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In tribute to his contributions to Salmon P. Chase College of Law and the legal profession, the editors and staff respectfully dedicate this issue to the retiring Professor W. Jack Grosse.
ACHIEVING SAFER WORKPLACES BY EXPANDING EMPLOYERS' TORT LIABILITY UNDER WORKERS' COMPENSATION LAWS

Kenneth Matheny*

I. INTRODUCTION

On April 4, 1984, Timothy Mayles, a short-order cook for a “Captain D’s” restaurant in Morgantown, West Virginia, was severely burned when he tried to carry an uncovered container of hot grease to a disposal area outside of the restaurant.1 As he walked down a wet, steep hill to dispose of the grease, Mayles slipped and spilled hot grease over much of his body.2 He received severe burns on his face, his shoulders, his legs, and his right arm.3

Mayles was eligible for workers’ compensation, but he chose to bring a civil suit against his employer under West Virginia’s statutory exception to the employer’s immunity.4 At trial, Mayles testified that he had received no training regarding grease disposal.5 He also testified that he observed that the other employees always disposed of the grease immediately without letting it cool off.6

In West Virginia an employer can lose its workers’ compensation immunity from tort suits if the injured worker can prove that the employer deliberately intended to injure her or him.7 One way of proving deliberate intent under the statute is to


2 Id.
3 Id.
4 W. VA. CODE § 23-4-2 (Supp. 1991) (workers’ compensation immunity from suit can be lost only if employer acts with deliberate intent to harm the employee and the injury is the result of this deliberate intent).
5 Mayles, 405 S.E.2d at 15.
6 Id.
meet a five-part test. The injured employee must prove each of these elements:

(A) That a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death;

(B) That the employer had a subjective realization and appreciation of the existence of such specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by such specific unsafe working condition;

(C) That the specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation ... or of a commonly accepted ... standard within the industry or business of said employer;

(D) That such employer nevertheless thereafter exposed an employee to such specific unsafe working condition intentionally; and

(E) That such employee so exposed suffered serious injury or death as a direct and proximate result of such unsafe working condition.

In Mayles's action, the jury found that each element was satisfied, and they awarded him $220,000. The employer appealed, but the West Virginia Supreme Court of Appeals affirmed by a three-to-two vote.

The decision drew a hostile reaction from the West Virginia business community and corporate attorneys. There were predictions that the decision would hurt the state's business climate and would also result in a flood of litigation.

The Mayles decision and the reaction it elicited are similar to the decision and resulting controversy caused by the West Virginia Supreme Court of Appeals in 1978 when it issued its decision in *Mandolidis Industries v. Elkins Industries*. However, as compared to *Mayles*, the decision in *Mandolidis* was farther reaching and the fervor it caused was more intense. In fact, the current immunity statute, construed in *Mayles*, was a reaction to the *Mandolidis* decision. *Mandolidis* held that an employer can
lose its immunity under the workers’ compensation laws if the employer caused injury or death as a result of its intentional or willful, wanton and reckless misconduct. The _Mandolidis_ majority reasoned that the purpose of workers’ compensation is to supplant tort actions for negligence, but not for recklessness or intentional misconduct.

The facts of _Mandolidis_ reveal a degree of misconduct that clearly exceeded mere negligence. On April 5, 1974, James Mandolidis was operating a table saw which had no safety guard. He alleged that his employer had removed the safety guard to increase production. Mandolidis lost part of his right hand when it came into contact with the saw. Elkins Industries had previously been cited by the Occupational Safety and Health Administration (OSHA) for not having a safety guard on the saw. The court considered the history of the workers’ compensation system and concluded that it was never intended to provide immunity for employers’ reckless or intentional misconduct. Hence, the court concluded that a showing of willful, wanton, or reckless misconduct is sufficient to overcome the employer’s immunity. According to the majority, such willful, wanton, and reckless misconduct is conduct “undertaken with a knowledge and appreciation of the high degree of risk of physical harm to another . . . .”

The dissenting opinion in _Mandolidis_ argued that the decision would damage the state’s economy by inviting numerous suits and by leading to huge jury verdicts. In 1982, a law review article contended that the dissent’s fear of frivolous suits and large awards was beginning to come true. The author stated

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17 _Id._ at 913.
16 _Id._ at 914.
15 _Id._ at 915.
14 _Id._ at 914.
13 _Id._ at 915.
12 _Id._ at 913.
11 _Id._ at 914.
25 _Id._ (quoting _RESTATEMENT (SECOND) OF TORTS_ § 500 cmt. a (1965)).
24 _Id._ at 922-23 (Neely, J., dissenting).
23 _Id._ at 922 (Neely, J., dissenting).
22 _Id._ at 914.
21 _Id._ at 913.
20 _Id._ at 914.
19 _Id._ at 913.
18 _Id._ at 914.
17 _Id._ at 913.
16 _Id._ at 914.
15 _Id._ at 915.
14 _Id._ at 914.
13 _Id._ at 913.
12 _Id._ at 914.
25 _Id._ (quoting _RESTATEMENT (SECOND) OF TORTS_ § 500 cmt. a (1965)).
24 _Id._ at 922-23 (Neely, J., dissenting).
23 _Id._ at 922 (Neely, J., dissenting).
22 _Id._ at 914.
21 _Id._ at 913.
20 _Id._ at 914.
19 _Id._ at 913.
18 _Id._ at 914.
17 _Id._ at 913.
16 _Id._ at 914.
15 _Id._ at 915.
14 _Id._ at 914.
13 _Id._ at 913.
12 _Id._ at 914.
25 _Id._ (quoting _RESTATEMENT (SECOND) OF TORTS_ § 500 cmt. a (1965)).
24 _Id._ at 922-23 (Neely, J., dissenting).
23 _Id._ at 922 (Neely, J., dissenting).
22 _Id._ at 914.
21 _Id._ at 913.
20 _Id._ at 914.
19 _Id._ at 913.
18 _Id._ at 914.
17 _Id._ at 913.
16 _Id._ at 914.
15 _Id._ at 915.
14 _Id._ at 914.
that juries could not distinguish between negligence and recklessness. 27 The juries' confusion caused large recoveries against employers whose level of fault was mere negligence rather than willful, wanton and reckless. 28 The note concluded that many businesses will leave West Virginia because of the Mandolidis decision and other businesses will elect not to locate there. 29

The threat of serious economic consequences resulting from liberalized workers' compensation laws is a real one. A recent survey by Tillinghast, a risk management consulting company, found that "nearly forty percent of companies consider the costs of a state's workers' compensation system before deciding where to locate operations. In manufacturing, fifty-six percent considered the cost as a location factor." 30 In 1983, the West Virginia legislature, fearing economic loss, considerably narrowed Mandolidis by amending the employers' immunity statute to require "deliberate intention" before an employer would lose tort immunity. 31 The legislature rejected the Mandolidis willful, wanton,

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27 Id. at 929.
28 Id.
29 Id. at 930.
31 W. VA. CODE § 23-4-2 (Supp. 1991). The statute provides that immunity from suit can be lost only if:

(i) It is proved that such employer or person against whom liability is asserted acted with a consciously, subjectively, and deliberately formed intention to produce the specific result of injury or death to an employee. This standard requires a showing of an actual, specific intent and may not be satisfied by allegation or proof of (A) Conduct which produces a result that was not specifically intended; (B) conduct which constitutes negligence, no matter how gross or aggravated; or (C) willful, wanton and reckless misconduct; or

(ii) The trier of fact determines, either through specific findings of fact made by the court in a trial without a jury, or through special interrogatories to the jury in a jury trial, that all of the following facts are proven:

(A) That a specific unsafe working condition existed in the workplace which presented a high degree of risk and a strong probability of serious injury or death; (B) That the employer had a subjective realization and an appreciation of the existence of such specific unsafe working condition and of the high degree of risk and the strong probability of serious injury or death presented by such specific unsafe working condition;

(C) That such specific unsafe working condition was a violation of a state or federal safety statute, rule or regulation, whether cited or not, or of a commonly accepted and well-known safety standard within the industry or business of such employer, which statute, rule, regulation or standard was specifically applicable to the particular work and working condition involved, as contrasted with a statute, rule, regulation or standard generally requiring safe workplaces, equipment or working conditions;
and reckless standard and attempted to narrow the definition of intent. However, the Mayles decision reveals that the legislature did not narrow the definition of intent as far as it believed that it had.

Many other states have struggled with the immunity issue. Some states have modified their immunity provisions. The option to sue in tort for willful misconduct by an employer is permitted in Arizona; for intentional injury in Kentucky, Oregon, Washington, and West Virginia; and for willful misconduct in Texas. Failure to obey safety rules imposed by statute or regulation results in percentage increases of awards in Arkansas, Kentucky, Missouri, New Mexico, North Carolina, Ohio, South Carolina, Utah and Wisconsin. In California and Massachusetts, an employer's serious and willful misconduct causing an employee's injury or death will result in an additional recovery of fifty percent and one hundred percent, respectively.

Ohio's experiences with workers' compensation immunity parallel West Virginia's in several respects. In 1982, the Supreme Court of Ohio decided Blankenship v. Cincinnati Milacron Chem-

(D) That notwithstanding the existence of the facts set forth in subparagraphs (A) through (C) hereof, such employer nevertheless thereafter exposed an employee to such specific unsafe working condition intentionally; and

(E) That such employee so exposed suffered serious injury or death as a direct and proximate result of such specific unsafe working condition.


Id. at 27 (Neely, J., dissenting).


KY. REV. STAT. ANN. § 342.165 (Michie/Bobbs-Merrill 1983).


KY. REV. STAT. ANN. § 342.165 (Michie/Bobbs-Merrill 1983) (15% increase).

MO. ANN. STAT. § 287.120(4) (Vernon Supp. 1992) (15% increase).

N.M. STAT. ANN. § 52-1-10(A) (Michie 1991) (10% increase).

N.C. GEN. STAT. § 97-12 (1985) (10% increase).

OHIO CONST. art. II, § 35 (amended 1923) (not greater than 50% nor less than 15%).


UTAH CODE ANN. § 35-1-12 (1968) (15% increase).

WIS. STAT. ANN. § 102-57 (West 1988) (15% increase with total increase not to exceed $15,000).

CAL. LAB. CODE § 4553 (West 1989) (50% increase).

MASS. ANN. LAWS ch. 152, § 28 (Law. Co-op. 1989) (100% increase).
icals, Inc., a case in which eight employees who suffered permanent disability when they were exposed to harmful chemicals in the workplace sued their employer. The plaintiffs contended that the defendant knew of the danger created by these chemicals, but failed to warn the employees or to report the dangers to state or federal agencies.

In the lower court, the plaintiffs alleged that the defendant was guilty of "intentional" and "malicious" conduct as well as "willful and wanton disregard" of the plaintiffs' safety. The lower court dismissed the case as barred by the Ohio Constitution and the Ohio Workers' Compensation Act. The court concluded that the state constitution barred all civil actions by employees against their employers.

The plaintiffs appealed to the Ohio Supreme Court, which also found that the Ohio Workers' Compensation Act bars civil actions against employers for injuries received "in the course of or arising out of employment." However, the court decided that injuries resulting from intentional misconduct by an employer are not received "in the course of employment."

The court said that the purpose of the workers' compensation system is to remove negligence actions from the tort system and thereby give employees much greater assurance for recovery for work-related accidents. The court stated that this tort immunity "has always been for negligent acts and not for intentional acts." The court further stated that the motivating spirit of workers' compensation is "to improve the plight of the injured worker." The court opined that granting immunity to employers who intentionally harm their employees "would be tantamount to encouraging such conduct" and cannot be reconciled with the purpose of the workers' compensation system.
The dissent in Blankenship reflects many of the same concerns voiced by the dissent in Mandolidis. The dissent believed that Blankenship would create a flood of litigation against employers. As a consequence, the dissent continued, Ohio will find itself at a disadvantage in trying to attract and keep business.

A law review article discussing Blankenship predicted calamity: "[T]he existence of small businesses may be imperiled, while even medium to large companies may be threatened. As to companies contemplating the choice between relocation to Ohio and another state, virtually any other state ... will be preferable."

Blankenship did not provide a definition of intent. The Ohio Supreme Court defined intent in Jones v. VIP Development Co. An intentional tort, according to Jones, is "an act committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur." The Ohio legislature, on August 22, 1986, in an attempt to narrow the holdings in Blankenship and Jones, passed Ohio Revised Code section 4121.80. The new section attempted to do away with the part of the Jones definition of intent as an act "committed with the belief that such injury is substantially certain to occur." The legislature defined "substantially certain" to mean "that an employer acts with deliberate intent to cause an employee to suffer injury, disease, condition, or death." Hence, the legislature attempted to narrow the Jones definition of intent by requiring deliberate intent before an employer loses its tort immunity. In addition, the new section put a $1,000,000 cap on the amount of damages that could be recovered.

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Id. at 582 (Krupansky, J., dissenting).

Id.

Id. at 583.


472 N.E.2d 1046 (Ohio 1984).

Id. at 1051.

Hertlein, supra note 67, at 252.


On August 27, 1991, the Ohio Supreme Court struck down Ohio Revised Code section 4121.80 as unconstitutional. The court held that because the code section limited a worker's right to bring an action for an intentional tort, it violated Sections 34 and 35, Article II of the Ohio Constitution. This holding is consistent with my proposal in this paper. Later, I will argue in favor of federal legislation permitting employees to recover amounts in excess of workers' compensation when they are injured by the reckless or intentional acts of employers. The Ohio Supreme Court's decision in Brady is a hopeful sign that courts could be ready to uphold legislation that will limit the current broad immunity enjoyed by the employers under compensation laws.

Mandolidis and Blankenship illustrate the struggle that many states have experienced in trying to establish the proper scope of employers' tort immunity. Some states have made the employers' immunity so broad that recovery is nearly impossible. For example, the Montana Supreme Court in 1985 decided the case of nineteen-year-old Randal Noonan, who lost three fingers and a thumb on his left hand while operating a planer for his employer. The planer that injured Noonan had been broken for a month, but the employer refused to repair it. The employer told Noonan not to turn off the planer because that would slow down production. Noonan's supervisor was intoxicated at the time of the accident. In addition, the planer had no guard; the "on" and "off" switches were mislabeled by the employer; prior accidents had occurred with the planer; the employer knew he was in violation of OSHA standards; and, the employer knew that Noonan would have to retrieve pieces of wood from the planer. Despite these serious allegations, the trial court granted summary judgment for the employer, and the Montana Supreme Court

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76 Id. at 728-29 (Section 34, Article II of the Ohio Constitution permits the legislature to pass laws "providing for the comfort, health, safety and general welfare of all employees." OHIO CONST. art. II, § 34. Section 35 provides for workers' compensation for employees injured or killed in the course of their employment. See OHIO CONST. art. II, § 35. The court reasoned that Ohio Revised Code § 4121.80 limited an employee's right to bring actions for intentional torts and thus violated both constitutional sections. Brady, 576 N.E.2d at 728-29.).
78 Id. at 624.
79 Id.
80 Id.
81 Id.
Court affirmed. The court acknowledged that the employer operated a hazardous workplace, but it found that there was insufficient evidence that the employer specifically intended to harm Noonan.

Another example of broad tort immunity afforded to an employer can be found in Poyser v. Newman & Co., Inc. In Poyser, the plaintiff, Steven Poyser, lost part of a finger while he was operating a notching machine. Part of this machine had six blades, which the plaintiff alleged the employer knew could cause an injury. Still, it did not comply with OSHA standards. Indeed, when OSHA inspectors visited the plant eleven days prior to the accident, the employer ordered Mr. Poyser to get the notching machine out of sight. Despite these facts, the employer obtained a judgment on the pleadings, which the Supreme Court of Pennsylvania affirmed. The court found that the exclusivity provision of the Pennsylvania Workers' Compensation Act barred all suits by employees even if the employer's conduct was intentional.

A Florida appellate court, in Schwartz v. Zippy Mart, Inc., found that a supervisor's sexual harassment of two female employees did not give rise to a tort action, partly because of the employer's workers' compensation immunity. The employees alleged that their supervisor made many offensive, unconsented to contacts with the plaintiffs, including grabbing their breasts, touching various parts of their bodies, and kissing them against their will. The plaintiffs pointed out that, because they suffered no medical expenses or disability, they would not be eligible for any relief from workers' compensation. The court agreed, but found that it did not matter if plaintiffs could not obtain any

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52 52 549, 551.
53 "The liability of an employer under this act shall be exclusive and in place of any and all liability to such employees ..." PA. STAT. ANN. tit. 77, § 481(a) (Supp. 1991).
56 Id. at 722.
57 Id. at 721-22.
58 Id. at 723.
relief under workers’ compensation as long as the injuries were encompassed by the act. The court concluded that the supervisor’s conduct was not in the scope of his employment and, therefore, no action could be brought against the employer under the doctrine of respondeat superior because there was no evidence that the employer acted with any intent to injure the plaintiffs. Since the employer had committed no intentional tort, and since the plaintiffs’ injuries occurred during the course of and in the scope of their employment, the supervisor’s actions were encompassed by the workers’ compensation immunity provision. Therefore, the plaintiffs had no remedy despite allegedly being victims of sexual harassment.

Many other cases could be cited, but the object of this article is not simply to relate examples of harsh decisions. Instead, these few examples should illustrate some important problems: (1) that jurisdictions vary considerably in the way they apply employer immunity; (2) that states that might want to narrow the scope of immunity are deterred by fear of economic loss; (3) that these are cases where broad immunity provisions have created substantial injustice; and, (4) that broad employer immunity provides little incentive for employers to operate safe workplaces. This safety incentive problem is the main focus of this article. Arguably, one of the purposes of workers’ compensation is to encourage workplace safety. This purpose can best be accomplished by a federal law mandating uniformity among the states on the issue of employer immunity from tort actions. Although other safety incentives exist, namely OSHA and state criminal prosecution, these are inadequate to create incentives for many employers to operate safely.

II. OSHA AND STATE PROSECUTIONS

The high incidence of workplace deaths and injuries is well documented. The National Safe Workplace Institute estimated that 71,428 workers died from occupational illness in 1987. In

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* Id.
* Id. at 724.
* Id.
* Id.
* Id.

100 Worked To Death, USA TODAY, Aug. 31, 1991, at D1.
1989, 10,700 workers died from work-related accidents. Another 70,000 were disabled. Furthermore, workplace accidents cost the American society $48.5 billion in 1989 and $63.8 billion in 1990. Work days lost due to accidents were 35,000,000 in both 1989 and 1990. One worker dies every hour in America from a work-related cause, and three workers are disabled every minute. Despite the trend away from manufacturing jobs to service industry jobs, the problem of workplace safety seems to be getting worse. For example, in 1988, the chance of getting killed in a work-related accident was 8.6 per 100 workers, an eight-year high.

In 1970, Congress passed the Occupational Safety and Health Act (OSH Act). Its purpose is “to assure so far as possible to every working man and woman in the Nation safe and healthful working conditions...” The OSH Act, however, has not even approximated this lofty goal. Since its passage, annual workplace deaths have been estimated at 7,000 to 11,000. In 1989 alone, 1.7 million workers suffered disabling accidents.

Many reasons have been offered to explain the OSH Act’s ineffectiveness. An October 4, 1988, report to the House of Representatives lamented OSHA’s failure to use its criminal penalties. The report gives specific examples of OSHA’s failures. For instance, Stefan Golab died in 1983 when he was overcome by cyanide fumes while he was working for Film Recovery Systems in Chicago. Two months prior to Mr. Golab’s...
death, an OSHA inspector visited the plant, reviewed the injury records, and satisfied, left.\textsuperscript{115} The inspector never went to the plant floor where he would have discovered seventy boiling vats releasing deadly cyanide vapors.\textsuperscript{116} After Mr. Golab's death, OSHA inspected the plant again and eventually levied a fine of $2,400.\textsuperscript{117} In addition, the report relates that from 1970 to 1988, OSHA had prosecuted only fourteen criminal cases.\textsuperscript{118} At that time no one had ever spent a day in jail for violating the OSH Act.\textsuperscript{119}

It is true that in 1990 Congress strengthened the OSH Act's civil and criminal penalties.\textsuperscript{120} Still, it is unlikely that increased penalties alone will solve all of OSHA's problems. One problem is that OSHA is an executive agency and, therefore, is vulnerable to political change.\textsuperscript{121} Instead of vesting some of the determinative power at the plant level with the workers themselves, Congress left workplace safety "dependent on the interests of elected officials in Congress and the White House."\textsuperscript{122}

Another reason for OSHA's ineffectiveness is that the limited number of safety inspectors, 1,233 as of 1989, cannot possibly enforce health and safety regulations at the nearly 3.6 million places of employment for which OSHA is responsible.\textsuperscript{123} Even if there were an adequate number of inspectors, it is unlikely that they could detect more than a small percentage of workplace

\begin{itemize}
\item \textsuperscript{115} Id.
\item \textsuperscript{116} Id.
\item \textsuperscript{117} Id. at 2.
\item \textsuperscript{118} Id. at 4.
\item \textsuperscript{119} Id. Since 1988 two persons have served jail time for OSH Act violations. Roger Stuart, \textit{OSHA mandate to protect workers plagued by cuts, bureaucracy, The Pittsburgh Press}, Sept. 25, 1990, at A6 [hereinafter Stuart, \textit{OSHA Mandate}].
\item \textsuperscript{120} 29 U.S.C.A. § 666 (West Supp. 1991).
\item \textsuperscript{121} CHARLES NOBLE, \textit{LIBERALISM AT WORK: THE RISE AND FALL OF OSHA} 205 (1986).
\item \textsuperscript{122} Id. The Reagan Administration's hostility to OSHA reveals the dangers of leaving an issue like workplace safety in the hands of politicians. For example, Reagan appointed Thorne Auchter, a Florida construction industry executive, to head OSHA. Auchter proceeded to fire a public health activist employed by the National Institute of Occupational Safety and Health. The Department of Labor intervened on the side of employers in pending cotton dust and lead cases. Over 100 rule-making projects were dropped. Agency policy was dramatically reversed to focus on costs above all else. Health standards had to be issued that would address obvious hazards with the least costly methods feasible. Existing rules, such as those for cotton dust, were weakened. Under the Reagan Administration, the number of inspections declined sharply as did the size of penalties. \textit{Id.} at 193-95.
\item \textsuperscript{123} Stuart, \textit{OSHA mandate}, \textit{supra} note 119.
\end{itemize}
hazards performing a walk-around inspection. Furthermore, it takes OSHA about four years to create a workplace health and safety standard. From 1970 to 1988, only twenty-seven standards had been adopted. Meanwhile, between 1,000 and 3,000 new chemicals are introduced each year into the workplace. Hence, there are thousands of chemicals in American workplaces that are unregulated by OSHA. OSHA also jeopardizes worker safety by being unable to keep pace with changes in modes of production that often jeopardize workers. Thousands of different modes of production create tens of thousands of different workplace hazards. OSHA does not have the number of workers or the vast expertise that is necessary to create appropriate safety regulations to meet the myriad of production processes and technologies.

Given the enormity of the regulatory task, some commentators have said that greater union involvement at the workplace is necessary. Unions have long been involved in health and safety issues, and they could prove to be an effective partner with OSHA.

Unfortunately, the continuing decline of union membership undercuts the optimistic conclusion that greater union involvement will help resolve worker safety issues. The decline of unions removes a possible aid to OSHA's effectiveness, and, unless

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125 Id. at 107.
126 Stuart, OSHA mandate, supra note 119.
127 Id.
128 NOBLE, supra note 121, at 37.
129 Id.
130 Id.
132 Id. at 22-33. Unionized workers usually have greater knowledge of their rights and feel safer asserting those rights because they can rely on union help against retaliation. Hence, a unionized workplace is more likely to receive OSHA safety inspections. Furthermore, the intensity of an inspection is greater in unionized workplaces. One reason for the greater intensity is that unionized employees are much more likely to exercise their "walk around" rights during an inspection. Inspections last longer and conditions are checked in much greater detail at unionized workplaces. Because of the greater intensity of inspections, OSHA's penalties for violations at unionized workplaces are higher than those at non-unionized workplaces. Id.
unions enjoy a miraculous turnaround soon, most employees will continue to work in low-safety enforcement, non-unionized environments.

OSHA's ineffectiveness has prompted state authorities to pursue criminal prosecutions when highly egregious employer misconduct causes death or permanent injury to an employee.\textsuperscript{134} California, for example, has enjoyed particular success in such criminal proceedings. Since 1973, California has brought over 250 prosecutions for death and injury of employees.\textsuperscript{135} Between 1980 and 1988, state prosecutors in California successfully brought 112 actions against employers.\textsuperscript{136}

Many commentators agree that when cases involve extremely serious employer misconduct, criminal sanctions are called for.\textsuperscript{137} One reason is that civil schemes, such as workers' compensation, seldom deter profitable "employee-endangering conduct."\textsuperscript{138} Because profit motivates the "employee-endangering conduct,"\textsuperscript{139} economic sanctions must be high to deter corporate criminal activity. Also, criminal sanctions are effective deterrents against decisions implicating employee endangerment by corporate managers.\textsuperscript{40} Managers are accustomed to weighing the costs and benefits of decisions. Therefore, criminal sanctions can effectively deter managerial decisions that would endanger employees provided that the sanctions are severe enough to make the costs of such decisions outweigh the potential benefits.

Although criminal sanctions will probably always play a role in advancing workplace safety, this role will probably always


\textsuperscript{136} Id.


\textsuperscript{138} von Ebers, supra note 137, at 983-85.

\textsuperscript{139} Id.

\textsuperscript{140} Maakestad & Helm, supra note 135, at 43.
remain limited. One reason is that prosecutors must allocate scarce resources to meet heavy demands. It is unlikely that prosecutors will have sufficient resources to prosecute any more that the most serious workplace crimes.\textsuperscript{141} A second reason is that large fines may not have the desired deterrence effect because the employer can recover some of her or his losses by charging higher prices, forcing workers to take wage cuts, or laying off workers.\textsuperscript{142} Ironically, the victims of unsafe workplaces, employees, could indirectly help to pay their employer's criminal fines. Another innocent group of persons, the stockholders, could be harmed by having the value of their of stock decrease. It is also possible that widespread reliance on criminal sanctions might accelerate the recent trend of employers to locate their operations in other countries.\textsuperscript{143}

Thus, imposing criminal sanctions on only the corporation might not achieve the required level of deterrence. Therefore, sanctions must also be placed on the responsible corporate actors.\textsuperscript{144} It is at this point that a major problem occurs: determining who the corporate actor is. In large corporations, identifying the responsible persons to prosecute for killing employees will be difficult, especially since the actual decision maker might be far removed from the workplace in question.\textsuperscript{145} Proving the involvement of the persons actually responsible might be impossible. Middle managers and supervisors who may have been only implementing corporate policy might unfairly end up shouldering all of the punishment.\textsuperscript{146} Not reaching those who are ultimately responsible will considerably weaken the deterrence of the criminal sanctions.\textsuperscript{147} Also, imposing these sanctions on the middle managers and supervisors probably will not accomplish a great deal since these persons are not in a position to create policy and implement substantial change in the workplace.\textsuperscript{148}

\textsuperscript{141} von Ebers, supra note 137, at 985.
\textsuperscript{142} Koprowicz, supra note 134, at 221.
\textsuperscript{143} For a good discussion of the tendency of business to relocate to other countries because of lower costs, see Bennett Harrison & Barry Bluestone, The Great U-Turn: Corporate Restructuring and the Polarizing of America (1988).
\textsuperscript{144} Koprowicz, supra note 134, at 223.
\textsuperscript{145} Id.
\textsuperscript{146} Id. at 224.
\textsuperscript{147} For a discussion of deterring individual corporate action, see id. at 223.
\textsuperscript{148} Id.
Even if the problem of identifying responsible actors is overcome, other problems could arise. For example, the prosecutor must be able to point to a specific criminal act. It might well be possible to establish that a corporate actor had an evil intent, but an evil intent alone will not lead to a conviction. The opposite problem could arise also. A prosecutor might find it easy to identify an act or omission that directly caused a death or serious injury but find it difficult to prove the requisite intent. The prosecutor would also have to prove that the result of the act or omission was directly foreseeable to prove that the requisite mental state existed. Another obstacle to convictions is proving causation. The corporate actor's acts or omissions must be the cause of the incident, not merely the cause of an unsafe working condition.

