision (b)(3)\(^{305}\) class for settlement purposes is also unfair to the future victim. For instance, for purposes of trial, the Agent Orange class members were given an opportunity to opt out.\(^{306}\) The subsequent settlement, however, binds every person who did not opt out, including those who may later manifest an injury.\(^{307}\) Under this circumstance, the exclusion provision has given the present victims one more bite at the apple than the future victims.\(^{308}\) Fairness requires that the settlement encompass every victim.

exceeded the assets of the defendant and hence to allow any group of individuals to be fully compensated would impair the rights of those not in court." See 3B MOORE'S FEDERAL PRACTICE § 23.35[2] (1975); Green v. Occidental Petroleum Corp., 541 F.2d 1335, 1340 n.9 (9th Cir. 1976).

304. In re "Agent Orange" Products Liability Litigation, 597 F. Supp. at 841. In a limited fund situation, if a settlement cannot be reached, it is reasonable to assume that the defendant will eventually file bankruptcy. Thus, the same result would occur in the bankruptcy proceeding as would have occurred in a 23(b)(1)(B) limited fund situation. Any funding for tort claims by the bankruptcy court would necessarily have to have a fixed ceiling because the very purpose of the bankruptcy proceedings is to provide the debtor with a fresh start. Absent a fixed ceiling, the debtor would continually be re-exposed to the liabilities that drove it to bankruptcy in the first instance. And note that a limited fund situation is also created when a financially healthy defendant seeks refuge in bankruptcy. Every debtor, solvent or not, is entitled to a fresh start, and thus must emerge from the bankruptcy with its liabilities fixed. See generally Manville Bankruptcy, supra note 71.

305. FED. R. CIV. P. 23(b)(3); opt-out class.

306. In re "Agent Orange" Products Liability Litigation, 100 F.R.D. at 732 (Exhibit A: LEGAL NOTICE TO CLASS MEMBERS OF PENDENCY OF CLASS ACTION, #7); at 734 (Exhibit B (Radio and Television Communication): SPECIAL ANNOUNCEMENT); at 734 (Exhibit C (Newspaper and Magazine Notice): TO ALL PERSONS WHO SERVED IN OR NEAR VIETNAM AS MEMBERS OF THE ARMED FORCES OF THE UNITED STATES, AUSTRALIA, AND NEW ZEALAND FROM 1961-1972); to the effect that "you are now a member of a class ... brought on your behalf ... unless you take steps to exclude yourself." Id. at 734.

307. In re "Agent Orange" Products Liability Litigation, 597 F. Supp. at 865, Appendix A, Settlement Agreement #8: "The [settlement] Class specifically includes persons who have not yet manifested injury. All persons who are otherwise qualified but who previously requested exclusion from the class shall have the opportunity to withdraw their exclusion within a reasonable time as determined by the Court, and shall thereby be included in the Class."

308. The argument is the same as that involved in the discussion of the (b)(3) class for trial of causation and liability (see supra notes 208-227 and accompanying discussion); the opt out opportunity means nothing to the person who cannot presently assert a claim. Thus, the persons who elected to remain opt outs from the Agent Orange settlement class can now bring individual actions and those who manifest future injury
The proper allocation and structuring of the settlement funds will provide the crucial protection necessary to bind the future victims. Subclassing can be used, if necessary, to divide the class by types and seriousness of injury. Each subclass is then divided by claims arising from presently manifested injury and those expected to arise in the future. Monies are segregated to provide compensation for present injuries and for the creation of a reserve fund for future claimants. The court is directed to provide all identifiable class members with notice of essential settlement terms, and must disclose that an approval of the settlement is binding on all class members. The fiduciary position held by the class representative ensures that future rights are provided for, and settlement is facilitated because the defendant can be assured that it is buying peace of mind by providing settlement funds for all plaintiffs at one time.

The proposed Bendectin settlement class was subclassed into an "A" class, composed of all persons who had filed suit as of are bound by the terms of the settlement. Opt outs were given two bites because they could choose between opting back into the class or bringing an individual action and then making use of the settlement indemnity fund. See In re "Agent Orange" Product Liability Litigation, 597 F. Supp. at 894, the Settlement Agreement #5: the settlement terms include a fund of 10 million dollars to indemnify for all "final compensatory judgments rendered against any [settling defendant] in a state-court action."

The future victim can be bound by the past actions of others on her behalf so long as there remains some way for her to assert a claim. See infra note 324.

For instance, the birth defects allegedly caused by Bendectin can be subclassed into the following: (a) limb defects; (b) musculo-skeletal defects; (c) central nervous system defects; (d) heart defects; (e) head deformities; (f) respiratory defects; (g) gastro-intestinal defects; (h) genitourinary defects; (i) death. In re Richardson-Merrell, Inc. Bendectin Products Liability Litigation, MDL #486, Order pertaining to common issues, Docket #1148 (December 29, 1983).

See Friends For All Children, Inc. v. Lockheed Aircraft, 87 F.R.D. 560 (D.C. 1981), for a novel approach to the dilemma of future manifested injury. "I am inviting the parties to address a possible solution having these four principal elements: (1) a procedure to evaluate the plaintiffs' medical conditions so that cases are brought to trial when their conditions permit accurate adjudication; (2) provision for diagnosis and observation of all plaintiffs for symptoms of brain injury; (3) provision during the period before trial for treatment of those plaintiffs who manifest signs of injury; and (4) establishment of a structure to encourage settlements by providing for the exchange of medical information and offers." Id. at 564.

See supra note 300.

See generally MANUAL, supra note 94, at § 30.212.

See supra note 286.

June 18, 1984, and a "B" class, composed of persons who had not filed as of that date. A class structured in this manner expressly includes those who manifest injury in the future. These classes were conditionally certified for the purpose of investigating the possibility of a global settlement. A guardian ad litem was appointed to represent class "B" interests because the parties could not come to a mutually agreeable solution to the problem of exhaustion of the reserve fund. The inability of class representatives to negotiate this vital aspect of settlement, in effect, creates a limited fund. A limited fund, in turn, creates a conflict between the interests of the present claimants and those of future claimants. In such a situation, the importance of treating future interests equally and fairly necessitates that an independent watchdog be appointed to determine the fairness of the settlement to future claimants. As can be seen

318. Id. at 242.
319. Id.
320. "The Class B claims can, thus, include any person with an existing, but unfiled claim, as well as any person born after June 18, 1984, who has a claim. The universe of Class B claims, because of the widespread use of Bendectin, is unknown and unknowable." Brief of Majority of Plaintiffs' Lead Counsel Committee in Opposition to Petition for a Writ of Mandamus, at 15, In re Bendectin Products Liability Litigation, 102 F.R.D. 239 (S.D. Ohio 1984), mandamus granted, 749 F.2d 300 (6th Cir. 1984).
322. "A class certification would enable any proposed settlement to be presented to all class members and by them either accepted or rejected." Id. at 240.
323. A guardian ad litem is a guardian appointed by a court of justice to prosecute or defend an infant in any suit to which he may be a party. BLACK'S LAW DICTIONARY 834 (4th ed. 1968).
324. "In order to preserve the viability of the settlement and avoid the due process problems of having class B claimants assert claims against an empty fund, the PLCC [Plaintiffs Lead Counsel Committee] has always contended that in the event the Fund is exhausted, Merrell-Dow should pay the additional Class B claimants who establish their claims in the same manner as other Class B claimants were compensated by the Fund. Thus far, Merrell-Dow has not acquiesced in this interpretation of the Settlement Agreement." Brief of Majority of Plaintiffs' Lead Counsel Committee in Opposition to Petition for a Writ of Mandamus, at 17, In re Bendectin Products Liability Litigation, 102 F.R.D. 239 (S.D. Ohio 1984), mandamus granted, 749 F.2d 300 (6th Cir. 1984).
325. Present claimants and future claimants are "in a competitive, adversarial role because the benefits to one class would vary in inverse proportion to the benefits awarded to the other." See generally MANUAL, supra note 94, at § 30.47. "Counsel whose clients fall in both Subclass A and Subclass B cannot possibly represent both classes as the classes are inherently in conflict with each other for their share of the settlement." In re Bendectin Products Liability Litigation, 749 F.2d 300, 304. "Because the size of Subclass B cannot be presently determined, members of Subclass A have the incentive to try to minimize the size of Subclass B in order to increase Subclass A's share of the settlement." Id. at n.5.
by subsequent events in the Bendectin litigation, the limited fund situation dooms a global settlement.

The portion of the Agent Orange settlement plan covering future victims is self-explanatory:

A portion of the fund—in an amount yet to be determined—will be set aside for future payment to those class members, who have not, as yet, manifested adverse health effects but who may manifest such effects in the future. This will be done after determining the number and nature of the claims submitted now for presently manifested adverse health effects. Some of the portion of the fund set aside for such future claims may later become available for additional payments to class members presently suffering from adverse health effects, depending on the number of future claims. The number and nature of such future claims should become clearer with the passage of time.

Establishment of a reserve fund for future claimants and providing a method to determine the validity of the claim are necessary ingredients of the settlement plan. The reserve funding need only be in existence for the latency period plus five or ten years. Statistical and economic data, generated from the number and epidemiology of the currently manifested disease or injuries, can be used to estimate the approximate

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326. Writ of mandamus granted, vacating the order of the district court certifying conditional settlement classes for the purpose of investigating settlement. In re Bendectin Products Liability Litigation, 749 F.2d at 300 (6th Cir. 1984). However, the Court noted: "Although we shall issue the writ, we realize that the district judge has been faced with some very difficult problems in this case, and we certainly do not fault him for attempting to use this unique and innovative certification method. On pure policy grounds, the district judge's decision may be commendable, and several commentators have argued that Rule 23 should be used in this manner." Id. at 307 (citations omitted).


328. The reserve funding protects the due process rights of the future claimant. Conversely, the establishment of an orderly method to determine the validity of the claim protects the defendant from what could be termed a nuisance claim, i.e., those persons who hear that there is money available and assert a claim merely because they suspect they have been injured by the defendant. See infra note 333.

329. The liability of the defendant must, of necessity, end at some point in time. If the drug or product is no longer available to the public, exposure to it cannot be asserted against the defendant. It is, therefore, not necessary to continue the funding indefinitely because after the latency period ends the causal link can no longer be established.

330. Epidemiology refers to the study of the occurrence and distribution of disease. BLACKISTON'S GOULD MEDICAL DICTIONARY 452 (4th ed. 1979). Etiology, the study of the causes of disease, should also be considered when making the estimate. Id. at 472.
amount of the reserve fund. A critical part of the solution is establishing a dollar amount for the damages suffered by individuals. Some mechanism to decide damage claims, without the need for a full-fledged trial, must be devised or the judicial and monetary economies provided by the class action device will be lost. The settlement terms must include a workable method for establishing guidelines, standards, and criteria for resolution of the claims for compensation based on the exposure. Provisions must also be made to periodically publicize the fund's existence and purpose.

The proof of claim procedure established for the present victims can also be used for the future claims. Any victim will be required to document his or her exposure and provide the necessary medical documentation, as established by the terms of the settlement, of specific causation. A registry can be set up to identify victims, serve as follow-up for research efforts, and to identify and keep track of claims as they arise. The Agent

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331. "Putting a dollar amount on the damages suffered by individual plaintiffs is, from a real-world standpoint, a critical part of the solution. If the judicial and monetary economies of the class action are not to be lost through lengthy and expensive individual trials on damages, some mechanism must be devised to decide damage claims without the need for a full fledged trial for each plaintiff." In re "Agent Orange" Product Liability Litigation, 597 F. Supp. at 838.

332. Id.

333. "Some substantial showing of exposure ... must be made to insure that only class members who were exposed receive payment. Exposure is a jurisdictional requirement for class membership." In re "Agent Orange" Product Liability Litigation, 611 F. Supp. at 1415. Toward this end: 1) Any veteran who directly handled Agent Orange will be considered exposed; 2) all other claims will be evaluated to determine a correlation between a veteran's whereabouts in Vietnam and the location of spraying missions. Id. at 1416-17.

334. "Provision of such information to the class is important. The funding of service programs by the foundation would be frustrated if class members did not know that the services would be available." Id. at 1446. The same is true for claim funding; the purpose is frustrated if future plaintiffs have no knowledge that they can seek redress for their injuries from the fund. Further, without periodic publicity of the claim fund, a claimant who failed to make a claim before the fund was discontinued could argue that his or her due process rights had been foreclosed by the lack of information.

335. "The Agent Orange Registry was established by the Veterans Administration in 1978 to accomplish four objectives: 1) to identify all Vietnam veterans expressing a concern about the possible adverse health effects of their exposure to Agent Orange; 2) to provide a mechanism for Vietnam veterans to voice their concerns to a physician, and to receive a physical examination; 3) to serve as a mechanism for follow-up of these veterans if, at a later date, new information develops as a result of the various research efforts under way or being planned; and 4) to obtain some preliminary information on the current health status of the veterans who have participated in the Registry program. In re "Agent Orange" Products Liability Litigation, 597 F. Supp. at 852.
Orange distribution plan, for instance, contains provisions for several ongoing projects, such as genetic counseling and investigation of birth defects, to be funded from the settlement.\textsuperscript{336}

The reserve funding must be administered by a board comprised of class members, scientists, doctors, social workers, and other qualified professionals as necessary.\textsuperscript{337} It is vital to treat the reserve funding like a trust fund; it must be managed by skilled investment counselors.\textsuperscript{338} The "structured settlement" technique, used in individual tort cases,\textsuperscript{339} is suggested by the \textit{Manual} as a possible way to set up the reserve funding.\textsuperscript{340}

Possible exhaustion of the reserve fund must be of paramount concern during the settlement negotiations. Due process con-
cerns can be laid to rest if the chance that a future victim may make a claim to an empty fund will not arise. Provisions for the replenishment of the fund are necessary because the number of future claimants, while capable of estimation, will remain unknown and unknowable. The Bendectin experiment in mandatory settlement probably would not have failed if the parties had been able to come to terms on replenishment of the reserve fund.

The prevailing view in the legal community is that a person who manifests an injury in the future cannot be bound by a settlement reached prior to the manifestation of that injury. Mass exposure litigation, however, does not arise in the best of all possible worlds. A frank and pragmatic eye must be leveled at the enormous judicial task of disposing of so many individual cases. The problem is a societal one, resulting from exposure to a highly technical product which is capable of causing "damage unprecedented in its magnitude." Creative and imaginative problem solving by the manufacturers, lawyers, and judges alike should tip the balance in favor of crafting the widest possible settlement in the most efficient manner available. Establishment of settlement classes, geared to treat all claimants fairly and

341. See supra note 324.
342. The parties must come to terms on a replenishment of the reserve funding even though the likelihood that the funds will run out is slim. This is because the number of future claimants will remain unknown, even with the best expert projections. An example of this occurred in the Dalkon Shield Bankruptcy: "The number of Dalkon Shield claims was far larger than expected, and no one so far has ventured more than the roughest guess as to what percentage of them are valid." 342 OB/GYN LR 5/14/86 P. 5927 and see supra note 59. However, the notice was phrased in such a way as to indicate (probably with good reason) that a failure to respond would forever bar any claim that may arise in the future. See supra note 217.
343. Newberg, supra note 33, at § 17.19.
344. See supra note 324.
345. Newberg says it cannot be done, see supra note 290. This issue has also been raised, if not expressly, at least implicitly, in the many Agent Orange appeals. It also can be read into the opinion decertifying the settlement class in the Bendectin litigation, mandamus granted, In re Bendectin Products Liability Litigation, 749 F.2d 300 (6th Cir. 1984). See also In the Matter of UNR Industries, Inc., 725 F.2d 1111 (7th Cir. 1984). UNR Industries proposed, in an effort to "remove an enormous cloud of potential tort liability," that the Bankruptcy Court should allow UNR to establish a "revolving fund [or purchase annuities] out of which the legal representative would pay possible future plaintiffs a fraction of their tort claims as they accrued ... ." Id. at 1113-14. The proposal was denied on the basis that "people who have not yet developed asbestosis do not have claims that can be proved in bankruptcy." Id. at 1114.
equally, shifts the burden to the private sector. Allowing dispute resolution to be shifted to the private sector eliminates the high transaction costs that must be borne by the public sector if individual case-by-case adjudication is continued.