Despite these problems, states undoubtedly will continue to prosecute corporate criminals who harm their employees. While they punish serious cases of wrongdoing, criminal sanctions do not do much to identify and remove threats to worker safety. A calculating corporate actor, weighing the risks and probability of conviction against the benefits of increased profits, could well conclude that the risk of being convicted is not great enough to justify the sacrifice of substantial profits. Truly effective deterrence will have to require a high probability that serious safety violations will be discovered and that the costs of such violations outweigh the profits that could accrue from endangering workers. Criminal sanctions and the OSH Act's sanctions can provide some deterrence. But, as pointed out above, prosecutors' offices and OSHA do not have the staff or the money to do more than part of the job. The possibility of getting caught and the possibility of sanctions being imposed successfully are not great enough to deter employers from endangering their employees. It would

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150 Id.
151 Id. at 55.
152 Id.
153 Koprowicz, supra note 134, at 225.
154 Mangum, supra note 137, at 231.
155 Recently, two dramatic instances have occurred which illustrate the continuing propensity of some employers to act in reckless disregard of their workers' safety. On September 3, 1991, 25 workers perished in a fire at a North Carolina chicken processing
be very expensive to strengthen the OSHA and prosecutors' offices to the degree necessary to effect widespread deterrence. Hence, a less expensive alternative is needed, such as making changes in the nation's workers' compensation laws to encourage safety.

III. WORKERS' COMPENSATION

Workers' compensation could provide employers with considerable incentive to maintain safe workplaces. One of the main purposes of workers' compensation is to promote workplace safety.\(^{156}\) Indeed, "[t]he true science of work[ers'] compensation is accident prevention."\(^{157}\) The problem of staff size to enforce safety is not as serious for workers' compensation because employees, in effect, enforce compensation laws by bringing claims.

Unfortunately, workers' compensation has had little effect on safety. Instead, it can encourage employers to ignore workplace hazards because employers can "internalize, regularize, and minimize the costs of workers' accidents, making worker injury simply a finite cost of doing business."\(^{158}\) One reason workers' compensation discourages safety is that the "benefit levels do not reflect the full costs of occupational accidents."\(^{159}\) In fact, workers' compensation's failure to achieve workplace safety was one reason given by Congress for enacting the OSH Act.\(^{160}\) The lack of deterrence caused by the low benefit levels is aggravated by the doctrine of tort immunity. Employers are usually immune

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plant. Pat Taylor, Twenty-five Die As Fire Hits N.C. Poultry Plant; Locked Doors Are Said To Add To Toll, WASHINGTON POST, Sept. 4, 1991, at A1. All of the exits were locked, and the plant had never been inspected by state authorities in its 11 years of existence. Id. A second instance occurred in December of 1991 when OSHA charged a West Virginia aluminum manufacturer with 231 violations and levied $600,000 in fines, the largest penalty ever imposed on an aluminum manufacturer. Bob Schwarz, Ravenswood fined $600,000 on safety, THE CHARLESTON GAZETTE (W. Va.), Dec. 21, 1991, at A1. Five workers have died at this plant since 1988 while acting in the course of their employment. Id.


\(^{157}\) Id. at 296 (quoting A. REEDE, ADEQUACY OF WORK COMPENSATION 323 (1947) (quoting U.S. BUREAU OF LABOR STATISTICS, BULL. 210, at 145 (1916))).


\(^{160}\) Id. (quoting Congressman Phillip Burton, Legislative History of the Occupational Safety and Health Act of 1970, 91st Cong., 2d Sess. 891 (1970)).
from most tort suits even when intentional conduct is involved.\footnote{James D. Ghiardi, Intentional Acts—An Exception To the Exclusivity of Workers’ Compensation, 37 Fed’N of Ins. & Corp. Counsel 149, 154 (1987).} Although sixteen states have some exceptions to employer immunity,\footnote{Arthur Larson, The Law of Workmen’s Compensation, § 69.10 (1989).} these exceptions are narrow and unlikely to encourage safety. Most of these exceptions require deliberate intent to injure by the employer before an employee can bring a tort suit.\footnote{Id. § 69.21.} As one commentator wrote, the deliberate intent exception to tort immunity “is more than merely strict in theory. It is fatal in fact [and will preclude recovery] [i]n the absence of a ‘left jab to the chin.’”\footnote{Washam, supra note 73, at 515 (quoting Larson, supra note 162, at § 68.13).} It is often said that workers’ compensation is a compromise in which employers are granted tort immunity in exchange for employees’ being given a quick, efficient recovery for injuries.\footnote{Arthur Larson, The Nature and Origin of Workmen’s Compensation, 37 Cornell L.Q. 206, 209 (1952).} Commentators often note the many differences between a no-fault system like workers’ compensation and a fault-based system like tort. “The employee is justifiably deprived of a tort claim because of the speed and certainty of workers’ compensation.”\footnote{Theodore F. Haas, On Reintegrating Workers’ Compensation and Employers’ Liability, 21 Ga. L. Rev. 843, 868 (1987).} Because fault is irrelevant to workers’ compensation, only two inquiries need to be made regarding eligibility: “first, did the employee suffer a work-connected injury; and second, did the employee receive compensation?”\footnote{Gurtler, supra note 156, at 294.}

However, the history of workers’ compensation does not support the idea that virtually total tort immunity was the price employees had to pay to obtain a quick, certain remedy. If “[t]he true science of work[ers’] compensation is accident prevention,”\footnote{Id. at 296 (quoting A. Reed, Adequacy of Work Compensation 323 (1947) (quoting U.S. Bureau of Labor Statistics, Bull. 210, at 145 (1916))).} it makes little sense to remove most of the safety incentives by permitting employers to escape liability for intentionally creating unsafe workplaces.

In fact, early compensation systems of other countries do not support the immunity doctrine. In 1884, Germany passed the first
workers' compensation law.169 Its goal was to alleviate the burdens that industrial accidents visited on employees.170 Such a pro-worker philosophy is not consistent with granting broad tort immunity to employers. The German workers' compensation law was concerned with accidents, not with intentional torts. In 1897, Britain adopted its workers' compensation act, the model for early American acts.171 The British act established the idea that the costs of industrial accidents should be passed on to consumers.172

While it can be argued persuasively that passing the costs of industrial accidents to consumers is justified, it can be just as persuasively argued that passing along the costs of injuries caused by recklessness or intentional misconduct is unfair. Accidents that are not caused by fault or that are caused by ordinary negligence can fairly be said to be a factor of production which should be passed on to consumers. On the other hand, reckless or intentional injuries are not a normal part of the production process, and it is unfair to shift these costs to the consumers.

One might object that employers will pass along the costs of tort awards to consumers also. However, as noted above, the costs of workers' compensation are less than the true costs of industrial injuries.173 The costs of a tort action cannot be passed along to consumers without resulting in higher product prices than those of employer's safer competitors.174 Also, as mentioned above, workers' compensation costs can be anticipated beforehand and made a predictable part of the costs of doing business.175 On the other hand, tort awards cannot be easily anticipated and are not susceptible to being budgeted beforehand. The unpredicta-

169 Id. at 288.
170 Id. at 290.
171 Id. at 291.
173 Amchan, supra note 159, at 686.
174 Barbara J. Tucker, Tort Liability For Employers Who Create Workplace Conditions "Substantially Certain" To Cause Injury or Death, 50 MONT. L. REV. 371, 395 (1989) ("Factories or plants that continually injure workers cannot compete with plants that choose the route of safety" if employers are subject to tort liability for intentional misconduct. Id.).
175 Raskin, supra note 158.
bility of tort awards would make it difficult simply to pass these costs on to the consumer. 176

As noted above, the original German and English systems focused on industrial accidents, not intentional torts. 177 Early American acts, drawing on the British act, also incorporated the idea that the burden of accidents should fall on consumers. 178 In 1915, the New Jersey Commission of Labor stated that the primary purpose of workers' compensation is accident prevention. 179 Thus, early compensation acts reveal that originally worker safety was a major concern, if not the main concern. We can conclude from this brief historical sketch that the safety emphasis underlying early compensation acts is inconsistent with the current broad tort immunity enjoyed by employers. 180

The workers' compensation system was a late nineteenth and early twentieth century creation. 181 There have been many changes in tort doctrine since the time of the early acts. 182 For example, part of the original compromise was that employers gave up their main defenses in actions by injured employees. 183 These defenses were contributory negligence, assumption of the risk, and the fellow-servant rule. 184 In the early twentieth century these defenses were very effective. 185 The workers' compensation quid pro quo in which workers gave up their right to sue at common law and employers gave up their right to use these three defenses was, at first, a fair exchange. This trio of defenses had made successful tort actions against employers nearly impossible. 186 However, as a present day reality, the original quid pro quo is no longer a fair exchange. 187 Courts have greatly narrowed the defenses of contributory negligence, assumption of the risk, and the fellow-servant rule. 188 Comparative negligence

176 Id. at 1070-71.
177 Perlin, supra note 172, at 873.
178 Id. at 872 n.179.
179 Id. at 873 n.185.
180 Id. at 878-79.
181 Id. at 868-69.
182 Haas, supra note 166, at 866.
183 Id. at 864.
184 Id. at 887.
185 Ghiardi, supra note 161, at 150.
186 Id. at 151.
187 Haas, supra note 166, at 868.
188 Id. at 867.
has replaced contributory negligence in most jurisdictions, and assumption of the risk is often assimilated into comparative negligence doctrines.\footnote{Id.} The fellow-servant rule has virtually disappeared.\footnote{Id.} Thus, presently employees give up a right to sue at common law which would be much more likely of success today in exchange for partial wage replacement.\footnote{Id. at 868.} The \textit{quid pro quo} can no longer be used as a justification for broad employer immunity.\footnote{Id. (Employees should not have to live with an agreement that was fair in the past but which is substantially less favorable in the present.).}

There are no historical or theoretical reasons to prevent states from modifying employer immunity to allow more tort actions by employees. If deterrence is to be effective, then there must be means of subjecting employers to the possibility of large damage verdicts.

There have been several proposals for modifying employer tort immunity. A common proposal is to enlarge the intent exception to include general intent in addition to specific intent.\footnote{See, e.g., Edward J. O'Connell, Jr., Comment, \textit{Intentional Employer Misconduct and Pennsylvania's Exclusive Remedy Rule After Poyser v. Newman & Co., Inc.}, \textit{A Proposal For Legislative Reform}, 49 \textit{U. of Pitt. L. Rev.} 1127, 1155 (1988); Washam, supra note 73, at 515; Perlin, supra note 172, at 879; Amchan, supra note 159, at 693.} Under this standard, employees would have to prove that their employers believed that the consequences of their actions were substantially certain to happen. Although employees would have to meet a high burden of proof under the general intent standard, at least recovery would be possible, which is rarely the case under specific intent exceptions. A second proposal is to increase the amount of damages by a set amount, instead of permitting a tort action, when employers willfully injure employees. For example, Massachusetts law provides for double compensation when there is a finding of willful misconduct.\footnote{Mass. Ann. Laws ch. 152, § 28 (Law. Co-op. 1989).} The employer must repay his or her insurer for any extra compensation paid.\footnote{Id.} A similar California law permits a fifty percent increase when employers commit serious and willful misconduct.\footnote{Cal. Lab. Code § 4553 (West 1989).}

Before it was
struck down as unconstitutional in *Brady*, Ohio's compensation laws provided for increased damages of up to three times the total workers' compensation award when employees were injured by intentional torts. Unlike Massachusetts where the employer must reimburse her or his insurer for extra damages, Ohio's Act created an intentional tort fund to pay additional damages resulting from employers' misconduct. Several states provide increased damages for failure to comply with safety duties prescribed by law.

A third proposal would keep the no-fault compensation system for all compensatory damages and permit a tort action for punitive damages when employers engage in reckless or intentional misconduct. The advantages of such a dual system would be to limit an employer's liability for compensatory damages while achieving deterrence by the possibility of punitive damages. Another proposal has been to abolish intentional tort funds, such as Ohio's, because such funds eliminate much of the deterrence element implicated by higher awards. Unscrupulous employers would have little to fear from willfully injuring employees if they were protected by an intentional tort fund. The worst economic harm would be a raise in premiums. Finally, there have been proposals to pass federal legislation to create uniform workers' compensation laws at least as far as the issues of tort liability and safety incentives are involved. One commentator proposes that achieving such uniformity could be accomplished by amending the OSH Act to permit tort actions when employees are killed or permanently disabled by employers' willful or intentional conduct.

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201 See supra notes 40-48 and accompanying text.
204 Id. at 89.
205 See Hertlein, supra note 67, at 262.
206 See Amchan, supra note 157, at 694.
207 Id. at 694-95.
All of these proposals have merit. However, it would be unwise to totally ignore the current system's supporters. The argument that expanding tort liability could result in a high flood of litigation and dangerously high tort awards has some persuasiveness, particularly in the light of West Virginia's experience after Mandolidis. Some injured employees did file frivolous suits, and some damaging verdicts were returned. Some juries found it difficult to draw the important line between negligence and recklessness. This failure can be critical because virtually everyone agrees that employers must be immune from suit for their negligence. Otherwise, immunity would be meaningless and employers would receive nothing by contributing to workers' compensation. Any system that narrows employers' immunity will have to provide methods to avoid excessive litigation, damaging verdicts, and confused juries.

**IV. PROPOSAL**

I propose that federal legislation be enacted to require that all states adopt a uniform procedure permitting recovery for reckless or intentional employer misconduct that kills or permanently disables an employee. In states where this liberal rule has been adopted, many people have feared that narrower immunity would ruin their state's business climate by inducing employers to move to other states. This fear is legitimate. The survey by Tillinghast, mentioned previously, found that forty percent of all businesses consider a state's workers' compensation costs before deciding whether to locate in that state. Cost is even more of

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208 See, e.g., Joseph H. King, Jr., *The Exclusiveness of An Employee's Workers' Compensation Remedy Against His Employer*, 55 Tenn. L. Rev. 405 (1988); Hertlein, *supra* note 67; Donald P. Wiley, Comment, *Workers' Compensation in Ohio: Scope of Employment and the Intentional Tort*, 17 Akron L. Rev. 249 (1983); Mohler, *supra* note 26; see also Larson, *supra* note 162, at § 68.15 (cases allowing tort recovery for anything less than a specific intent to injure are "distinctly out of line").

209 Mohler, *supra* note 26, at 928.

210 Id.

211 Id. at 928 n.217.

212 Id, at 929.


a consideration for manufacturers, fifty-six percent of whom consider costs before deciding where to locate.\textsuperscript{216} Competition among the states to keep costs low creates a nearly insuperable roadblock to workers’ compensation reform.\textsuperscript{217} Only federal legislation can transcend this competition and create uniform immunity provisions.

There is little doubt that the jurisdictional basis for such legislation exists because of Congress’s power to regulate commerce.\textsuperscript{218} The well-known decision in \textit{Garcia v. San Antonio Metropolitan Transit Authority},\textsuperscript{219} makes it clear that Congress’s authority under the Commerce Clause extends to all intrastate economic activities that affect interstate commerce.\textsuperscript{220} \textit{Garcia} made it clear that the check on Congress’s power over matters affecting interstate commerce is the political process itself.\textsuperscript{221} The Court refused to identify affirmative limits on Congress’s powers under the Commerce Clause.\textsuperscript{222} One can conclude that federal legislation setting standards for all workers’ compensation acts is well within Congress’s authority to enact.

I propose a system in which administrative remedies must be exhausted. An administrative board (board) would first determine if the employer’s conduct is reckless or intentional. An expert agency should be able to make the distinction between recklessness and negligence more easily than would a jury of lay persons. As mentioned above, juries have experienced difficulty distin-

\textsuperscript{216} \textit{Id.}
\textsuperscript{217} Haas, \textit{supra} note 166, at 899.
\textsuperscript{218} Congress’s power to regulate commerce derives from Article I, Section 8, Clause 3 of the United States Constitution. \textit{See also} Haas, \textit{supra} note 166, at 899; Mondou v. New York, New Haven & Hudson R.R., 223 U.S. 1 (1912) (early case holding that the Federal Employee Liability Act’s (FELA) provisions supersede state laws that preclude filing FELA actions).
\textsuperscript{220} \textit{Id.} at 537. \textit{See also} Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc., 452 U.S. 264 (1981) (congressional power under Commerce Clause broad enough to include regulation of activities that pollute the air or water or cause other environmental hazards that may affect more than one state); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (Commerce Clause provides source of congressional power to enact provisions of Civil Rights Act of 1964 precluding discrimination in public accommodations); Wickard v. Filburn, 317 U.S. 111 (1942) (power of Congress to regulate commerce is not confined to interstate activities, but extends to intrastate commerce that affects interstate commerce).
\textsuperscript{222} \textit{Id.} at 556.
guishing recklessness from mere negligence. It is crucial that this problem be circumvented because it is not one of my proposal's purposes to impose greater penalties for merely negligent behavior.

It is also very important that the board be insulated as much as is possible from changing political climates. Otherwise, the board could be subject to the kinds of political influence which, as described previously, have hampered OSHA's effectiveness. It is unlikely that any agency of a state can be wholly insulated from political influences. However, certain safeguards can be created to reduce excessive political influence. I propose that federal legislation require each state to create the above-mentioned board which would consist of seven lawyers. The members should be lawyers because of the crucial determinations they must make regarding the nature of an employer's misconduct, if any. A board consisting of lay members could well have the same difficulties mentioned previously that juries have had when trying to distinguish among negligent, reckless, and intentional misconduct. The governor of each state would nominate the board members. Their appointment would be contingent upon the approval of the state legislature. Of the seven members, three must be representatives of labor, and one must be a representative of consumers. To further reduce political influence on the boards' decisions, I propose that each member serve for life. Of course, a member could be removed for good cause, such as dereliction of duty, willful refusal to follow the law, and so on. A further check on political pressures would come from the availability of judicial review which should make it more likely that the applicable laws and regulations govern decisions rather than political ideology.

Under the uniform system I propose, if the board finds that the employer was reckless, the employee's compensation would be increased by one hundred percent. Either party could appeal the decision to the state's appellate courts. The courts should limit their review to that of verifying that the findings were supported by substantial evidence. If so, the board's decision

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223 Mohler, supra note 26, at 929.
224 NOBLE, supra note 121, at 193-95.
225 Mohler, supra note 26, at 929.
should be affirmed. This deferential review would help to control the costs of time and money involved in excessive relitigation and would preserve the board's role as the decision makers.

Intentional conduct would be subject to greater penalties because the degree of fault is greater. If the board finds that the employer's conduct was intentional, the employee would have a choice of remedies. She or he can either accept damages increased by two hundred percent or accept workers' compensation and sue for punitive damages. Allowing the employee to keep the workers' compensation award even if she or he elects to sue removes the risk that an employee could lose everything by choosing to go to court. The possibility of losing everything if the employee loses the tort action would discourage many employees from pursuing their right to go to court and sue for punitive damages for employers' intentional torts. This disincentive to seek punitive damages would limit much of the deterrence contemplated by this proposal. Of course, an employer could appeal the board's decision that the misconduct was intentional. The same deferential level of review that applies to recklessness determinations would apply to intentional misconduct determinations.

Under the proposed legislation, intentional and reckless conduct would be defined exactly as they are in accordance with Restatement (Second) of Torts. The comments to the Restatement would be fully included as authoritative guides to aid the boards in making their determinations.

"Intent," then, would include situations when the consequences of an employer's act were those that she or he believed were

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222 A reckless act differs from an intentional act in that the reckless actor does not intend the harm that results from the act while the intentional actor does intend the harm that results. RESTATEMENT (SECOND) OF TORTS § 500 cmt. f (1965).

227 The Restatement provides:

The word "intent" is used ... to denote that the actor desires to cause [the] consequences of his act, or that he believes that the consequences are substantially certain to result from it. The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Id. § 500.
substantially certain to follow. Although this is a more lenient standard than the intent standard in use nearly everywhere when workers' compensation immunity is involved, the Restatement's definition of intent still puts a heavy burden on plaintiffs. A plaintiff must prove that the employer believed that the consequences of her or his action were "substantially certain" to occur. Proving "belief" and "substantial certainty" will require a large quantum of persuasive evidence. This need for considerable evidence should allay many of the fears that frivolous suits will routinely result in large verdicts.

"Recklessness" would include acts and intentional omissions which violate the employer's duty to provide a safe workplace. It would further include facts that would cause a reasonable person to know that she or he is creating an unreasonable risk of physical harm to others and that this risk is substantially greater than that required for negligence. The definitions and comments ought to enable the boards to draw accurate lines not only between intentional and reckless behavior but between reckless and negligent behavior as well. For example, the comments make it clear that intentional conduct differs from reckless conduct because the reckless actor does not intend to cause the harmful consequences of her or his acts or omissions. Recklessness requires a "strong probability" that harm will occur, which is a lesser standard than the "substantial certainty" needed to prove intent. Furthermore, the comments clearly distinguish recklessness from negligence. Recklessness requires a "conscious choice of a course of action," while negligence is a result of inadvertence, incompetence, and so on. The difference between the two is in the "degree of the risk," a difference "so marked as to amount substantially to a difference in kind."

One advantage of the Restatement's definition of recklessness is that it embraces intentional failures to act when one knows facts which would lead a reasonable person to act. It would,
therefore, be reckless to fail to act to remedy known statutory violations which one knows imperil workers’ safety. To achieve a high degree of deterrence, it would be necessary to motivate employers not only to refrain from intentional acts that are substantially certain to harm employees, but also to require that they take affirmative steps to remedy known dangers. There must be adequate punishment to deter wrongful acts and omissions. Like the intent standards, the reckless standard would require a large quantum of persuasive evidence. The plaintiff would have to prove that the employer recognized that her or his acts or omissions created a degree of risk that is “substantially greater” than that needed to establish negligence. The distinct difference would help boards make quick, accurate decisions in the vast majority of cases.

Ideally, punitive damages awarded for intentional misconduct will be sufficient to deter wrongdoing but not so high as to bankrupt the employer involved. I can think of no general formula that could guarantee the desired ideal amount of punitive damages. Neither does it seem that putting a cap on punitive damages will yield the desired results in each case. A one million dollar cap on punitive damages might not be sufficient to prevent a small business from being destroyed by a punitive damage award. On the other hand, a one million dollar award might be only a relatively minor matter to a “Fortune 500” company. Therefore, I do not propose federal laws mandating a particular formula for computing punitive damages. I believe the best results would come from having lawyers present their cases to the jury in each case; introduce evidence regarding the profits, assets, and potential effects of the punitive damages; and let juries decide. A clearly excessive award would be subject to appeal where appellate courts can scrutinize the award to ensure that it is not clearly excessive. If it is not, then the award should stand. The

236 Id.
237 The propensity of juries to award large verdicts might be exaggerated. For example, in Mayles v. Shoney’s Inc., 405 S.E.2d 15 (W. Va. 1990), the plaintiff received only $220,000 despite his substantial and painful burns. Id. at 16. In the wake of Mandolidis Indus. v. Elkins Indus., 246 S.E.2d 907, 914 (W. Va. 1990), a study purported to demonstrate that juries tend to award exorbitant verdicts for intentional employer torts, yet the study was based on an “analysis” of only six cases that had been brought successfully in the four-year period following Mandolidis. Mohler, supra note 26, at 898. In any event, if the deterrence contemplated by this proposal works, few such awards will be made.
uniform legislation would mandate that no penalties or punitive
damages can be passed on to insurers. The guilty party itself
must pay the penalty or punitive damages award. The purpose
of not permitting such insurance is to guarantee that the full
cost of misconduct falls on the employer because the present
workers’ compensation system "creates inadequate economic in-
centives for workplace safety."238 Also, the uniform legislation
would prohibit the types of intentional tort funds such as the
one Ohio had.239 Allowing employers to insure the risks of reckless
or intentional misconduct not only damages the deterrence con-
templated by this proposal, it also is unfair to safe employers by
forcing them to pay part of the costs of employer misconduct.240

Finally, the uniform legislation would require states to estab-
lish a uniform percentage rate equal to that of every other state.
Without uniformity in benefits, states could continue to compete
against each other to attract business by providing lower benefits.
This kind of competition would constantly keep benefits low and
undermine the deterrent effect desired by this proposal.241 There
have been attempts before to achieve uniformity among the
states. For example, in 1972, the National Commission on Work-
ers' Compensation recommended a benefit level equal to two-
thirds of the injured worker's wages up to a maximum of one
hundred percent of the state's average weekly wages.242 Despite
the recommendations, benefit levels continue to vary considera-
bly. In 1979, Congress defeated a bill that would have mandated
that states establish uniform benefit levels.243 It is
unjust that
states continue to pay disparate benefit rates.244 A uniform stan-
dard would significantly reduce competition among the states.
More research would be needed to determine the uniform rates
that would adequately compensate injured employees while si-

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240 Ballam, supra note 203, at 88-89.
241 Id. at 89. If a uniform approach to employer tort immunity were adopted, states
would not have to fear placing their businesses in a disadvantageous position.
242 National Commission on Workers’ Compensation, Report of the National Com-
mission on State Workers’ Compensation Laws 57 (1972).
the Health and Safety Committee on Education and Labor, 96th Cong., 2d Sess. 3-47 (1980).
244 Keith C. Miller, Problems of Workers’ Compensation Federalization, 30 Drake L.
multaneously encouraging significantly employers' commitment to workplace safety. Of course, the average weekly wage will vary from state to state and, therefore, benefit levels will vary. However, uniformity does not require absolutely equal compensation amounts. What is needed is substantial similarity so that the costs of workers' compensation will not be an important factor in deciding where to locate a business. If the percentage level for payments is adequate, safety incentives will be greatly encouraged,\textsuperscript{245} even if some variation in benefit amount exists.

\textbf{V. CONCLUSION}

If the "true science of work[ers'] compensation is accident prevention,"\textsuperscript{246} then the current system is irrational. Providing virtual total immunity to employers conflicts fundamentally with the goal of accident prevention. Allowing employers to insure against intentional and reckless misconduct destroys safety incentives, punishes careful employers by forcing them to pay higher premiums, and punishes consumers by making them pay the costs of intentional and reckless misconduct.

Doubtless there has historically been strong federal aversion to federal involvement in workers' compensation because the states have always exercised control of their systems.\textsuperscript{247} However, fear of alienating business and damaging their economies creates an almost insuperable roadblock to needed reforms as states concentrate more on costs than safety.\textsuperscript{248}

There is little in the history of workers' compensation or its theory to preclude the fundamental changes I propose. Indeed, I believe my proposal is more consistent with the goals of accident prevention and just compensation to injured employees than is the present system. Furthermore, abstract concerns about federalism and states' "rights" to administer workers' compensation provide weak justification to reject needed federal remedies when

\textsuperscript{245} JOSEPH V. REES, REFORMING THE WORKPLACE: A STUDY OF SELF-REGULATION IN OCCUPATIONAL SAFETY (1988); see also NATIONAL COMMISSION ON WORKERS' COMPENSATION, REPORT OF THE NATIONAL COMMISSIONS ON STATE WORKERS' COMPENSATION LAWS 57 (1972).

\textsuperscript{246} Gurtler, supra note 156, at 296 (quoting A. REEDE, ADEQUACY OF WORK COMPENSATION 323 (1947) (quoting U.S. BUREAU OF LABOR STATISTICS, BULL. 210, at 145 (1916))).

\textsuperscript{247} Miller, supra note 244, at 779.

such abstract concerns are measured against employee deaths and injuries. The uniformity created by federal legislation would ensure that the compensation system not only adequately compensates injured employees and their families, but that it also successfully reduces the incidence of avoidable tragedies.
A LOOK AT THE DIRECTOR AND OFFICER LIABILITY INSURANCE CRISIS: INSURING A BALANCE OF INTERESTS

Jay L. Kanzler, Jr.*

I. INTRODUCTION

The business community in recent years has experienced what many commentators have termed the "director and officer liability insurance crisis."1 This "crisis" centers around the possibility of personal liability for the actions of corporate officers and directors taken pursuant to their roles as such within the company. Since the landmark case of Smith v. Van Gorkom,2 present and potential directors of corporations have had to think long and hard about the reward/risk factor now inherent in serving in such a capacity. Many have opted out, preferring to avoid any possibility of personal liability.3 From the corporation's perspective, the crisis has created a dearth of insurance options, leaving it with the Hobson's Choice of paying exorbitant

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1 Sara R. Slaughter, Comment, Statutory and Non-Statutory Responses to the Director and Officer Liability Insurance Crisis, 63 IND. L.J. 181, 182 (1987) (the "combination of shrinking insurance coverage and increasing liability exposure has resulted in a D&O [director and officer] insurance crisis."); see also Dennis J. Block, et. al., Advising Directors on the D&O Insurance Crisis, 14 SEC. REG. L.J. 130, 130-31 (1986) [hereinafter Advising Directors] ("The market for directors and officers liability insurance is currently in a state of crisis. Premiums are skyrocketing, deductibles are increasing at an extraordinary rate, coverage is shrinking, and more and more companies are terminating their D&O programs.").

2 488 A.2d 858 (Del. 1985).

3 Richard Myers, Jr., Comment, Where Have All the Directors Gone: Corporate Director and Officer Liability and Coping With the Insurance Crisis, 36 CLEV. ST. L. REV. 575 (1988) citing the increased likelihood of personal liability and the unavailability or unaffordability of insurance to cover this; Alfred Conard, A Behavioral Analysis of Director's Liability for Negligence, 1972 DUKE L.J. 895, 903 ("If the available indemnification procedures and insurance coverage do not provide a sense of security, people may refuse to serve as directors.").

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 premiums for director's and officer's liability insurance (D&O insurance), or taking the risk of liability upon themselves.¹

In response to the crisis, many state legislatures have become involved. Some states passed statutes which exculpate directors for certain actions.² Others have enacted legislation which broadens the indemnification possibilities for the corporation, thereby limiting the exposure of the individual officers and directors.³ Still others have taken the more novel approach of limiting the liability exposure of the officers and directors to a predetermined amount such as one year's salary or $100,000.⁴

At the heart of the crisis and the resultant responses thereto, is the ideal that a balance can and should be struck between promoting corporate accountability and creating an environment which does not inhibit taking reasonable corporate risks. If corporate directors and officers are protected too broadly through indemnification or exculpation, they will have little or no personal exposure and the incentive to use appropriate discretion and judgment is reduced. However, burdening these same individuals with an increased chance for personal liability will cause them to take an overly conservative direction in guiding the company.

In this article, I will look at the history of the D&O crisis. I will examine the statutory responses of individual states. In particular, I will examine those states which have enacted exculpation statutes, increased indemnification statutes, and predetermined liability limit statutes. In addition, I will review the desirability of indemnifying directors for liability resulting from shareholder derivative suits. Finally, I will discuss the strengths and weaknesses of each response in light of the underlying goal: achieving a balance between corporate accountability and profitability.

¹ Advising Directors, supra note 1, at 131 (noting that D&O liability insurance may not be available to the corporation, causing such companies to "go naked," the result being that the directors may choose to resign rather than risk liability). See JOSEPH W. BISHOP, JR., THE LAW OF CORPORATE OFFICERS AND DIRECTORS ¶ 8.01 (1982) (despite high premiums and more restrictive provisions, over 90% of corporations with over a billion dollars in assets, and 96.8% of all companies listed on the New York Stock Exchange carry D&O liability insurance).

² See DEL. CODE ANN. tit. 8, § 102(b)(7) (1991) (limiting or eliminating the personal liability of directors to the corporation or its shareholders for breach of their fiduciary duty). See also infra notes 38-69 and accompanying text.

II. CIVIL LIABILITY FOR OFFICERS AND DIRECTORS

In their roles within the corporation, officers and directors may face the possibility of civil liability for their conduct. They are liable to the shareholders for the breach of their fiduciary duty. This liability may be divided into two categories: first, civil liability for self-serving conduct, and second, civil liability for negligence. With respect to negligence, a director may be liable either to the corporation itself for failing to conduct his affairs with reasonable care and diligence, or to individual securities buyers and creditors of the corporation for failing to disclose fully and accurately the condition of the corporation when so required. The suits themselves will be brought either by the shareholders in the name of the corporation, known as shareholder derivative suits, or by the shareholder, creditor, or another directly in his own right. In the latter case, the corporation itself may often be a defendant as well.

A. History of the D&O Liability Crisis

The genesis of the D&O liability crisis can be traced to litigation which occurred in the first half of this century. In New York Dock Co. v. McCollom, the court denied that the corporation had a common law right to indemnify its directors in a shareholder derivative suit.

More recently, in Smith v. Van Gorkom, the Delaware Supreme Court made it clear that the business judgment rule would not provide a complete umbrella of protection from personal liability for the officer or director. In Van Gorkom, the court

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"See Roberta Romano, What Went Wrong With Directors' and Officers' Liability Insurance?, 14 DEL. J. CORP. L. 1, 3 (1989).

Conard, supra note 3, at 895 (paying themselves excessive compensation or entering into contracts favorable to themselves).

Id. (for example, by making unwise investments based upon incorrect or insufficient information); see Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985) (finding that the board of directors acted in a grossly negligent manner in accepting a proposed merger agreement without fully reviewing the agreement itself).

Conard, supra note 3, at 896. Liability in these areas would most likely concern violations arising under the Federal Securities Act of 1933 and the Federal Securities Exchange Act of 1934, as well as corresponding state securities laws.

16 N.Y.S.2d 844 (Sup. Ct. 1939).

Id. at 848.

488 A.2d 858 (Del. 1985).
held that the business judgment rule does not protect directors who have made an "unintelligent or unadvised Judgment."\textsuperscript{15} Whether a business judgment is in fact informed "turns on whether the directors have informed themselves 'prior to making a business decision, of all material information reasonably available to them.' "\textsuperscript{16} The standard required for a finding of liability is that of "gross negligence."\textsuperscript{17}

The directors were found to have breached their duty of care in approving a $55 per share cash-out merger, even though the price per share was significantly higher than the market closing price before the offer.\textsuperscript{18} The court held that the directors did not adequately inform themselves as to the role that Van Gorkom, the chief executive officer, had played in forcing the sale; that the directors were uninformed as to the intrinsic value of the company; and, given the circumstances, were grossly negligent in approving the sale of the company upon two hours' consideration, without prior notice, or absent exigent circumstances.\textsuperscript{19} The court found the directors to be personally liable for that amount by which the intrinsic value of the company exceeded the $55 per share merger price.\textsuperscript{20} The action was eventually settled for $23.5 million.\textsuperscript{21}

The precedent set by \textit{Van Gorkom} continues to cause concern. The door has been pried open on personal liability for officers and directors; participants on both sides are seeking to determine just how far and how long it will remain open.

\textsuperscript{15} \textit{Id.} at 872 (quoting Mitchell v. Highland-Western Glass, 167 A. 831, 833 (Del. 1933)).

\textsuperscript{16} \textit{Id.} (quoting Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1981)).

\textsuperscript{17} \textit{Id.} (quoting with approval from its holding in \textit{Aronson}, 473 A.2d at 812: "While the Delaware cases use a variety of terms to describe the applicable standard of care, our analysis satisfies us that under the business judgment rule director liability is predicated upon concepts of gross negligence.").

\textsuperscript{18} \textit{Id.} at 866 n.5 (noting that the trading range for the corporate stock in the nine months prior to the proposed merger was between $29 1/2 and $38 1/4).

\textsuperscript{19} \textit{Id.} at 874. Among its findings, the court noted that the board had based its decision to approve the merger almost exclusively upon the representations of Van Gorkom. The members of the board attended the meeting completely unaware of its purpose. They did not possess any documentation concerning the transaction, were given no documentation to support the adequacy of the per share price, and the board had nothing more than Van Gorkom's oral representations as to the proposed agreement, which he had admittedly not read. \textit{Id.}

\textsuperscript{20} \textit{Id.} at 893.

\textsuperscript{21} \textit{Advising Directors, supra} note 1, at 136. The D\&O insurance carrier contributed the policy limit of $10 million, with much of the rest being paid by the acquiring party. \textit{Id.}
B. The Function of D&O Liability Insurance and Indemnification

Statutes in all fifty states authorize the indemnification of corporate officers and directors. According to one commentator, officers and directors, like most human beings, are likely to consider their mistakes as "the products of the unforseeability of human events, rather than as failures to exercise the skill and care of normally prudent managers." Accordingly, these individuals regard it as only fair that the corporations reimburse them for the costs and expenses incurred in defending against such claims. Indemnification is the payment or reimbursement by the corporation to its officers or directors for liabilities arising out of their roles as such, including in appropriate circumstances, judgments, amounts paid in settlement, and expenses and attorney's fees. These indemnification provisions are often contained within the corporate bylaws or articles of incorporation.

Director and officer liability insurance typically insures against losses arising out of the claims against the officers and directors for their "wrongful acts." The need for insurance arises out of the "gap" which may exist in state indemnification statutes, or from the inability or refusal by the corporation to actually indemnify the officer or director. D&O liability insurance normally

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23 Charles Hansen & Don G. Lents, Missouri Corporation Law and Practice 211 (Supp. 1990). For a discussion of "duty of care" owed to the corporation and the business judgment rule, see Robert Charles Clark, Corporate Law § 3.4, at 123-25 (1986) ("The rule is simply that the business judgment of the directors will not be challenged or overturned by courts or shareholders, and the directors will not be held liable for the consequences of their exercise of business judgment—even for judgments that appear to have been clear mistakes—unless certain exceptions apply." Id.).
24 Id. (under the current corporation laws, officers and directors can reasonably be expected to make the fullest use of indemnification).
26 Advising Directors, supra note 1, at 132. "'Wrongful acts' generally [refer to] any breach of duty, neglect, error, misstatement, misleading statement, omission or other act done or wrongfully attempted ..." by the officer or director. Id. (quoting Joseph F. Johnston, Jr., Corporate Indemnification and Liability Insurance for Directors and Officers, 33 Bus. Law. 1993, 2016 (1973)).
27 Dennis J. Block, et al., Indemnification and Insurance of Corporate Officials, 13 SEC. REG. L.J. 239, 249 (1985) [hereinafter Indemnification and Insurance]. This "gap" may occur where a state statute prohibits the indemnification of settlements in shareholder
serves the dual purpose of: (1) reimbursing the company for its costs due to indemnification of its officers and directors, and (2) insuring the officers and directors themselves in those situations as to which indemnification is not available. Statutes like that of Missouri allow a corporation to purchase and maintain insurance "whether or not the corporation would have the power to indemnify him against such liability."

C. Recent Trends in D&O Liability

The "crisis," as it has been referred to, is the result of increased claims against officers and directors, and the increased judgments being awarded to plaintiffs. According to the 1988 Wyatt Directors and Officers Liability Insurance Survey, a current survey of practices in the field, shareholder actions continue to be the largest source of D&O claims, accounting for 46.9% of all claims in 1988. Of these shareholder claims, 17.2% were in connection with a merger, tender offer, or acquisition. The next largest source of claims cited in the 1988 Wyatt Directors and Officers Liability Insurance Survey were those brought by employees, 21.5% of all claims, with the bulk of those alleging derivative suits, or where a statutory prohibition exists against reimbursement for judgment amounts. A corporation may be unwilling or unable to provide indemnification as a result of hostile takeover, insolvency, or bankruptcy. Id.  

Advising Directors, supra note 1, at 132-33; see also HANSEN & LENTS, supra note 23, at 211.  

Mo. Rev. Stat. § 351.355(8) (1990). Only two states, Mississippi and Vermont, do not permit a corporation to purchase insurance to protect directors and officers against liability, whether or not the corporation would be permitted to provide indemnification to them. AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 7.19, at 201 (Tent. Draft No. 10, 1990) [hereinafter AMERICAN LAW INSTITUTE].  

Myers, supra note 3, at 575 (citing a dramatic increase in the number of legal actions being brought against directors and officers. "In 1985, for example, there were more than 500 claims of $1 million or more against directors compared with just two 15 years ago."

(quoting Michael A. Verespej, Boardroom Roulette: Who's Ready to Risk His Personal Wealth to Sit on a Corporate Board, INDUSTRY WK., Aug. 10, 1987, at 48)).  

See AMERICAN LAW INSTITUTE, supra note 30, at 211 (citing THE WYATT CO., 1988 WYATT DIRECTORS AND OFFICERS LIABILITY SURVEY (1988). The projected ultimate average payment to claimants for all claims reported in the 1988 Wyatt Co. Survey was $1,155,000, with a projected average ultimate legal defense cost of $693,000; see also Myers, supra note 3, at 575 ("In the last two years alone, there have been at least ten court settlements of $20 million or more .... ").  

AMERICAN LAW INSTITUTE, supra note 30, at 211 (citing THE WYATT CO., 1988 WYATT DIRECTORS AND OFFICERS LIABILITY SURVEY (1988)).  

Id.
wrongful termination.\textsuperscript{35} The third largest source of claims was actions by customers of financial institutions in connection with the extension of credit and loan foreclosures, 9.9%.\textsuperscript{36} The end result of the crisis has been the flight of qualified persons from the corporate boardroom.\textsuperscript{37}

III. LEGISLATIVE RESPONSES TO THE CRISIS

A. Delaware’s Exculpation Statute

In 1986, Delaware, in its usual role as a leader in corporate legislation, enacted into law a provision which allows a corporation the option of exculpating its officers and directors from liability for certain conduct.\textsuperscript{38} The statute allows a corporation to provide in its articles of incorporation a provision eliminating or limiting the personal liability of a director for money damages for breach of fiduciary duty except for: (1) any breach of the director’s duty of loyalty to the corporation or stockholders, (2) conduct not in good faith or for intentional misconduct, (3) violations under section 174 of title 8, and (4) any violation whereby the director derived an improper personal benefit.\textsuperscript{39}

\textsuperscript{35} Id.

\textsuperscript{36} Id.

\textsuperscript{37} Roberta Romano, Corporate Governance in the Aftermath of the Insurance Crisis, 39 EMORY L.J. 1155, 1159 (1990) [hereinafter Romano, Corporate Governance]. (“The D&O market dislocations immediately affected corporate behavior.... The proportion of boards filled by outside directors (individuals not employed by the corporation) declined for the first time in two decades.”); Once-Coveted Directors’ Posts Go Begging, USA TODAY, June 27, 1990 at B1 (the former “dream job” is being rejected by many. “Now some firms are being forced to approach five to ten potential board members before they find one to take the job.”); see generally Lynne A. Whited, Note, Corporate Directors — An Endangered Species? A More Reasonable Standard for Director and Officer Liability in Illinois, 1987 U. ILL. L. REV. 495; and William A. Sahlman, Why Sane People Shouldn’t Serve on Public Boards, HARV. BUS. REV., May-June 1990, at 28.

\textsuperscript{38} DEL. CODE ANN. tit. 8, § 102(b)(7) (1991).

\textsuperscript{39} Id., stating in pertinent part:

“(b) In addition to the matters required to be set forth in the certificate of incorporation by subsection (a) of this section, the certificate of incorporation may also contain any or all of the following matters: ...

(7) A provision eliminating or limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director, provided such provision shall not eliminate or limit the liability of a director: (i) [for any breach of the director’s duty of loyalty to the corporation or its stockholders; (ii) for acts or omissions not in good faith or which involve intentional misconduct or a knowing violation of law; (iii) under § 174 of this title; or (iv) for any transaction from which the director derived an improper personal benefit ....”
This provision would seem to attack the D&O liability problem at its source, that is, the conduct of the directors themselves. By allowing the shareholders of the corporation to limit the liability of a director for certain conduct, the law thereby curtails the director's fear of serving the corporation. This limited liability puts the director in a better position than could have been achieved with only the possibility of insurance or indemnification as protection. By limiting the types of conduct for which a director may be liable, the statute limits the causes of action which might ultimately be brought. This has the effect of bestowing dual benefits upon the directors: first, it limits the monetary exposure of the director, and second, it reduces the nonpecuniary risks associated with potential liability.

These "nonpecuniary risks" include the black mark on the director's reputation associated with the claims of improper conduct, and the value of the director's time spent in defending against claims. As one commentator explained:

Moreover the law doesn't always protect those who are right. Frivolous lawsuits, all too common, require the same, reasoned response as legitimate claims. At the very least, directors lose control over their time. To protect that precious resource and to save legal fees, directors often settle their lawsuits out of court, even where they stand a good chance of winning. But settling a case is like pleading the Fifth Amendment. It implies culpability, whether or not there is any. The pragmatic resolution of frivolous lawsuits can therefore damage a director's reputation.

For the director who sits on a board of a corporation only as an addition to his primary source of income and responsibility, the nonpecuniary risks can be quite devastating.

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40 Section 102(b)(7) only allows for the limiting of liability for the directors, and not the officers of the corporation. "The narrow application of the law reinforces its purpose of allowing corporations to attract and retain directors. 'It was not felt [by the drafters] that the increased perception of risk of personal liability coupled with the unavailability of D&O insurance were sufficient to cause officers, who were dependent upon a corporation for their livelihood, to resign or refuse to serve.'" Slaughter, supra note 1, at 187 (quoting A. Gilchrist Sparks, Delaware's D&O Liability Law: Other States Should Follow Suit, LEGAL TIMES, Aug. 18, 1986, at 10).

41 Slaughter, supra note 1, at 189.

42 Id. The time element includes the hours spent in depositions, interviews, consultations, and possibly the courtroom.

43 Sahlman, supra note 37.
1. Other Legislative Approaches

Delaware's approach, although novel at the time, is very similar to the ability of a trustee to bargain for a contract which excludes or limits personal liability for negligence. While the Delaware statute and those similarly fashioned permit the shareholders to eliminate, or to limit director liability, other states have raised the culpability level for which directors can be held personally liable in monetary damages. These statutes directly alter the applicable standard of care of the corporate director without the requirement of shareholder action. Under this approach, the director has attained an even safer ground, for the liberalized culpability standard applies to all corporations without the need for shareholder approval.

Under the Indiana statute, the level of culpability required must reach willful misconduct or recklessness. The Ohio statute requires a showing of deliberate intentional wrongdoing or reckless disregard of the corporation's best interest.

2. The Effect of the Legislation

One reason that shareholders might support such limited liability provisions is that these provisions reduce the instances in which the parties to a suit are willing to settle, thereby reducing the financial risks to the insurer and the company. Shareholders approving a limited liability provision must believe that the reduction in future insurance premiums is worth foregoing the possibility of recovering against negligent directors.

However, the exculpation approach is not without its opponents. Although this approach—whether it be a permissive heightening of the culpability standard by the shareholders, or a

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44 Romano, supra note 8, at 30 (stating that thirty states have enacted similar legislation).
45 Slaughter, supra note 1, at 188 (citing RESTATEMENT (SECOND) OF TRUSTS § 222 (1959)).
50 Romano, Corporate Governance, supra note 37, at 1167.
51 Id.
mandatory prescription set forth by statute—has the effect of lessening the negative effects flowing from the D&O crisis, some contend that the lifting of liability decreases deterrence.52 In the ideal situation, the threat of liability acts as a deterrent to the directors from breaching their duty to the corporation and its shareholders. Without this deterrent, the opponents of exculpation argue, the directors are free to act in a less responsible manner.53

Opponents of these statutes point out that increased levels of culpability have an adverse effect upon the shareholders. Since the shareholders themselves will be directly affected by the actions of the directors, these statutes create “the paradoxical situation of increasing the possibility for less scrupulous conduct while diminishing the opportunity for adequate remedial action.”54 From the disgruntled shareholder’s perspective, the statute offers two losing alternatives: in order to attract competent and qualified directors, the shareholders must provide these individuals with an increased level of protection from their own acts of negligence but, in doing so, they relinquish their rights to remedy a director’s wrong.55

This argument fails to consider, though, that without this level of protection, many individuals would be unwilling to act as corporate directors. Furthermore, the degree of protection afforded by the statute is directly related to the breadth the courts give the two exceptions: breach of the “duty of loyalty” and actions not in “good faith.”56 A broad reading of these phrases renders the statute’s effectiveness nugatory. The business judgment rule already protects the director of a Delaware corporation from liability for conduct which is merely negligent.57 The courts could, however, hold all grossly negligent conduct as being a per se breach of the duty of loyalty,58 and therefore not capable of

52 Slaughter, supra note 1, at 188-89.
53 Id. at 189 (“The elimination of deterrence under the new Delaware law may result in more frequent occurrences of negligent and bad faith acts.” Id.).
54 Id. at 189-90.
55 Id. at 190.
58 David S. Schaffer, Jr., Delaware’s Limit on Director Liability: How the Market for Incorporation Shapes Corporate Law, 10 Harv. J.L. & Pub. Pol'y 665, 668-69 (1987); but
protection under the statute. Additionally, the courts could interpret a director's behavior as constituting recklessness and consequently a breach of the duty of loyalty. Finally, it is not unthinkable that a court may find complete inattention to duty as constituting bad faith. New Jersey has attempted to clear up some of this uncertainty by including in its definitional terms that the duty of loyalty is to be narrowly construed.

In a takeover or merger situation, the "duty of loyalty" exception to the Delaware statute could easily be invoked by a court. In *MacAndrews & Forbes Holdings, Inc. v. Revlon, Inc.* during an attempted takeover of Revlon, the board of directors made a number of decisions leading to an eventual commitment to one suitor over another. In reviewing the decisions of Revlon's board, the court found that they had failed in their fiduciary duty to the shareholders.

The court stated that the board may have

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*see John Hancock Capital Growth Management, Inc. v. Aris Corp., No. 9920, 1990 Del. Ch. LEXIS 130 (Del. Ch. Aug. 24, 1990) (The court recognized the defendant board of directors' protection from a claim of "gross negligence" pursuant to an express provision in the corporation's articles of incorporation. *Id.* at *6. Consequently, the court stated that the plaintiff was left "only with its claim that the directors violated their duty of loyalty." *Id.* According to the court: "To prevail on its breach of loyalty claim, the plaintiff must show that a majority of [the defendant's] directors had selfish interests that were potentially adverse to the interests of [the corporation] and its shareholders." *Id.* The court failed to find evidence of such an adverse interest. *Id.* at *7.).*

* See, e.g., IND. CODE ANN. § 23-1-35-1(e) (Burns Supp. 1991) states in pertinent part: (e) A director is not liable for any action taken as a director, or any failure to take action, unless: (1) the director has breached or failed to perform the duties of the director's office in compliance with this section; and (2) the breach or failure to perform constitutes willful misconduct or recklessness.

* Schaffer, *supra* note 58.


* Id. at 1250. The court found that the board failed in its fiduciary duty to the shareholders by agreeing to a "lock-up" and "no-shop" clause in exchange for protecting the rights of noteholders, a protection which would ameliorate a separate legal problem affecting the board. The court stated:

Of necessity, the starting point for an analysis of Revlon's conduct must be the application of the business judgment rule. As a result of recent decisions of a Delaware Supreme Court which applied the business judgment rule in the context of responses to acquisition attempts, certain standards of director conduct have evolved ... But even an informed board may not exercise unbridled discretion. An element of balance is required to insure that the measure adopted is reasonably designed to meet the posed threat. This balance overlay must be applied to the particular circumstances of each situation, in order to gauge the reasonableness of the response against the perceived threat. *Id.* at 1247 (citations omitted).
been informed, but its performance failed the second component of the business judgment rule, the "duty of loyalty."64 In a case such as Revlon, the Delaware statute would not cover the actions of the board.

In takeover and merger situations, the element of "good faith" becomes very important as well. In their subsequent review of Revlon, the Delaware Supreme Court stated that in such cases there arises, "'the omnipresent specter that a board may be acting primarily in its own interests, rather than those of the corporation and its shareholders.'"65 The court noted that in dealing with an effort to forestall a takeover or merger:

[The board's actions are strictly held to the fiduciary standards outlined in Unocal. These standards require the directors to determine the best interests of the corporation and its stockholders, and impose an enhanced duty to abjure any action that is motivated by considerations other than a good faith concern for such interests.66

The court found that the Revlon board could not make the requisite showing of good faith67 and, therefore, was unable to sustain its "Unocal [sic] burdens in justifying [its] measures."68 The court was unclear whether the basis for finding "good faith" was subjective or objective. Often the director fending off a hostile takeover will be forced to at least consider the effect that such a takeover would have on his or her position within the company, and thereby offer a plausible basis for a court's deter-

64 Id. at 1250. "[T]hus, the element of loyalty may turn, as it does here, in the selection of a takeover defense or a bargaining device that is not proportionate to the objective needs of the shareholders but merely serves the convenience of the directors." Id.
65 Revlon v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 180 (Del. 1986) (quoting Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 954 (Del. 1985)). The court reasoned that where the business judgment rule applies, there is a "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company" . . . . This potential for conflict places upon the directors the burden of proving that they had reasonable grounds for believing there was a danger to corporate policy and effectiveness, a burden satisfied by a showing of good faith and reasonable investigation.
66 Id. (quoting Aronson v. Lewis, 473 A.2d 805, 812 (Del. Super. Ct. 1984)).
67 Id. at 181.
68 Id. at 185.
69 Id.
mination of bad faith in connection with a decision in opposition to the takeover.\footnote{96}

Finally, those statutes which require shareholder approval do little to remedy the fears of the directors who perform their services for a corporation that is unwilling to make such an amendment to its bylaws. In such a scenario, the directors remain hesitant and reluctant to serve, perpetuating the effects of the D&O crisis.