VIII. CONCLUSION

I hope I have demonstrated that case management of mass exposure litigation need not be considered an insurmountable problem. The task of developing a method to deal with the big cases is a continuing one; we must never stop learning as we go through that evolutionary process. However, we will have failed in our task if we do not learn from our past mistakes and experience. A continual reapplication of the old tried- and-true methods will not relieve overcrowded dockets or reduce transaction costs, but will, in fact, disserve plaintiffs, defendants, and the system itself by perpetuating the chaos that reigns at the present time.

And as we proceed with this continuing saga, it may be helpful to keep the following thought in mind:

The system and its managers must pay the price for every effective and societally equitable solution to a demanding problem. Finding a fair and efficient treatment for the thousands of identical lawsuits filed in mass tort litigation is a result so precious that diligent thought, research, hard work and boldness are justified expenditures in its pursuit.

347. Though the court has a continuing duty to monitor the settlement fund, it is only necessary for the court to assume a modest supervisory role in order to satisfy the mandate of Rule 23(e). This is because the parties themselves, in negotiating for and establishing a settlement, have assumed the bulk of the responsibility for treating all claimants fairly and uniformly. Thus, the burden is shifted to the private sector because the responsibility for the management of the settlement fund and determinations as to the validity of claims are borne by the administrators of the funding.

348. See supra note 244.

349. Williams, Mass Tort Class Actions, supra note 6, at 336.
COMMENT

RECREATIONAL INJURIES: OHIO EMPLOYERS’ DILEMMA RESOLVED?

William H. Wambaugh

I. INTRODUCTION

The nightmare began August 1, 1987. That day, eleven advertising executives, all friends, decided to cap off five days of fishing in Canada with a raft trip down British Columbia’s Chilko River.

The weather was clear, the water sparkling, the scenery breathtaking and the trip fatal. Suddenly, the raft hit a rock and turned on its side. The men were flung into the rapids surging over jagged rocks. When it was over, five were dead.

The tragedy stunned the advertising industry. But it also raised troubling questions for industries of all kinds; Was the excursion a business trip or a social outing? How does a company tell the difference? And when is a firm liable for damages—or for deaths?¹

With the increased emphasis on health and physical fitness, the contemporary employment environment includes a diversity of recreational activities sponsored, encouraged, or permitted in varying degrees by employers.² Although employers derive immeasurable intangible benefits from employer-sponsored recreational activities—including better employee health, increased employee morale, and improved employer-employee relations—cases in numerous jurisdictions suggest that sponsoring such events exposes employers to financial risks.³ Ohio has devised a unique approach to resolving this dilemma.

In 1986 the Ohio Workers’ Compensation Law was legislatively revised to exclude from the definition of “injury” an “injury

sustained by an employee while voluntarily participating in an employer-sponsored recreation or fitness activity if the employee signs a waiver of his right to compensation or benefits in advance of participation." 4 This is a significant modification to a definition which has remained substantially unchanged in Ohio for eight decades.5 The revision coincides with an upsurge in compensable work-related injuries.6 Ironically, excluding such injuries from compensation exposes the employer to the common law negligence remedies—the same consideration which made the workers' compensation concept attractive to employers.7 This comment will explore the circumstances which led to the legislative reversion, its significance, and its potential impact on employer-employee relationships.

II. BACKGROUND

Prior to the development of workers' compensation, if an employee suffered an injury in the workplace, the only recourse for compensation was a common law action against the employer for negligence.8 In addition to having to establish negligence on the part of the employer, the employee's prospects of recovery were further diminished by the need to overcome the employer's common law defenses of contributory negligence, assumption of the risk, and the fellow-servant doctrine.9 However, if a successful cause of action ensued, the damage awards could be potentially devastating for the employer.10

In an effort to achieve a middle ground, the workers' compensation concept evolved. Workers' compensation operates as a risk reduction mechanism, protecting the interests of both the employer and the employee. In exchange for relinquishing their

4. Ohio Rev. Code Ann. § 4123.01(c)(3). Although it addressed a variety of issues, only the definition of injury is germane to the scope of this comment.
5. Previously there were no exceptions to the definition of injury: "Injury" includes any injury whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment. Ohio Rev. Code Ann. § 4123.01(c).
7. See Larson, supra note 2, at §§ 4,5.
8. Id.
9. Id.
10. Id.
common law remedies, employees receive greater assurance of recovery for injuries because it is a no-fault system; conversely, in exchange for relinquishing their common law defenses, employers are shielded from unlimited liability. It is then, in effect, a quid pro quo with a statutorily predetermined schedule of compensation. All American jurisdictions now have some type of workers' compensation program.

Ohio adopted its workers' compensation program in 1911. The underlying policy consideration was articulated by the Ohio Supreme Court as follows:

[T]he theory upon which the compensation law is based... is that each time an employee is killed or injured there is an economic loss which must be made up or compensated in some way, that most accidents are attributable to the inherent risk of employment—that is, no one is directly at fault—that the burden of this economic loss should be borne by the industry rather than society as a whole, that a fund should be provided by the industry from which a fixed sum should be set apart as every accident occurs to compensate the person injured, or his dependents, for his or their loss.

As in most states, compensation in Ohio is payable for accidental injury or death, "arising out of and in the course of employment," regardless of fault. The term "arising out of" requires a causal connection between the injury and the employment, while the term "in the course of" connotes injury sustained while performing some required duty directly or indirectly in the service of the employer. The basic inquiry, then, is whether a sufficient nexus exists between the injury and the employment in order to trigger compensation.

Recreational injuries are unique within the workers' compensation context because neither prong of the two-part test is

11. Id. at § 65.10.
12. Id. at § 5.30.
13. 1911 Ohio Laws 524.
15. "A determination of work relatedness, not the degree of fault of the employer or employee, is critical to a claim for workmens' compensation." Larson, supra note 2, at § 2.10.
17. Industrial Comm'n v. Ahern, 118 Ohio St. 41, 162 N.E. 272 (1928).
clearly met—the causal connection between employment and injury is often tenuous; while the employee is usually not engaged in a required duty. Therefore, in an effort to determine whether or not a particular recreational activity is incident to employment, five criteria have emerged from which each American jurisdiction selects its particular compensation scheme:

1) the "customary nature of the activity;"
2) the "employer's encouragement or subsidization" of it;
3) the "presence of substantial pressure or actual compulsion upon the employee to attend and participate";
4) the employer's management or direction of the enterprise; and
5) whether the employer expects and/or receives a benefit from the employee's attendance and participation in the activity.

While the relative weight accorded each factor varies widely among jurisdictions, the evolution of the law in Ohio is best understood by focusing on the latter two criteria—popularly known as the "control test" and the "business related benefit test."

A. Ott v. Industrial Commission: Control Test

In 1929, Ohio administratively promulgated the following rule with regard to recreational injuries:

[I]n all cases where the employer encourages the employee to engage in athletics, either during working hours or outside of working hours, and supervises and directs, either directly or indirectly, such activities, meritorious claims for injuries to any such employee while so engaged will be recognized, the employer's risk and experience to be charged with such cases. . . . This order shall not apply to employers who do not supervise and direct either directly or indirectly, athletic activities of their employees or do not pay the employees for the time devoted.

Judicial interpretation of this "control test" did not occur until 1948 when the Court of Appeals of Ohio was called upon to decide whether a widow was entitled to compensation when her husband

suffered a fatal heart attack while playing on a company-sponsored baseball team. In affirming the lower court, the appeals court in Ott found the following factors controlling in establishing that death resulted from an activity which occurred "in the course of and arising out of" decedent's employment:

1) the employer had adopted a recreational program for its employees; 2) playing equipment was furnished by the employer; 3) the program was supervised by a company representative; and 4) the program was designed to promote the health and general welfare of the participants, cultivate a friendly relationship with the company and incidentally advertise its existence to the public.

A subsequent Ohio case, Miller v. Young, was held to be distinguishable where the employer, unaware of the existence of the softball team until after it had been organized, made only nominal cash contributions to the team and also allowed the team to use the employer's name on caps and sweatshirts "to promote 'good feelings' between employees and the employer."

During the course of a game, an employee suffered a traumatic injury which resulted in his death. In denying the widow participation in the workers' compensation funds, the Ohio Supreme Court held: "Where the use of the [E]mployer's name and its modest [cash] contribution has as its object, promotion of good feeling; [it is] in no wise comparable to the four facts set out in the Ott case ...."

These indicia of employer involvement served as precedent for the "control test" until 1970, when Ohio adopted a new standard by which to measure the nexus between recreational injury and employment.

B. Kohlmayer v. Keller: Business-Related Benefit Test

In Kohlmayer v. Keller, an employee sought to establish that his broken neck, sustained when he dove off a pier on his employer's premises during a company picnic sponsored, paid for, and supervised by the employer and held on the employer's

23. Id. at 13-14, 82 N.E.2d at 137-38.
25. Id. at 269, 193 N.E.2d at 559.
26. Id. at 270, 193 N.E.2d at 560.
27. 24 Ohio St. 2d 10, 263 N.E.2d 231 (1970).
premises for the purpose of generating "friendly relations," was sufficiently work-related to qualify for compensation. In finding for the employee, the Ohio Supreme Court articulated a "business-related benefit test" in lieu of the "control test" which clearly would have applied. Focusing on the purpose of the event, rather than the control of the employer, the court found that the injury was sustained in the course of employment. The court stated that:

[Business-related benefits, even though not immediately measurable, which may be expected to flow to the employer for sponsoring a purely social event for his employees, are sufficiently related to the performance of the required duties of the employee so that it is correct to say that the Legislature intended the enterprise to bear the risk of injuries incidental to that company event. 23]

Business-related benefits were identified as including: (1) improved employee relationships; (2) a more harmonious working atmosphere; (3) better services and greater interest in the job on the part of the employees; and (4) income tax deductions for business expense. 29

The court further expounded that "[a] swimming injury is one which can reasonably be expected to occur at a company picnic at which swimming facilities are provided. In this case, the danger to plaintiff was a natural risk of the activity in which he was involved." 30

Kohlmayer is significant for two reasons. First, it appears to focus solely on the intangible benefit element of Ott as controlling with regard to the panorama of recreational injuries. Although Ott articulated four elements to be considered in determining whether an activity was sufficiently work-related to derive compensation, Kohlmayer, in effect, revised the standard so that the single criterion of an intangible benefit was sufficient. Secondly, the negligence aspect surfaces with regard to the "natural risk" of a swimming accident. This is especially significant since workers' compensation is essentially a no fault concept. These views would become critical factors in shaping the ultimate response of the Ohio legislature.

28. Id. at 13, 263 N.E.2d at 243 (quoting Sica v. Retail Credit Co., 24 Md. 606, 227 A.2d 93 (1967)).
29. Id. at 12, 263 N.E.2d at 233.
30. Id.
Four years later, in *Columbia Gas of Ohio, Inc. v. Sommer*, the Ohio Appeals Court relied on *Kohlmayer* to allow a claim by an employee injured during a basketball game after work. Although the teams were formed at the instance of the employees, and the leagues in which they participated were not supervised or controlled by the company, the employer, in an attempt to bind the wounds of a bitter strike, nevertheless supported the program by purchasing equipment and uniforms with the company name imprinted thereon, and paying entrance fees. The company sought to deny compensation by distinguishing the lack of supervision and control from the facts in *Ott*. However, the court expressly held *Kohlmayer* to be controlling, finding that the company sustained an intangible and not immediately measurable business-related benefit, sufficiently related to the employment, to impose upon the company a risk incidental to the activity.

The opinion indicates that the element of supervision is not the *sine qua non* but the business-related benefits derived by the employer from the event, may also be considered to determine if the injury sustained by the employee arose out of and in the course of employment within the terms of the Workmen's Compensation statute.

Ohio's broad interpretation of the business-related benefit test is without precedent in American jurisdictions. Further, it appears to have had the effect of contradicting a principle laid down by Larson in his treatise on workmen's compensation:

Recreational or social activities are within the course of employment when:... (3) The employer derives substantial direct benefit from the activity *beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life*.

In essence, Larson believes that the argument favoring coverage for activities giving rise to intangible benefits is defective because such benefits, which have a bearing on an employee's job per-

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32. Id.
33. Id. at 73, 335 N.E.2d at 746.
35. Larson, supra note 2, at § 22.00 (emphasis added).
formance, are also derived from non-work-related activities—therefore creating a continuum of intangible benefits which cannot be consistently or meaningfully delineated.\textsuperscript{36}

For example, in a New York case, compensation was granted to a caddie, injured while playing golf with another caddie on the employer's course, on the theory that such an activity made him a more efficient caddie.\textsuperscript{37} However, in neighboring New Jersey, compensation was denied where a caddie was injured while playing in a caddie tournament which, although organized by the caddies, had a prized donated by their employer.\textsuperscript{38}

One of the most extreme examples of the type of fact pattern which can emerge under the business related benefit concept is the case where a salesman was injured when he went hunting on company owned land with four other salesmen, instead of attending a scheduled sales meeting. He sought compensation on the theory that his employer derived an intangible benefit from this recreational activity.\textsuperscript{39} Although compensation was denied, the case is illustrative of the inherent problems in dealing with a standard as nebulous as intangible benefits.

The business related benefit test appears to be a product of parallel statutory\textsuperscript{40} and judicial\textsuperscript{41} mandates existing in Ohio as well as most other jurisdictions, directing that workers' compensation statutes be liberally construed in favor of the employee. However, as subsequent events would indicate, perhaps the construction was too liberal.

III. RECENT DEVELOPMENTS

Effective August 22, 1986, Senate Bill 307 made sweeping revisions to the Ohio Workers' Compensation Law. Included among the changes was the introduction of an optional waiver which excludes from compensation any injury or disability incurred while voluntarily participating in an employer-sponsored

\textsuperscript{36} Id. at § 22.33.
\textsuperscript{38} Stevens v. Essex Falls Country Club, 136 N.J.L 656, 57 A.2d 469 (1948).
\textsuperscript{39} Woodmansee v. Frank Lyon Co., 223 Ark. 222, 265 S.W.2d 521 (1954).
\textsuperscript{40} OHIO REV. CODE ANN. § 4123.95 provides that §§ 4123.01 to 4123.94, inclusive, of the Revised Code shall be liberally construed in favor of employees and the dependents of deceased employees.
or fitness activity. In effect, it places the sphere of recreational or fitness injuries for which a waiver was signed within the purview of negligence concepts rather than under no-fault workers' compensation. This compromise would seem to be inevitable, as a means to reestablish voluntariness as an overriding feature in most recreational activities. The waiver is the fulfillment of the dissent in Kohlmayer, which held that the only compensable injuries should be those incurred at the compulsion or direction of the employer, thereby being "within the ambit of the contract of hire, express or implied, oral or written." Consistent with this view of voluntariness, many states have enacted statutes denying compensation unless the employee's participation was involuntary. Unfortunately, the distinction between voluntary and coerced, required, or expected is unclear since these terms are all subjective. For example, in a California case, a female law clerk was injured in a softball game. The firm paid for the equipment, uniforms, and refreshments; memos were circulated in the office to remind players of games; and, although participation was "voluntary," the league's rule required a minimum of four women on each team to avoid forfeiture. In reversing the Workers' Compensation Appeals Board, the court found the law clerk's participation was a reasonable expectancy of employment, since she was particularly vulnerable to pressure of a partner's suggestion that she play, especially in light of the league's coed requirement.