\textit{B. Expanded Indemnification Statutes}

Rather than alter its standard of culpability, some legislatures have expanded the availability of indemnification to the officers and directors of corporations. The states of Missouri, New York, Colorado, and Louisiana have enacted just such laws.\footnote{70} For example, a few states have allowed for indemnification in shareholder derivative suits, permitting indemnification for judgments, penalties, and fines, as well as settlements.\footnote{71}

Other states allow the advance payment of expenses for defending suits, and have shifted the burden of defending the

\footnote{96 \textit{But see} \textit{Ohio Rev. Code Ann.} § 1701.59 (Baldwin Supp. 1991) which provides that:

\begin{quote}
(C)(1) A director shall not be found to have violated his duties ... unless it is proved by \textit{clear and convincing evidence} that the director has not acted in good faith, in a manner he reasonably believes to be in or not opposed to the best interests of the corporation, or with the care that an ordinarily prudent person in a like position would use under similar circumstances, in any action brought against a director, including actions involving or affecting any of the following: ... (b) A termination or potential termination of his service to the corporation.
\end{quote}

Id. (emphasis added); and \textit{Radol v. Thomas, 772 F.2d 244 (6th Cir. 1985)} ("[D]irectors owe a duty of loyalty to the corporation and are not entitled to the discretion permitted by the business judgment rule when they are interested in a corporate control transaction which is the subject of their business judgment as directors.") \textit{Id.} at 257. \textit{However,} the court refused to give a narrow reading to the Ohio laws on fiduciary duty, stating that "the general rule remains that directors carry the burden of showing that a transaction is fair and in the best interests of shareholders only after the plaintiff had made a prima facie case showing that the directors have acted in bad faith or without requisite objectivity." \textit{Id.} (emphasis added)).


entitlement to retaining those advances from the director to the corporation. California and Delaware provide that advances must be repaid, but only if it is ultimately determined that the payee is not entitled to indemnification.72

In addition, states have enacted legislation which permits alternative sources of reimbursement for indemnification. Captive insurers, trust funds, letters of credit, and other forms of self-insurance are available. Ohio allows corporations to maintain insurance and "similar protection," including self-insurance, trust fund arrangements, and letters of credit.73 The Louisiana statute provides for self-insurance plans, as well as exoneration for directors from liability for approving such arrangements.74 Additionally, the Louisiana statute exempts these captive insurers from state requirements for insurance companies.75

1. Missouri's Approach

The Missouri statute,76 adopted in 1986, "pioneered a statutory pattern to meet the D&O crisis.77 The Missouri indemnification statute is permissive as opposed to mandatory, unless the officer or director has been successful on the merits or otherwise—in the latter case the director must be indemnified.78 If the director has not been successful on the merits or otherwise, the corporation has the option (permissive indemnification) of determining the extent to which it will indemnify. This determination is to be made by a majority of the board of directors who are not parties to the action or by independent legal counsel.79

If this were the total extent of the coverage provided by the Missouri statute, it would mirror the legislation of almost every

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75 Id.
76 Mo. REV. STAT. § 351.355(1) (1990). The statute states that the corporation may indemnify "any person who is or was a party ... to a suit ... other than an action by or in the right of the corporation ... if he acted in good faith and in a manner he reasonably believed to be in or not opposed to the best interests of the corporation ...."
78 Mo. REV. STAT. § 351.355(3) (1990). (This section applies to suits "other than an action by or in the right of the corporation." For a discussion of indemnification from shareholder derivative suits, see Mo. REV. STAT. § 351.355(2) (1990) and infra notes 110-18 and accompanying text. For a discussion of suits brought "by or in the right of the corporation," see infra notes 103-13 and accompanying text.).
79 Id. § 351.355(4) (1990).
other state—a statute not responsive to the liability problems experienced by corporations today. The provisions which make the Missouri statute attractive from a director or officer's standpoint are those which allow shareholders to provide for broad indemnification without the usual exceptions, and the corporation's ability to purchase and maintain liability insurance regardless of the extent of indemnification allowable by statute.

The most important provision of the Missouri statute provides almost complete protection to the officers and directors of Missouri corporations through the use of indemnification. This provision permits the corporation to indemnify its officers and directors for actions or conduct not specifically authorized under the other provisions of the statute. This additional protection may be created, provided that it is: (1) authorized or provided for in the articles of incorporation or an amendment thereto, or (2) is authorized or provided for in any bylaw, or any further agreement or bylaw adopted by a vote of the corporation's shareholders. The extent of possible indemnification is restricted by the statute's prohibition on indemnification for any conduct which was "finally adjudged to have been knowingly fraudulent, deliberately dishonest or willful misconduct." Indemnification is also limited by the Securities and Exchange Commission's policy...

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80 Id. § 351.355(7) (1990).
81 Id. § 351.355(8) (1990). The ability to provide insurance has been a part of the statute since the 1940s.
82 Id. § 351.355(7) (1990) which provides in pertinent part:

A corporation created under the laws of this state shall have the power to give any further indemnity, in addition to the indemnity authorized or contemplated under other subsections of this section, including subsection 6, to any person ...[serving as an officer, director, employee or agent] ... provided such further indemnity is either (i) authorised, directed, or provided for in the articles of incorporation of the corporation or any duly adopted amendment thereof or (ii) is authorized, directed, or provided for in any bylaw or agreement of the corporation which has been adopted by a vote of the shareholders of the corporation. Nothing in this subsection shall be deemed to limit the power of the corporation under subsection 6 of this section to enact bylaws or to enter into agreements without shareholder adoption of the same.

83 Id. (emphasis added).
84 Id. § 351.355(6) (1990) ("The indemnification provided by this section shall not be deemed exclusive of any other rights to which those seeking indemnification may be entitled under the articles of incorporation or bylaws or any agreement, vote of shareholders or disinterested directors or otherwise.")
85 Id. § 351.355(7) (1990).
86 Id.
of prohibiting inclusion of securities violations from indemnification.86

2. The Effect of These Provisions

Such liberal indemnification provisions would seem to allow the corporation the unfettered ability to provide almost complete protection to its officers and directors. Some state courts have set limits on the broad statutory provisions which seem to grant unlimited discretion.87 However, still other courts have been more willing to apply a liberal approach to indemnification.88

The Missouri statute is limited by its exclusion of fraudulent conduct, willful misconduct, and knowing dishonesty. Even with this restriction, the Missouri statute provides a broad range of

86 Hansen & Lents, supra note 23, at 215-16 (Supp. 1990) (stating that the latter exclusion results from an SEC policy disfavoring indemnification for securities violations, enforceable through the SEC's ability to manipulate the registration process, the threat of denying acceleration under section 8(a) of the Securities Act of 1934); see also Bishop supra note 4, at § 9.08.

87 Paula Walter, Statutory Indemnification and Insurance Provisions for Corporate Directors—To What End?, 38 Drake L. Rev. 241, 246-47 (1988-89) ("To hold otherwise, these courts reason, would be to frustrate any judicial remedy which the shareholders might have." Id. at 247.). The author cites to Merritt-Chapman & Scott Corp. v. Wolfson, 264 A.2d 358 (Del. Super. Ct. 1970) (against "sound public policy" to provide indemnification for charges of fraud, perjury, and obstruction of justice); Globus v. Law Research Serv. Inc., 418 F.2d 1276 (2d Cir. 1969) (public policy considerations preclude indemnification for securities violations); and People v. Uran Mining Corp., 216 N.Y.S.2d 985 (App. Div. 1961) (denying indemnification for fraudulent conduct). See also Radol v. Thomas, 772 F.2d 244, 258 (6th Cir. 1985) (in dicta stating, "It may be that some corporate control events, such as the payment of greenmail, should shift the burden of proof [to the defendant directors] and invoke close judicial scrutiny . . . ."); and Mooney v. Willys-Overland Motors, Inc., 204 F.2d 888, 896 (3d Cir. 1953), noted in Bishop, supra note 4, at § 6.03[1][b] [discusses reimbursement for expenses in settlement of a derivative suit under the old Delaware Corporation Law, "We think that Delaware Corporation Law § 122(1) and [the corporate bylaws] have met the requirements of public policy by the realistic limits they set upon the right of indemnification.").

88 Although allowed under the mandatory indemnification provisions, the Delaware courts have been willing to overlook the lack of good faith on the part of the director in interpreting Delaware's indemnification statute. MCI Telecommunications v. Wanzer, Nos. 89C-MR-216, 89C-SE-26, 1990 LEXIS 222 (Del. Super. June 19, 1990) (former director entitled to mandatory indemnification for partial success in defending against suit brought by the corporation alleging conspiracy, fraud, conversion, and breach of fiduciary duty under § 145(e) of Delaware Corporation Law); see also Green v. Westcap, 492 A.2d 260 (Del. 1985) (indemnification allowable under § 145(e) where plaintiff successfully defended criminal charges); Merritt-Chapman & Scott Corp. v. Wolfson, 321 A.2d 188 (Del. Super. Ct. 1974) (providing indemnification to the extent that the director is successful in defending against suit).
potential protection for the wary director. As a means of addressing the D&O crisis, the statute creates a potential safe harbor for directors who are unwilling to expose themselves to unlimited liability.

The Missouri statute does not go as far as those statutes which provide for an alteration of the common law standard of care, but proponents of the Missouri approach would argue that it provides the necessary protection while preserving traditional shareholder remedies, and at the same time retaining the deterrence factor associated with nonpecuniary risks. If the theory of modern indemnification statutes is that a director acting in good faith, in furtherance of the corporation's interests, is entitled to indemnification for expenses and losses in defending against those actions, then these broad statutes would seem to be consistent. While such broad protection may achieve the goal of attracting qualified people to serve as directors, such liberally bestowed protection may concomitantly serve to decrease the accountability level of the directors. In reality, though, the decrease in accountability would be inversely related to a director's willingness to subject himself to the very meaningful non-pecuniary effects of a lawsuit. Some would argue that the potential for such risks will be deterrence enough.

Concerns such as the nonpecuniary effects associated with a looming lawsuit, as well as others, leave the corporate director with a less than secure feeling. Two factors in particular pose potential pitfalls for the unwitting director. First, the expanded indemnification coverage of the Missouri statute is permissive. For example, the director who opposes a

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90 'See supra notes 38-69 and accompanying text.'
91 Slaughter, supra note 1, at 192; see supra notes 42-43, and infra notes 91-101 and accompanying text for a discussion of "nonpecuniary" factors.
93 Id.
94 See id. This may be a conceivably sound objective in the search for director accountability.
95 Id. § 351.355(4) (1990). An unwillingness to adopt such a provision can be recognized as a means of avoiding the potential shift of liability from the officer or director to the
successful hostile takeover may find himself having to battle the
incoming board of directors for indemnification.\textsuperscript{96} These poten-
tially broader protections must either be agreed to by the board
of directors or voted on by the shareholders.\textsuperscript{97} Just as with the
exculpation statutes, absent an agreement to institute such an
arrangement, there is no further protection, regardless of the
statutory possibilities.\textsuperscript{98}

The second concern, and of conceivably greater consequence
to the officer and director, is the fact that the indemnification
agreement is dependent upon the financial soundness of the
corporation itself.\textsuperscript{99} An agreement to offer indemnification under
an expansive array of circumstances is of little consolation when
the corporation cannot provide the promised protection. Such
would be the case when a corporation ends up in bankruptcy. In
an attempt to rectify these possibilities, corporations will often-
times purchase insurance\textsuperscript{100} or in some instances provide for a
trust fund to cover such amounts.\textsuperscript{101}

3. Ability to Purchase D&O Liability Insurance in Excess of
Indemnification Amounts

Missouri's statute permits a corporation to "purchase and main-
tain insurance on behalf of any person [director, officer, employee,
or agent] ... against any liability ... whether or not the corpo-
reration would have the power to indemnify him against such
liability under the provisions of this section."\textsuperscript{102} As discussed
above, such insurance policies may be necessary.

There are a number of situations which exemplify the impor-
tance of a company's ability to purchase D&O liability insurance.

corporation, and thereby using corporate assets to protect the directors. Myers, \textit{supra}
note 3, at 585; \textit{but see} Conard, \textit{supra} note 3, at 900 ("If there are disinterested directors,
they may be expected to hold a favorable view of their fellow directors, since otherwise
they would not be serving on the same board." \textit{Id.}).
\textsuperscript{96} See Conard, \textit{supra} note 3, at 900.
\textsuperscript{98} See \textit{supra} notes 83-86 and accompanying text.
\textsuperscript{99} See Myers, \textit{supra} note 3, at 585; and Slaughter, \textit{supra} note 1, at 192.
\textsuperscript{100} Insurance will not always cover all instances of conduct which may be provided for
in an indemnity agreement. Some D&O insurance policies contain numerous exclusions.
\textsuperscript{101} Some commentators have questioned this use of corporate assets. \textit{See Advising
Directors}, \textit{supra} note 1, at 142-43.
The most significant of these to the officer or director is where indemnification is available—either permissively or contractually to the officer or director—but where the corporation is either unable or unwilling to provide it. This could conceivably occur when the directors find themselves on the losing side of a hostile takeover and consequently the new board is unwilling to provide indemnification. Similarly, the corporation may be unable to indemnify its directors, either because of the prevailing policy consideration of the SEC, or because the company lacks available funds due to bankruptcy proceedings or insolvency. Furthermore, many state statutes prohibit the company from reimbursing an officer or director for the amounts of any judgments, fines, or penalties incurred in derivative suits. In each of the above situations, D&O liability insurance provides the necessary source of protection for the corporate officer or director.

The ability of the corporation to provide insurance coverage to its directors has been criticized as being “subversive of public policy, eliminat[ing] deterrence, and encourag[ing] the unscrupulous director to pursue questionable activity ....” Others consider D&O insurance coverage as nothing more than a form of compensation provided to the director which does not contravene any policy considerations. Furthermore, from the corporation’s perspective, D&O liability insurance permits reimbursement to the corporation for amounts expended to indemnify its officers and directors. With the increase in suits being instituted against officers and directors, the increased amounts of judgments and settlements, and the availability of expanded indemnification for officers and directors, insurance is of extreme importance to corporations. The availability of D&O insurance also permits

103 See, e.g., Advising Directors, supra note 1, at 136; and Romano, supra note 8, at 4.
104 Romano, supra note 8, at 4.
105 Advising Directors, supra note 1, at 136.
106 Indemnification and Insurance, supra note 28, at 244. See CAL. CORP. CODE § 317(c)(3) (West 1991); and N.Y. BUS. CORP. LAW § 723(h)(2) (McKinney Supp. 1992). But see Mo. REV. STAT. § 351.355(2) (1990) "The corporation may indemnify [a party to a suit] by or in the right of the corporation ... against expenses, including attorney's fees, and amounts paid in settlement actually and reasonably incurred by him in connection with the defense or settlement of the action or suit ...."; and supra notes 110-18 and accompanying text.
107 Walter, supra note 87, at 257.
108 Id.
corporations to spread the risk of liability to those similarly situated, rather than having to shoulder the entire burden.  

C. Indemnification in Derivative Suits  

Numerous states allow a corporation to indemnify officers and directors of the corporation for expenses incurred as a result of shareholder derivative suits. For example, the Missouri statute permits reimbursement for amounts "paid and reasonably incurred ... in connection with the defense or settlement ..." of derivative suits. The broad scope of the statute is tempered by the exception prohibiting indemnification if the person has been adjudged liable for negligence or misconduct in the performance of his duties to the corporation. Even so, the statute provides for judicial determination of the right to indemnification in such cases.

The states take differing approaches to indemnification in derivative suits. The majority of states permit only the reimbursement of expenses, or if amounts paid in settlement are allowed under the statues, they require court approval. Other states, like Missouri, provide indemnification for expenses incurred in settlement of the third-party derivative suit, including amounts paid in settlement of the suit.

Statutes which permit indemnification payments to a director in settlement of, or in otherwise disposing of, derivative suits have been described as wrong in their circularity and in their promotion of a lesser standard of accountability. Opponents argue that indemnification in derivative suits results in a subversion of the purpose of such suits. The funds received by the

109 See generally Conard, supra note 3, at 909-12.


111 Id. Prohibiting indemnification when the person has been adjudged liable for negligence or misconduct "unless and only to the extent that the court in which the action or suit was brought determines upon application that despite the adjudication of liability and in view of all the circumstances of the case, the person is fairly and reasonably entitled to indemnity for such expenses which the court shall deem proper." Id.


115 Walter, supra note 87, at 248.
corporation from the responsible party are then returned to that party by the corporation.\textsuperscript{116} Still others argue that this system reduces the standard of care expected from the officers and directors. To allow for indemnification of amounts due to the corporation results in reduced accountability.\textsuperscript{117} Again, however, this argument fails to examine the effect and the extent to which nonpecuniary costs deter officers and directors from "errant" behavior.\textsuperscript{118}

\textbf{D. Limited Liability: The Virginia Approach}

One alternative approach to the crisis is to limit the amount of liability for any officer or director as a result of their negligence. This approach has been taken by the Virginia legislature\textsuperscript{119} and was proposed by the American Law Institute in 1987.\textsuperscript{120} Under the Virginia approach, a director's potential for liability arising out of a single transaction or occurrence cannot exceed $100,000 or the amount of compensation received by the officer or director from the corporation during the preceding twelve months, whichever is greater.\textsuperscript{121} This amount may be limited further by mandate in the articles of incorporation or by amendment to the bylaws.\textsuperscript{122}

The wisdom of such an approach is twofold. First, liability limits provide an incentive to officers and directors to conform their conduct to the required standard of care without scaring them away with the potential for catastrophic personal liability. Second, the corporation and the shareholders will ultimately benefit through a reduction in litigation costs and in reduced premiums for liability and indemnification insurance.

Critics of this approach allege that it suffers in two respects. First, by limiting the dollar amount that may be collected from any officer or director, the statute has thereby limited the amount

\textsuperscript{116} 	extit{Indemnification and Insurance}, supra note 28, at 244.

\textsuperscript{117} Walter, supra note 87, at 248 ("When the corporate executive need no longer fear any personal liability, he cannot be deterred from errant behavior. In fact, the errant director would be rewarded for his wrongdoing.").

\textsuperscript{118} See supra notes 42-43, 91-101 and accompanying text.


\textsuperscript{120} \textsc{American Law Institute, Principles of Corporate Governance: Analysis and Recommendations} § 7.17 (Tent. Draft No. 7, 1987).

\textsuperscript{121} VA. CODE ANN. § 13.1-692.1(A) (Michie 1989).

\textsuperscript{122} Id.
recoverable by a shareholder in his cause of action. Consequently, the shareholder has but a fractional remedy for his wrong in many instances.\textsuperscript{123} Second, the possibility exists that judges and juries will be more liberal in their finding of liability if a limit is placed on the amount recoverable.\textsuperscript{124} However, the apparent criticisms are illusory when closely examined.

First, investors do not necessarily view limited liability statutes as adverse.\textsuperscript{125} Furthermore, it is not all that clear that such a change will adversely affect shareholder recovery, at least with regard to duty of care cases.\textsuperscript{126}

The fear of judicial interference may be a legitimate concern. However, due to the reduced possibilities for recovery, plaintiffs may well be dissuaded from bringing frivolous suits.\textsuperscript{127} Very few shareholders are willing to invest their own time and money in a lawsuit. Although some lawyers are willing to make such an investment of their time and money, they are only likely to do so when the prospect of return outweighs the possibility of failure. “This factor may serve to diminish the [number] of detected malfeasances which are likely to be prosecuted by complainants.”\textsuperscript{128}

IV. CONCLUSION

While it appears that the D&O crisis has forced the corporations, the shareholders, the officers and directors, and the states to search for answers, it also appears that the ideal solution has

\textsuperscript{123} This is especially so in today’s high stakes business world. See Smith v. Van Gorkom, 488 A.2d 858 (Del. 1985) ($23 million settlement); see supra notes 31-36 and accompanying text (discussing the occurrence of lawsuits and judgment rendered therein).

\textsuperscript{124} Advising Directors, supra note 1, at 149.

\textsuperscript{125} See Romano, Corporate Governance, supra note 37, at 1188 (investors do not view adversely the adoption of a limited liability provision).

\textsuperscript{126} Id. (“While [duty of care cases] increased in significance during the insurance crisis, they produced the least identifiable returns to shareholders: they provided little compensation for shareholders or deterrence of managers, yet considerable fees for attorneys.” Id.). See Meyers, supra note 3 (Excluding directors of financial institutions, less than one-half of one percent of all directors sued are the subject of an adverse judgment, and yet they are subjected to extensive and expensive litigation. Id.).

\textsuperscript{127} This is especially true since the legal fees involved may represent a large percentage of the recovery anyway.

\textsuperscript{128} Conard, supra note 3, at 907.
yet to be discovered. Insurance coverage still presents a significant expenditure, if the coverage is available at all.

There needs to be a balance between accountability on behalf of the officers and directors, and freedom to direct the operations of a corporation in an environment free from heavy restrictions. As one commentator surmised, "[T]he objective, therefore, must be to find a means of dispensing with indemnification and insurance, while simultaneously restraining the destructive effects of the deterrent." 129

Some states have attempted to address the crisis by raising the level of culpability required for a finding of liability. Other states have increased the types of conduct which a corporation can indemnify and/or insure its officers and directors against. One state, Virginia, has limited the dollar amounts of potential liability for corporate officers and directors.

The answer would seem to lie in a hybrid of the exculpation statutes and the Virginia approach. If officers and directors are not adequately protected, they will refuse to serve. Contrary to the argument that it is only the "bad" directors who will be scared off, it is not certain that those nominees refusing to serve are the least competent ones. 130 "The quality of 'prudence', so valued in a money manager, is highly incompatible with incurring risks of million-dollar liabilities." 131

By limiting those instances where a director will be forced to defend himself to circumstances where there has been gross misconduct or a breach of the duty of loyalty, a balance is attained. The risk that a jury will second-guess in hindsight is reduced. More importantly, the monetary risk in those situations is made commensurate with the job's rewards. Maybe in a perfect society, or in an atmosphere where everyone's priorities and ideals are identical, we could forge inflexible standards of care and harsh penalties for their breach. But that is not the world in which we live. Consequently, the business world must adapt as well. Compromises like those found in these statutes must be made in order to balance the competing interests.

129 Id. at 913.
130 Id. at 903.
131 Id.
NOTES

WILLIAMS BY WILLIAMS V. ELLINGTON: STRIP SEARCHES IN PUBLIC SCHOOLS—TOO MANY UNANSWERED QUESTIONS

Tamela J. White

I. INTRODUCTION

In January of 1988, public school officials in Mayfield, Kentucky conducted a strip search of two fourteen-year-old girls in search of a vial of white powder. The authority of public school officials in conducting searches of students' possessions and persons has been a topic of dispute in cases ranging in topic from dragnet canine sniffing for contraband to visual examinations of the belongings of an entire student population for articles such as radios and "walkmen" headsets. In fact, children have been strip

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1 See Daugherty v. Campbell, 935 F.2d 780, 781 n.1 (6th Cir. 1991) (a strip search generally refers to the inspection of an individual that is nude, without inspection of the person's body cavities); E.Z. v. Coler, 603 F. Supp. 1546, 1548-49 n.2 (N.D. Ill. 1985) (the terms "body search," "strip search," "visual examination," or "visual inspection" are defined as the removal or rearranging of clothing or the causing of such in order to visually inspect the body of the person exposed).

2 Brief for Appellant at 9 n.7, Williams by Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991) (No. 90-5993) [hereinafter Brief for Appellant].


4 Compare Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470 (5th Cir. 1982), cert. denied, 463 U.S. 1207 (1983) (canine sniffing constitutes a search which is reasonable as to lockers and vehicles but not as to students); Zamora v. Pomeroy, 639 F.2d 662 (10th Cir. 1981) (canine sniffing of lockers is a search but is reasonable due to the school's ownership of the property); Jones v. Latexo Indep. Sch. Dist., 499 F. Supp. 223 (E.D. Tex. 1980) (canine sniffing is analogous to hidden electronic surveillance devices and therefore, is an unreasonable search); Doe v. Renfrow, 475 F. Supp. 1012 (N.D. Ind. 1979), cert. denied, 451 U.S. 1022 (1981) (canine sniffing of students and school grounds is not a Fourth Amendment search but subsequent strip search of student following arousal by the dog is unreasonable absent other individualized evidence). See also Martin R. Gardner, Sniffing for Drugs in the Classroom — Perspectives on Fourth Amendment Scope, 74 NW. U. L. REV. 803 (1990); Erica Tina Helfer, Comment, Search and Seizure in Public Schools: Are Our Children's Rights Going to the Dogs?, 24 ST. LOUIS U. L.J. 119 (1979).

searched for seemingly nominal amounts of money and for suspicion regarding the size of an anatomical part.

On the other hand, educators have placed upon them great responsibility in overseeing the safety and well-being of their charges in the hours during which the school serves as custodian. It is in school that basic societal values and ideals of discipline are cultivated. In light of the need to combat drug problems among school-aged children and the concern over rising violence at school, the issue of student searches is indeed a foreseeable one.

Somewhere in the labyrinth of seemingly insurmountable social problems, student privacy rights are said to exist. The often quoted saying "[students do not] shed their constitutional rights"

In November of 1991, a security guard and the PTA president for an elementary school in Oakland, California, conducted a strip search of ten young boys after a student reported that $7.50 was stolen. The money was not found. Pearl Stewart, Oakland Strip-Searches Ten Students: Boys Told To Drop Pants—Outraged Parents Complain; S.F. CHRONICLE, November 15, 1991, at A25. To the school's credit, the security guard was later discharged. Daniel Vasquez, School Guard Fired Over Strip-Search, S.F. CHRONICLE, November 16, 1991, at A14. See also Bellnier v. Lund, 438 F. Supp. 47 (N.D.N.Y. 1977) (entire class of fifth grade students strip searched for missing $3.00; the money was not found).

In Oakland Park, Illinois, a high school junior was forced to remove his clothing when school administrators "could not believe that the bulge in his trousers was natural." Eric Zorn, Battle of the Bulge Will Go To Court, CHI. TRIB., April 9, 1991, at 1.

By the sixth grade, 19% of children report having begun smoking cigarettes and 11% having begun consuming alcohol. Of the drugs marijuana and inhalants, 2.8% of the high school senior class of 1990 report having initiated use by the sixth grade, with the peak initiation age being during the ninth grade. The highest initiation rates for cocaine and hallucinogens is reported by the same population as being in the tenth and eleventh grades. NATIONAL INSTITUTE ON DRUG ABUSE, U.S. DEPT. OF HEALTH AND HUMAN SERVICES 9 (1991).

In 1986, nearly three million incidents of rape, assault, robbery and theft occurred in the public schools or on public school property. NATIONAL INSTITUTE OF JUSTICE, NIJ REPORTS No. 212, at 9 (Jan./Feb. 1989).

In February of 1990, the ABA Journal reported that in just one day, an average of 2,795 teenagers become pregnant, 211 children are arrested for drug abuse, 437 minors are arrested for drinking and for drunk driving, 10 children die from gunshot wounds, 135,000 students bring a gun to school, 1,512 student drop out of school, and 1,629 minors are in adult jails. L. Stanley Chauvin, Jr., Startling Statistics About Children, 76 ABA J. 8 (1990).

See infra notes 55-58 and accompanying text.
... at the schoolhouse gate"\textsuperscript{13} is clearly being put to the test by unrestrained search policies.\textsuperscript{14} Privacy rights, the deepest representation of freedom,\textsuperscript{15} must be balanced against the special problems created by what students bring to school with them.

The legal concerns arise from interpretation of the Fourth Amendment to the United States Constitution.\textsuperscript{16} If the purpose of the Fourth Amendment is violated,\textsuperscript{17} principles of qualified immunity\textsuperscript{18} of state officials\textsuperscript{19} under 42 U.S.C. § 1983\textsuperscript{20} are invoked.

\textsuperscript{14} As so succinctly stated by the Seventh Circuit:
It does not require a constitutional scholar to conclude that a nude search of a ... child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human decency. Apart from any constitutional readings and rulings, simple common sense would indicate that the conduct of school officials in permitting such a nude search ... [is] not only unlawful but outrageous....
\textsuperscript{16} The Fourth Amendment reads:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
U.S. CONST. amend. IV.
\textsuperscript{17} See Camara v. Municipal Court, 387 U.S. 523, 528 (1967) ("The basic purpose of [the Fourth Amendment] ... is to safeguard the privacy and security of individuals against arbitrary invasions by government officials."); New Jersey v. T.L.O., 469 U.S. at 337 ("the underlying command of the Fourth Amendment is always that searches and seizures be reasonable ... ").
\textsuperscript{18} Qualified immunity differs from absolute immunity in that, with absolute immunity, officials are totally immune from liability. In questions involving qualified immunity, a state/government actor is shielded from liability if his/her actions are such that a reasonable person in that same position could have seen the actions as being lawful, in light of clearly established law at the time and the information at hand. Martin v. City of Eastlake, 686 F. Supp. 620, 624 (N.D. Ohio 1988). See also infra part II.D.
\textsuperscript{19} State officials include state school boards, independent local school boards, and individual school employees. See West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (state board of education); Monell v. Department of Social Servs., 436 U.S. 658 (1978) (independent school boards as well as individual employees); Wood v. Strickland, 420 U.S. 308 (1975) (school officials).
\textsuperscript{20} Section 1983 reads:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.
Thus, an otherwise emotional and controversial issue is further complicated by such legal terms as "reasonableness" and "qualified immunity." The purpose of this note is to analyze the evolutionary perspective of Fourth Amendment law as it concerns student rights. Cases leading to the Supreme Court opinion of New Jersey v. T.L.O. are presented first. Then, the T.L.O. opinion is presented, followed by analysis of the subsequent application of the T.L.O. standard by lower federal courts and state courts. Issues of qualified immunity in recent student search cases are then discussed. Finally, the decision of the Sixth Circuit in the case of Williams by Williams v. Ellington is presented. The note points out that in regard to student strip searches, the current state of the law is far from clearly established. Both educators and students have little guidance as to the authority of school officials in conducting intrusive searches. While the thought of strip searching an innocent child is offensive to most anyone's concept of decency, the law does nothing to shield the child nor does it provide guidelines for what constitutes an appropriate search.