The Ohio waiver is unique among American jurisdictions as a way to avoid liability. The waiver provision represents a political compromise between Ohio employers, concerned with increasing claims for recreational injuries, yet interested in preserving the intangible benefits of sponsorship, and Ohio employees, dependent upon employer support for recreational pursuits, yet unwilling

42. See supra note 4 and accompanying text.
45. Id.
to relinquish the insurance to which they believed they were entitled. The waiver effectively circumvents the problem of subjectively determining the existence of voluntariness by providing an objective criterion.

IV. CONCLUSION

It would appear that the judiciary had exceeded the scope of legislative intent, leaving the Ohio employers in an untenable position—either curtailing sponsorship of activities and realizing tangible as well as intangible disadvantages or facing financial liability for activities from which they derived increasingly attenuated intangible benefits. The introduction of the waiver has restored equilibrium to the compensable status of injuries sustained by employees during employer-sponsored recreation in Ohio. However, although the solution appears to favor the employer, this is only a delusion if the employer is negligent. The waiver exposes the negligent employer to unlimited liability—a position ideally suited to the interests of the plaintiff's attorney.

To date, there is no case law regarding the viability of the waiver in recreational injury cases. However, the wife of one of the victims of the Chilko rafting disaster has filed suit in federal district court in Cincinnati, charging her husband's employer with "gross, willful, reckless and wanton misconduct" for arranging a trip it "knew or should have known was exceedingly dangerous." Of significance is the fact that the victim signed a waiver before the trip.

Unless the case is settled out of court, it may yet establish a precedent that helps define the difference between business and pleasure. Says ... the Cincinnati attorney representing [the plaintiff]: "It's a fine line distinction, and ultimately a jury will decide." 49

47. Ohio employers are either self-insured or pay premiums to the state insurance fund, the amount being determined by a formula which increases the premiums as claims are awarded. Thus, under either method, it is in an employer's financial interest to minimize injuries, thereby reducing the number of successful claims.


49. Lipman, supra note 1 at 37, col. 6.
NOTES

BOYLE V. UNITED TECHNOLOGIES CORP. — IN SEARCH OF THE DEFINITIVE INTERPRETATION OF THE GOVERNMENT CONTRACTOR DEFENSE

I. INTRODUCTION

On June 27, 1988, the United States Supreme Court decided Boyle v. United Technologies Corp. In its 5-4 decision, the Court held that federal contractors have an affirmative conformity-to-specifications defense where third persons assert contractor liability for design defects in military equipment under state tort law. Legal scholars, commentators and military contractors were hopeful that the Court's opinion would provide a standardized, definitive statement of the scope and applicability of the "government contractor defense," especially in light of the divergent views taken by the various federal courts in applying the de-

2. Oral arguments were heard by the Supreme Court in October 1987, when the Court consisted of eight members. A reargument was ordered in February 1988, apparently because the Court was split 4-4. The tie was broken by Justice Kennedy. See Supreme Court Rules Contractors Immune From Negligence Lawsuits, AVIATION WEEK & SPACE TECHNOLOGY, July 4, 1988, at 21.
3. 108 S. Ct. at 2518. See also a similar definition used in 101 L.E. 2d 442, 446.
4. See e.g., Grumman Aerospace Corp.'s amicus curiae brief, Boyle v. United Technologies Corp., 792 F.2d 413 (4th Cir. 1986).
5. In Shaw v. Grumman Aerospace Corp., 778 F.2d 736 (11th Cir. 1985), the court adopted the term "military contractor defense" instead of the more commonly used "government contractor defense." Id. at 739 n.3. The court reasoned that the term "military contractor defense" was "more descriptive and more precise." Id. In its discussion of the Shaw holding, the Court considered Shaw as an "alternative formulation of the Government contractor defense." Boyle, 108 S. Ct. at 2518. Justice Scalia, writing for the Court, apparently considered the terms interchangeable. Another term, "government specifications defense," was used in Dorse v. Armstrong World Indus., 798 F.2d 1372 (11th Cir. 1986). See Comment, In Defense of the Government Contractor Defense, 36 CATH. U.L. REV. 219, 220 n.6 (1986) [hereinafter Comment, In Defense of the Government Contractor Defense], where commentator used the term "government contractor defense" as a mere choice and not indicative of a preference. Throughout this Note the term "government contractor defense" will be used.
defense. Federal courts had stayed action pending the outcome of the Court's decision.

This Note examines the Boyle decision and its formulation of the government contractor defense and how the Boyle formulation has evolved from earlier related concepts. In addition, this Note compares various other versions of the government contractor defense applied in federal courts, and the reasons for those distinctions, the arguments used against the government contractor defense, and the future impact of the Boyle formulation.

II. BACKGROUND

The concept of shielding military contractors from strict liability for defects caused by government design specifications is of comparatively recent origin, a fact that often overshadows the divergent legal roots and contorted evolution leading to the modern formulation. Considerations of fairness and public policy underscore the government contractor defense, and the concept has evolved from traditional principles of agency and sovereign immunity.

Many courts and commentators trace the traditional roots of the government contractor defense to agency concepts enunciated

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7. See, e.g., Schwindt v. Cessna Aircraft Co., No. CY 485-472 (S.D. Ga. 1988) (LEXIS, Genfed library, Newer file) (following the crash of an Air Force O-2 aircraft due to alleged fatigue cracks in the threaded area of the propeller hub, the father of the deceased pilot sued the aircraft manufacturer; the court found the Boyle holding "clearly despositive" to the design defect claim).

8. The extension of a government contractor defense to military products first appeared in Littlehale v. E. I. du Pont de Nemours & Co., 266 F. Supp. 791 (S.D.N.Y. 1966), aff'd, 380 F.2d 274 (2d Cir. 1967). The defense was given a title and the elements necessary for its proof were outlined during the "Agent Orange" suits. See Comment, In Defense of the Government Contractor Defense, supra note 5, at 219 n.2.

GOVERNMENT CONTRACTORS

in the 1940 seminal case of *Yearsley v. W.A. Ross Construction Co.* In *Yearsley*, a property owner filed suit against a government contractor to recover damages for the erosion of his land. The Court held that the defendant had acted pursuant to a valid government contract, and was entitled to a legal defense based on an agency relationship existing between the government and the contractor. This line of reasoning was followed in a number of subsequent decisions involving public work contracts.

While the *Yearsley* case and its progeny allowed government contractors to share the immunity of the government on the basis of an agency relationship, a Congressional act in 1946 limited the scope of the government's sovereign immunity. The doctrine of sovereign immunity precludes suits being instituted against the government without its prior consent. In its purest form, the government contractor defense is an outgrowth of the doctrine of sovereign immunity. Congressional enactment of the Federal Tort Claims Act (FTCA) was an effort to ease the harshness of sovereign immunity by allowing injured persons to bring suit against the government or its agents in certain situations. The FTCA excludes claims of tort liability arising from the performance of discretionary functions or duties, and this

11. Id. at 19.
12. Id. at 21, 22. See also Note, The Government Contractor Defense: Should Manufacturer Discretion Preclude its Availability?, 37 Me. L. Rev. 187, 188 (1985), [hereinafter Note, Manufacturer Discretion].
18. 28 U.S.C. §§ 2680(a) (1982). The discretionary function exception provides that no liability shall attach to: any claim based upon an act or omission of an employee of the
exclusion played an important role in the subsequent development of the government contractor defense. 19

Soon after the enactment of the FTCA, in Feres v. United States, 20 the Supreme Court decided the application of the FTCA in cases involving servicemen and determined that the government "is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 21 The Feres holding effectively barred servicemen from bringing tort claims against the government. 22 As a result, servicemen brought suits against military contractors to recover for injuries stemming from government design defects, even though the contractors often had little or no discretion in the design specifications. This dilemma of the contractors was addressed by the United States Supreme Court in Stencel Aero Engineering Corp. v. United States, 23 where a military contractor was ordered to proceed with design specifications even after expressing doubt about the specifications. 24

government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused. See Dalehite v. United States, 346 U.S. 15, 35-36 (1953), for the Supreme Court test for the discretionary function based on whether the product design reflects a governmental policy decision. See also Note, Government Contract Defense, supra note 13, at 186 & n.30.

19. 108 S. Ct. at 2517.

20. 340 U.S. 135 (1950). The Feres opinion decided three cases which were appealed on similar grounds: Feres v. United States, 177 F.2d 535 (2d Cir. 1949) (executor of a serviceman killed in a barracks fire brings suit); Jefferson v. United States, 178 F.2d 518 (4th Cir. 1949) (plaintiff serviceman sues government eight months after military surgery, when doctors doing a second surgery discover and remove a towel marked "Medical Department U.S. Army"); and Griggs v. United States, 178 F.2d 1 (10th Cir. 1949) (serviceman's executor brings wrongful death action for alleged negligent and unskillful medical treatment by army surgeons). See Note, In Defense of the Government Contractor Defense, supra note 5, at 225 & n.29.


23. 431 U.S. 686 (1977) (suit brought by National Guard officer who sustained permanent injury as result of malfunctioning emergency ejection system in his fighter aircraft).

24. An independent panel of investigation determined that the officer's injuries directly
Following the settlement of a lawsuit resulting from the design defect, the defendant contractor sought indemnification for the claims paid to the injured serviceman. The Court held the contractor's indemnity claims were impermissible. The resulting Feres-Stencel doctrine, which excused the government from liability to injured servicemen as a result of design defects and yet prohibited contractor indemnification, served as an important stimulus for contractors to resort to traditional defenses growing out of the Yearsley public works immunity.

Twenty-six years after the Yearsley case, the United States District Court for the Southern District of New York, in Littlehale v. E.I. du Pont de Nemours & Co., suggested that it might be possible to apply the Yearsley government contractor defense to manufacturers of military equipment. The Littlehale suggestion was utilized by the New Jersey Superior Court in Sanner v. Ford Motor Co., allowing a supplier of army jeeps to be insulated from strict liability when complying with the Army's specific insistence to omit seat belts as a part of the design specifications. In a subsequent case, Casabianca v. Casabianca, resulted from the design defect which had been pointed out to the Air Force by Stencel. See Note, In Defense of the Government Contractor Defense, supra note 5, at 226 & n.38; and Tobak, A Case of Mistaken Liability: The Government Contractor's Liability for Injuries Incurred by Members of the Armed Forces, 13 PUB. CONT. L.J. 74, 75-76 (1982).

25. 431 U.S. at 668.
26. Id. at 672-674. The Court relied on four public policy factors in making its decision: (1) suppliers of military equipment maintained a relationship with the government that was distinctly federal in character; (2) recovery through indemnification would circumvent the statutorily created limit for compensation to injured servicemen under the Veteran Benefits Act; (3) sovereign immunity would be undermined by contractors passing the costs of liability or liability insurance onto the government; and (4) civilian courts would be required to second guess military orders.
29. 268 F. Supp. at 803, n.17. The Littlehale court did not specifically use the government contractor defense in reaching its decision, although it stated that such a defense might have merit. The court held that defendant simply had no duty to warn.
31. The Sanner court stated that to impose liability on a governmental contractor who strictly complies with the plans and specifications provided to it by the Army in a
the New York Supreme Court similarly held that compliance with the military's specifications was a complete defense to an action based on defective design, especially where the manufacturer lacked discretion to make alterations with respect to the alleged design flaw.33

In the early 1980s the courts began to frame specific elements for the government contractor defense in the "Agent Orange" cases.34 In In re "Agent Orange" Product Liability Litigation (Agent Orange I),35 the court acknowledged that the government contractor defense may be available to the manufacturers of Agent Orange, a chemical defoliant used by the military during the Vietnam War. The claimants, representing the claims of as many as 2.4 million veterans who had served in Southeast Asia36 asserted damages ranging from $4 billion to $50 billion37 for

situation such as this would seriously impair the government's ability to formulate policy and make judgments pursuant to its war powers." 364 A.2d at 46-47 (quoting Dolphin Gardens, Inc. v. United States, 243 F.Supp. 824, 827 (D. Conn. 1965)). See also McKay v. Rockwell Int'l Corp., 704 F.2d 444, 448 (9th Cir. 1983); and Note, Government Contract Defense, supra note 13, at 195 n.89.

32. See Casabianca v. Casabianca, 104 Misc. 2d 348, 428 N.Y.S.2d 400 (Sup. Ct. 1980), aff'd, 79 A.D.2d 1117 (1981) (infant plaintiff brings action against father and defendant manufacturer of mixer manufactured for Army field kitchens during World War II, after the infant's hand was caught in the blades of the mixer in his father's pizza shop), McKay, 704 F.2d at 448, and Note, Manufacturer Discretion, supra note 12, at 190-191.

33. The Casabianca court considered the Sanner holding based on the fact the defendant had no discretion in changing the specifications. Casabianca, 104 Misc. 2d at 350, 428 N.Y.S.2d at 402; and Note, Manufacturer Discretion, supra note 12, at 191 n.27.

34. In re "Agent Orange" Product Liability Litigation, 506 F. Supp. 702 (E.D.N.Y. 1980) (Agent Orange I), cert. denied sub nom., Diamond Shamrock Chemicals Co. v. Ryan, 465 U.S. 1067 (1984). In Agent Orange I the court certified the potential viability of the government contractor defense but denied defendant manufacturer's motion for summary judgment and set the litigation for a "Phase I" trial solely on the merits of the defense. However, many observers believe the "Phase I" trial will never take place since the Federal District Court on September 25, 1984, tentatively approved a $180 million settlement.


36. Agent Orange I, 506 F. Supp. at 790 & n.35. The plaintiffs claimed to represent 2.4 million veterans serving in Southeast Asia from 1962 to 1971 as well as the families and survivors of these victims. See also Note, Government Contract Defense, supra note 13, at 196 & n.96.

37. See In re "Agent Orange" Products Liability Litigation, 635 F.2d 987 (2d Cir. 1980), cert. denied sub nom., Chapman v. Dow Chemical Co., 454 U.S. 1128 (1981); Agent Orange I, 506 F. Supp. at 790; and Note, Government Contract Defense, supra note 13, at 196. The plaintiff's second amended complaint asserted damages in this range and asked the court to enter a decree establishing a trust fund out of the defendant's current earnings.
alleged carcinogenic injuries caused by their exposure to the chemical Agent Orange. The United States District Court for the Eastern District of New York concluded that the defendants must prove that three elements in order to avoid liability on the basis of compliance with a government contract: (1) that the government had established the specifications for Agent Orange; (2) that the Agent Orange manufactured by the defendant met the government’s specifications in all material respects; and (3) that the government knew as much or more than the defendant about the hazards to people that accompanied the use of Agent Orange. The court rejected plaintiff’s request that the defendants be required to prove that they had no part in forming the specifications and instead focused on whether the product matched the specifications contained in the government contract.

In Brown v. Caterpillar Tractor Co., a manufacturer providing bulldozers meeting Army specifications was allowed to employ the government contractor defense even though the defendant manufacturer had the discretion to add safety features. Furthermore, in Koutsoubos v. Boeing Vertol, Division of Boeing Co., the court interpreted the government contractor defense as having the flexibility to permit some degree of contractor participation in the design process. This approach had the effect of relaxing the stricter Agent Orange standard requiring that the government alone be the party providing reasonably detailed specifications.

An important revision of the elements of the government contractor defense took place in McKay v. Rockwell Int’l Corp.,

38. 505 F. Supp. at 768.
40. Id. at 1056; Shaw v. Grumman Aerospace Corp., 778 F.2d 736, 744 (11th Cir. 1985).
41. 696 F.2d 246 (3d Cir. 1982) (plaintiff, while on weekend duty as Army reservist, was injured when a felled tree jumped over the blade of the bulldozer he was operating; he alleged his injuries were due to the fact that the bulldozer lacked a protective canopy.).
42. Id. at 253-254. The plaintiff relied on Merritt, Chapman & Scott Corp. v. Guy F. Atkinson Co., 295 F.2d 14 (9th Cir. 1961), for his position that lack of design discretion was prerequisite to the availability of the government contractor defense. Although the Pennsylvania court found plaintiff’s argument persuasive, it nonetheless felt constrained to harmonize its holding with its previous interpretation of state public works cases. See Note, Manufacturer Discretion, supra note 12, at 193-194.
where the Ninth Circuit adopted a standard for the defense that was considerably more lenient than previously contained in case law. In McKay, the court consolidated the wrongful death actions brought by the widows of two Navy pilots who died when they were forced to eject from their disabled military aircraft. According to the McKay holding, a supplier of military equipment is not subject to section 402A strict liability for a design defect where: (1) the United States is immune from liability under Feres and Stencel; (2) the supplier proves that the United States established, or approved, reasonably precise specifications for the allegedly defective military equipment; (3) the equipment conformed to those specifications; and (4) the supplier warned the United States about, patent errors in the government’s specifications or about the dangers involved in the use of the equipment that were known to the supplier but not to the United States.

The McKay formulation of the government contractor defense differed from that advanced in the Agent Orange cases primarily in terms of the degree of government involvement in setting the product specifications. Under the McKay test mere governmental approval of a contractor’s design will shield the supplier from liability.

46. Id. at 446. The two U.S. Navy pilots were killed in separate training missions while ejecting from their disabled RA-SC jet aircraft. Their widows brought suit against the aircraft’s manufacturer, alleging defective design of ejection seat components. The federal district court awarded $750,000 in damages to the widows. The Ninth Circuit reversed this ruling and held that the manufacturer was shielded from liability. Note, Government Contract Defense, supra note 13, at 181.

47. RESTATEMENT (SECOND) OF TORTS § 402A (1965)
§ 402A Special Liability of Seller of Product for Physical Harm to User or Consumer
(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
(a) the seller is engaged in the business of selling such a product, and
(b) it is expected to and does reach the user or consumer without substantial change in condition in which it is sold.
(2) The rule stated in subsection (1) applies although
(a) the seller has exercised all possible care in the preparation and sales of his product, and
(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

48. See supra text accompanying notes 20-27.
49. 704 F.2d at 451.
51. Id.
In the *Tillett*\(52\) and *Bynum*\(53\) cases, the Seventh and Fifth Circuits adopted the *McKay* test without modification.\(54\) The Third Circuit introduced a "hybrid version" of the government contractor defense in the *Koutsoubos*\(55\) case, by utilizing features of the *McKay* test even though the court formally adopted the *Agent Orange* test.\(56\)

The final pre-*Boyle* formulation of a "military contractor defense"\(57\) was the 1985 opinion of the Eleventh Circuit in *Shaw v. Grumman Aerospace Corp.*\(58\). In *Shaw*, the court held that the military contractor defense was solely based on the constitutional separation of powers doctrine and rejected both the *McKay* and *Agent Orange* formulations.\(59\) Under the *Shaw* test, a military contractor may escape liability only if it affirmatively proves the following: (1) that it did not participate, or participated only minimally in the design of those products or parts of products shown to be defective; or (2) that it warned the military in a timely manner of the risks of the design and notified it of alternative designs reasonably known by the contractor, and that the military, although forewarned, clearly authorized the contractor to proceed with the dangerous design.\(60\)

\(52\). *Tillett v. J.I. Case Co.*, 756 F.2d 591 (7th Cir. 1985) (widow of serviceman killed when a front end loader overturned sought to recover under state wrongful death statute; the court held that even if she had a cause of action against the manufacturer, it was barred by a properly asserted government contractor defense).

\(53\). *Bynum v. FMC Corp.*, 770 F.2d 556 (5th Cir. 1985) (products liability action brought by a national guardsman after a cargo carrier falls off a bridge; the court held that federal common law provided a basis for the manufacturer to assert the government contractor defense).

\(54\). *Shaw*, 778 F.2d at 744.

\(55\). *Koutsoubos v. Boeing Vertol*, 755 F.2d 352, 355 (3rd Cir. 1985); *In re Air Crash Disaster at Mannheim Germany*, 769 F.2d 115, 122 (3rd Cir. 1985) (survivors and personal representatives of deceased servicemen bring suit against a helicopter manufacturer following crash using state law tort claim; the court held that the government contractor defense applied); *Shaw*, 778 F.2d at 744.

\(56\). *Shaw*, 778 F.2d at 744.

\(57\). See cases and sources cited *supra* note 5.

\(58\). 778 F.2d 736 (11th Cir. 1985), *petition for cert. filed*, 54 U.S.L.W. 3632 (U.S. Mar. 25, 1986) (No. 85-1529) (father files wrongful death action under the Death On The High Seas Act and federal admiralty law, alleging the Grumman KA-6D aircraft in which his son was killed shortly after taking off from an aircraft carrier, was defectively designed).

\(59\). *Id.* at 740-743; *Boyle v. United Technologies Corp.*, 108 S. Ct. 2510, 2518 (1988).

\(60\). 778 F.2d at 746. Under the *Shaw* test, the trial judge is to make a determination whether the military contractor has shown by a preponderance of the evidence that it played no more than a minimal part in the design specification process. If the matter goes to the second element, the contractor must show more than a "rubber stamp" approval, there must be clear authorization by the military relevant to the warning.
By turning the "McKay test on its head," the Shaw court had merely added to the confusion of tests, elements, burdens of proof, and underlying policy considerations of the government contractor defense on the eve of the Supreme Court decision in Boyle.

III. **Boyle v. United Technologies Corp.**

**A. Facts**

On April 27, 1983, David A. Boyle, a United States Marine helicopter copilot, was killed when the CH-53D helicopter in which he was flying crashed off the coast of Virginia Beach, Virginia, during a training exercise. The helicopter plunged into the sea, approximately one and one-half miles off the coastline, after making an uncontrollable right turn at a low altitude, and became inverted in the mud in thirty-five feet of dark and murky water. While the pilot of the helicopter and other passengers made their way to safety, Lieutenant Boyle, despite surviving the crash and being the best swimmer of the crew, was unable to escape and drowned.

A subsequent examination by a U.S. Navy engineering investigator concluded that the most likely cause of the accident was

61. Id.
63. According to Captain Tussing, the helicopter pilot with over 1,600 hours of flying experience, he had just initiated a right hand turn at an altitude of about 200 feet when the control stick jerked to the right and became jammed. Because of the low altitude he had no time to respond except for pulling the collective handle "full up" in an attempt to soften the impact with the water. (Testimony cited in Petitioner's Brief for writ of certiorari to U.S. Court of Appeals for the Fourth Circuit).
64. See Judge Advocate General's Report, J.A. 700-708 [hereinafter J.A.] cited in Petitioner's Brief for Certiorari. After entering the water the craft rolled to the left, to the copilot's side, thus putting his escape window under water and rendering it non-useable due to water pressure.
65. 108 S. Ct. at 2513; J.A., supra note 64, at 106-108. The Report indicated that Lt. Boyle had attempted to escape: he had disconnected his seat belt and shoulder harness; lacerations on his left hand indicated an attempt to grasp the escape hatch handle in the murky water. Captain Tussing testified that he and the other passengers only escaped by "sheer luck" after the helicopter rolled over and even they were almost "sucked back" into the craft as it sank.
a metal chip of wire found in the roll servo “Moog” valve, which forced the helicopter out of control.66

Boyle’s family brought a diversity action in federal district court against the Sikorsky Division of United Technologies Corporation which built the helicopter for the United States.67 At trial, plaintiff sought recovery based on two theories of liability under Virginia tort law; first, it was alleged that Sikorsky had defectively repaired the servo device which subsequently malfunctioned and caused the crash; and secondly, Sikorsky had defectively designed the copilot’s emergency escape system.68 The latter allegation was based on the design of the escape hatch which opened outward instead of inward, and thus became inoperative because of the water pressure when the helicopter rolled over and was submerged underwater. The Boyle family also alleged that the cockpit design obstructed the copilot’s access to the escape hatch handle when the collective handle was pulled “full up.”69 The jury entered a general verdict in favor of plaintiff and awarded a total of $725,000.70 The district court denied Sikorsky’s motion for judgment notwithstanding the verdict.71

On appeal, the United States Court of Appeals for the Fourth Circuit reversed and remanded with directions that judgment be entered for Sikorsky.72 The court ruled that the plaintiff had failed to meet the Virginia tort law burden of demonstrating that Sikorsky’s repair work was responsible for the metal chip in the

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66. Boyle v. United Technologies Corp., 792 F.2d 413, 414 (4th Cir. 1986), cert. granted, 107 S. Ct. 872, aff’d, 108 S. Ct. 2510 (1988); see also J.A., supra note 64, at 45104, 826-852. The pilot and copilot control the flight of the CH-53D helicopter by means of two control sticks (the collective and cyclic) and foot pedals. The controls are linked mechanically. In addition there are augmenting devices known as servos which afford assistance to the pilot in flying (similar to the power steering of a car). If the servo goes suddenly out of control it can make the helicopter go out of control and crash (much like when the power steering of a car goes out and causes the steering wheel to turn unexpectedly). Here the metal chip was found in the AFCS roll servo “Moog” valve which is a part of the servo and controls its movements.

67. Boyle, 108 S. Ct. at 2513
68. Id.
69. Id.
70. Id. The total amount was divided as follows: $250,000 to Delbert Boyle (father of deceased); $250,000 to Wilma Boyle (mother of deceased); and the remainder was divided among the three surviving sisters of Lt. Boyle.
71. Id.
Furthermore, Sikorsky satisfied the requirements of the "military contractor defense" and as such could not be held liable for the allegedly defective design of the escape hatch.\textsuperscript{74}

Petitioner (Boyle) sought review by the United States Supreme Court and challenged the court of appeals decision on three levels: (1) no justification was present in federal law to shield a government contractor from liability for design defects in military equipment; (2) even if the government contractor defense was valid, the formulation used by the court of appeals was inappropriate; and (3) the court of appeals' error in not remanding for a jury determination violated plaintiff's constitutional right to a trial by jury as guaranteed by the seventh amendment.\textsuperscript{75} The Supreme Court granted certiorari.\textsuperscript{76}

\textbf{B. Holding}

In its decision the Supreme Court upheld the government contractor defense—a defense of conformity to contract specifications by a contractor providing military equipment to the federal government, when the contractor is asserted to be liable, under state tort law, to third persons for injury caused by a design defect in the equipment.\textsuperscript{77} State law is "displaced" in areas where there is a "unique federal interest," such as the procurement of military equipment by the United States, and where a "significant conflict" exists between an identifiable federal policy or interest and the operation of state law.\textsuperscript{78}

\textsuperscript{73} Id. at 415-416. Even though the yellow paint tamper seal was undisturbed, the court pointed to the Navy servicing of a power piston in 1982 which could have exposed the hydraulic system to contaminants, thus allowing the metal chip to get into the valve from the unsealed underside. Under Virginia law, products liability is conditioned on responsibility and does not permit recovery where responsibility is conjectural. Logan v. Montgomery Ward, 219 S.E.2d 685 (Va. 1975).

\textsuperscript{74} 792 F.2d at 414. The court noted that Sikorsky had built a mock-up of the cockpit with all instruments and controls, including the collective stick and emergency escape hatch, which was reviewed and approved by the Navy; furthermore, testimony established the necessary "back-and-forth" discussions between the Navy and Sikorsky to invoke the defense. The Fourth Circuit also recognized the validity of the "military contractor defense" on the same day in Tozer v. LTV Corp., 792 F.2d 403 (4th Cir. 1986) (widow of navy pilot killed in aircraft accident sues aircraft manufacturer alleging defective design of aircraft modifications).\textsuperscript{79}

\textsuperscript{75} Boyle, 108 S. Ct. at 2513.

\textsuperscript{76} Id.

\textsuperscript{77} Id. at 2518.

\textsuperscript{78} Id.
The Supreme Court also rejected the traditional reliance on the Feres-Stenel doctrine as a "limiting principle" to identify the existence of a "significant conflict." The Boyle decision relies on the discretionary function exception to the Federal Tort Claims Act as a guidepost for determining the outlines of significant conflict between federal interest and state law in matters involving the government contractor defense.

To determine when state law liability for design defects is to be displaced and federal law applied, the Court adopted a three-prong McKay-type test: (1) when the United States approves reasonably precise specifications; (2) when the equipment conforms to those specifications; and (3) when the supplier warns the United States about dangers in the use of the equipment known to the supplier but not to the government.

Petitioner's contention that the new formulation of a government contractor defense by the court of appeals necessitated a jury trial on remand was rejected by the Court. The Court ruled that if the evidence presented at the first trial would not suffice as a matter of law to support a jury verdict under the properly formulated defense, judgment could properly be entered immediately for respondent without a new trial.

The Court vacated the judgment and remanded the case for clarification of the court of appeals' opinion: (1) if the court of appeals' language in its opinion indicates that no reasonable jury would find against the government contractor under a properly formulated defense, then its judgment would stand; (2) if, however, the court of appeals was assessing on its own whether the government contractor defense had been established, the court of appeals would have to undertake a proper inquiry on remand since the defense is a factual question for the jury.

79. Id. at 2517.
80. Id. at 2517-18.
81. Id. at 2518.
82. Id. at 2519.
83. Id. For a brief discussion of the Boyle holding, see Schwarz, The Government Contractor Defense After Boyle [Boyle v. United Technologies Corp., 108 S. Ct. 2510], 24 TRAIL 88, 89 (1988) (author asserts that Boyle provides no dramatic change and cites three significant aspects of the holding: (1) a validation of the government contractor defense; (2) a standardization of the defense by rejecting the Shaw formulation and thus resolving the conflict between the circuits; and (3) extending the defense to suits involving non-military personnel as plaintiffs).
84. 108 S. Ct. at 2519.
IV. ANALYSIS OF THE MAJORITY OPINION

Justice Scalia, writing the majority opinion for the Court, focused on the following objectives:

1) Addressing petitioner's primary contention that the absence of specific federal legislation immunizing government contractors from state tort law liability prevented usage of federal law to shield contractors.

2) Establishing "when" federal common law would displace state tort law liability with respect to a "uniquely federal interest" justifying the transference of governmental immunity to government contractors.

3) Isolating an appropriate and functional "limiting principle" to consistently identify areas of significant conflict between federal law and state law.

4) Identifying the appropriate test elements or limiting factors necessary for the application of the government contractor defense in cases asserting state law tort liability by a third party for injuries caused by design defects in equipment.

5) Examining the validity of alternate formulations of the government contractor defense.

6) Identifying policy rationales underlying the government contractor defense.

7) Examining the alternative claims of the petitioner regarding the constitutional right to a trial by jury on remand.

The essence of the Boyle decision is that a state law which holds government contractors liable for design defects in military equipment does in some circumstances present a "significant conflict" with federal policy and must be displaced. Therefore, the proper issue before the Court was not if the government contractor defense existed, but rather when it would be exercised to displace state tort law liability.