II. BACKGROUND

A. Early Cases

Early in Fourth Amendment jurisprudence the amendment was determined to apply to state action and that of state officials via the Fourteenth Amendment. Until the case of Terry v. Ohio, probable cause was required in most circumstances for a war-

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21 As to Fourth Amendment searches, the United States Supreme Court has said: "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasions which the search entails." Camara v. Municipal Court, 387 U.S. 523, 536-37 (1966). See also Tarter v. Raybuck, 742 F.2d 977, 981-83 (6th Cir. 1984) (reasonableness to be factually determined by the underlying circumstances of each case).


23 936 F.2d 881 (6th Cir. 1991).

24 E.g., Mapp v. Ohio, 367 U.S. 643 (1961) (warrantless search of home by police officers held to be unconstitutional).

25 392 U.S. 1 (1968) (pat down search by police officer lawful without a warrant; pat down justified at its inception due to safety considerations and due to its limited scope).

26 Probable cause is said to exist when facts and circumstances are such as to warrant a "prudent man in believing that the offense has been committed." Henry v. United States, 361 U.S. 98, 102 (1959).
rantless search to be considered reasonable. In Terry, the court determined that a reasonable suspicion standard would justify a search or seizure if the intrusion met a modified scrutiny test. In order to meet this test, the search or seizure must be justified by important government interests and be *minimally intrusive* of individual privacy and liberty interests.

Courts subsequently struggled to determine whether such a reasonable suspicion approach applied to warrantless searches conducted in the public school setting and to determine whether student privacy and liberty interests were of lesser constitutional weight in the school environment. The result was a continuum of rulings with findings ranging from liability for a constitutional deprivation to absolute immunity. For example, Louisiana courts determined that the Fourth Amendment applied in full force to student searches and imposed the more stringent probable cause standard. On the opposite end of the spectrum, courts of other states were classifying school officials as private persons and, in light of this classification, the restraints of the Fourth Amendment did not apply. Specifically, the doctrine of *in loco parentis* was said to endorse the creation of a special status concerning the relationship of school officials to students. Still other jurisdictions recognized that school officials were state actors, but

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28 Terry v. Ohio, 392 U.S. 1, 16-20 (1968).


32 The *in loco parentis* doctrine was said to give school officials authority over children the same as possessed by parents. The duty to protect children created considerable latitude in allowing school officials to act in ways in which it was perceived that a parent could act. Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 480 n.18 (5th Cir. 1982), cert. denied, 463 U.S. 1207 (1983). See also Jean E. O'Daniel, *Juvenile Strip Searches in Public Schools*, reprinted in CLEARINGHOUSE REVIEW 826-29 (Dec. 1980).
used the *in loco parentis* doctrine to justify application of the *Terry* rationale of reasonable suspicion and not the stronger probable cause requirement. To further complicate matters, other courts were requiring probable cause if police officers were involved or if the search was seen as highly intrusive.

The clear majority of jurisdictions abided by a standard that fell in the middle of this continuum. Following the *Terry* doctrine, this standard was a requirement of some form of reasonable suspicion. As described by New York's highest court:

[Particular conditions change the basis for probable cause and therefore the standard of reasonableness of searches and seizures under constitutional limitations. A school is a special kind of place in which serious and dangerous wrongdoing is intolerable. Youngsters in a school, for their own sake, as well as that of their age peers in the school, may not be treated with the same circumspection required outside the school or to which self-sufficient adults are entitled.... At the same time, in a civilized society it is also recognized that the obligations and powers of those charged

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34 E.g., *M. M. v. Anker*, 477 F. Supp. 837 (E.D.N.Y. 1979) (search of student's bookbag and person upon mere suspicion that the student could have committed theft was deemed unlawful); *Picha v. Wielgos*, 410 F. Supp. 1214 (N.D. Ill. 1976) (police participation in search warranted probable cause standard).

35 See *supra* notes 25-29 and accompanying text.

36 See *Bilbrey by Bilbrey v. Brown*, 738 F.2d 1462 (9th Cir. 1984) (student required to remove clothing after student was observed to be exchanging "something" with another student on the playground; search deemed unreasonable without individualized suspicion); *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983) (reasonable standard applies to generalized canine searches of lockers and school facilities); Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981) (strip searches are *per se* unreasonable); *Jones v. Latexo Indep. Sch. Dist.*, 499 F. Supp. 223 (E.D. Tex. 1980) (reasonable required for individual student searches and for searches of vehicles on school property); Bellnier v. Lund, 438 F. Supp. 47 (N.D. N.Y. 1977) (reasonable standard not met for strip search of entire class for missing money); State v. D.T.W., 425 So. 2d 1383 (Fla. 1983) (items of drug paraphernalia in "plain view" of school officials gave rise to reasonable suspicion); *Rone v. Daviess County Bd. of Educ.*, 655 S.W.2d 28 (Ky. Ct. App. 1983) (search of seventeen-year-old student's possessions reasonable because of student's history of drug possession and personal admission of having drugs); People v. Ward, 233 N.W.2d 180 (Mich. Ct. App. 1975) (threat of search during interrogation reviewable under reasonableness standard); People v. D., 315 N.E.2d 466 (N.Y. 1974) (cannot search a student on mere possibility that student could have committed a wrong; must have reasonable suspicion).
with the care of children should be limited by standards shaped by the conditions which require them. Thus, the imposition of authority over children may not exceed the causes which give rise to that authority.... Given the special responsibility of school teachers in the control of the school precincts ... the basis for finding sufficient cause for a school search will be less than that required outside the school precincts.\(^{37}\)

Balancing the interests of safety and order in the school setting with the privacy and liberty interests of children was inherent in the application of this philosophy.\(^{38}\) At least two courts described a requirement of balancing the "danger of the conduct ... against the students' right of privacy and the need to protect them from the humiliation and psychological harms associated with such a search."\(^{39}\) More than an "articulable hunch" was necessary for a student search to be lawful.\(^{40}\) The factors most commonly recognized in determining reasonableness included the child's age, history and record of conduct at school, general prevalence of crime/unlawful activity at the school, and the exigency of the presenting circumstances.\(^{41}\)

The slate was, therefore, far from clean when the United States Supreme Court addressed the issue of warrantless searches in the public school setting.

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\(^{41}\) See Rone v. Daviess County Bd. of Educ., 655 S.W.2d 28 (Ky. Ct. App. 1983) (consideration given to the fact that the student was age seventeen, had a history of passing drugs at school, and student's own admission of wrongdoing); People v. D., 315 N.E.2d 466 (N.Y. 1974) (seventeen-year-old student under observation by school officials for six months prior to the search for drug dealing; court acknowledged the scope of search and risk of harm to the child will vary significantly with the age and mental development of the individual); See also State v. Baccino, 282 A.2d 869 (Del. Super. Ct. 1971); People v. Ward, 233 N.W.2d 180 (Mich. Ct. App. 1975); In re John Doe, 540 P.2d 827 (N.M. Ct. App. 1975); People v. Jackson, 319 N.Y.S.2d 731 (App. Term. 1971), aff'd, 333 N.Y.S.2d 167 (1972).
B. The Supreme Court’s Plurality Decision: New Jersey v. T.L.O.\textsuperscript{42}

The State of New Jersey appealed a ruling from its own highest court which held that the search of the purse of a student, T.L.O., was unreasonable.\textsuperscript{43} The relevant facts are as follows. T.L.O. was a fourteen-year-old, high school freshman.\textsuperscript{44} A teacher observed T.L.O. and another student smoking in the restroom.\textsuperscript{45} The students were escorted to the principal’s office where they were questioned by the assistant vice principal regarding the incident.\textsuperscript{46} T.L.O.’s companion admitted she had violated the school’s smoking rule, something which T.L.O. denied.\textsuperscript{47} In fact, T.L.O. also denied that she smoked at all.\textsuperscript{48} The assistant principal then examined T.L.O.’s purse and the contents thereof, finding cigarettes.\textsuperscript{49} Upon removing the cigarettes from the purse, he found evidence of marijuana use and drug dealing.\textsuperscript{50}

In establishing the appropriate standard to apply for warrantless searches in the school setting, the Court recognized the struggle of the lower courts.\textsuperscript{51} The Court first stated that Fourth Amendment prohibitions of unreasonable searches and seizures apply to all government actions, including those of school officials.\textsuperscript{52} The \textit{in loco parentis} rationale for immunity\textsuperscript{53} was expressly rejected: “In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents’ immunity from the strictures of the Fourth Amendment.”\textsuperscript{54}

\textsuperscript{42} 469 U.S. 325 (1985).
\textsuperscript{43} Id. at 330-31.
\textsuperscript{44} Id. at 328.
\textsuperscript{45} Id.
\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Specifically, a pipe, a small quantity of marijuana, index cards with names of students who appeared to owe money to T.L.O., small plastic bags, a substantial amount of money in small bills, and two letters implicating T.L.O. in drug dealing were found. Id.
\textsuperscript{51} Id. at 332. See supra part IA.
\textsuperscript{52} Id. at 333-37 (citing Fourth Amendment application in the following cases: Marshall v. Barlow’s, Inc., 436 U.S. 307 (1978) (Occupational Health and Safety Act inspectors); Michigan v. Tyler, 436 U.S. 499 (1978) (firemen); and Camara v. Municipal Court, 387 U.S. 523 (1967) (building inspectors)).
\textsuperscript{53} See supra notes 32-33 and accompanying text.
Additionally, students' privacy expectations in items of non-contraband personalty were declared to be legitimate. Consistent with the findings of the lower courts, these expectations were balanced against equally legitimate governmental interests in maintaining discipline and order in the school so as to promote an educational environment and to provide for the safety and well-being of the student population. In this regard, it was determined that a warrant requirement would create an undue burden on school officials and would affect the need for swift, immediate, and informal disciplinary procedures in the school setting. Thus, warrantless searches, of some kind, were endorsed.

Noting that the dictate of the Fourth Amendment was reasonableness and that the requirement of probable cause was unnecessary in certain circumstances, a new standard of "reasonableness under all the circumstances" was created. The school official's challenged action was to be analyzed by "whether the ... action was justified at its inception" and whether the scope of the search was reasonable in light of the circumstances justifying the privacy invasion in the first place. In describing this two-prong test, the court said:

Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

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55 Id. at 338-39. The court specifically stated that children, unlike prisoners who have no privacy expectations during incarceration, may claim legitimate expectations of privacy in items which the students may bring to school. "We are not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment." Id.
56 See supra notes 35-41 and accompanying text.
58 Id. at 340.
59 See, e.g., State v. Slattery, 787 P.2d 932, 933 (Wash. Ct. App. 1990) (exceptions to the warrant requirement noted to be recognized in searches incident to arrest, in exigent circumstances, and in school searches).
60 New Jersey v. T.L.O., 469 U.S. at 341.
61 Id. at 341 (citing Terry v. Ohio, 392 U.S. 1, 20 (1968)).
62 Id. at 341-42.
The intended goal of a standard granting authority to search based on less than probable cause was said to be the avoidance of undue burdens on school officials in promoting school discipline and order, avoidance of creating a need for educators to become versed in probable cause law and its intricacies, and permitting conduct to be regulated according to "the dictates of reason and common sense."

The Court then applied this test, at least on the surface, and determined that no Fourth Amendment violation occurred in the search of T.L.O.'s purse. The search was said to be justified at its inception since T.L.O. was caught smoking, despite her denials of engaging in such activity. The search did not exceed a reasonable scope as it was said to be in accordance with the dictates of common sense and not carried beyond the point of finding the evidence of unlawful conduct.

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61 See supra note 58 and accompanying text (court using the same rationale for denying that a warrant was required).
62 "Unlike police officers, school authorities have no law enforcement responsibility or indeed any obligation to be familiar with criminal laws." New Jersey v. T.L.O., 469 U.S. at 350 n.1 (Powell, J., concurring).
63 Id. at 343.
64 The decision has been criticized for failure to apply the standard as set out by the Court. For example, one commentator, Martin Gardner, points out that the Court did not explain how the age and sex of T.L.O. was considered in its conclusion. According to Mr. Gardner, this may be particularly troubling since T.L.O.'s purse was searched by a male principal. The nature of the infraction was not defined—what are the evils to be avoided? Do privacy rights increase with age or are they greater for the young and naive? If T.L.O. could not prevail, who could, since, at the time the principal went through her purse, he already had sufficient evidence of the violation of a school rule? Martin R. Gardner, Student Privacy in the Wake of T.L.O.: An Appeal For An Individualized Suspicion Requirement For Valid Searches and Seizures in the School, 22 GA. L. REV. 897, 919-25 (1988).
65 In addition, educators themselves have criticized the ruling for lacking the precision and clarity necessary to serve as a ready tool for school officials in fulfilling their duties. For example: 1) How does this standard relate to the general search versus the particularized search? 2) How does police involvement, prior or otherwise, alter the lawfulness of a search? 3) Under what circumstances, if any, is a strip search justified? 4) Are articles placed in a student's car or locker given less protection than articles placed on a student's person or purse? 5) In short, what are the consequences and legal safeguards associated with particular types of searches. Again, what is reasonable?
67 Id. at 347-48.
Justices Brennan, Marshall, and Stevens dissented as to the dilution of the Fourth Amendment protection. In particular, Justice Brennan pointed out that the line of cases beginning with *Terry v. Ohio* addressed a standard of *minimal intrusion* on reasonable expectations of privacy and not a broad sweeping generality standard. Justice Brennan argued for application of the traditional probable cause standard, noting it to have sufficient flexibility from which school officials may conduct appropriate investigations of unlawful behavior or possessions. Justice Stevens spoke out regarding the social impact of the new standard, expressing concern about subsequent treatment of student rights in light of this deviation from other Fourth Amendment rulings.

Six years have passed since the *T.L.O.* decision and creation of this new standard of reasonableness under all the circumstances. It is with its practical application that the standard is being put to the real test. The subsequent decisions by lower courts will now be considered.

C. After T.L.O.: The Broadening Scope of Reasonableness

The standard established in *T.L.O.* represents the minimal requirement for student protection. No court has subsequently wandered beyond the scope of the *T.L.O.* analysis and applied a stricter standard pursuant to state law or a state constitution. The two-prong test is being applied by placing the evidentiary

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10 392 U.S. 1 (1968).
11 New Jersey v. T.L.O., 469 U.S. at 360-65 (emphasis added).
12 Specifically, Justice Brennan referred to the decision of Illinois v. Gates, 462 U.S. 213 (1983), in which the court redefined probable cause to be a standard that is flexible and which takes into consideration the “totality of the circumstances.” Noting that students and teachers interact closely with one another, are familiar with one another, and that teachers observe the behavior of children, the standard should be easily applicable in the school setting. New Jersey v. T.L.O., 469 U.S. at 364-66 (citations omitted).
13 Justice Stevens (Marshall, J., concurring) (Brennan J., concurring in part and dissenting in part) specifically condemned the practice of student strip searches. “One thing is clear under any standard — the shocking strip searches that are described in some cases have no place in the schoolhouse. ... To the extent that deeply intrusive searches are ever reasonable outside the custodial context, it surely must only be to prevent imminent, and serious harm.” Id. at 382 n.25 (citations omitted).
14 Id. at 343 n.10.
burden on the nonstudent, the school official in a civil action or the prosecution in a criminal action.\textsuperscript{76}

Beginning with the first prong, a search\textsuperscript{77} must be justified at its inception.\textsuperscript{78} Both quality and quantity of evidence should be considered and not mere possibilities.\textsuperscript{79} The standard is an objective one which inquires "whether there [are] specific and articulable facts known to the officer, which taken together with rational inferences from these facts, create[s] a reasonable suspicion of criminal activity to justify the intrusion into... personal security."\textsuperscript{80}

In \textit{Cales v. Howell Public Schools},\textsuperscript{81} evasive and ambiguous conduct on the part of a student, without particular suspicion regarding an identifiable offense, was not enough to justify the


\textsuperscript{77} At least one court continues to be permissive in the definition of a search. See Jennings \textit{v.} Joshua, \textit{Indep. Sch. Dist.}, 877 F.2d 313, 316 (5th Cir. 1989), \textit{cert. denied}, 110 S. Ct. 3212 (1990) (citing Horton \textit{v. Goose Creek Indep. Sch. Dist.}, 690 F.2d 470, 477 (5th Cir. 1982), \textit{cert. denied}, 110 S. Ct. 3212 (1990)).

\textsuperscript{78} See \textit{supra} notes 61-62 and accompanying text.

\textsuperscript{79} In the \textit{T.L.O.} decision, the Supreme Court noted that more than guessing was required for a search to be justified. However, whether individualized suspicion regarding a particular student is required was not established. The court noted that such a question was not raised by the facts at hand. \textit{New Jersey v. T.L.O.}, 469 U.S. 325, 342 n.8 (1985).

\textsuperscript{81} At least one court continues to be permissive in the definition of a search. See Jennings \textit{v.} Joshua, \textit{Indep. Sch. Dist.}, 877 F.2d 313, 316 (5th Cir. 1989), \textit{cert. denied}, 110 S. Ct. 3212 (1990) (citing Horton \textit{v. Goose Creek Indep. Sch. Dist.}, 690 F.2d 470, 477 (5th Cir. 1982), \textit{cert. denied}, 110 S. Ct. 3212 (1990)).

\textsuperscript{78} See \textit{supra} notes 61-62 and accompanying text.

\textsuperscript{80} In \textit{re} P.E.A., 754 P.2d 382, 388 (Colo. 1988) (quoting \textit{People v. Thomas}, 660 P.2d 1272, 1277 (Colo. 1983)); \textit{See also In re Pima County}, 733 P.2d 316, 316-18 (Ariz. Ct. App. 1987) (search of student when student observed to be in an area on school grounds where drug use was suspected to be occurring was insufficient without specific suspicion as to the particular student); \textit{In re Frederick B.}, 237 Cal. Rptr. 338, 341-43 (Ct. App. 1987) (in applying the \textit{New Jersey v. T.L.O.} standard to detentions for interrogation purposes by school officials, the court determined that nonspecific assertions of wrongdoing should be given little weight; \textit{T.J. v. State}, 538 So. 2d 1320 (Fla. Dist. Ct. App. 1989) (simple curiosity in the search of a handbag is insufficient); \textit{In re Dumas}, 515 A.2d 984, 986-89 (Pa. Super. Ct. 1986) (Kelly, J., concurring) (warrantless search of student locker unreasonable where school assistant principal unable to identify facts which lead to conclusion that contraband would be in such locker).

subsequent strip search. The student, a fifteen-year-old girl, was seen "ducking" behind cars in the school parking lot in order to avoid notice by the school security guard. When questioned, she lied about her identity. The court noted that the facts presented could have indicated that she was truant, or that she was stealing hubcaps, or that she had left class to meet a boyfriend. In short, it could have signified that plaintiff had violated many of an infinite number of laws or school rules. This court does not read T.L.O. so broadly as to allow a school administrator the right to search a student because that student acts in such a way so as to create a reasonable suspicion that the student has violated some rule or law.

Thus, the principal's assertion that the minor may have violated any rule or law was said to fall short of the requirement of this prong of the reasonableness test.

The ability to articulate a specific suspicion is, in most instances, readily possible since the majority of search cases arise due to suspected drug use or theft. These crimes are obviously of such a nature that, upon an adequate investigation, school officials could meet this requirement.

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82 Id. at 454.
83 Id.
84 Id.
85 Id. at 457.
86 Id.
89 Arguably, as pointed out by Justice Brennan, adequate investigation would also meet probable cause requirements. See supra note 72 and accompanying text. See generally Gardner, supra note 66, at 937-47.
However, the quantity of evidence necessary to form this reasonable suspicion is far from insurmountable. Tips from various informants are considered sufficient so long as school administrators can articulate the perception that such information is reliable.\textsuperscript{90} To illustrate, in \textit{Martens by Martens v. Board of Education},\textsuperscript{91} telephone calls from an anonymous tipper\textsuperscript{92} which, when acted upon, provided evidence of drug possession, were alone sufficient to warrant student searches.\textsuperscript{93} Understandably, current educational programs encourage students and the general public to be informants. These programs have been judicially recognized as a valuable tool for officials to be put on notice of a potential drug or crime problem.\textsuperscript{94} The sufficiency of such evidence, standing alone, should be considered with caution due to the likelihood of that information leading to an invasion of an individual student's privacy.\textsuperscript{95}

\textsuperscript{90} \textit{See In re Corey L.}, 250 Cal. Rptr. 359, 360 (Ct. App. 1988) (three students, separately and individually complaining to principal that someone had drugs on campus; two of the students identified the drug as cocaine; one of the students identified the accused); \textit{In re P.E.A.}, 754 P.2d 382, 384 (Colo. 1988) (information obtained from a minor by law enforcement officer in the investigation of a theft which was relayed to school officials by such officer); T.J. v. State, 538 So. 2d 1320, 1321 (Fla. Dist. Ct. App. 1989) (student who had been involved in a fight at the bus stop the day before informed assistant principal of fears relating to a threat made after the fight); \textit{In re Devon T.}, 584 A.2d 1287, 1300 (Md. Ct. Spec. App. 1991) (student informant and outside informant); Irby v. State, 751 S.W.2d 670, 671 (Tex. Ct. App. 1988) (teacher informed associate principal of overhearing students talking about a student who had marijuana; students were questioned and identified defendant); State v. Slattery, 787 P.2d 932, 932-33 (Wash. Ct. App. 1990) (student informant who was considered reliable due to past experience as an informant); and State v. Brooks, 718 P.2d 837 (Wash. Ct. App. 1986) (reliability of student informant reinforced by history of reported suspicion of defendant by three teachers).

\textsuperscript{91} 620 F. Supp. 29 (N.D. Ill. 1988).

\textsuperscript{92} Specifically, the principal received two phone calls the same day. He acted upon the first call in which the caller stated a named student had marijuana in a school locker. Upon investigation, marijuana was found. When the caller phoned a second time and reported that the named student may have drug paraphernalia in his coat, the information was used to conduct a search of the student's pockets. \textit{Id.} at 30-31.

\textsuperscript{93} \textit{Id.} at 31-32.

\textsuperscript{94} In commenting with regard to the credibility of student informants and the question of anonymity of such sources in criminal proceedings, the Sixth Circuit has stated: "In this turbulent, sometimes violent, school atmosphere, it is critically important that we protect ... students who 'blow the whistle' on their classmates who engage in drug trafficking and other serious offenses." \textit{Newsome v. Batavia Local Sch. Dist.}, 842 F.2d 920, 925 (6th Cir. 1988).

\textsuperscript{95} This caution is evident in judicial consideration of reliability of informants in light of surrounding circumstances. Thus, the amount of information considered sufficient may vary according to individual principals and teachers, especially in light of what one may consider to be within the dictates of common sense. \textit{See supra} note 66 and accompanying text.
T.L.O.'s denial of cigarette smoking\(^9\) is now considered to have established the premise that such a denial warrants a search. In fact, denial is said by some to lead to a presumption that the child is committing a wrong, justifying action to verify whether the child is being truthful.\(^7\) This interpretation of the T.L.O. requirement of justification at inception is in direct conflict with basic objectives of socialization which are inherent in public education.\(^8\)

In addition to the above factors, the list of valuable evidence, compiled in pre-T.L.O. decisions\(^9\) is being given favorable treatment. History of suspicious conduct,\(^10\) the prevalence of unlawful activity among the school population,\(^101\) and direct observation of misconduct or of intoxication\(^12\) are at least by some, relevant

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\(^9\) See supra text at note 68.

\(^7\) See In re P.E.A., 754 P.2d 382, 389 (Colo. 1988) (student's denial regarding driving himself to school and subsequent admission of such driving gave rise to reasonable inference the child had something to hide in the vehicle); Berry v. State, 561 N.E.2d 832, 837 (Ind. Ct. App. 1990) (student's denial justifying the search for drugs in order to confirm or refute the denial); but see Cales v. Howell Pub. Schs., 635 F. Supp. 454 (E.D. Mich. 1985) (student's lying about name while avoiding being seen by security officer insufficient to warrant a search).

\(^8\) As stated by Justice Stevens: "The schoolroom is the first opportunity most citizens have to experience the power of government. Through it passes every citizen and public official, from schoolteachers to policemen and prison guards. The values they learn there, they take with them in life." New Jersey v. T.L.O., 469 U.S. 325, 385-86 (1985). The rationalization of invasions of a child's privacy to verify whether the child is truthful is certainly beyond the dictates of common sense. If one of society's values is to foster trust, respect, and appreciation of other members of society and of persons in authority, how can this be nurtured if such trust and respect is not reciprocated? See also Brief for Appellant, supra note 2, at 24-28 (reviewing trend in pre-T.L.O. cases where such denials were viewed as insufficient).

\(^9\) See supra note 41 and accompanying text.

\(^10\) See, e.g., In re Corey L., 250 Cal. Rptr. 359, 360 (Ct. App. 1988) (school official acted on basis that student had, one month earlier, been found in possession of $195 in small bills and was without a credible explanation); Coronado v. State, 806 S.W.2d 302, 303 (Tex. Ct. App. 1991) (principal had been informed one week before of student's attempt to sell drugs to another student); State v. Brooks, 718 P.2d 837 (Wash. Ct. App. 1986) (student with history of reports from three teachers that he appeared to be under the influence of drugs or alcohol).

\(^101\) See, e.g., In re Frederick B., 237 Cal. Rptr. 338 (Ct. App. 1987) (recent narcotic-related detainments on school property); State v. Slattery, 787 P.2d 932, 935 (Wash. Ct. App. 1990) (court noting that the school had a serious and ongoing problem with drugs at the school).

\(^12\) See, e.g., Shamberg v. State, 762 P.2d 488, 489 (Alaska Ct. App. 1988) (student observed to be intoxicated, bumping into furniture, having glazed eyes and flushed face); Berry v. State, 561 N.E.2d 832, 834-35 (Ind. Ct. App. 1990) (student in argument in school hallway with another student regarding the sale of marijuana).
evidence. The court in *T.L.O.* demanded consideration of all circumstances. Such consideration should include more than a hunch that is stirred only by the word of an unknown third party, another student, or a denial by the accused himself.

The second prong of the test goes to the scope of the search. The scope or extent of the search must be restrained to that of producing evidence such as the sought-after contraband. The interpretation of excessiveness varies. For example, the court in *Cales v. Howell Public Schools* determined that a nonproductive strip search was not excessive in scope for a fifteen-year-old girl. In comparison, in the case of *T.J. v. State*, the finding of a soft packet of cocaine in a child's purse while searching for a knife, was beyond the scope of the search.