85. Justice Scalia was joined by Chief Justice Rehnquist and Justices White, O'Connor, and Kennedy.
86. 108 S. Ct. at 2513.
87. Id. at 2515-16.
88. Id. at 2517.
89. Id. at 2518.
90. Id.
91. Id.
The biggest obstacle faced by the Court in preempting state tort law liability was the fact that Congress had repeatedly rejected specific proposals to enact legislation which would embody the government contractor defense. 92 Previously, the Court had recognized federal preemption of state law where there was a "clear statutory prescription" 93 or where there was a "direct conflict between federal and state law." 94 The Court, however, was precluded in using either of these traditional avenues to displace the state law. Rather than following the usual narrow analysis which limited preemption of state law to these two circumstances, the Court relied on an exception in the areas involving a "uniquely federal interest." 95

The Court recognized that there were some areas involving "uniquely federal interests" 96 which prescribed preemption and replacement of state law by so-called "federal common law" even though legislative directives were lacking. 97 There were two areas in which the Court had traditionally recognized such "uniquely federal interests": a relationship growing out of contractual rights involving the federal government 98 and the civil liability of federal officials for actions taken in the course of their duty. 99 Since the present case was for all practical purposes a case growing out of contractual performance (despite being "styled" a tort liability to third persons) 100 and since the independent contractor was performing its obligation under a procurement contract (a circumstance similar to an official performing his duty), 101 the same

93. 108 S. Ct. at 2513.
94. Id. at 2513-14.
95. Id. at 2514-15.
96. Id. at 2514 (citing Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 640 (1981)).
97. Id.
98. Id. at 2516 (citing United States v. Little Lake Misere Land Co., 412 U.S. 580, 592-594 (1973)).
99. Id. at 2514 (citing Westfall v. Erwin, 108 S. Ct. 580 (1988)).
100. Id.
101. Id.
“uniquely federal interest” was obviously implicated.\textsuperscript{102} For the Court, the federal “interest” focused on “getting the government’s work done”\textsuperscript{103} and thus the present case was similar to the interest recognized by the Court in past cases owing to its contractual and performance of duty aspects.

This process of “implication” used by the Supreme Court is the most controversial aspect of the \textit{Boyle} decision. The Court utilized a perceived similarity between circumstances in the present case and those existing in cases using the “unique federal interest” exception, and synthesized a new legal concept by virtue of a process of implication. This new legal expression, in effect, circumvents federal legislation and “displaces”\textsuperscript{104} state tort law liability for the benefit of government contractors. While the Court characterized this legal reasoning process as one of implication, Justice Brennan in his dissenting opinion observed that it smacked of creative lawmaking.\textsuperscript{105} In any event, regardless of whether the Court’s reasoning was sufficiently linked to similar past circumstances or was creative in nature, the process is illustrative of the analytical method by which the Court establishes a new legal entity where none had in fact previously existed.

The Court extended this newly recognized form of “uniquely federal interest” to apply to the civil liabilities arising out of the performance of federal procurement contracts.\textsuperscript{106} This holding came “close” enough to the \textit{Yearsley} case holding to be valid in the present case.\textsuperscript{107} While the nature of the federal interest in \textit{Yearsley} concerned a performance contract, the Court saw no reason to distinguish between a performance contract and a procurement contract in its analysis.\textsuperscript{108}

\textsuperscript{102} Id.
\textsuperscript{103} Id.
\textsuperscript{104} Id. at 2515, n.3. The Court uses the term “displacement” of state law although it recognized it was possible, in its “uniquely federal interest” analysis, to see it as the displacement of federal-law reference to state law for the rule of the decision. In some areas of a “uniquely federal interest,” the federal law merely “borrows” or “adopts” state law where no conflict exists. Since the Court felt there was nothing to be gained by expanding the theoretical scope of federal preemption, it opted to use the more modest terminology.
\textsuperscript{105} Id. at 2528.
\textsuperscript{106} Id. at 2514.
\textsuperscript{107} Id.
\textsuperscript{108} Id. at 2515.
The Court also reasoned that a "uniquely federal interest" in the procurement of military equipment is implicated in suits such as the one presently before the Court, even though the dispute is between private parties. Thus the traditional determination that a litigation is subject to state law when the suit in no way touches or affects the rights and duties of the United States was not available here. In the present case, the imposition of state tort law liability would "directly" affect the terms of government contracts by causing a price increase in the cost of equipment or perhaps a refusal of contractors to manufacture the design specified. In either situation, the government interests would be directly affected even though the suit seemingly involved only two private parties.

Mere procurement of military equipment by the government, however, does not automatically mean that state law will be displaced. In order for state law to be displaced, there must exist "substantial conflict" in an area of unique federal concern. In the present case, a "substantial conflict" exists between an identifiable federal policy and the operation of state law (the contractual duty to manufacture and deliver helicopters with escape hatch mechanisms conforming to government specifications verses the state-imposed duty to design helicopters with a safe escape hatch mechanism).

To identify those situations, in a military equipment procurement setting, where a "significant conflict" exists, necessitates a "limiting principle." Previous federal courts, including the Fourth Circuit Court of Appeals, had focused on the Feres doctrine as the source of conflict by reasoning that military contractors would

109. Id. at 2516. Justice Scalia, writing for the Court, distinguished the holding in Miree v. DeKalb County, 433 U.S. 25, 30 (1977), from the facts of the present case, while Justice Brennan, writing for the dissent, saw the Miree precedent as controlling. The Miree case involved a county contract pursuant to a grant agreement with the Federal Aviation Agency, whereby activities adjacent to an airport were limited to those activities compatible with normal airport operations. The county operated a dump close to the airport which allegedly attracted birds causing a fatal plane crash. Private parties brought a suit instead of the government. The Court held that state law should govern the claim because there was no federal interest in the outcome of the dispute.

110. Id.
111. Id. at 2517.
112. Id.
113. Id.
114. See supra text accompanying notes 20-27.
merely "pass through" costs to the government and thus defeat
the basic purpose of the Feres immunity. Justice Scalia, writing
for the Court, clearly rejected the Feres doctrine as a satisfactory
"limiting principle" to identify "significant conflict" situations.115

After rejecting the Feres doctrine as a satisfactory "limiting
principle," the Court examined the "discretionary function excep-
tion" to the Federal Tort Claims Act (FTCA) and found that it
properly outlined the parameters of a "significant conflict" be-
tween federal and state law in the context of government pro-
curement.116 In cases such as the present one, the selection by
the Armed Forces of an appropriate design for military equip-
ment was "assuredly a discretionary function" within the meaning
of 28 U.S.C. § 2680 (a).117 Such procurement decisions by the
military required a balancing of a variety of considerations other
than a pure engineering analysis, and the "second-guessing" of
these judgments by state tort liability suits would produce results
which the FTCA exception originally sought to avoid.118 In ad-
dition to the contractors "passing through" costs to the govern-
ment either to cover actual liability or insure against the
contingency of liability, the Court also advanced a basic fairness
argument; how can there be immunity for the government when
producing the equipment itself, yet not when it contracts for the
same equipment?119

115. Boyle, 108 S. Ct. at 2517. Justice Scalia's interest in limiting the Feres doctrine
can be seen also in his dissenting opinion in United States v. Johnson, 107 S. Ct. 2063,
2068 (1987). In Johnson, Justice Powell, writing for the Court, outlined broad policy
rationales for the Feres doctrine and observed that Congress had not altered Feres in
almost forty years. Justice Scalia, writing for the dissent, indicated that the Court should
reassess the Feres doctrine.

116. Boyle, 108 S. Ct. at 2517; see supra notes 1718 and accompanying text.


for a review of the policy reasons supporting the government contractor defense. In the
Ramey case, the court applied the government contractor defense in a suit brought by a
civilian aircraft mechanic injured by the accidental triggering of a rocket powered F-18
ejection seat. The court mentioned six policy reasons for the government contractor
defense: (1) to prevent judicial second-guessing of military procurement decisions; (2) to
prevent contractors from raising prices to cover the risk; (3) to avoid "subverting" the
policy rationales behind the Feres doctrine and the discretionary function exception; (4)
to ensure the government's capacity in the interests of the national defense, to push
technology to the limit; (5) to provide incentive for government contractors to coordinate
with government officials; and (6) because it would be unfair to place liability on
contractors when it properly belongs to the government.

In formulating a test to determine the “scope” of the displacement of state tort law in a procurement context, the Court adopted a formulation based on the McKay model:\textsuperscript{120}

Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States."\textsuperscript{121}

In adopting this formulation, the Court reasoned that the first two elements (or limiting conditions) assured that the “design feature in question be actually considered by a government officer”\textsuperscript{122} (rather than being proposed solely by the contractor). The third element was necessary to prevent manufacturers from withholding knowledge of risks, since such information was critical to the discretionary decision.\textsuperscript{123}

In deciding to accept a McKay-type formulation for the government contractor defense, the Supreme Court rejected the alternate approach used by the Eleventh Circuit in the Shaw case.\textsuperscript{124} The Court expressed concerns that a formulation based on the Shaw holding was “not a rule designed to protect the federal interest embodied in the ‘discretionary function exception,’” nor was it conducive to active contractor participation in the design process.\textsuperscript{125}

In summation, the Supreme Court acknowledged that an affirmative government contractor defense was available to contractors acting pursuant to a contract of reasonable specifications for military equipment. Such contractors would be shielded from state tort law liability for design defects, since federal law operated to protect the discretionary facet of the procurement decision-making process. The government contractor defense was based on the following policies: fairness; the need to protect the discretionary component of modern military procurement practices; the need to protect the government from “pass through”

\begin{itemize}
\item \textsuperscript{120} \textit{Id.}; see supra notes 45-51 and accompanying text.
\item \textsuperscript{121} 108 S. Ct. at 2518.
\item \textsuperscript{122} \textit{Id.}
\item \textsuperscript{123} \textit{Id.}
\item \textsuperscript{124} \textit{Id. See supra notes} 57-61 and accompanying text.
\item \textsuperscript{125} 108 S. Ct. at 2518.
\end{itemize}
costs; and the need to protect the military procurement process from judicial "second-guessing."

V. ANALYSIS OF THE MINORITY OPINION

Two separate dissenting opinions were rendered in the Boyle case, one written by Justice Brennan126 (joined by Justices Marshall and Blackmun), and a separate dissenting opinion written by Justice Stevens.127

Justice Brennan's dissent initially focused on the failure of Congress to enact a statutory government contractor defense, despite a sustained campaign by government contractors to secure such legislation.128 He further pointed out that the Court's "newly discovered" government contractor defense was far too sweeping (indeed "breathtaking" in scope) in that it could apply to any government "made-to-order gadget," could apply to civilians as well as military personnel, and had no mechanism to deal with defects of a blatant nature.129 Furthermore, the Court lacked both the expertise and the authority to fashion such a broad rule.130

Justice Brennan also maintained that the Majority opinion misapplied the concept of federal common law. According to Justice Brennan, Erie R. Co. v. Tompkins131 had renounced the power of federal courts to fashion rules of "general federal common law" and prevented the displacement of state law by federal judges acting according to their personal whims. Erie mandated the existence of a specific constitutional text or federal statute before a state law could be preempted, not the determination that a particular area was "uniquely federal" by the five judges comprising the Majority opinion.132 Justice Brennan reasoned that there was no showing in the present case that the clear and substantial interests of the national government would suffer major damage if the state law was applied,133 and certainly

126. Id. at 2519-28.
127. Id. at 2528.
128. Id. at 2519-2520.
129. Id. at 2520.
130. Id.
131. 304 U.S. 64 (1938).
132. 108 S. Ct. at 2521.
133. Id. (citing United States v. Yazell, 382 U.S. 341, 352 (1966)). In Yazell, however, the Court linked the clear and substantial interests of the national government to a "solicitude for state interests, particularly in the field of family and family-property arrangements." 382 U.S. 341, 352 (1966).
the Congress had not superseded state law in the area.\textsuperscript{34}

According to Justice Brennan, Justice Scalia's Majority opinion clearly exceeded the traditional narrow constructions used by past Courts to determine the parameters of "uniquely federal interests" by creating a new category of federal interest which justified the government contractor defense.\textsuperscript{35} This reliance on the "synthesis" of two pre-\textit{Erie} concepts to forge this new category was both misapplied and needless; the present case was "simply a dispute between two private parties," where the claim is at best collateral to the government contract.\textsuperscript{36} The mere fact that the government may be forced to pay higher prices for the exposure of contractors to potential liability was not sufficient to distinguish this case from previous Court holdings.\textsuperscript{37}

Nor is Justice Brennan convinced that the government contractor defense is implicated by the traditional immunity granted to governmental officials, since "immunity for a contractor lacks both a positive law basis and a presumption that it furthers the congressional will" (which underlined the aforementioned immunity).\textsuperscript{38} The Court in the past had sought to restrict the scope of such grants of immunity since they violate the basic tenet that individuals should be accountable for their wrongful acts.\textsuperscript{39} Policy considerations behind extending immunity to government officials, reasoned the dissent, simply do not apply to government contractors; the potential for harm to individuals caused by contractors is much greater; the threat of a tort suit is less likely to influence the conduct of a contractor (despite the "pass through" cost rationale of the majority); and the threat to the "administration of government policies" is less likely by government contractors.\textsuperscript{40} Thus, reasons Justice Brennan, it is not surprising that the Court has previously declined to extend immunity for

\textsuperscript{134} 108 S. Ct. at 2521.
\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{137} Id. at 2523.
\textsuperscript{138} Id. at 2524.
\textsuperscript{139} Id. (citing Westfall v. Erwin, 108 S. Ct. 580, 583 (1988)). See also Comment, \textit{Government Contractor Liability in Military Design Defect Cases: The Need for Judicial Intervention}, 117 Mil. L. Rev. 219, 249 (1987) (commentator argues that contractor liability would not only protect individual interests of service members, but also save the government money in the long run by improving weapons systems, increasing operational readiness and providing a "therapeutic effect" on competitors).
\textsuperscript{140} 108 S. Ct. at 2524.
tort liability for design defects to government contractors.

Justice Brennan further asserts that the sole case used by the Court as precedent for the government contractor defense, the *Yearsley* case, was misapplied and was insufficient to justify the Court’s “drastic departure” from previous holdings. Justice Brennan could be clearly distinguished from the present case in that the *Yearsley* holding was more properly limited to a takings context, and applied to a situation where the contractor stood in an agency relationship with the government and was following, not actively formulating, the specifications. In the present case, respondent’s participation in the helicopter design is a clear distinguishing factor.

The Court’s invoking of the discretionary function exception of the FTCA is also inappropriate according to Justice Brennan’s viewpoint. Since the present case involves a petitioner suing a private manufacturer under Virginia law, and not the federal government under the FTCA, the exception has no direct bearing. Furthermore, the respondent contractor disavowed reliance on the discretionary function on three occasions, as did the government, even after “coaching” by the majority. The Court’s reliance on the discretionary function exception is questionable for the additional following reasons: the Court cites no authority whatsoever to support the proposition that cost burdens would be passed on to the government; the statutory basis of the Court ruling is unstable since contractors were not protected before the passage of the FTCA; the Court relies on an exception to a statute that is inapplicable (even if the statute were repealed, nothing would change); and, if all circumstances were exactly the same and Lt. Boyle had died in a helicopter crash three miles further away from the coastline, the family would have a cause of action specifically authorized by Congress under the Death on the High Seas Act (DOHSA).

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141. *Id.* at 2525.
142. *Id.*
143. *Id.*
144. *Id.* Justice Brennan observes that the majority’s use of the discretionary function exception is “a valiant attempt to bridge the analytical canyon between what *Yearsley* said and what the Court wishes it had said...”
145. *Id.* at 2525-2526 & n.4-5.
146. *Id.* at 2527.
Finally, Justice Brennan sees the Court's analysis "premised on the proposition" that whenever the government indirectly absorbs a tort liability, the resulting burden on governmental functions compels Court action even when Congress refuses to do so.147 Acceptance of such a proposition assumes that the tort system is incapable of working properly and that tort liability will always result in a net burden on the government rather than a net gain. Assuming, arguendo, that a burden will result and that there is merit to the policy consideration that state courts should not be in a position to "second-guess" governmental procurement decisions, the proper forum to reflect such policy changes is that of Congress.148

VI. IMPACT OF THE BOYLE DECISION

The most obvious impact of the Boyle decision is that the Supreme Court has granted official recognition to the government contractor defense. Third parties seeking to use state tort law liability standards to assert the liability of a government contractor for injuries caused by design defects now face a formidable legal obstacle. From a practical standpoint, the Boyle decision may be the final nail in the coffin of lingering hopes held by mass tort claimants, many of whom had hoped that the Court would reverse the trend toward a lenient formulation of the government contractor defense (the McKay formulation) by adopting the reasoning of the Shaw holding or by rejecting the defense altogether. By adopting a broader and more lenient McKay-type formulation for determining the necessary elements to establish the government contractor defense, the Court demonstrated a decided deference to military interests.149 In light of the enormous expenditures and profits involved in the contemporary military procurement process, and the increasingly complex and sophis-

147. Id.
148. Id. at 2527-28. The separate opinion by Justice Stevens echoes this reasoning. He believes the legislature is better equipped to deal with such a lawmaker venture, and even though there may be a place for "interstitial lawmaking," the Court should be reluctant to embark on the creation of entirely new doctrines. Furthermore, according to Justice Stevens, only Congress should handle the policy complexities of balancing governmental programs and the protections of the rights of individuals.
149. This viewpoint is shared by at least one commentator on the Boyle decision; see Comment, The Supreme Court 1987 Term, Leading Cases, 102 HARV. L. REV. 143, n.7 (1989).
ticated specifications requiring an ever increasing participation of contractors in the design process, there seems little doubt from a public policy standpoint that a valid rationale for a reasonable government contractor defense exists. As pointed out by Justice Brennan, however, perhaps the most appropriate forum for shaping the final dimensions of immunity for government contractors, in light of these important public policy considerations, is Congress. But the failure of Congress to act is hardly a clear signal that the legislators prefer that important questions concerning government contractor liability be handled solely within the context of a continued state tort law vitality. At any rate, it is extremely unlikely that Congress will enact legislation affecting the government contractor defense in the near future, even if as one observer noted, the Boyle decision is a "viable candidate for legislative overturning." In all likelihood, the Boyle holding will take on a stature of increased importance.

At first glance it is also difficult to assess the type of reception Boyle will receive in the courts. While some courts stayed action pending the outcome of the Boyle case, and thus treated the holding as a "clarification" of the law on the government contractor defense, other courts have interpreted the holding as limited to a mere "rejection of the ideological basis for contractor immunity based upon the Feres doctrine." One court has

150. See Mecham, High Court's Reasoning in Sikorsky Suit May Provide Unexpected Benefits, AVIATION WEEK & SPACE TECHNOLOGY, July 11, 1988, at 129 [hereinafter Mecham article].

151. Three recent decisions illustrate the point: Smith v. Xerox Corp., 866 F.2d 135 (5th Cir. 1989) (summary judgment in favor of defense contractor upheld based on Boyle test when serviceman injured due to premature discharge of shoulder-mounted "VIPER" weapon simulator); Trevino v. General Dynamics Corp., 865 F.2d 1474 (5th Cir. 1989) (survivors of Navy divers dying from vacuum-induced bends while in submarine's hangar diving system sue military contractor which designed system; court held that government contractor defense does not apply where the government "delegates" design and testing of military equipment to a private contractor and where governmental official merely provided a "rubber stamp" instead of actually choosing the design feature); and Garner v. Santoro, 865 F.2d 629 (5th Cir. 1989) (manufacturer of epoxy spray paint used on Navy vessels is entitled to use government contractor defense in strict liability action).


153. McGonigal v. Gearhart Industries, Inc., 861 F.2d 774 (5th Cir. 1988) (case filed against manufacturer and assembler of M67 hand grenade which exploded prematurely during a requalification training session in September 1981, killing two servicemen; in "McGonigal II" (788 F.2d 321 (5th Cir. 1986)), the court reversed a directed verdict in favor of the assembler and remanded for a new trial based on negligence, and at the
"counseled caution" when there was a "conflict in logic" between the government contractor defense and the logic on which the third party alleging liability of the government is based.154 Even the aerospace defense industry, which initially hailed the Boyle decision as "remarkable,"155 remains uncertain as to Boyle's future application in the courts,156 especially since the Court did not specifically reverse the Shaw decision.157

While many questions remain after Boyle, the decision is likely to result in an increased emphasis on the legal status of the discretionary function exception158 and a reevaluation of the Feres doctrine as well as the Shaw formulation of the government contractor defense. The Court may also be soon confronted with the question of the applicability of the government contractor

second trial the jury gave a judgment to the injured servicemen which was upheld by the court. The McGonigal court said the Boyle decision did not change the law, especially in cases involving defective manufacture.

154. Lopez v. A.C.&S., Inc., 858 F.2d 712, 731 (Fed. Cir. 1988) (plaintiff was pipe fitter and insulator at Puget Sound Naval Shipyard and worked with asbestos, later brought suit against the company supplying asbestos products to the Navy).

155. See Mecham article, supra note 151, at 129. (This article was one of a series of articles in AVIATION WEEK & SPACE TECHNOLOGY which traced the development of the Boyle case as it made its way through the courts. The author observed that the Boyle decision was "remarkable" both for sidestepping the Feres doctrine (which the aerospace industry had assumed the Court would rely upon), and for the benefits that would flow directly to defense contractors, even though that was not the intention of the Court.

156. Id. The article quoted former Deputy Assistant Attorney General Robert L. Willmore, who had helped prepare the Justice Department brief on behalf of United Technologies Corp., as saying it could take "a decade or more" before the questions raised by the Boyle decision will be resolved. See also Schwarz, The Government Contractor Defense After Boyle [Boyle v. United Technologies Corp., 108 S. Ct. 2510], 24 TmAL 88 (1988) (attorney offers practical advice on how to "overcome" the Boyle holding in a product liability or negligence case against a government contractor and notes that "interpreting [the] elements [of Boyle] will require substantial case-law development" which could "take years to determine the true significance of the decision"). Id. at 89.

157. See Mecham article, supra note 151, at 129. (The article points out that even though Justice Scalia rejected the reasoning of the Shaw court, it let stand the $845,500 judgment against Grumman Aerospace by turning away a petition for review of the Shaw decision two days after Boyle was decided.)

158. See, e.g., Trevino v. General Dynamics Corp., 865 F.2d 1474 (5th Cir. 1989) (court holds that the FTCA discretionary function exception does not apply to subsequent decisions made by government contractor after initial discretionary decision and, further, that the discretionary decision must involve governmental judgment or policy choice); and, McMichael v. United States, 856 F.2d 1026 (8th Cir. 1988) (when government inspector failed to close plant during approaching thunder storm, the government argued that it should be protected from suit since the inspector's actions fell within the discretionary function exception).
defense to non-military claims as well as failure to warn claims.

Finally, the Boyle utilization of the so-called "federal common law" and its use of implication to carve out a new area of "uniquely federal interest," may have an enormous impact in the area of preemption of state law. The inability of the Erie doctrine to constrain the lawmaking powers of federal courts could be of enormous importance given the ideological shift of the Court and the increasing complexity of socio-legal issues.

VII. CONCLUSION

The United States Supreme Court in Boyle v. United Technologies Corp. recognized the government contractor defense where the contractor conforms to government design specifications and where the contractor is asserted to be liable under state tort law to third persons for design defects in military equipment. In such circumstances, the military procurement process may constitute a "uniquely federal interest" entitling the contractor to immunity under federal common law which will displace state tort law liability. This holding is consistent with a trend in federal courts and accords with policy considerations of fairness, the unique needs of national defense, the counterproductive aspects of "passing through" costs to the government, and a desire to prevent judicial "second-guessing" that would be disruptive of the military procurement process.

While the Boyle holding reflects the political and economic realities of modern defense procurement needs, it also reflects


160. See, e.g., Nicholson v. United Technologies Corp., 697 F. Supp. 598, 603-604 (D. Conn. 1988) (plaintiffs sue helicopter manufacturer following alleged injuries stemming from "explosion" of nose gear of CH-54B helicopter). In Nicholson, the court discussed the application of the Boyle holding to failure to warn claims against government contractors and decided that the government contractor defense was a valid affirmative defense in both design defect and failure to warn claims. The court cited Bynum v. FMC Corp., 770 F.2d 556, 574 & n.24 (5th Cir. 1985), and Ramey v. Martin-Baker Aircraft Co., 666 F. Supp. 984, 1000 (D. Md. 1987).


an inventive form of judicial lawmaking that circumvents a proper sphere of legislative activity and expands the application of the so-called "federal common law."
Attorney Richard Shapero applied to the Kentucky Attorney's Commission for approval to send the following letter:

It has come to my attention that your home is being foreclosed on. If this is true, you may be about to lose your home. Federal law may allow you to keep your home by ORDERING your creditor to STOP and give you more time to pay them.

You may call my office anytime from 8:30 a.m. to 5:00 p.m. for FREE information on how you can keep your home.

Call NOW, don't wait. It may surprise you what I may be able to do for you. Just call and tell me that you got this letter. Remember, it is FREE, there is NO charge for calling.¹

The proposed letter was found neither false nor misleading, but nevertheless, the Commission found that it violated Kentucky Supreme Court Rule 3.135(5)(b)(i) which prohibits the mailing or delivery of written advertisements "precipitated by a specific event or occurrence involving or relating to the addressee or addresses as distinct from the general public."²

The Ethics Committee of the Kentucky Bar Association concurred with the Commission and denied approval of the proposed direct-mail letter.³ The Kentucky Supreme Court affirmed the decision of the Ethics Committee to deny Shapero's request.⁴ When the case reached the United States Supreme Court, Justice Brennan, writing for the Majority, framed the issue as "whether a state may, consistent with the first and fourteenth amendments, categorically prohibit lawyers from soliciting legal business for pecuniary gain by sending truthful and nondeceptive letters to potential clients known to face particular legal problems."⁵

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2. Id.
4. Id. at 301.
The Court held that direct-mail solicitation, unlike in-person solicitation, was protected by the first and fourteenth amendments, even when sent to potential clients known to face particular legal problems. This Note will examine the holding of Shapero in light of earlier United State Supreme Court decisions regarding commercial speech protection, and define the remaining regulatory parameters of attorney advertising.

**HISTORY**

Commercial speech has been defined "as speech of any form that advertises a product or service for profit or for business purpose." In the 1942 case of Valentine v. Chrestensen, the Supreme Court excluded commercial speech from any protection under the first amendment. The Court, in formulating a commercial speech doctrine, held "that the Constitution imposes no such restraint on government as respects purely commercial advertising."

In a series of three decisions rendered thirty years later, the Court rejected the notion that commercial speech is not afforded first amendment protection. In the last case of that trio, Virginia Pharmacy Bd. v. Virginia Citizens Consumer Council, Inc., the Court invalidated a ban on advertising prescription drug prices because of the public interest in the free flow of truthful information about commercial activity. The application of first amendment protection to advertising in the pharmaceutical field led to similar inquiries about advertising by attorneys.

The Court quickly responded in the 1977 case of Bates v. State Bar of Arizona, which held that attorney advertising was a form of commercial speech, protected by the first amendment,

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6. Id. at 1920.
8. 316 U.S. 52 (1942).
9. Id. at 54.
12. Id. at 773.
13. In fact, "the dissent foresaw that the logic of Virginia Pharmacy would almost necessarily extend to advertising by physicians and attorneys." Shapero, 108 S. Ct. at 1927 (O'Connor, J., dissenting).
and as such, the states could no longer have a prophylactic rule absolutely banning advertising by the legal professional. The Court emphasized, however, that states were not to be precluded from regulating the area of attorney advertising. In fact, the Court took great care to limit its holding to that of truthful advertising by attorneys regarding the availability and terms of routine legal services. The Court expressly stated that it was not considering the issues of in-person solicitation, nor problems associated with advertising claims relating to the quality of legal services. The holding in Bates was expressly narrow, causing obvious confusion as to its far wider applications.

The Court, in the following year, addressed two unresolved issues from Bates in the cases of Ohralik v. Ohio State Bar Ass'n and In re Primus. At issue in the Ohralik case was in-person solicitation. While still in traction, an accident victim was approached by Ohralik, an attorney, who offered his services. The Court reasoned that this type of activity presented "a striking example of the potential for overreaching that is inherent in a lawyer's in-person solicitation of professional employment." The Court found that the facts in Ohralik demonstrated "the need for prophylactic regulation in furtherance of the state's interest to protect the public from fraud, undue influence, intimidation, and other forms of "vexatious conduct." Regarding the commercial speech doctrine, Justice Powell expressly indicated that while commercial transactions are now within protections of the first amendment, it is still in a "subordinate position in the scale of first amendment values."

One would have thought the Court was in retreat from Bates after the decision in Ohralik, but its companion case, In re Primus, dispelled those fears. Its facts concerned solicitation by direct mail. An attorney belonging to the American Civil Libe-
ties Union (ACLU) wrote a letter on behalf of that organization offering free legal representation to a victim of doctor-induced sterilization.25 The Board of Commissioners on Grievances and Discipline determined Primus had attempted to solicit a client in violation of the Canons of Ethics of South Carolina. The Board’s decision was adopted verbatim by the state Supreme Court.26 Upon appeal, however, the United States Supreme Court reversed. It held that direct mail to a known victim was protected by the first amendment when its purpose was not monetary gain.27 The absence of monetary gain was a factor used in distinguishing these facts from those in Ohralik. The prophylactic rule in Ohralik withstood constitutional challenge but failed in In re Primus because of the decreased potential for abuse in written communication and the absence of motivation for monetary gain.28 The Court did not, however, completely dismiss the issue of direct-mail solicitation. Because of the Court’s emphasis on the lack of monetary gain as a motive for the mailing in In re Primus, the issue of direct mailing for monetary gain to persons with specific needs was left open.

In 1980, the Court confronted commercial speech again in the case of Central Hudson Gas and Elec. Corp. v. Public Service Comm’n of New York.29 Although not an attorney advertising case, the case does offer exceptional guidance in the arena of commercial speech analysis. In that case, the New York Public Service Commission completely banned promotional advertising by electric utilities. Only advertisements designed to reduce consumption during peak usage periods were permitted. The Court invalidated the regulation and established a four-part test for evaluating such restrictions.30 The comprehensive test inquires: “(1) Does the speech concern lawful activity and is it not misleading; (2) Has the state advanced a substantial interest in the regulation; (3) Does the state’s regulation directly promote that interest; (4) Does the state’s regulation exceed the bounds of necessity to serve such interest.”31 The Court has continued

25. Id. at 416.
26. Id. at 417.
27. Id. at 422.
28. Id. at 438.
30. Id. at 566.
to apply this test when engaged in commercial speech analysis.

In expanding the use of attorney advertising, the Court once again faced the issue in the case of In re R.M.J.\(^ {32} \) An attorney sent cards to announce the opening of his office.\(^ {33} \) The general mailing was in violation of Disciplinary Rule 2-102 (A)(2) which allowed distribution only to personal friends, relatives, lawyers, clients, and former clients.\(^ {34} \) The Court, now firmly involved in an ad hoc approach towards attorney advertising cases, held that the announcement card was not inherently misleading and that the state's blanket prohibition was more "extensive than reasonably necessary to further substantial [state] interests."\(^ {35} \) Although the Court held that a mailing to those other than family and clients was constitutionally protected, the question remained as to whether a letter to persons with a specific legal problem deserved first amendment protection.