The permissible scope is now legitimately extended beyond the student's person and belongings to lockers and to automobiles. Pat down searches, in instances of theft, illegal weapon

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103 See *supra* note 60 and accompanying text.
104 In the following cases, only one of these factors was necessary to justify the subsequent student search: Martens *by* Martens v. Board of Educ., 620 F. Supp. 29 (N.D. Ill. 1985) (information from anonymous caller sufficient; *In re* Corey L., 250 Cal. Rptr. 359 (Ct. App. 1988) (word of student naming the accused as the possessor of cocaine sufficient); but see *In re* Pima County, 733 P.2d 316 (Ariz. Ct. App. 1987) (general mention of student at teacher's meeting insufficient).
105 See *supra* note 61 and accompanying text.
106 See *supra* notes 61-62 and accompanying text.
108 Id. at 458.
110 Id. at 1322 (simple curiosity regarding a soft, plastic bag in a zippered portion of student's purse was excessive when the search was initiated to locate a knife or weapon; *contra* *In re* Frederick B., 237 Cal. Rptr. 338, 344 (Ct. App. 1987) ("fortuitous" discovery of a revolver while student detained and patted down for suspected drug activity was not outside of scope of search).
possession, and drug dealing, have also been found to fall within the scope of reasonableness.\textsuperscript{114}

The case of \textit{Wynn by Wynn v. Board of Education},\textsuperscript{115} sadly demonstrates abuse of the permissible scope of a search. Upon a finding that six dollars was missing from the class money fund, the teacher reasonably suspected two students who had been alone in the room while the remainder of the students attended physical education class.\textsuperscript{116} However, the resulting visual inspection and sorting through the accused students' belongings was conducted by fellow fifth-grade students\textsuperscript{117} while the teacher examined the accused children's shoes and socks.\textsuperscript{118} Neither the manner nor the extent of the search was found to be unconstitutional.\textsuperscript{119}

Other questions not answered by the \textit{T.L.O.} ruling are being decided.\textsuperscript{120} The school official exception to a probable cause requirement has been applied to students who were searched as juveniles but prosecuted as adults while attending public school.\textsuperscript{121} If the search is associated or part of a police investigation, the probable cause standard has been required.\textsuperscript{122} However, police liaisons functioning as security officers for the school can offer assistance without triggering the dictates of probable cause.\textsuperscript{123}

\textsuperscript{115} Id. at 1170-71.
\textsuperscript{116} Id. at 1171.
\textsuperscript{117} Id. at 1171-72.
\textsuperscript{118} See \textit{New Jersey v. T.L.O.}, 469 U.S. 325, 341-42 n.7 (1985) (noting that the case at hand did not require consideration of whether the involvement of police officers in a search would modify the standard). See also supra notes 79, 111.
\textsuperscript{120} See \textit{In re F.P.}, 528 So. 2d 1253 (Fla. Dist. Ct. App. 1988).
\textsuperscript{121} \textit{E.g.}, \textit{Cason v. Cook}, 810 F.2d 188 (8th Cir. 1987), \textit{cert. denied}, 482 U.S. 930 (1987) (liaison police officer justified in conducting pat down searches after investigation conducted by vice principal); see also \textit{Martens by Martens v. Board of Educ.}, 620 F. Supp. 29 (N.D. Ill. 1985) (police officer, at school for another reason, instructed student to empty pockets after school officials informed of suspicion); \textit{In re P.E.A.}, 754 P.2d 382 (Colo. 1988) (police officer tipping school officials of suspected theft; school security officer participating in investigation and search).
Public policy and psychological impact are infrequently discussed. Interestingly, at least one court has recognized parental expectations and rights when discussing student searches without a similar recognition of the rights of children. Thus, with these trends in the law subsequent to the T.L.O. ruling, courts continue to struggle to balance the interests at hand with the requirement of reasonableness demanded by the Fourth Amendment.

D. Qualified Immunity of State Actors

Before principles of qualified immunity can be invoked, a violation of the Fourth Amendment must be found which in turn, triggers the application of 42 U.S.C. § 1983. Specifically, an individual's reasonable expectations of privacy must be violated by a state actor in a manner that is unconstitutional. The provisions of section 1983 create no substantive rights for plaintiffs but rather serve as a mechanism by which suit may be brought. In turn, principles of qualified immunity are used affirmatively by the defending party, not only as a defense, but as a shield from liability.

Section 1983 specifically refers to the actions of any "person" which result in a deprivation of rights created under the federal constitution or laws. The term "person" is interpreted to mean

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124 In re Devon T., 584 A.2d 1287 (Md. Ct. Spec. App. 1991): [The mixed mission of the school authority is to protect not only the constitutional rights of the student who may be a drug pusher but equally, perhaps more importantly, to protect the health and welfare of the entire school community from the ravages of that drug pusher. The parents of those other students, entrusting their children to the public charge, are entitled to expect nothing less. Id. at 1300 (emphasis added).

125 See supra notes 17-20 and accompanying text.

126 See Ohio Civil Serv. Employees Assoc. v. Seiter, 858 F.2d 1171, 1175 (6th Cir. 1988) (describing a two-fold requirement for Fourth Amendment violations in the qualified immunity area which includes an actual, subjective expectation of privacy and societal recognition of that expectation. These two requirements have been clearly established for students in the public school setting.). See supra notes 55-57 and accompanying text.


129 See Monell v. Department of Social Servs., 436 U.S. 658, 664-90 (1978) (judicial analysis of the Civil Rights Act of 1871, a portion of which is now known as section
not only an individual officer or government employee, but also local governmental bodies, including school boards.\textsuperscript{130} Thus, claims for monetary, declaratory, and injunctive relief may be brought against both individual school officials\textsuperscript{131} as well as the body of officials governing state employees.\textsuperscript{132}

In Harlow v. Fitzgerald,\textsuperscript{133} the Supreme Court described the immunity issue, and the policy behind its protection, and established the controlling test for determining whether the shield of protection would be applicable. In describing the issue and policy basis, the court said:

The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative. In situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees.... It is this recognition that has required the denial of absolute immunity to most public officers. At the same time, however, it cannot be disputed seriously that claims frequently run against the innocent as well as the guilty — at a cost not only to the defendant officials, but to society as a whole. These social costs include expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office. Finally, there is the danger that fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties."\textsuperscript{134}


\textsuperscript{131} E.g., Wood v. Strickland, 420 U.S. at 321-22.

\textsuperscript{132} E.g., Monell v. Department of Social Servs., 436 U.S. at 690.

\textsuperscript{133} 457 U.S. 800 (1982) (action for damages due to alleged wrongful discharge from the Air Force).

\textsuperscript{134} Id. at 813-14 (citation omitted) (quoting from Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950)). See also Scheuer v. Rhodes, 416 U.S. 232, 242 (1974) (qualified immunity encompasses the fact officials may err in actions, but "it is better to risk some error and possible injury from such error than not to decide or act at all . . . .").
The Court went further to establish the appropriate test for determining whether the defense of qualified immunity would apply. Historically, a two-part analysis had been applied in qualified immunity issues. This analysis involved an objective element and a subjective one. In reviewing the application of this test, the Court determined the subjective element to be incompatible with the costs and burdens of unsubstantiated suits. The final ruling was that government officials performing discretionary functions are qualifiedly immune from civil liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." If, at the time of the alleged misconduct, the state of the law is not clearly established, there can be no liability.

In application, an official is presumed to be knowledgable of an individual's constitutional rights. However, an official cannot be expected to anticipate subsequent legal developments or changes in the law which may alter the lawfulness of the conduct. This objective standard has been noted to fail in at least

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136 Id. at 815 (identifying the objective element to involve a presumption of knowledge on behalf of the person of basic constitutional rights).
137 Id. at 815-16 (noting the subjective element to include an analysis into the intentions of the wrongdoer; a finding of malice or subjective intent being necessary to show liability). See also Wood v. Strickland, 420 U.S. 308, 322 (1975) (recognizing malice or negligent conduct as actionable).
139 Id. at 818.
140 Id. This statement was subsequently clarified by the Court in Anderson v. Creighton, 483 U.S. 635 (1987). The term "clearly established" is not meant to apply in a generalized sense, but rather specifically to the act at hand and the alleged unconstitutional conduct. In the Fourth Amendment area, the right to be free from unwarranted searches and seizures is clearly established. However, this legal principle cannot be applied in a generalized manner. Principles of probable cause, reasonableness, and the warrant requirement must be distinguished. The facts in Anderson dealt with a warrantless search of a home by a police officer. Failure of the appellate court to look more specifically into issues of probable cause and the exigency of the circumstances was inappropriate. Id. at 640-41. See also Mitchell v. Forsyth, 472 U.S. 511, 530-35 (1985) (defendants qualifiedly immune due to fact that at the time it was unclear whether wiretaps violated the Fourth Amendment). See generally Kinports, supra note 129, at 645-46; Mayer, supra note 129, at 279-80.
142 Id. at 818-19. See also Anderson v. Creighton, 483 U.S. at 639 (quoting Davis v. Scherer, 468 U.S. 183, 195 (1984)) describing the intent of qualified immunity as being to provide officials with the ability to "reasonably anticipate when their conduct may give rise to liability for damages ...."); Mayer, supra note 129, at 261-63, 267-75.
two circumstances. These include where the plaintiff can recover only by showing the defendant's state of mind and when the conduct itself is governed by a generalized standard.

This principle of qualified immunity differs when applied to governing bodies such as school boards. In Monell v. Department of Social Services, local governing bodies were found to be susceptible to suit where the challenged conduct was due to the official execution and promulgation of a policy, ordinance, regulation, or decision made by that body. Additionally, custom or usage may be sufficient to impose liability, without formal adoption by the governing body, so long as the activity is treated as having the same force as official law. The violation must be secondary to the driving force of official policy. Causation is essential to finding liability.

As indicated above, the qualified immunity question is not relevant unless a Fourth Amendment violation is found. There are several cases in the student search area that have reached the section 1983 issue. In Cales v. Howell Public Schools, a

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143 See Mayer, supra note 129, at 274 n.111.
144 Id. (citing Allen v. Scribner, 812 F.2d 426, 436 (9th Cir. 1989) (jury being required to determine defendant's motive).
145 Id. (citing Anderson v. Creighton, 483 U.S. at 656 n.12 (Stevens, J., dissenting)).
147 Id. at 690.
148 Id. at 690-91.
149 Also referred to as under "color of state law." See id. at 691 (referring to original language of section 1983).
150 Vicarious liability solely on the basis of an employer-employee relationship cannot be read into the statute. "Indeed, the fact that Congress did specifically provide that A's tort became B's liability if B 'caused' A to subject another to a tort suggests that Congress did not intend § 1983 liability to attach where such causation was absent." Id. at 692.
151 See supra notes 17-20, 125-27 and accompanying text.
152 See Jennings v. Joshua Indep. Sch. Dist., 877 F.2d 313 (5th Cir. 1989) (police officer, with valid warrant, searched plaintiff's car after a dog was aroused during a routine school canine inspection; Federal Rule of Civil Procedure 11 sanctions imposed as to plaintiff); Webb v. McCullough, 828 F.2d 1151 (6th Cir. 1987) (issues of material fact in section 1983 case against high school principal and others for unlawful search of hotel room of student while student was on a class trip with the principal as guardian/custodian; court applied the in loco parentis theory due to the principal's assumed role as guardian while on field trip); Allen v. Koon, 720 F. Supp. 570 (E.D. La. 1989) (procedural discussion regarding abstention in a federal civil rights action due to student strip search).
fifteen-year-old girl was strip searched on the basis of an assistant principal's belief that she possessed illegal drugs.154 Suit was brought against the school district155 and individual school officials.156 After finding the search failed the first prong of the reasonableness test, justification at its inception,157 the court reached the issue of qualified immunity.158 As to the official ordering the search,159 the court determined he was not shielded by qualified immunity, stating:

[It is clear that defendants [sic] knew at a minimum that reasonable cause or reasonable suspicion was necessary to justify a search by school administrators. Since the Court has already concluded that reasonable suspicion was lacking here, the Court must conclude that defendant ... is not entitled to qualified immunity as a matter of law.160

However, as to those persons carrying out the strip search, the court determined the applicability of qualified immunity to be dependent upon the reasonableness of the scope of the search.161 The manner in which this conclusion was drawn was not explained.162 Nor did the court explain why the determination as to "reasonableness under all the circumstances" was bifurcated in order to reach its conclusion affording qualified immunity to those who actually strip searched Ms. Cales.163 Mary Steinhelper, another assistant principal, conducted the search which was witnessed by a secretary.164 Since the scope of the search was limited to the objective of finding drugs, the conclusion was that it was

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155 The issue of liability of the board of education was undetermined because a question of fact existed as to whether an official school student search policy had been formulated. Id. at 456.
156 Id. at 454.
157 See supra text accompanying notes 81-86.
159 Assistant Principal McCarthy did not take part in the search but rather ordered the search. Pursuant to these facts, the court chose to analyze his conduct under a "supervisory liability theory," holding him liable if the evidence established the authorization or approval of the unconstitutional conduct. Id. at 456.
160 Id. at 458 (footnote omitted).
161 Id. at 458.
162 Id.
163 Id.
164 Id. (the court noted that Mary Steinhelper did not question her peer's decision to conduct the strip search).
not excessive and the court found those defendants to be qualifiedly immune from civil action.\textsuperscript{165}

\textit{Burnham v. West}\textsuperscript{166} is a case that demonstrates the application of qualified immunity on the grounds that the law was unsettled at the time of the conduct.\textsuperscript{167} Plaintiffs brought suit challenging the practice of generalized searches of the entire student population for items such as magic markers, radios and “walkmen” headsets, and for marijuana.\textsuperscript{168} The court analyzed the \textit{T.L.O.} decision, recognizing that the question of individualized suspicion was left unanswered by that opinion.\textsuperscript{169} Since no subsequent decision in the circuit had decided the issue, the court determined that the area of the law was unsettled and therefore, qualified immunity applied.\textsuperscript{170}

In conclusion, not only must the plaintiff prove a violation of Fourth Amendment rights of constitutional magnitude, but also that the defendant violated the specific prohibition of unreasonableness in the school setting. Even if successful in meeting this burden, liability can be easily avoided through application of qualified immunity if the defendant can show the law to have been unsettled or uncertain, or claim reliance upon the direction of a superior.

\section*{III. WILLIAMS BY WILLIAMS V. ELLINGTON}

\subsection*{A. Facts}

The plaintiff, Angela Williams, brought action under 42 U.S.C. § 1983 against school officials and the School Board of Graves

\textsuperscript{165} The opinion does not address how this conclusion complies with the standard set forth in Harlow v. Fitzgerald, 457 U.S. 808 (1982), and Anderson v. Creighton, 483 U.S. 685 (1987) regarding reasonableness in light of clearly established law. \textit{See supra} notes 133-45 and accompanying text. This poses interesting questions regarding the overall analysis where, previously in the opinion, the court found the search to be unjustified, and yet the court affords qualified immunity to those carrying out the search on the basis that the scope was not unduly excessive. \textit{See supra} note 79.

\textsuperscript{166} 681 F. Supp. 1160 (E.D. Va. 1987).

\textsuperscript{167} Id. at 1168.

\textsuperscript{168} Id. at 1163-64.

\textsuperscript{169} Id. at 1164-67. \textit{See also supra} note 79.

\textsuperscript{170} Id. at 1168 (requisite level of specificity not met by plaintiff in showing a constitutional deprivation) (citing Anderson v. Creighton, 483 U.S. 685 (1987); Jensen v. Conrad, 570 F. Supp. 91, 102 (D.S.C. 1983), \textit{aff’d}, 747 F.2d 185 (4th Cir. 1984), \textit{cert. denied}, 470 U.S. 1052 (1985)).
County High School, Mayfield, Kentucky.171 The strip search that occurred on January 22, 1988,172 was the culmination of the following events. Principal Jerald Ellington received a telephone call from a student's mother on Tuesday, January 19, 1988. In the conversation, the mother reported concern about a situation in which her daughter was offered drugs at school. No names were mentioned other than that of the mother's daughter.173 Later in the day, Mr. Ellington spoke with the student, at which time the student reported that Angela Williams and another girl, Michelle, had a vial of white powder in typing class the day before.174 The student also reported the girls had sniffed the powder and had offered it to her.175 Mr. Ellington reported that he questioned the teen regarding her relationship with the accused students and that he was satisfied that no animosity existed between the girls.176

Mr. Ellington began an investigation by speaking with Angela Williams's typing teacher and her aunt, who happened to be the school's guidance counselor.177 He also spoke with Michelle's father, a school bus driver.178 The typing teacher reported having noticed unusual behavior on the part of Michelle on the previous day.179 She also recalled a note that was found under Angela Williams's desk the semester before. The note made reference to a party and the use of the "rich man's drug."180 Angela Williams's aunt, the guidance counselor, indicated that the Williams family was concerned that she may be "running with the wrong crowd," but reported no occurrences of suspicious conduct.181 The father of Michelle reported concern about his daughter because a large sum of money was recently missing from his home.182

172 Id. at 883 (see supra note 1 for a general discussion of what constitutes a "strip search.").
173 Id. at 882.
174 Id.
175 Id.
176 Id.
177 Id.
178 Id.
179 The teacher had confronted Michelle who reported that she had the "flu." Id.
180 The teacher reported she understood the letter to be a joke and, therefore, made no mention of it. Id.
181 Brief for Appellant, supra note 2, at 7.
182 Specifically, $200 was missing from his bureau drawer. Williams by Williams v. Ellington, 936 F.2d 881, 882 (6th Cir. 1991).
On Friday, January 22, 1988, the same student informant came to Mr. Ellington during the fifth period class and reported "those girls are at it again," or words of similar meaning, and indicated the possession of a vial of white powder. After informing Assistant Principal Easely of the week's events, the two officials retrieved both Angela Williams and Michelle from class. Neither of the girls appeared to be disoriented or intoxicated. Upon confrontation, Michelle handed Ellington a brown vial. The vial contained an inhalant called "rush." Angela Williams denied possession of any unlawful substance.

Since the brown vial did not match the description of a white one, searches ensued. Finding no evidence of drugs in Angela Williams's belongings or on the person of Michelle, a strip search of Angela Williams was conducted. The search was conducted at the order of Ellington and, in accordance with school policy, was performed by two female employees, Assistant Principal Easely and Ellington's secretary. No evidence of drugs was found.

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183 Id. at 883.
184 Id.
185 Id.
186 Id. "Rush" is an over-the-counter product that, used as an inhalant, is violative of section 217.900 of the Kentucky Revised Statutes. Id. at 882. The statute reads, in relevant part:

(1) As used in this section: "Volatile substance" means any glue, cement, or paint or other substance containing a solvent or chemical having the property of releasing toxic vapors or fumes which when inhaled may cause a condition of intoxication, inebriation, stupefaction, dulling of the brain or nervous system, or distortion or disturbance of the auditory, visual, or mental processes.

(2) It shall be unlawful for any person to intentionally smell or inhale the fumes of any volatile substance, or to induce any other person to do so for the purpose of inducing a condition [sic] described in subsection (1) of this section....

187 See Brief for Appellant, supra note 2, at 8. In response to this denial, Principal Ellington testified the subsequent strip searches were conducted to verify the truthfulness of the girls' denials. Id. at 10.
188 While the search of Angela Williams's locker, books, and purse were done, Michelle was strip searched. Id. at 9 n.7.
189 The school had a policy regarding strip searches. The policy essentially reiterated the dictates of the New Jersey v. T.L.O. standard:

1. A pupil's person will not be searched unless there is a reasonable suspicion that the pupil is concealing evidence of an illegal act. ... When a pupil's person is searched, the person conducting the search shall be the same sex as the pupil; and a witness of the same sex shall be present during the search....

Williams by Williams v. Ellington, 936 F.2d 881, 883 n.2 (6th Cir. 1991) (citing Graves County High School Student Handbook 34 (1987-88)).
B. The Court's Opinion

Since the case was brought under section 1983, the court first addressed the issue of liability as to the school board members.\(^\text{192}\) Noting the school's search and seizure policy\(^\text{193}\) and its close resemblance to the standard set forth in the \textit{T.L.O.} opinion, the court determined it to be facially valid.\(^\text{194}\) The court summarily concluded that insufficient evidence had been offered to indicate the policy had been repeatedly or even sporadically misapplied.\(^\text{195}\) The court found that no custom or policy existed which would support a causal link between the school board and a constitutional violation and that liability for a single, isolated event would not be justified.\(^\text{196}\)

Turning to Ellington, Easley, and individual board members, the standards set out in \textit{Harlow v. Fitzgerald} and \textit{Anderson v. Creighton} were reviewed.\(^\text{197}\) Thus, the reasonableness under all the circumstances test of \textit{T.L.O.} was applied.\(^\text{198}\) To this application, the court noted:

A diligent but unsuccessful search for additional guidance \ldots leads us to a troubling conclusion: the reasonableness standard articulated in \textit{New Jersey v. T.L.O.}, has left courts later confronted with the issue either reluctant or unable to define what type of official conduct would be subject to a 42 U.S.C. § 1983 cause of action. A thorough review of \textit{T.L.O.} reveals that the Court was careful to protect a school official's right to make discretionary decisions in light of the knowledge and experience of the educator and the information presented to him or her at the time the decision was made \ldots. To question an official's every decision with the benefit of hindsight would undermine the authority necessary to ensure the safety and order of our schools.\(^\text{199}\)

With this foundation, Easely and Ellington were said to have reason to believe that a strip search was not a violation of Angela Williams's constitutional rights.\(^\text{200}\) The search was "just-

\(^\text{191}\) Id.
\(^\text{195}\) Id. at 883-85. \textit{See supra} notes 130, 146-50 and accompanying text.
\(^\text{196}\) See \textit{supra} note 189.
\(^\text{197}\) Id. at 884-85; \textit{See infra} notes 227-32 and accompanying text.
\(^\text{197}\) Williams \textit{by Williams v. Ellington}, 936 F.2d 881, 884 (6th Cir. 1991).
\(^\text{198}\) Id. at 884-85; \textit{but see infra} notes 227-32 and accompanying text.
\(^\text{199}\) Williams \textit{by Williams v. Ellington}, 936 F.2d at 884-85 (noting the causal relationship required by \textit{Monell v. Department of Social Servs.} was missing).
\(^\text{197}\) Id. at 885. \textit{See supra} text accompanying notes 133-45.
\(^\text{198}\) Williams \textit{by Williams v. Ellington}, 936 F.2d at 886. \textit{See supra} notes 60-62 and accompanying text.
\(^\text{199}\) Williams \textit{by Williams v. Ellington}, 936 F.2d at 886.
\(^\text{200}\) Id. at 886-87.
tified at its inception" due to the nature of the concern over illicit drugs and the events of the few days before the search.\textsuperscript{201} Using the finding of cigarettes and then marijuana in T.L.O.'s purse as being analogous to the facts at bar,\textsuperscript{202} the court noted production of evidence of misconduct by one of the girls as sufficient to warrant further investigation.\textsuperscript{203} The court discussed the validity of a student tipper and the concern that such information may be given under ulterior motives of malice or spite.\textsuperscript{204} This issue was resolved when the court reviewed Ellington's testimony wherein he perceived the teen's story to be genuine and the investigative acts taken throughout the week.\textsuperscript{205} Then, using a similar rationale as with the justification requirement, the court drew the conclusion that the scope of the search was not excessive.\textsuperscript{206} Finding no Fourth Amendment violation, relief for Angela Williams was not possible.\textsuperscript{207}

C. Analysis of Opinion

The Sixth Circuit's treatment of T.L.O.'s "reasonableness under all the circumstances" standard is demonstrative of further weakening of student privacy rights and failure of the courts to provide guidance as to when, if at all, strip searches of students should be conducted by public school officials.\textsuperscript{208} First of all, the court did not consider relevant factual information in determining whether the search was justified at its inception. The balancing approach used in both pre- and post-T.L.O. decisions\textsuperscript{209} was absent. For example, Graves County High School had no major drug problems.\textsuperscript{210} School officials admitted that factors such as age, disciplinary record, or academic standing of the particular student were not considered in

\begin{itemize}
\item\textsuperscript{201} Id. at 887.
\item\textsuperscript{202} See supra notes 49-50 and accompanying text.
\item\textsuperscript{203} Id. at 887-88.
\item\textsuperscript{204} Id. at 887-89.
\item\textsuperscript{205} Williams by Williams v. Ellington, 936 F.2d at 887-89. But see infra text accompanying notes 213-14.
\item\textsuperscript{206} Id. at 887-89.
\item\textsuperscript{207} Id. at 887-89 ("taking into account the size of the clear, glass vial that was sought and the suspected nature of the white powdery substance contained in the vial. . . ").
\item\textsuperscript{208} See discussion in supra note 66.
\item\textsuperscript{209} See supra notes 38-41, 97-102.
\item\textsuperscript{210} Brief for Appellant, supra note 2, at 6.
\end{itemize}
decisions to conduct a search.\textsuperscript{211} Although these were not requirements of the \textit{T.L.O.} decision, these are attributes that weigh heavily in the balance of the competing interests at hand.\textsuperscript{212}

The analogy constructed between a finding of cigarettes in T.L.O.'s purse and the voluntary admission of Angela Williams' classmate of possession of "rush" was misplaced. If evidence sufficient to show violation of a school rule or a law is volunteered, how does that justify a subsequent total invasion of privacy?\textsuperscript{213} Certainly the principal had sufficient evidence to discipline Angela Williams's friend, and perhaps to counsel Angela and to put her parents on notice of the events of the week. Such minimally intrusive conduct would be more in line with the dictates of common sense and the acceptable role of a school administrator. As stated by Justice Stevens, invasive tactics typified by a strip search should only be to prevent imminent and serious harm.\textsuperscript{214}

Particular concern also resurfaces regarding student informants and their reliability.\textsuperscript{215} In \textit{T.L.O.}, the students were directly observed by an adult teacher to be engaging in misconduct.\textsuperscript{216} In \textit{Williams}, a student allegedly observed such activity while the accused were in the classroom and under the direct supervision of an adult teacher. The teacher observed no suspicious conduct. Although student informants should not be suppressed,\textsuperscript{217} the reliability of these sources of information is an

\textsuperscript{211} Id. at 5. If such factors were considered as relevant, the officials would have found Angela Williams to be of good disciplinary and academic standing in the school as well as respected within the small community of Mayfield. Id. at 4.

\textsuperscript{212} As pointed out by Charles Avery and Robert Simpson, these factors indeed become relevant in the ultimate decision to conduct a search in the school setting. Age is relevant because younger children are considered less likely to be involved in unlawful activity. History and school record are important because, to a certain extent, a pattern emerges and may be predictive of future behavior. The prevalence of the problem is relevant because, if misconduct is rampant and common, the learning environment itself is disrupted and may breed similar behavior among the student population. Avery & Simpson, \textit{supra} note 66, at 427-28.

\textsuperscript{213} See discussion in \textit{supra} note 66.

\textsuperscript{214} See \textit{supra} note 73 (discussing dissent of Justice Stevens in \textit{New Jersey v. T.L.O.}, 469 U.S. 325 (1985) to the Court's dilution of Fourth Amendment protection).

\textsuperscript{215} See \textit{supra} notes 90-95 and accompanying text.

\textsuperscript{216} See \textit{supra} note 45 and accompanying text.