Before that question would be answered, however, the Court in Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio\(^ {36} \) addressed the issue of newspaper advertisements which had information and advice concerning a specific legal problem. The contested advertisement featured a line drawing of the Dalkon Shield Intrauterine Device accompanied by the question "DID YOU USE THIS I.U.D.?"\(^ {37} \) The advertisement then gave information on the device's harmful effects and offered to assist victims on a contingency fee basis.\(^ {38} \) The complaint filed by the Ohio Office of Disciplinary Counsel did not allege that the advertisement was false or misleading,\(^ {39} \) but rather that it "constituted self-recommendation in violation of DR-2-103(A)...."\(^ {40} \)

In its analysis, the Court relied on principles articulated in Central Hudson.\(^ {41} \) The test in Central Hudson required that commercial speech which is neither false nor deceptive be restricted only where the governmental interest is substantial, and only

\(^{32} \) 455 U.S. 191 (1982).
\(^{33} \) Id. at 196.
\(^{34} \) Id. at 198.
\(^{35} \) Id. at 207.
\(^{36} \) 471 U.S. 626 (1985).
\(^{37} \) Id. at 630.
\(^{38} \) Id. at 631.
\(^{39} \) Id. at 633.
\(^{40} \) Id. at 635.
\(^{41} \) 447 U.S. 557 (1980).
through means that directly advance that interest.\footnote{Id. at 566.} Applying this test in \textit{Zauderer}, the Court found that the state of Ohio did not present a convincing argument that the rule forbidding specific legal advertising was necessary to achieve a substantial governmental interest.\footnote{\textit{Zauderer}, 471 U.S. at 644.} Therefore, "the substantial interests that justified the ban on in-person solicitation upheld in \textit{Ohralik} cannot justify the discipline imposed on appellant for the content of his advertisement."\footnote{Id. at 642.} The danger of undue influence present with in-person solicitation does not exist with printed advertisements that are truthful and nondeceptive. This broad holding was interpreted by many as allowing targeted direct mailing to those with specific legal problems.\footnote{Committee on Professional Standards v. Von Wiegen, 63 N.Y.2d 163, 470 N.E.2d 838, 481 N.Y.S.2d 40 (1984), cert denied, 472 U.S. 1007 (1985). Note, \textit{Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio: States' Rights v. The First Amendment}, 46 La. L. REV. 923, 936-937 (1986). Whitman, \textit{Evolving Concepts of Lawyer Advertising: The Supreme Court's Latest Clarification}, 19 Ind. L. REV. 497, 552-55 (1986).} Their beliefs were proven correct in \textit{Shapero}.

\textbf{FACTS}

Although the Kentucky Supreme Court affirmed the Ethics Committee opinion by denying Shapero's request to send the letter in question, it did feel "compelled by the decision in \textit{Zauderer} to order [Rule 3.135(5)(b)(i)] deleted"\footnote{\textit{Shapero}, 108 S. Ct. at 1920 (quoting \textit{Shapero v. Kentucky Bar Assoc.}, 726 S.W.2d 299, 300 (Ky. 1987)).} and adopt instead Rule 7.3 of the American Bar Association's Model Rules of Professional Conduct which provides in its entirety:

A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, by mail, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term 'solicit' includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed of advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they
might in general find such services useful.\footnote{Id. (quoting Shapero, 726 S.W.2d at 301) (quoting Model Rules of Professional Conduct, Rule 7.3 (1984)).}

Since Shapero's letter was sent for pecuniary gain and it was to persons known to need particular legal service, the Kentucky Supreme Court held that its new rule left the letter without first amendment protection.\footnote{Shapero, 726 S.W.2d at 301.} Shapero, however, contended that the first amendment afforded protection for truthful and nondeceptive solicitation letters sent by attorneys, even when the letters were targeted at specific events.

\textbf{HOLDING}

The United States Supreme Court concluded that the substitution by the Kentucky Supreme Court of the ABA's Rule 7.3 for that of its own Rule 3.135(5)(b)(i)\footnote{Rule 3.135(5)(b)(i) provided in full: A written advertisement may be sent or delivered to an individual addressee only if that addressee is one of a class of persons, other than a family, to whom it is also sent or delivered at or about the same time, and only if it is not prompted or precipitated by a specific event or occurrence involving or relating to the addressee or addressees as distinct from the general public.} cured nothing\footnote{Shapero, 108 S. Ct. at 1920.} and "like its predecessor, prohibits targeted direct mail solicitation."\footnote{Id.} The Court then held that such a blanket prohibition as Rule 7.3 (ABA) which precluded targeted, direct mail solicitation was inconsistent with the first amendment.\footnote{Id.} It thereby reversed the Kentucky Supreme Court.\footnote{Id.} In deciding \textit{Shapero}, the United States Supreme Court for the fourth time in less than a decade "has repudiated attempts by bar officials to block lawyers from seeking new clients through advertisements and other written communications."\footnote{Stewart, Hawking Legal Services, A.B.A. J., Aug. 1, 1988, at 44.}

The Court in \textit{Shapero} displays this commitment in its first line of reasoning where it reiterates its prior holding in \textit{Bates},\footnote{433 U.S. 350 (1977).} that lawyer advertising is in the category of constitutionally protected "commercial speech."\footnote{Shapero, 108 S. Ct. at 1921. See Bates v. State Bar of Arizona, 433 U.S. 350 (1977).} The Court, consistent with its analysis in
Zauderer, then promulgates the standard that commercial speech which is "not false or deceptive and does not concern unlawful activity ... may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." Therefore, the state regulation "may be no broader than reasonably necessary to prevent the perceived evil." 58

The Kentucky Supreme Court perceived the evils of direct mail solicitation as the risk of misleading, overbearing, or deceiving the recipients of such targeted mail. 59 The substantial interest of the state, therefore, was to prevent the "serious potential for abuse inherent in direct solicitation by lawyers of potential clients known to need specific legal services." 60

Justice Brennan concludes, however, that the interest of the state is not substantial. 61 The most important factor in determining whether there is a potential for overreaching and undue influence (and therefore a substantial interest) is "the mode of communication." 62 By establishing "the mode of communication" as the talisman, the Court affords first amendment protection to potentially all areas of advertising except in-person solicitation, simply because, unless the "mode of communication" is in-person solicitation, the Court can foresee no potential for abuse by attorneys which would be substantial enough of a state interest to categorically ban such communication. 63

The Court, in an attempt to support the emphasis it placed on modes of communication, distinguishes the facts in Shapero from those in Ohralik. 65 The Court states in pertinent part:

Our decision in Ohralik that a state could categorically ban all in-person solicitation turned on two factors. First was our characterization of face-to-face solicitation as a practice rife with possibilities for overreaching, invasion of privacy, the exercise of undue influ-

57. Id. (quoting Zauderer, 471 U.S. at 638) (citing Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York, 447 U.S. 557, 566 (1980)).
58. Id. (quoting In re R.M.J., 455 U.S. 191, 203 (1982)).
59. Shapero, 726 S.W.2d at 301.
60. Id.
62. Id. at 1922.
63. Id.
64. Id. at 1923.
65. Id. at 1922-1923.
ence, and outright fraud. Second, unique ... difficulties would frustrate any attempt at state regulation of in-person solicitation short of an absolute ban because such solicitation is not visible or otherwise open to public scrutiny.66

The Court then concludes that "[t]argeted, direct-mail solicitation is distinguishable from the in-person solicitation in each respect."67 Concerning the substantial state interest of preventing attorney abuse, the Court simply sees written communication as that which, even if direct and targeted, "can readily be put in a drawer to be considered later, ignored, or discarded."68 However, the Court concedes that even if direct-mail solicitation is a viable state interest, the complete ban of such communication is not the least restrictive means to achieve that state interest.69

The Court suggests that the state can regulate abuses and minimize mistakes by requiring attorneys to file letters with a state agency for approval. If the letter contains facts which are particular to a certain group of persons, the agency might require the attorney to substantiate those facts or give an accessible means for recipients of the letters to report inaccuracies or misleading letters.70 The Court realizes that such efforts would be costly and time consuming, but emphasizes "that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful."71

The Court then proceeds to succinctly address the argument by the Kentucky Bar Association that the proposed letter by Shapero was guilty of "overbearing solicitation in its use of exhortations couched in underscored capital letters and in its resort to 'pure salesman puffery.'"72 Justice Brennan argues that a "truthful and non-deceptive letter, no matter how much it speculates can never 'shou[t] at the recipient' or 'gras[p] him by

66. Id. at 1922 (citing Zauderer, 471 U.S. at 638; Ohrlik, 436 U.S. at 457, 458, 464, 465, 466).
67. Id.
68. Id. at 1923.
69. Id.
70. Id. at 1924.
71. Id. (quoting Zauderer, 471 U.S. at 646 (1985)).
72. Id. (quoting Brief For Respondent at 20).
the lapels' as a lawyer engaging in face-to-face solicitation. 73 He finds that the letter simply is not as overreaching as in-person solicitation, and therefore, its exclusion is not a substantial state interest.

The Dissent, led by Justice O'Connor, categorically disagrees with the Majority and asserts that the logic behind a ban on targeted direct mail is both "a substantial interest and in practical terms, the least restrictive means of achieving that state interest."

Although confused in some areas, the real point of contention for the Dissent is the second prong of the Central Hudson test, the requirement that the governmental interest be substantial. The Dissent 75 sees a substantial state interest in curbing attorney abuse and maintaining professional standards by banning direct-mail solicitation. 76 In fact, O'Connor confidently asserts that "it is clear to me that the states should have considerable latitude to ban advertising that is potentially or demonstrably misleading" 77 and even the latitude to ban "truthful advertising that undermines the substantial governmental interest in promoting the high ethical standards that are necessary in the legal profession."

The Dissent insists that the Court's de-emphasis on the state's substantial interests has resulted in "a line of cases built on defective premises and flawed reasoning." 79 Justice O'Connor concludes that the logic behind the line of cases from Bates to Zauderer has gone beyond the bounds of reason. 80 As a result of the Court's strained logic, Justice O'Connor believes that "the analytical framework itself should now be reexamined." 81 As an alternative, she would give greater deference to the question of whether the state's interest is substantial and would adhere to the belief that "constraints on attorney advertising ... play an

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73. Id. (quoting Brief For Respondent at 19).
75. O'Connor, Rehnquist, and Scalia joined in the Dissent.
77. Id. at 1927-28 (quoting In re R.M.J., 455 U.S. at 202).
78. Id. at 1928.
79. Id. at 1925.
80. Id.
81. Id.
important role in preserving the legal profession as a genuine profession."\(^{82}\)

**ANALYSIS**

In little more than a decade, the Court has gone from proscribing all advertising by attorneys to the present day open season approach. Certainly, *Bates* "was an early experiment,"\(^{83}\) and some members of the Court, such as the dissenters in *Shapero*, think "it has proved to be problematic in its application."\(^{84}\) Ergo, Justice O'Connor opined, "We should now return to the states the legislative function that has so inappropriately been taken from them in the context of attorney advertising"\(^{85}\) and use "[t]he *Central Hudson* test for commercial speech [which] provides an adequate doctrinal basis ...."\(^{86}\) By its decision in *Shapero*, however, a majority of the Court has sustained its broad and expansive purview of permitting attorney advertising.

The Court has clearly solidified its commitment to the protection of attorney advertising that is nondeceptive and in written form. Perhaps the most significant vote in the Majority block is that of Justice Kennedy "who joined the majority in playing out the implications of *Bates* and *Zauderer* rather than allying himself with the Court's three most conservative justices in attacking those rulings."\(^{87}\) The importance of Kennedy's alliance with the Majority is heightened when juxtaposed against the view of his predecessor Justice Powell, who "had expressed deep distrust of lawyer advertising."\(^{88}\)

In concluding that a solidification has occurred, it is now important to define, in the context of attorney advertising, (1) the direction the Court has taken since its initial holding in *Bates*, and (2) the regulatory control still reserved for the states. Considering the former inquiry, it is apparent from Justice Brennan's opinion in *Shapero* that written commercial communication by attorneys is almost *per se* protected by the first amendment.

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82. *Id.* at 1931.
83. *Id.* at 1929.
84. *Id.*
85. *Id.*
86. *Id.*
87. Stewart, *supra* note 54, at 50.
88. *Id.*
unless false or deceptive. This is evidenced by his emphasis on the "mode of communication" and his conclusion that it "makes all the difference." He is, of course, referring to the distinction between written and face-to-face communication with a potential client. If the "mode of communication" is in written form, then an attorney can advertise in a newspaper the availability and terms of his routine legal services, including the solicitation of those with specific legal problems. If not by newspaper, then the attorney can use direct mail. This includes a letter announcing the opening of his/her office with areas of law which he/she intends to practice, and of course, with the holding in Shapero, a direct letter can be targeted to those with specific legal problems.

Although the Court recognizes that the Constitution accords a lesser protection to commercial speech than to other areas of protected speech under the first amendment, it still engages in a serious and substantive review of the Kentucky statute. By doing so, it can reject an ardent Kentucky Supreme Court and its rationale that a ban on direct-mail solicitation is needed because of the "serious potential for abuse inherent in direct solicitation by lawyers of potential clients known to need specific legal services." By comparison, the Dissent led by Justice O'Connor would review the substantial state interest test of Central Hudson under a more deferential analysis. Again, evidence of this is her conclusion that by applying the test in Central Hudson to the facts of Shapero, she thinks "it is clear that Kentucky has a substantial interest in preventing the misleading effects of targeted, direct-mail advertising ...." Justice O'Connor's deferential approach, however, has not and is not likely to prevail;

89. Shapero, 108 S. Ct. at 1925.
90. Id. at 1922.
91. Id.
92. Id.
98. Shapero, 726 S.W.2d at 301.
therefore, the standard with which to be concerned is that articulated by Justice Brennan, that of a serious probe and search into the purported state interest.

It is apparent that courts and bar associations around the country realize this deferential scope of review after Zauderer and certainly Shapero. In Maryland, an "ethics rule prohibiting lawyers from sending advertisements to people with impaired judgment may be unconstitutional,"100 a Maryland court of appeals ruled recently. The Maryland court stated the rule is of questionable validity because of Shapero's holding which permits truthful written communications, regardless of the recipient's physical or emotional condition.101 Justice Brennan does write, even though dicta, that the condition of the recipient is irrelevant; rather, the issue is whether "the mode of communication poses a serious danger that lawyers will exploit any such susceptibility."102 He questions whether an attorney can ever exploit a written letter situation because it can "readily be put in a drawer ..."103

The second inquiry after Shapero is the regulatory control still retained by the states. Without question, and dating back to Bates, the Court has held "advertising that is false, deceptive, or misleading ... is subject to restraint."104 The policy is well spelled out by Justice Blackmun when he writes, "[i]ndeed, the public and private benefits from commercial speech derive from confidence in its accuracy and reliability. Thus, the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena."105

The state seemingly has a firm hand regulating both in-person solicitation and disclosure requirements, two areas which are soon to be again contested in courts. The Supreme Court has addressed both areas, in-person solicitation in Ohralik106 and disclosure requirements in Zauderer.107

101. Id.
103. Id. at 1923.
105. Id.
Even after *Ohralik* was decided, there were those, including the constitutional scholar John Nowak, who thought that the in-person prohibition by the Court in *Ohralik* was narrowly tailored. Nowak writes, "[h]owever, even these distinctions [the special nature of in-person solicitation] apparently do not justify a broad, per se rule against in-person solicitation, for the *Ohralik* majority seemed careful to limit its holding to the facts before the Court." He seemed to deduce that Justice Marshall's concurring opinion in *Ohralik* gave an open window to the possibility of in-person solicitation being permitted by the Court. However, the Court's decision in *Shapero*, ten years after *Ohralik*, reveals that the Court has decided that in-person solicitation is simply too overreaching and not conducive to effective state regulation. Unlike the letter which can be put in the desk, or the television which can be easily turned off, a face-to-face confrontation involves "pressure on the potential client for an immediate yes-or-no answer to the offer of misrepresentation." As such, it seems that challenging a state's right to categorically ban all in-person solicitation would be futile.

The other area which attorneys will likely challenge is disclosure requirements. The Court in *Zauderer* denied that disclosure requirements were restrictions on free speech. The Court did not suggest, however, that disclosure requirements would never implicate the first amendment. Rather, it held "that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the state's interest in preventing deception of consumers." The Court seems to conclude that the intrusion on advertisers by forcing them to speak is outweighed by the need to prevent consumer confusion or deception. For example, the state, as in *Zauderer*, will be able to require an attorney to inform individuals that even with a contingency fee contract, they might still have to pay for costs if a case is lost.

108. J. Nowak, supra note 7, at 937.
109. Id.
110. Id.
112. Id.
114. Id. at 651.
115. Id.
This analysis by the Court, like that of in-person solicitation, is unlikely to change.

CONCLUSION

Unless these two areas are successfully challenged, it seems that the Supreme Court’s approach to attorney advertising has reached a plateau. An attorney can with confidence advertise in her local newspaper, or if she is more resourceful, mail letters to those persons who need specific legal advice. It will be necessary to adhere to the disclosure requirements by the state, and most likely, states will require the submission of such advertisements to a commission before approval.

As well, the use of the electronic medium is perfectly acceptable. Although never tested by appeal to the Supreme Court, it is readily accepted that television advertising fits the requirements established in Zauderer and Shapero.

Certainly, the Court has provided attorneys the opportunity to participate in commercial speech, and hopefully, this will continue to result in a responsible and ethical response by attorneys.
BOOK REVIEWS


Reviewed by Rebecca Carroll Davis

Approximately 14,436,550 new cases of sexually transmitted diseases (STDs) were diagnosed in 1988,\(^1\) of which sixty-five percent of those who became inflicted were twenty-five years of age or younger,\(^2\) a portion of the population which has the potential to infect many others in a never-ending chain for years to come. As one person spreads the disease to another, and then another, those who become infected will want to know their rights and possibly even their obligations to others. This book gives a detailed analysis of the rights and obligations involved when two people engage in sexual relations, explaining the implications, both medical and legal, in laymen's terms. It is also a potential starting point for an attorney who is sought out by a client who is infected with an STD.

Chapter one is the weakest chapter of the book. It provides checklists containing questions for the individual to ask himself and his prospective sexual partner. Unfortunately, law, like medicine, is more remedial than preventative in nature. Even if a person asks the prospective partner about prior health and sexual history, he is by no means guaranteed an honest answer. At the end of the chapter is a legal checklist which is more likely to be used. The legal checklist lets the STD-inflicted person know what facts will be important if he turns to a lawyer to seek redress.

After dealing mainly with preventative measures in chapter one, Ms. Davis moves on to the heart of the matter, what happens once an STD is transmitted. Specifically, Ms. Davis discusses the possible causes of action available to an inflicted client. The difference between intentional and unintentional torts is ex-

\(^1\) DAVIS, LOVERS, DOCTORS AND THE LAW 199 (1988).
\(^2\) Id. at 5.
plained, then the various elements of the actions are discussed individually, as are the defenses available in each action, and the damages which can be recovered under each theory. Later chapters provide more detail on some of the concepts. The element of causation is discussed in further detail in chapter five. An in depth discussion of damages and defenses is in chapter six.

Chapter three deals with tort liability among spouses. Interspousal immunity is explained along with a reference list of states where full interspousal tort immunity still exists. The five states which have abolished immunity for intentional torts while retaining it for negligence actions are also listed. Another thirty states have fully abolished interspousal immunity, and these are also listed. In these states it has been possible for one spouse to recover from the other spouse for such acts as intentional and negligent infliction of genital herpes. In a related matter, the possibility of obtaining an annulment for the existence of STDs is explored.

Not too surprisingly, the claims between spouses for transmission of STDs often arise in the divorce setting. Parents with STDs may encounter problems in custody battles, because, as Ms. Davis points out, some custody and visitation decisions are made by courts solely on the basis of the existence of an STD, instead of on the effect the STD has upon the parent's relationship with the child.

One may be criminally liable for transmission of an STD to another, and the fourth chapter discusses the statutes under which a transmitter may be prosecuted. The statutory provisions, varying a great deal from state to state, are set out in table form. The table lists the penalties which can be imposed for exposing others to STDs, with fines ranging from $25 to $1000, and imprisonment ranging from thirty days to a maximum of five years, depending upon the jurisdiction and the circumstances.

A number of cases have also been successfully tried on the basis of assault, attempted murder and assault with a deadly weapon (the mouth and teeth of an AIDS victim), even where public health and communicable disease laws exist, thus showing that the communicable disease laws do not preclude other types of actions.

Ms. Davis discusses a number of concerns for those with STDs, or those who must counsel such clients. Employment discrimination is not uncommon for people with STDs. The question
arises whether employees with STDs can assert any claims if they are discharged from employment. Ms. Davis explains how the Vocational Rehabilitation Act of 1973 may be applicable in such cases. The United States Supreme Court has held that a contagious disease qualifies as a handicap within the meaning of the Act in a case in which a teacher infected with tuberculosis had been fired. It is suggested that this holding will be extended to employees fired because of STDs. Of course, the Act provides protection only to a limited number of employees, so state discrimination laws may be of more use. In addition, some large companies have already established written policies that prohibit discrimination against workers with AIDS.

Housing discrimination against those with AIDS has been a problem nationwide. A story is told of one specialist in internal medicine whose landlord refused to renew his lease because most of the specialist’s patients had AIDS. The doctor was able to obtain an injunction, however, which was followed by a settlement which allowed him to stay.

Those with STDs, especially AIDS victims, may encounter problems in obtaining health and life insurance. The underlying issue, as Ms. Davis correctly points out, is “who should be responsible for the cost of AIDS health care and who should be permitted or denied the opportunity to purchase insurance.” Some insurance companies have been accused of basing their decisions upon the life-styles of the applicant, e.g., their sexual orientation, thus using classification schemes that are overly broad or underinclusive, and thereby violating state unfair-trade-practice laws. State insurance regulators have established guidelines barring insurance carriers from using marital status, living arrangements, occupation, gender or geographic location, in order to establish a person’s sexual orientation, which is an impermissible ground for determining whether to insure.

A truly emotionally charged issue is whether children with AIDS or other STDs should be allowed to attend public schools. Federal statutes such as the Rehabilitation Act of 1973 and the Education of the Handicapped Act prohibit discrimination against children on the basis of physical handicaps or perceived handicaps. It is suggested that the equal protection clause of the

3. Id. at 155.
fourteenth amendment is also a source of protection for school-children with STDs. The protections afforded the children, however, are of no value when the community takes matters into its own hands. In Florida, three brothers with hemophilia tested positive for the AIDS antibody, and were prohibited by the local school board from attending public school. The family brought a federal lawsuit to enforce the children's rights to a public education, and in response the family's home was burned down. It is no doubt difficult to protect and enforce the rights of the children in this sort of atmosphere. No practical solution is offered to this problem, but Davis offers as a starting point that one should query whether there is any possible way to calm the fears of the public, or at least to prevent it from overreacting.

Chapter eight deals with special AIDS-related issues. Doctors may be subject to malpractice actions when they fail to diagnose AIDS, make an erroneous diagnosis, fail to properly inform a patient of the diagnosis, or fail to properly counsel in relation to an HIV antibody test. A physician may be liable for wrongful birth when he fails to inform parents that an unborn child might be infected with AIDS in time for the mother to terminate the pregnancy. Some health care professionals have refused to treat patients with AIDS due to some real concerns about handling the patients and coming into contact with their body fluids. The Center for Disease Control has established guidelines which are intended to minimize the risk inherent in treating AIDS patients. Doctors do not have the option of minimizing their risk by refusing treatment. The American Medical Association has stated that no physician may ethically refuse to treat a patient with AIDS as long as the doctor is competent to treat that patient.4

A completely different issue presents itself when it is the physician who has AIDS. A doctor at Cook County Hospital in Chicago was ordered to stop seeing patients and suspended from practicing medicine when officials of the hospital learned that the doctor had AIDS. Medical authorities in the area state that even though the risk to patients might be minimal, the risk perceived by the public is very great and could cause panic if the public learned that a doctor was infected.

Chapter eight also deals with the possibility of one getting AIDS through blood transfusions. Theories of recovery for those

4. Id. at 175.
infected with AIDS through blood transfusions have included breach of implied warranty of merchantability, strict liability, negligence and misrepresentation.

Ms. Davis' final thoughts urge those with STDs to be honest and considerate in their relations with their partners. In writing this book, she attempted to show those with STDs what can happen to them if they choose not to be honest. The problem with this, no doubt, is that there are probably a great number of people who will never take their sexual partner to court for fear of embarrassment and humiliation.

*Lovers, Doctors and the Law* explores the problems associated with AIDS in a sympathetic manner. It provides food for thought to the practitioner, but could be more helpful in some respects. The book is aimed at the general public, and as such, does not provide case names or citations for the examples given. This book, nevertheless, provides comprehensive coverage on a very timely topic. If a theoretical discussion of STDs is what you are looking for, then this book is not for you; however, if you are looking for an extremely practical approach to the novel issues which an attorney may be facing, especially in the midst of the AIDS epidemic, then this book is for you.

Reviewed by Howard S. Levy

The Terrible Truth About Lawyers is an insightful look at the psychological make-up of today's attorney. Author Mark McCormack has duplicated the formula that made What They Don't Teach You at Harvard Business School so successful. However, instead of providing a practical, common-sense approach to competing in the business world, McCormack has focused on how to effectively deal with and understand lawyers.

In addition to being a successful businessman, McCormack is a graduate of Yale Law School and a former practicing attorney. As a result, he has had the opportunity to act as both an attorney and a client. McCormack utilizes this vantage point to discuss how both parties can improve their respective positions.

McCormack sets forth his thoughts regarding "the real truths about lawyers" by formulating broad "axioms" to follow in improving the attorney-client relationship. These axioms, in turn, are accompanied by short, amusing anecdotes illustrating how they apply in practical situations. The anecdotes are based upon McCormack's experiences as founder, chairman, and C.E.O. of International Management Group (IMG), a sports marketing and management firm. McCormack's stories range from discussing IMG's representation of Pope John Paul II's visit to great Britain to the dilemmas encountered in licensing products using Bjorn Borg's name and likeness. After each anecdote, McCormack tells the moral of the passage, complete with his own advice on how to become a more productive attorney, as well as being a smarter client.

McCormack believes that many of the frustrations experienced by attorneys stem from what is taught and emphasized throughout law school. McCormack correctly theorizes that ninety per-

cent of what is taught in law school is never used in practice. As a result, many lawyers use their legal knowledge in an unproductive manner. For example, McCormack criticizes lawyers for their tendency to complicate simple matters. Lawyers fight instead of resolve, McCormack says, resulting in litigation stalling to the point that a small dispute can remain in the courts for years. McCormack offers attorneys his own practical savvy to assist in overcoming these aforementioned problems.

Specifically, McCormack urges lawyers to view their cases through the eyes of a businessman, not an attorney. McCormack believes that attorneys need to pay more attention to human nature, relying on their creativity and common sense, rather than approaching all dealings as a technical, rigid process where only the law governs. Thus, when dealing with both clients and the opposition, attorneys are encouraged to recognize when solid legal issues should yield to principles of good faith and trust.

The Terrible Truth About Lawyers is recommended reading for law students, attorneys, and clients. Law students will find it to be a helpful book for filling in the voids of law school and gaining an understanding of how the law really works outside of the classroom. Attorneys will obtain a practical reminder that there is more to the practice of law than adhering to case law and statutes. Clients will gain a better understanding of the legal process and how to maximize an attorney's services. The Terrible Truth About Lawyers does indeed reveal many terrible truths about lawyers. Hopefully, the attorney-client relationship will benefit as a result.

3. Id. at 181-199.
4. Id. at 85-165.

Reviewed by Edward J. Spaeth

The editors of this book, Professors Haas and Inciardi, openly admit that they favor abolition of capital punishment. As the title indicates, the studies in this book are challenges to the continued viability of the death penalty in the United States. With this fact in mind, I highly recommend this book to anyone who is unsure about his or her position on capital punishment. After reading the book, one will not walk away with the answer to the capital punishment debate in hand, but the questions and issues will be more narrowly defined and the framework for more critical thinking about capital punishment will have been laid.

One of the more interesting aspects of this book is that the various studies point out the dire need for some type of scholarly interface between the legal world and the social sciences. Professor Dorin's article\(^1\) in chapter eight specifically deals with this issue. I recommend reading this chapter first because the question overlays the entire book and Professor Dorin's insights will shed some light on the other authors' commentaries. Along with this chapter, one should read Professor Ellsworth's article\(^2\) in chapter seven which evaluates the Supreme Court's response to social scientists' research in the area of capital punishment.

Professor Reiman's article\(^3\) in chapter two is an interesting philosophical perspective on the justice of the death penalty. Professor Reiman separates the justice of the death penalty in principle and in practice. He basically states that even if it is just in principle, if in practice it is unjustly administered, we

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should question its usefulness as a tool of justice in our society. While I agree with the concept, some of Professor Reiman's analysis, particularly dealing with society's shared responsibility with the criminal for his/her actions, needs further proof or investigation.

William J. Bowers' article in chapter three, which sets forth the theory that the effect of executions is not deterrence but rather a "brutalization" of society, is particularly interesting. This concept of the "brutalizing" effect of executions goes directly against the strongest argument the proponents of the death penalty espouse—deterrence. This is perhaps one of the strongest arguments for the abolition of capital punishment. Mr. Bowers' article is very complete given the nature of the publication but at times tends to deteriorate into a recitation of statistics. I do not see this as a flaw, but it does point out the need for the reader to research further before drawing any concrete conclusions.

Professors Radelet and Bedau's article in chapter four addresses the possibility of innocent parties being subjected to the death penalty. I found this article theoretically interesting, but I have difficulty drawing any concrete conclusions from the research cited because the data upon which the research is based is subject to so many uncontrolled variables.

Professor Paternoster and Ms. Kazyaka's article in chapter five addresses the issue of racial bias in capital punishment cases. This is one of the most controversial areas in the capital punishment debate. This article excellently sets forth the abolitionist's viewpoint on the issue of racial bias in capital cases; however, at times it becomes mired in statistical jargon and requires careful reading by one not well versed in statistics in order to extrapolate the information contained therein.

In chapter six, Professor Hans addresses the role the jury plays in capital punishment. This article is a good critical evaluation of the capacity of a jury to perform the functions that are necessary in a capital punishment case.

4. W. BOWERS, THE EFFECT OF EXECUTIONS IS BRUTALIZATION, NOT DETERRENCE.
5. M. RADELET & H. BEDAË, FALLIBILITY AND FINALITY: TYPE II ERRORS AND CAPITAL PUNISHMENT.
6. R. PATERNOSTER & A. KAZYAKA, RACIAL CONSIDERATIONS IN CAPITAL PUNISHMENT: THE FAILURE OF EVENHANDED JUSTICE.
7. V. HANS, DEATH BY JURY.
Professor Streib's article in chapter nine discusses the imposition of the death penalty on juveniles both from an historic and current perspective. This article, through the use of statistics, points out a trend towards the elimination of the imposition of capital punishment on juveniles.

John L. Carroll's article, in chapter ten, is an illuminating piece. It lends a perspective that helps the reader appreciate the plight of the inmates on death row. This article chronicles some of the advances that have been made in the treatment of death row inmates and points the direction we need to pursue for future advances.

In summary, this book is an excellent tool to introduce oneself to the theoretical constructs of the capital punishment debate, particularly the abolitionist point of view. Many references are cited at the end of each chapter as a guide to further, more detailed research in that particular area. This book is enlightening, and I highly recommend it as a starting point in an analysis of the abolitionist view of capital punishment.

8. V. Streib, Imposing the Death Penalty on Children.