\textsuperscript{217} See \textit{supra} note 94 and accompanying text.
ongoing concern as evidenced by the Sixth Circuit's detailed analysis of this part of the case. Once again the concern of whether more concrete and particularized suspicion is mandated for student searches to be reasonable, and whether this type of information justifies a highly intrusive strip search, is left unresolved.\footnote{218 The Kentucky Constitution has not been interpreted in the more specific area of searches of students' persons. The Kentucky Office of Attorney General has advised that, at least as to guidelines for generalized canine searches, individualized suspicion is recommended when criminal sanctions apply. 91-9 Ky. Op. Att'y Gen. 2-523 (1991).}

Also left unresolved is the question of whether a strip search may be justified on the grounds the search was conducted in order to verify the innocence of a child who denies misconduct.\footnote{219 See supra note 187 and accompanying text.}

In \textit{T.L.O.} it was specifically noted that students could not be classified the same as prisoners who have no legitimate privacy expectations.\footnote{220 See supra note 55 and accompanying text.} The policy of allowing the scope of student searches to exceed nonintrusive alternatives in order to verify innocence may come alarmingly close to equating students with prisoners.\footnote{221 See supra note 98.}

Even if a Fourth Amendment violation had been found, the shield of qualified immunity likely would have prevented Angela Williams from a remedy. As recognized in the opinion, application of the "reasonableness under all the circumstances" approach in terms of qualified immunity is unclear.\footnote{222 See supra note 199 and accompanying text.} The result in \textit{Williams by Williams v. Ellington}, as compared to \textit{Burnham v. West}\footnote{223 See supra part II.C.} and \textit{Cales v. Howell Public Schools}, far from clears the picture. Under current interpretation of the \textit{T.L.O.} ruling, even the most invasive of searches may be interpreted as if the school official(s) reasonably perceived the search as lawful. Although the Supreme Court attempted to establish a workable standard by the \textit{T.L.O.} ruling, the result has been uncertainty in interpretation.\footnote{224 See supra notes 6-7 with text accompanying notes 82-86.} The law is far from "settled," particularly in the area of student strip searches.\footnote{225 See supra note 153-65.}
As to supervisory liability, the policy considerations of Monell v. Department of Social Services\textsuperscript{227} foreseeably result in liability for independent acts that are ratified by local school boards and that may thereafter be regarded as "policy or custom."\textsuperscript{222} Interestingly, in Williams by Williams v. Ellington, the opinion failed to note certain facts indicating that the student strip search was not an isolated incident. Graves County School officials indicated that several other students had been strip searched in the past.\textsuperscript{229} Precise data regarding the actual number or factual background of these occurrences was not available due to the practice of not keeping records unless illegal items were found.\textsuperscript{230} The School Board was aware of such searches. In fact, the policy had previously been challenged by an aggrieved parent.\textsuperscript{231} At that time, the Board failed to clarify its policy on intrusive searches\textsuperscript{232} and, as in the Williams case, ratified the conduct.\textsuperscript{233} Perhaps the Sixth Circuit did not give more treatment to this issue because a finding of no constitutional deprivation pursuant to the T.L.O. standard renders the student without an adequate claim to seek a remedy, therefore rendering moot the need to consider any additional searches.

IV. CONCLUSION

Student privacy rights truly are challenged in the public school setting. Social realities are such that stringent Fourth Amendment requirements are unsuitable. Educators are faced with demanding situations, unarmed in the physical sense yet shielded by a broad interpretation of student privacy rights. However, at least in theory, the scope of reasonableness permissible under the Constitution does not sanction complete deprivation of an individual's privacy due to the individual's status as a student. The Supreme Court's ruling in New Jersey v. T.L.O. has left courts struggling to determine how far the

\begin{footnotes}
\footnote{227}{436 U.S. 658 (1978); see also supra text accompanying notes 146-50.}
\footnote{228}{Id.}
\footnote{229}{Brief for Appellant, supra note 2, at 13.}
\footnote{230}{Id. at 13 n.14.}
\footnote{231}{Id. at 13-14.}
\footnote{232}{Perhaps the Graves County School Board could not do so because of the varying interpretations and unanswered questions from the T.L.O. ruling.}
\footnote{233}{Brief for Appellant, supra note 2, at 13-14.}
\end{footnotes}
scope of reasonableness may legitimately extend, leaving many questions unanswered. Thus, aggrieved parents and students are left with no legal recourse, either because of Fourth Amendment interpretation or because of the shield of qualified immunity. Somewhere a line needs to be drawn. Until then, the scope of “reasonableness” surely will continue to grow and could actually absorb the remnants of student privacy rights.
BRADY V. SAFETY-KLEEN CORP.: 
INTENTIONAL TORT ACTIONS IN WORKERS' 
COMPENSATION CASES—BACK TO A COMMON LAW 
CAUSE OF ACTION

Cynthia Cannata Felson

I. INTRODUCTION

On August 27, 1991, the Ohio Supreme Court decided Brady v. Safety-Kleen Corp. In its four-to-three decision, the court ruled that section 4121.80 of the Ohio Revised Code is unconstitutional in toto. Section 4121.80 was an attempt by the legislature to

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2 Section 4121.80 provides as follows:

(A) If injury, occupational disease, or death results to any employee from the intentional tort of his employer, the employee or the dependents of a deceased employee have the right to receive workers' compensation benefits under Chapter 4123. of the Revised Code and have a cause of action against the employer for an excess of damages over the amount received or receivable under Chapter 4123. of the Revised Code and Section 35, Article II of the Ohio Constitution or any benefit or amount, the cost of which has been provided or wholly paid for by the employer. The cause of action shall be brought in the county where the injury was sustained or the exposure primarily causing the disease alleged to be contracted occurred. The claim on behalf of the dependents of a deceased employee shall be asserted by the employee's estate. All defenses are preserved for and shall be available to the employer in defending against an action brought under this section. Any action pursuant to this section shall be brought within one year of the employee's death or the date on which the employee knew or should have known of the injury, disease, or condition, whichever date occurs first. In no event shall any action be brought pursuant to this section more than two years after the occurrence of the act constituting the alleged intentional tort.

(B) It is declared that enactment of Chapter 4123. of the Revised Code and the establishment of the workers' compensation system is intended to remove from the common law tort system all disputes between or among employers and employees regarding the compensation to be received for injury or death to an employee except as herein expressly provided, and to establish a system which compensates even though the injury or death of an employee may be caused by his own fault or the fault of a co-employee; that the immunity established in Section 35, Article II of the Ohio Constitution and Sections 4123.74 and 4123.741 of the Revised Code is an essential aspect of Ohio's workers' compensation system; that the intent of the legislature in providing immunity from common law suit is to protect those so immunized from litigation outside the workers' compensation
restrict the rights of injured workers with regard to intentional tort actions in workers' compensation cases. As part of Amended

system except as herein provided; and that it is the legislative intent to promote prompt judicial resolution of the question of whether a suit based upon a claim of an intentional tort prosecuted under the asserted authority of this section is or is not an intentional tort and therefore is or is not prohibited by the immunity granted under Section 35, Article II of the Ohio Constitution and Chapter 4123. of the Revised Code.

(C) Notwithstanding any other provision of law or rule to the contrary, and consistent with the legislative findings of intent to promote prompt judicial resolution of issues of immunity from litigation under Chapter 4123. of the Revised Code, the court shall dismiss the action:

(1) Upon motion for summary judgment, if it finds, pursuant to Rule 56 of the Rule of Civil Procedure the facts required to be proved by division (B) of this section do not exist;

(2) Upon a timely motion for a directed verdict against the plaintiff if after considering all the evidence and every inference legitimately and reasonably raised thereby most favorably to the plaintiff, the court determines that there is not sufficient evidence to find the facts required be proven.

(D) In any action brought pursuant to this section, the court is limited to a determination as to whether or not the employer is liable for damages on the basis that the employer committed an intentional tort. If the court determines that the employee or his estate is entitled to an award under this section and that determination has become final, the industrial commission shall, after hearing, determine what amount of damages should be awarded. For that purpose, the commission has original jurisdiction. In making that determination, the commission shall consider the compensation and benefits payable under Chapter 4123. of the Revised Code and the net financial loss to the employee caused by the employer's intentional tort. In no event shall the total amount to be received by the employee or his estate from the intentional tort award be less than fifty per cent of nor more than three times the total compensation receivable pursuant to Chapter 4123. of the Revised Code, but in no event may an award under this section exceed one million dollars. Payments of an award made pursuant to this section shall be from the intentional tort fund. All legal fees, including attorney fees as fixed by the industrial commission, incurred by an employer in defending an action brought pursuant to this section shall be paid by the intentional tort fund.

(E) There is hereby established an intentional tort fund, which shall be in the custody of the treasurer of the state. Every public and private employer, including self-insuring employers, shall pay into the fund annually an amount fixed by the industrial commission and based upon the manner of rate computation established by section 4123.29 of the Revised Code. The fund shall be under the control of the commission and the commission shall adopt by rule procedures to govern the reception of claims against the fund pursuant to this section and disbursements from the fund.

(F) The commission shall make rules concerning the payment of attorney fees by claimants and employers in actions brought pursuant to this section and shall protect parties against unfair fees. The commission shall fix the amount of fees in the event of a controversy in respect thereto. The commission and the bureau of workers' compensation shall prominently display in all areas of an office which claimants frequent a notice to the effect that the commission has statutory authority
Substitute Senate Bill 307, \(^1\) section 4121.80 was included to remedy what the Ohio business community perceived, at that time, as a workers' compensation "crisis." \(^5\) This perception was fueled by two Ohio Supreme Court decisions favoring the injured worker. \(^6\) From the beginning, the constitutionality of section 4121.80 has been questioned. \(^7\) This note will begin with a brief review of the history of workers' compensation in Ohio, including a discussion of the evolution of the exemption of intentional torts from employer immunity. A discussion of the enactment of section 4121.80 leading up to the Brady decision will be followed by an analysis to resolve fee disputes. The commission shall make rules designed to prevent the solicitation of employment in the prosecution or defense of actions brought under this section and may inquire into the amounts of fees charged employers or claimants by attorneys for services in matters relative to actions brought under this section.

(G) As used in this section:

1. "Intentional Tort" is an act committed with the intent to injure another or committed with the belief that the injury is substantially certain to occur.

   Deliberate removal by the employer of an equipment safety guard or deliberate misrepresentation of a toxic or hazardous substance is evidence, the presumption of which may be rebutted, of an act committed with the intent to injure another if injury or an occupational disease or condition occurs as a direct result.

   "Substantially certain" means that an employer acts with deliberate intent to cause an employee to suffer injury, disease, condition or death.

2. "Employer," "employee," and "injury" have the same meanings given those terms in section 4123.01 of the Revised Code.

(H) This section applies to and governs any action based upon a claim that an employer committed an intentional tort against an employee pending in any court on the effective date of this section and all claims or actions filed on or after the effective date, notwithstanding any provisions of any prior statute or rule of law of this state.


1. Brady, 576 N.E.2d at 725.


   Senator Finan, sponsor of Senate Bill 307, stated that his main goal was "the reversal of the Blankenship problem...." JERALD D. HARRIS, OHIO WORKERS' COMPENSATION ACT 31 (1986).

of the decision itself and a discussion of the impact *Brady* will have on intentional tort causes of action in workers' compensation cases in Ohio.

II. BACKGROUND

The limited common law tort liability of the master to his servant forms the basis of workers' compensation statutes. An employer's obligations were limited to specific common law duties for the protection of his servants:

1. The duty to provide a safe place to work.
2. The duty to provide safe appliances, tools, and equipment for the work.
3. The duty to give warning of dangers of which the employee might reasonably be expected to remain in ignorance.
4. The duty to provide a sufficient number of suitable fellow servants.
5. The duty to promulgate and enforce rules for the conduct of employees which would make the work safe.

However, even when an employee was able to show that the employer had violated one of these specific duties, the employer had at its disposal common law defenses which sufficiently limited or totally precluded the worker's recovery. Among these defenses were contributory negligence, the fellow servant rule, and assumption of risk.

To counteract the harshness of the common law, in 1910 Ohio enacted an employer's liability act known as the Norris Bill. This bill precluded the employer from raising the assumption of risk defense when it failed to remedy ordinary risk defects, and incorporated a comparative negligence theory so that an employee's minor negligence, although reducing recovery, would not completely foreclose it. Subsequent to the enactment of the Norris Bill, the Ohio General Assembly passed Senate Bill 250.

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* Id. at 569.
* FULTON, supra note 7, at 14.
* Id.
* Id. at 17.
* FULTON, supra note 7, at 17.
* Act of May 10, 1910, 1910 Ohio Laws 231.
Senate Bill 250 created the Employers' Liability Commission of Ohio to research the possibility of a compensation law for industrial accidents. After completion of the extensive research project, the commission's chairman concluded that the Ohio system for dealing with work-related injuries was completely ineffective.

In 1911, the Ohio General Assembly passed the state's first workers' compensation law. The first law, a voluntary plan, required employers to pay ninety percent of the premium with the employees contributing the remaining ten percent. As a result of the law, injured workers were guaranteed benefits but, in turn, had to forego their rights to bring an action at common law. The employers, on the other hand, gave up their common law defenses in exchange for limited liability.

There were two exceptions to this workers' compensation law. The first was the lawful requirement exception. The second was for injuries caused by the willful act of the employer. If a worker sustained injuries as a result of either situation, the employee could elect to recover under the workers' compensation laws or in an action brought at common law. For all other situations, the workers' compensation award was the exclusive remedy.

In 1912 the people of Ohio voted to amend the state constitution. Pursuant to this amendment, Section 35, Article II, the

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16 Fulton, supra note 7, at 19.
17 Id.
18 Act of May 31, 1911, 1911 Ohio Laws 524.
19 The Norris Bill was still in effect for those employers and employees who chose not to participate in the new plan. Fulton, supra note 7, at 20.
20 Id.
21 Washam, supra note 7, at 495.
23 Fulton, supra note 7, at 20.
24 The lawful requirement exception allowed a civil cause of action when an employee was injured as a result of the employer's failure to comply with an ordinance, lawful order, or statute for the protection of the lives or safety of the employees. Id.
25 Id.
26 Id. at 21.
28 Fulton, supra note 7, at 21. Section 35, Article II provides in pertinent part:
General Assembly enacted, on February 26, 1913, a mandatory workers' compensation system. In essence, the mandatory law was the same as the 1911 voluntary plan except that all employers with five or more persons were required to participate, and the employer was responsible for paying the entire premium. The lawful requirement exception was specifically included in this mandatory plan, and this exception was expanded in section 1465-76 of the Ohio General Code to include claims by workers injured as a result of a willful act by the employer. The statute did not include a definition for the term "willful act." In 1914, however, the General Assembly amended section 1465-76 of the General Code to include the definition of "willful act" as an act done "knowingly and purposefully with the direct object of injuring another." As in the 1911 voluntary plan, the employee could elect to recover a workers' compensation award or, in the alternative, bring an action at law.

Section 35, Article II was amended in 1923 to eliminate the election of the civil remedy and in its place provided for additional recovery if the injury was a result of the lawful requirement exception. The Ohio Supreme Court had previously noted in *Patten v. Aluminum Castings Co.* that the willful act exception had prompted case law "constitut[ing] an 'insidious attack' on the [Workers' Compensation] Act and that the expansion of this

For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom.

*Ohio Const. art. II, § 35.*

*Id. at § 14, 1913 Ohio Laws 72, 77. In 1924 § 1465-61 of the General Code was amended to mandate participation by employers of three or more persons. Act of Apr. 6, 1923, 1923 Ohio Laws 224; see also Fulton, *supra* note 7, at 22. Today, any employer who has one or more employees is required to pay into the state insurance fund unless the employer qualifies as a self-insurer. *Id.* at 104. See *Ohio Rev. Code* § 4123.01 (Baldwin 1990).*

*Act of Feb. 26, 1913, § 15, 1913 Ohio Laws 72, 77.*

*Ohio General Code* § 1465-76 (Page 1920).

*Hertlein, *supra* note 7, at 248.*

*Act of Feb. 6, 1914, § 29, 1914 Ohio Laws 193, 194; see also Fulton, *supra* note 7, at 126.*

*1914 Ohio Laws 193, 194.*

*fulton, *supra* note 7, at 126.*

*136 N.E. 426 (Ohio 1922).*
litigation had the effect of weakening the structure of the workers’ compensation law.” The willful act exception was repealed in 1931. Thus by 1931, a workers’ compensation award was the exclusive remedy for an injured worker regardless of how the injury was sustained.

The exclusive remedy provision of Article II, Section 35 was upheld by the Ohio courts until 1939 when the Ohio Supreme Court decided Triff v. National Bronze & Aluminum Foundry Co. Triff involved a claim seeking recovery for silicosis, an occupational disease that, at that time, was not one of the enumerated occupational diseases compensable under Ohio workers’ compensation law. The question raised was whether an employee could maintain an action for damages for his employer’s negligence which proximately caused the silicosis. If the court recognized the exclusivity of the workers’ compensation laws, then the plaintiff would be without a remedy. The court opined that the legislative intent behind the workers’ compensation law was to grant immunity to employers for those injuries that were compensable, but not to exempt from liability noncompensable injuries. As a result of the decision in Triff, employers and organized labor negotiated a compromise which was adopted as an amendment to the Ohio Workers’ Compensation Act. This compromise eliminated employer liability for noncompensable injuries, but granted coverage to employees for occupational diseases. A workers’ compensation award was once again the exclusive remedy for an employee who suffered a work-related

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40 See Hertlein, supra note 7, at 248-49.
41 Section 35, Article II provides in pertinent part: “Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law ... shall not be liable to respond in damages at common law ....” Ohio Const. art. II, § 35.
42 20 N.E.2d 232 (Ohio 1939).
43 Id. at 234.
44 Id.
45 Id. at 237.
46 Employers were represented by the Ohio Manufacturers’ Association and the employees were represented by the American Federation of Labor. Miller, supra note 22, at 291 nn.20-21.
47 Act of May 25, 1939, § 1, 1939 Ohio Laws 422; see also Miller, supra note 22, at 291 nn.20-21.
injury. To further clarify an employer's immunity under the workers' compensation law, the statute was again amended in 1959.\footnote{Act of Aug. 14, 1959, 1959 Ohio Laws 1334.} Section 4123.74 of the Ohio Revised Code states that employers are immune from damages at common law for all injuries "received or contracted by an employee in the course of or arising out of his employment ...."\footnote{Id. Section 4123.74 states in pertinent part: "[E]mployers who comply with section 4123.35 of the Revised Code shall not be liable to respond in damages at common law or by statute for any injury, or occupational disease, or bodily condition, received or contracted by any employee in the course of or arising out of his employment ...." OHIO REV. CODE ANN. § 4123.74 (Baldwin 1990).}

Because the only remedy for an employee injured "in the course of or arising out of his employment" was workers' compensation benefits,\footnote{Damages for pain and suffering, loss of consortium for a spouse, and punitive damages are unavailable remedies to an injured employee. Blankenship v. Cincinnati Milacron Chems., Inc., 433 N.E.2d 572, 577 (1982).} a worker was barred from seeking common law damages even when the injuries resulted from an employer's intentional act.\footnote{There are three categories of employer intentional torts: (1) a deliberate act by the employer with the knowing intent to harm the employee, i.e., assault and battery; (2) when an employer violates an affirmative duty it owes to the employee, i.e., the failure to disclose to an employee the knowledge it has of a dangerous disease or physical condition; and (3) when an employer exposes an employee to a known hazard. JEFFREY V. NACKLEY, PRIMER ON WORKERS' COMPENSATION 93 (2d. ed. 1989).} The harshness of the exclusivity of the workers' compensation law is evidenced in Bevis v. Armco Steel Corp.\footnote{93 N.E.2d 33 (Ohio Ct. App. 1949), appeal dismissed per curiam, 91 N.E.2d 479 (Ohio 1950), cert. denied, 340 U.S. 810 (1950). In 1951 the plaintiff's wife sued for loss of consortium, and the court stated that there was no greater right to a cause of action based on an employer's intentional or malicious misconduct than if the action had been based on negligence. Bevis v. Armco Steel Corp., 102 N.E.2d 444, 445-47 (Ohio 1951). See Washam, supra note 7, at 499 n.57.} and Greenwalt v. Goodyear Tire & Rubber Co.\footnote{128 N.E.2d 116 (Ohio 1955).} In Bevis, the employer failed to inform the employee that medical examinations and chest x-rays indicated the employee had contracted an occupational disease.\footnote{Bevis v. Armco Steel Corp., 93 N.E.2d 33, 34 (Ohio Ct. App. 1949).} When the employee discovered the disease he filed for workers' compensation and also filed a civil suit against the employer for aggravation of his injury.\footnote{Id. See Washam, supra note 7, at 499.} The court of appeals affirmed the dismissal of the case holding that workers' compensation was the exclusive remedy even in light of the employer's misconduct.\footnote{Bevis, 93 N.E.2d at 37.}
In *Greenwalt*, the employer told the injured employee that it would file the workers' compensation claim. The employer never filed the claim. Unbeknownst to the employee, the payments he received were from the employer. When the statute of limitations for filing a workers' compensation claim had run, the employer stopped all payments and informed the totally disabled worker that the claim had never been filed. The Ohio Supreme Court dismissed the suit on the grounds that workers' compensation was the exclusive remedy for injuries occurring during the course of or arising out of employment and that the employer had no legal duty to file the claim. It was not until twenty-seven years after *Greenwalt*, in the landmark decision of *Blankenship v. Cincinnati Milacron Chemicals, Inc.*, that the Ohio Supreme Court ruled that an employee was not precluded from enforcing common law remedies against an employer for an intentional tort.

The sole question decided in *Blankenship* was whether the trial court had properly granted the employer's motion to dismiss on the grounds that Section 35, Article II of the Ohio Constitution bars an employee from bringing a civil action against an employer for an intentional tort. The plaintiffs alleged that within the scope of their employment they had been exposed to poisonous chemicals, that their employer knew the hazardous condition of the workplace, that their employer failed to correct the condition, and that their employer failed to warn them of the danger that existed as a result of the condition. The plaintiffs claimed that such failure was "intentional, malicious and in willful and wanton disregard of their health."

The court held that where an employee asserts a claim for damages based on an intentional tort, the injury is not received "in the course of or arising out of his employment." Therefore,

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58 Id. at 118.
59 Id.
60 Id.
61 Id. at 120.
62 433 N.E.2d 572 (Ohio 1982).
63 Id.
64 Id. at 575.
65 Id. at 573-74.
66 Id. at 574.
67 Id. at 576.
since the employer's intentional conduct did not arise out of employment, the workers' compensation laws did not bestow upon employers immunity from civil liability for such intentional acts.68 The court further stated that workers' compensation laws were designed to improve the plight of the injured worker. Thus, to preclude the worker from bringing a civil action for the employer's intentional torts would be tantamount to encouraging such conduct.69 The court remanded the case to the trial court for a determination of what constituted an intentional tort.70 Because the case was ultimately settled the Blankenship court never decided the issue. The question of whether an employee had to elect between a workers' compensation award and a civil action also remained unanswered.71 Two years later, in Jones v. VIP Development Co.72 the Ohio Supreme Court addressed both issues.

In Jones, the court defined intentional tort as "an act committed with the intent to injure another, or committed with the belief that such injury is substantially certain to occur."73 Thus, the court rejected the proposition that a specific intent to injure is necessary for the finding of intentional misconduct.74 The court also stated that an employee who is receiving workers' compensation benefits can also pursue a civil action against the employer for an intentional tort.75 The court then went even further by finding that an employer who has been held liable for an intentional tort is not entitled to a setoff of the award in the amount of workers' compensation benefits received by the employee.76

Believing that the balance of the workers' compensation system had shifted considerably in favor of the injured worker as a result of the decisions in Blankenship and Jones, employers and their representative organizations used the media to create the perception that a "workers' compensation crisis" existed in the

68 Id.
69 Id. at 577.
70 Id. at 578.
71 As noted above, the early workers' compensation statutes required an employee to elect between the workers' compensation award and the civil cause of action. See supra text accompanying notes 26-36.
72 472 N.E.2d 1046 (Ohio 1984).
73 Id. at 1047.
74 Id. at 1051.
75 Id. at 1047-48.
76 Id. at 1048.
state of Ohio. Pandering to the fears of the general public, employers predicted that Ohio would not be able to attract new business nor expand or maintain those businesses already in the state. Effective August 22, 1986, the workers' compensation law of Ohio was substantially revised by Amended Substitute Senate Bill 307. Section 4121.80 was included in the bill in direct response to the Blankenship and Jones decisions.

With the enactment of section 4121.80, it could now be said that the workers' compensation system had shifted considerably in favor of the employers. All defenses were made available to employers including contributory negligence, assumption of risk, and the fellow servant rule. The employee was not entitled to trial by jury. The court was limited to determining only employer liability; the Ohio Industrial Commission determining the amount of damages to be awarded. There was a provision which limited the amount of recovery that an injured worker could receive. Although the definition of intentional tort provided in the legislation is identical to the definition set forth in Jones, a definition of "substantially certain" was added. "Substantially certain" means that an employer acts with deliberate intent to cause an employee to suffer injury, disease, condition, or death. This definition imposes a stricter standard of proof on the employee. Legal fees incurred by the employer in defending an action were to be paid out of an intentional tort fund established by section 4121.80(E). There was no legal fee provision included for the claimant.

Although section 4121.80 shifted the balance in favor of employers, its constitutionality was questionable. Five years after

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77 Harris, supra note 6, at 3.
78 Id.
81 OHIO REV. CODE ANN. § 4121.80(A) (Baldwin 1990).
82 Although the denial of a right to trial by jury is not express in § 4121.80, use of the phrase "prompt judicial resolution" indicates that the legislature intended to eliminate a jury trial on the issue of employer liability. See Nasal, supra note 5, at 497. See also Harris, supra note 6, at 38.
83 OHIO REV. CODE ANN. § 4121.80(D) (Baldwin 1990).
84 Id.
85 OHIO REV. CODE ANN. § 4121.80(G)(1) (Baldwin 1990).
86 FULTON, supra note 7, at 129.
87 OHIO REV. CODE ANN. § 4121.80(E) (Baldwin 1990).
the enactment of Amended Substitute Senate Bill 307, the constitutionality was addressed by the Ohio Supreme Court in *Brady v. Safety-Kleen Corp.*

III. **BRADY V. SAFETY-KLEEN CORP.**

A. **Facts**

Mike O. Brady was employed with Safety-Kleen Corporation as a truck driver. On July 24, 1987, Brady and some coworkers were driving two trucks containing perchloroethylene through Pennsylvania to one of Safety-Kleen's facilities when the truck traveling in front of Brady spilled some of the chemical. As a result of the spill some of the perchloroethylene splashed onto the windshield of the truck Brady was driving. Brady alleged that he was exposed to phosgene gas which was produced as a result of the perchloroethylene's contact with the exhaust manifold of his truck. Brady was subsequently diagnosed as having progressive fibrosis of the lungs and a restrictive lung disease precipitated by scarring within his lungs. Brady's condition was medically determined to be a direct result of his exposure to the phosgene gas on July 24, 1987.

On December 30, 1987, Brady filed a diversity action in federal district court alleging that the injuries he received were a direct result of Safety-Kleen's intentionally tortious conduct. After
filing its answer, Safety-Kleen filed a motion for a judgment on the pleadings claiming that Ohio workers' compensation provisions granted it immunity from liability. The trial court overruled the motion. After determining that section 4121.80 was constitutional, the trial court sua sponte ordered the parties to file briefs on the issues of whether the court had proper jurisdiction and whether the court could properly certify questions to the Ohio Supreme Court concerning the constitutionality of section 4121.80. The trial court reviewed the briefs and again determined that section 4121.80 was constitutional, but stated that the real party in interest was the State of Ohio as custodian of the intentional tort fund. Thus, diversity jurisdiction no longer existed, and the trial court certified the cause to the Ohio Supreme Court to determine whether section 4121.80 was unconstitutional in whole or in part under Ohio law.

B. Majority Opinion

The majority, while recognizing various portions of section 4121.80 as constitutionally infirm, directed its inquiry to the question of whether section 4121.80, as a whole, exceeded the limits of legislative power under the Ohio Constitution. The court determined that section 4121.80 violated two provisions of the state constitution. In agreeing with Brady's argument, the court found that the statute is totally repugnant to Section 34, Article II because the statute does not further

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96 Brady, 576 N.E.2d at 723.
97 Id.
98 Id.
99 Id.
100 Id.
101 Id. at 728 n.7, in which the court said:
   The author of this opinion finds merit in these arguments and agrees with the concurring opinion in the case sub judice that various portions of R.C. 4121.80 are unconstitutional under several provisions of the Ohio Constitution. For example, the "cap on damage" portions of 4121.80(D) clearly violates the right to equal protection found in Section 2, Article I. R.C. 4121.89(D) also violates the right to a trial by jury guaranteed in Section 5, Article I.
102 Id. at 728.
103 "Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general welfare of all employees; and no other provision of the constitution shall impair or limit this power." OHIO CONST. art. II, § 34.
the "comfort, health, safety and general welfare of all employees."\textsuperscript{104} As mentioned earlier, pursuant to \textit{Blankenship v. Cincinnati Milacron Chemicals, Inc.}, employees were not barred from bringing a civil action against their employers for an intentional tort.\textsuperscript{105} The court stated that section 4121.80 "remove[s] a right to a remedy under common law that would otherwise benefit the employee" and thus could not be recognized as a law that furthers the "comfort, health, safety and general welfare of all employees."\textsuperscript{106}

The court then turned to Section 35, Article II. Relying on Justice Douglas's dissenting opinion in \textit{Taylor v. Academy Iron & Metal Co.,}\textsuperscript{107} the court stated that injuries suffered by employees as a result of their employers' intentional acts are "totally unrelated to the fact of employment."\textsuperscript{108} The court reasoned that Section 35, Article II was designed to create a system of compensation for workers injured "in the course of employment."\textsuperscript{109} In reaffirming its decision in \textit{Blankenship}, the court recognized that the immunity from liability that an employer enjoys as a result of workers' compensation laws is not relevant to intentional torts. Thus, since an intentional tort dissolves the employer/employee relationship and the parties simply become tortfeasor and victim,\textsuperscript{110} any intentional misconduct by an employer against its employee "has no bearing upon any question relating to employment."\textsuperscript{111} Therefore, any legislation attempting to govern intentional torts committed by an employer against its employee is beyond the scope of the powers given to the General Assembly by Section 35, Article II.\textsuperscript{112}

\textbf{C. Concurring Opinions}

1. \textit{Justice Douglas}

In his concurring opinion, Justice Douglas wrote separately in order to address the unconstitutionality of individual provisions

\textsuperscript{105} See supra text accompanying notes 62-63.
\textsuperscript{106} Id.
\textsuperscript{107} 522 N.E.2d 464 (Ohio 1988).
\textsuperscript{108} Brady, 576 N.E.2d at 729 (quoting Taylor v. Academy Iron & Metal Co., 522 N.E.2d 464, 476 (Douglas, J., dissenting)).
\textsuperscript{109} Id.
\textsuperscript{110} Id. (citing Taylor, 522 N.E.2d at 476).
\textsuperscript{111} Id. (quoting Taylor, 522 N.E.2d at 476).
\textsuperscript{112} Id.
of section 4121.80. Justice Douglas stated that section 4121.80 violated the right to equal protection found in Section 2, Article I of the Ohio Constitution. Justice Douglas also found that the statute violated the right to trial by jury guaranteed by Section 5, Article I, and the open courts provision ensured by Section 16, Article I.\footnote{Id. at 730 (Douglas, J., concurring). Justice Douglas refers to Justice Sweeney's opinion, concurring in part and dissenting in part, in Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991), decided the same day as Brady. Morris was concerned with many of the same constitutional provisions as Brady.}

Justice Douglas stated that because section 4121.80(D) places a cap on damages recoverable by an injured employee from the offending employer, an employee is treated differently than other victims of intentional torts.\footnote{Id., at 730-31.} Because of this disparate treatment, Justice Douglas reasoned, a special category of intentional tort victims was created within the class of all victims of intentional torts.\footnote{Id. at 730} Therefore, unless the state had a legitimate interest in making the distinction, and Justice Douglas said that he could find none, section 4121.80(D) violated the right to equal protection and was thus unconstitutional.\footnote{Id. at 730-31.}

As for the violation of the right to a trial by jury, Justice Douglas recognized the ambiguity of the language used in section 4121.80(D).\footnote{Id.} Justice Douglas noted that it was unclear whether, in fact, a jury trial is precluded when a court of law is determining the issue of liability.\footnote{Id.} What is clear, Justice Douglas stated, is the unconstitutionality of the delegation of the determination of damages to the Ohio Industrial Commission.\footnote{Id. at 730-31.} By removing the determination of damages from the jury, Justice Douglas stated, the right to a trial by jury has been abrogated in direct violation of Section 5, Article II of the Ohio Constitution.\footnote{Id.}

Justice Douglas went on to discuss the open courts provision of Section 16, Article I of the Ohio Constitution.\footnote{Id. Section 5, Article II provides, in part, that "[t]he right of trial by jury shall be inviolate." \textsc{Ohio Const.} art II, § 5.} Justice Douglas
succinctly stated that because "pertinent parts of" section 4121.80 prohibit employees who have been injured by the intentional acts of their employers from gaining access to the courts, section 4121.80 violates Section 16, Article I and is thus unconstitutional.122

Finally, Justice Douglas addressed the dissenting opinion of Justice Holmes. In a vituperative analysis, Justice Douglas criticized Justice Holmes's failure to comprehend the Blankenship decision.123 Justice Douglas called attention to the fact that Justice Holmes, attacked the Blankenship decision in his dissent, yet cited it as authority in another opinion.124 Justice Douglas stated that under Justice Holmes's analysis, an employer would be able to deliberately attack his employee with a two-by-four, leaving the employee severely disabled, and yet that employee would be "limited to the workers' compensation system for redress of his injuries because the attack occurred while he was at work."125 In conclusion, Justice Douglas stated that Justice Holmes's "position cannot be rationally or legally supported ...."126

2. Justice Brown

In his concurrence, Justice Brown accepted the determination of the majority that the enactment of section 4121.80 was beyond the scope of the power given to the General Assembly by Sections 34 and 35, Article II of the Ohio Constitution.127 Justice Brown recognized that according to Blankenship, an employer's intentional tort against its employee does not occur within the employment relationship, and thus Section 34, Article II is inapplicable. Justice Brown further stated that an exception to the exclusivity of workers' compensation for intentional torts has been widely adopted.128 Therefore, in his view, intentional torts do not come within the scope of Section 35, Article II.

122 Brady, 576 N.E.2d at 731.
123 Id. at 732.
125 Brady, 576 N.E.2d at 732.
126 Id.
127 Id.
128 Id. at 733. Justice Brown cites a dozen cases in eleven jurisdictions in support of the exception.
Justice Brown wrote separately, however, because contrary to the view of the majority, he does not believe that the General Assembly is absolutely precluded from passing legislation which attempts to modify intentional tort law in workers' compensation situations. In his opinion, the General Assembly could legitimately enact such legislation pursuant to an exercise of its police power.

In support of his position, Justice Brown cited to an Ohio Supreme Court decision, State ex rel. Yaple v. Creamer, which held that it is the right and duty of the state, acting through the legislature, to provide for the common welfare of the governed. Thus, Justice Brown suggested that it is necessary to go beyond the majority opinion's consideration of only Sections 34 and 35 of Article II in determining whether section 4121.80 is unconstitutional.

Justice Brown acknowledged the constitutional flaws of section 4121.80. He agreed with Justice Douglas that section 4121.80 violates Section 5, Article I of the Ohio Constitution in denying the right to a trial by jury. Justice Brown also recognized that the cap on damages provision was a violation of equal protection. With regard to the cap on damages, Justice Brown referred to Morris v. Savoy, decided the same day as Brady, in which the court invalidated a cap on noneconomic damages in medical malpractice cases on the grounds that there was no rational basis for the cap. Justice Brown stated that there would have to be a legitimate state interest for setting the cap.

In a footnote, however, he went further and stated that even if the statute could survive the rational basis test, it would probably fail on equal protection grounds. Justice Brown predicated this idea on several malpractice cases decided in other jurisdictions.
which struck the cap on malpractice damages on grounds that the limitation on recovery violated equal protection.\(^{140}\)

In conclusion, Justice Brown acknowledged that section 4121.80 was enacted in response to the court’s decision in *Jones v. VIP Development Co.*\(^{141}\) Justice Brown stated, however, that the problems that arose as a result of the definition of intentional tort in *Jones* were resolved by the court in *Van Fossen v. Babcock & Wilcox Co.*\(^{142}\) and its progeny.\(^{143}\) Therefore, Justice Brown stated, since the problems have been resolved by the case law, the fears that Ohio’s employers will be subjected to “unlimited and unpredictable exposure to liability are not well founded.”\(^{144}\) Justice Brown reasoned that the exposure to frivolous lawsuits is not unique to the employment relationship.\(^{145}\) He opined that the only way to insure against having to defend a frivolous lawsuit is to do away with the Ohio civil law system *in toto.*\(^{146}\) Employers, Justice Brown stated, can seek redress through the use of court-imposed sanctions pursuant to Ohio Rule of Civil Procedure 11.\(^{147}\)

**D. Dissenting Opinions**

1. **Justice Holmes**

   In his dissent, Justice Holmes began with an overview of the history of workers’ compensation law in Ohio. He then turned to that portion of the majority opinion which held that section 4121.80 is unconstitutional because it does not further the “comfort, health, safety and general welfare of all employes.”\(^{148}\) Relying on *State ex rel. Yaple v. Creamer,*\(^{149}\) Justice Holmes stated

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\(^{140}\) Id. (citing cases from New Hampshire, North Dakota and Illinois).

\(^{141}\) 472 N.E.2d 1046 (Ohio 1984).

\(^{142}\) 522 N.E.2d 489 (Ohio 1988).

\(^{143}\) See Kunkler v. Goodyear Tire & Rubber Co., 522 N.E.2d 477 (Ohio 1988); Pariseau v. Wedge Prods., Inc., 522 N.E.2d 511 (Ohio 1988); and Fyffe v. Jeno’s Inc., 570 N.E.2d 1108 (Ohio 1991). *Van Fossen, Kunkler,* and *Pariseau* were all decided by the Ohio Supreme Court on April 13, 1988. Unhappy with the definition set forth in *Jones,* the court in those decisions attempted to define what constitutes an intentional tort. Three years later the court recognized in *Fyffe* that the trial courts and attorneys in Ohio were misinterpreting *Van Fossen.* *Fyffe,* 570 N.E.2d at 1111. Through *Fyffe* the court attempted to clarify the definition set forth in *Van Fossen.*


\(^{145}\) Id. at 734 n.10.

\(^{146}\) Id.

\(^{147}\) Id.

\(^{148}\) Id. at 739.

\(^{149}\) 97 N.E. 602 (Ohio 1912).
that while there may be a disagreement over whether section 4121.80 achieves the goal of protecting the worker, the disagreement over the wisdom of the policy is irrelevant to the statute’s constitutionality.\footnote{Brady, 576 N.E.2d at 739.} Justice Holmes reasoned that section 4121.80 must be “clearly incompatible with Section 34, Article II” before it can be declared invalid.\footnote{Id. at 739 (quoting State ex rel. Yaple v. Creamer, 97 N.E. 602, 604 (Ohio 1912)).} Since, in Justice Holmes’s opinion, Brady failed to show the incompatibility of section 4121.80 with Section 34, Article II, the argument of unconstitutionality should fail.\footnote{Id. at 740.}

Justice Holmes then addressed the majority’s holding that section 4121.80 violated Section 35, Article II of the Ohio Constitution.\footnote{Id.} Justice Holmes opined that the majority “leans upon a weak reed”\footnote{Id.} by relying on Justice Douglas’ dissenting opinion in Taylor v. Academy Iron & Metal Co.\footnote{Blankenship, 522 N.E.2d 464 (Ohio 1988).} Justice Holmes found it absurd that the majority adopted the theory set forth in Blankenship that an intentional tort “occurs outside of the employment relationship.”\footnote{Brady v. Safety-Kleen Corp., 576 N.E.2d 722, 741 (Ohio 1991).} Justice Holmes believed that Brady’s injuries are not “totally unrelated” to his employment.\footnote{Id.} By reviewing the facts of the case, Justice Holmes attempted to show why Brady’s injuries were sustained “in the course of employment.”\footnote{Id.} Justice Holmes referred to the definition of “in the course of employment” adopted by the Ohio Supreme Court in Industrial Commission v. Ahern.\footnote{Id.} Ahern states that the phrase “‘in the course of employment’ connotes an injury sustained in the performance of some required duty done directly or incidentally in the service of the employer.”\footnote{Id.} Justice Holmes stated that an employee who sustains an intentional tort injury receives that injury in the course of employment. Therefore, he reasoned, since Section 35, Article II bestows upon the General Assembly power to enact workers’ compensation laws for injuries “occasioned in the course of such workmen’s employment,” then

\begin{itemize}
  \item \footnote{Brady, 576 N.E.2d at 739.}
  \item \footnote{Id. at 739 (quoting State ex rel. Yaple v. Creamer, 97 N.E. 602, 604 (Ohio 1912)).}
  \item \footnote{Id. at 740.}
  \item \footnote{Id.}
  \item \footnote{Id.}
  \item \footnote{Blankenship, 522 N.E.2d 464 (Ohio 1988).}
  \item \footnote{Brady v. Safety-Kleen Corp., 576 N.E.2d 722, 741 (Ohio 1991).}
  \item \footnote{Id.}
  \item \footnote{Id.}
  \item \footnote{162 N.E. 272 (Ohio 1928).}
  \item \footnote{Brady, 576 N.E.2d at 741 (quoting Industrial Comm’n v. Ahern, 162 N.E. 272, 272 (Ohio 1928)).}
\end{itemize}
the passage of section 4121.80 was not beyond the scope of the legislature’s power and is thus constitutional.\textsuperscript{161}

With regard to an assault and/or battery type of intentional tort, Justice Holmes explained that if the act “arose from some personal ill will” then the injury would be considered to have arisen outside of the employment relationship.\textsuperscript{162} Thus the employer would not be protected by the exclusivity rule of the workers’ compensation law.\textsuperscript{163}

Justice Holmes then went on to address the equal protection, open courts, cap on damages, and right to jury trial issues raised by Justice Douglas’s concurring opinion. As to equal protection, Justice Holmes believed that the General Assembly has a legitimate interest in balancing the interests of employers and employees.\textsuperscript{164} Justice Holmes stated that because all workers’ compensation claimants are treated equally, section 4121.80 does not create classes of workers’ compensation claimants.\textsuperscript{165} In Justice Holmes’s view there is no constitutional requirement that intentional tort victims in general and employee intentional tort victims be treated equally.\textsuperscript{166}

According to Justice Holmes, section 4121.80 does not violate the open courts provision of Section 16, Article I of the Ohio Constitution.\textsuperscript{167} Predicating his opinion on \textit{State ex rel. Yaple v. Creamer},\textsuperscript{168} Justice Holmes reasoned that the workers’ compensation statutes provide a substitute remedy for injured workers from the state insurance fund.\textsuperscript{169} He agreed with the court’s position in \textit{Yaple} that the workers had given up their civil cause of action in exchange for the protection of the statutory provisions.\textsuperscript{170}

Justice Holmes disagreed with Justice Douglas’s determination that the delegation of the assessment of damages to the Ohio Industrial Commission abrogates the right to a trial by jury.\textsuperscript{171} First, relying on \textit{Tull v. United States},\textsuperscript{172} Justice Holmes stated

\begin{itemize}
  \item \textsuperscript{161} Id.
  \item \textsuperscript{162} Id. at 742.
  \item \textsuperscript{163} Id.
  \item \textsuperscript{164} Id. at 743.
  \item \textsuperscript{165} Id.
  \item \textsuperscript{166} Id.
  \item \textsuperscript{167} Id.
  \item \textsuperscript{168} 97 N.E. 602 (1912).
  \item \textsuperscript{170} Id.
  \item \textsuperscript{171} Id.
  \item \textsuperscript{172} 481 U.S. 412 (1987).
\end{itemize}
that there is no federal constitutional guarantee to a jury trial in the remedy stage of a civil proceeding. Second, Justice Holmes said that the right to a jury trial is not applicable in an administrative proceeding.

Finally, Justice Holmes addressed Brady's argument that the delegation of the assessment of damages to the Ohio Industrial Commission violates Section 1, Article IV of the Ohio Constitution. Brady had argued that the General Assembly had violated separation of powers because section 4121.80(D) vests judicial power with the Ohio Industrial Commission through the Commission's exclusive right to determine damages. He contended that this determination is exclusively a matter for the judiciary. Justice Holmes contended that the determination of damages in intentional tort actions by the Ohio Industrial Commission is indistinguishable from the Industrial Commission's power to determine "a variety of damages such as medical, lost wages, and other compensatory awards ...."

In his epilogue Justice Holmes questioned what will become of the intentional tort fund. Justice Holmes further questioned whether future workers' compensation awards would be set off against any amounts recovered from intentional tort actions. Finally, Justice Holmes stated that intentional tort actions in workers' compensation cases will now be limited by the definitions of intentional tort set forth in Van Fossen and its progeny.

2. Justice Wright

Justice Wright briefly concurred with Justice Holmes's dissent. Justice Wright wrote separately because, unlike Justice Holmes, he agreed with the result of the Blankenship decision.

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173 Brady, 576 N.E.2d at 744.
174 Id.
175 Section 1, Article IV of the Ohio Constitution states the following: "The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas and divisions thereof, and such other courts inferior to the supreme court as may from time to time be established by law." Ohio Const. art. IV, § 1.
176 Petitioner's Brief, supra note 91, at 38.
177 Id.
179 Id.
180 Id. at 745.
181 Id. See supra notes 142-44 and accompanying text. (This statement by Justice Holmes was an attempt to avoid a regression to the standard developed in Jones v. VIP Development Co. See supra notes 72-76 and accompanying text.).
182 Id.
IV. ANALYSIS

The Ohio General Assembly was well aware when it voted to pass section 4121.80 that the statute was fraught with constitutional infirmities. Nevertheless, the legislature passed it, apparently reacting to public pressure as a result of the media blitz orchestrated by the employers and their representatives. As a result, for the last five years workers of the state of Ohio who were injured by the intentional misconduct of their employers have been subject to the provisions of this unconstitutional legislation.

The Ohio Supreme Court's ruling in Brady attempts to restore some balance to the workers' compensation system of Ohio. That balance had been shifted in favor of the employers as a result of the passage of section 4121.80. Although section 4121.80 purported to provide a remedy for victims of intentional torts in the workplace, in fact, of the dozen or so cases in which employer liability has been determined by the courts, not one penny of the intentional tort fund has been allocated to those injured workers. This is because the Industrial Commission of Ohio has failed to implement a method by which an amount of damages could be awarded to such victims as mandated by section 4121.80(D). The legislature, by delegating the power to award damages to the Ohio Industrial Commission, in essence, left the victims of intentional torts in the workplace without a remedy.

The majority opinion in Brady made it very clear that there is no legislation with regard to intentional torts in the workplace that can withstand constitutional scrutiny. In his concurrence, Justice Brown was of the opinion that such legislation can be enacted pursuant to the legislature's police power. However, the majority opinion noted that a law which removes the right to a common law remedy, which would have benefitted the employee, does not further the "comfort, health, safety and general welfare

183 See supra notes 79-88 and accompanying text.
184 Petitioner's Brief, supra note 91, at 19.
185 "The industrial commission shall, after hearing, determine what amount of damages should be awarded." OHIO REV. CODE ANN. § 4121.80(D) (Baldwin 1990) (emphasis added).
187 Id. at 733.
of all employe[e]s" as set forth in Section 34, Article II. Laws enacted pursuant to the legislature's police power involve such laws that "secure generally the comfort, safety, morals, health, and prosperity" of the state's citizens. Therefore, even under Justice Brown's police power theory, the legislature would be precluded from enacting any law with regard to intentional torts in the workplace that would eliminate the right of the injured worker to bring a common law cause of action. Thus, the argument that the workers' compensation exclusivity rule in intentional tort situations should prevent actions at common law will never prevail.

As a result of Brady, the business community lobbied the legislature to implement a new statute with regard to employment intentional torts. Senate Bill 192 was adopted by the Ohio Senate in July of 1991. This bill initially dealt with a change in billing procedures for workers' compensation insurance. After Brady, the Bureau of Workers' Compensation requested that the bill be amended to include an authorization for disbursement of the intentional tort fund. The House passed a substitute form of the bill in January of 1992, after adding a provision to refund to employers monies in the intentional tort fund. The Senate, though, refused to accept the House changes. As a result, the bill was sent to a House-Senate conference committee.

The Ohio Chamber of Commerce and the Ohio Manufacturer's Association requested that a definition of intentional tort be added to the bill. A proposed definition contained within the conference committee report was brought before the Senate for consideration. The definition stated: "An 'employment intentional tort' means an act committed by the employer in which the employer subjectively and deliberately intends to injure the employee and ... as a direct and proximate result of the employer's intended

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190 Id. at 728.
191 BLACK'S LAW DICTIONARY 1041 (5th ed. 1979).
193 St. Clair, supra note 190.
194 Id. See also Senate Rejects House Amendments on Intentional Tort Fund Refunds, 61 Ohio Rep. (Gongwer News Serv.) No. 268, at 2 (Jan. 29, 1992).
195 St. Clair, supra note 190.
196 Id.
197 See Senate Democrats Get Republicans to Pull Back From Intentional Tort Revision, 61 Ohio Rep. (Gongwer News Serv.) No. 274, at 1 (Feb. 6, 1992).
action . . . , the employee suffers a serious physical injury, condition, or disease, or death." This attempt to limit the rights of injured workers failed, however, when the added language was discovered and the vote on the bill was postponed.

The definition's focus on the subjective state of mind of the employer would have virtually precluded a finding of intentional tort in any situation. Thus, the definition as proposed would appear violative of the open courts provision of the Ohio Constitution. "Access to the courts is granted for the purpose of redressing injuries." Victims of employment intentional torts would have been prevented from redressing their injuries had the legislature adopted this definition.

Additionally, subjecting employment intentional tort victims to a stricter definition creates a subclass of employment intentional tort victims within the general class of intentional tort victims. In order to pass constitutional muster, there must be reasonable grounds for making the class distinction. The argument that a more lenient definition would be detrimental to Ohio's economy by driving business out of the state is simply without merit.

A second attempt to define intentional tort for workers' compensation purposes was approved by the conference committee and brought before the House. This second proposal specifically stated:

Sec. 2745.01. (A) An employer is subject to liability to an employee or the dependent survivors of a deceased employee in a civil action for damages for an employment intentional tort.

(B) An employer is liable under this section only if all of the following conditions are met:

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197 St. Clair, supra note 190, at 6C. See also Senate Democrats Get Republicans to Pull Back From Intentional Tort Revision, 61 Ohio Rep. (Gongwer News Serv.) No. 274, at 1 (Feb. 6, 1992). The conference committee's report, including the same intentional tort definition, was again brought before the Senate on March 4, 1992. The report was not agreed to by the Senate, Senate J. 1597, 119th Leg., 1991-92 Reg. Sess. (Mar. 4, 1992), and the bill was returned to the joint conference committee to try to "come up with a more acceptable statutory definition of 'intentional tort' for workers' compensation purposes. See Lawmakers Will Try to Come Up with "Intentional Tort" Definition Next Week, 61 Ohio Rep. (Gongwer News Serv.) No. 292, at 2 (Mar. 4, 1992).
198 OHIO CONST. art. I, § 16.
(1) The employer deliberately ordered, had prior knowledge of, or knowingly participated in, the specific act which was intended to injure the employee;
(2) The employer had prior knowledge that, as a direct and proximate result of the act, a serious physical injury, occupational disease, or death would follow;
(3) As a direct and proximate result of the employer's act described in the definition of employment intentional tort in division (C)(1) of this section and as further described in divisions (B)(1) and (2) of this section, the employee suffers a serious physical injury, occupational disease, or death.

(C) As used in this section:
(1) "Employment intentional tort" means an act committed by an employer in which the employer deliberately and intentionally injures or causes an occupational disease or death of an employee.202

This second proposal would appear, though, to be constitutionally infirm for the same reasons previously discussed in connection with the first legislative attempt.203

The conference committee's report, including the second proposed definition, was rejected by the House.204 After the House rejected this second proposal, the Senate ultimately approved the recommendation of the second conference committee.205 This recommendation was to accept the bill in the same form as had originally been passed by the House,206 thus stripping away the controversial intentional tort definition language.207

Legislation in the area of employment intentional torts is, though, unnecessary. The definition of intentional tort as set forth by the Ohio Supreme Court in the Van Fossen v. Babcock & Wilcox Co. and Fyffe v. Jeno's Inc. decisions208 is narrow enough

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203 See supra notes 198-200 and accompanying text.
206 Id.; see also supra note 192 and accompanying text.
208 See supra note 143 and accompanying text. In Fyffe, Justice Holmes revised the syllabus in Van Fossen v. Babcock & Wilcox Co., 522 N.E.2d 489 (Ohio 1988), in this manner:
5. Within the purview of Section 8(A) of the Restatement of the Law 2d, Torts, and Section 8 of Prosser & Keeton on Torts, (5 Ed.1984), in order to establish "intent" for
to prevent Ohio businesses from having to pay damages in cases where the action of the employer may not rise to the level of an intentional tort. Van Fossen specifically addressed that problem.\textsuperscript{209} The definition, however, is not so narrow as to preclude recovery for those workers who have valid claims of injuries caused by their employers' intentional misconduct.

One remedy available to an employer in lieu of seeking a more restrictive intentional tort definition is the possibility of securing insurance for intentional torts occurring in the workplace. It is true that insurance for intentional torts has been determined to be against public policy on the assumption that allowing insurance for intentional torts would encourage employer misconduct.\textsuperscript{210} However, the Ohio Supreme Court in Harasyn \textit{v.} Normandy Metals, Inc.\textsuperscript{211} distinguished between intentional torts where deliberate actions were taken to injure the employee and intentional torts where the harm was substantially certain to occur.\textsuperscript{212} The court held that public policy does not prohibit an employer from insuring against tort claims by employees in cases where the employer did not deliberately intend to injure the employee, but

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\item\textsuperscript{6} The purpose of proving the existence of an intentional tort committed by an employer against his employee, the following must be demonstrated: (1) knowledge by the employer of the existence of a dangerous process, procedure, instrumentality or condition within its business operation; (2) knowledge by the employer that if the employee is subjected by his employment to such dangerous process, procedure, instrumentality or condition, then harm to the employee will be a substantial certainty; and (3) that the employer, under circumstances, and with such knowledge, did act to require the employee to continue to perform the dangerous task.
\item To establish an intentional tort of an employer, proof beyond that required to prove negligence and beyond that to prove recklessness must be established. Where the employer acts despite his knowledge of some risk, his conduct may be negligence. As the probability increases that particular consequences may follow, then the employer's conduct may be characterized as recklessness. As the probability that the consequences will follow further increases, and the employer knows that injuries to employees are certain or substantially certain to result from the process, procedure or condition and he still proceeds, he is treated by the law as if he had in fact desired to produce the result. However, the mere knowledge and appreciation of a risk—something short of substantial certainty—is not intent.
\end{itemize}


\textsuperscript{209} "This trend reached the limit of absurdity in \textit{Van Fossen}, where we were presented with an employer 'intentional' tort claim based on a simple slip and fall." Brady \textit{v. Safety-Kleen Corp.}, 576 N.E.2d 722, 734 (Ohio 1991) (H. Brown, J., concurring) (quoting \textit{Van Fossen}, 522 N.E.2d at 506 (H. Brown, J., concurring)).

\textsuperscript{210} W. PAGE KEETON ET AL., PROSSER AND KEETON ON \textit{THE LAW OF TORTS} § 82 (5th ed. 1984).

\textsuperscript{211} 551 N.E.2d 962 (Ohio 1990).

\textsuperscript{212} \textit{Id.} at 964.
instead knew that the injury was substantially certain to occur.\textsuperscript{213} The court based its reasoning on the fact that the presence of insurance in these types of situations would not encourage intentional misconduct.\textsuperscript{214} Insurance for “substantially certain to occur” intentional torts would assure a victim compensation, without sacrificing safety, and would also protect an employer from possible bankruptcy.

From industry’s perspective, without a more restrictive definition, there is the problem of the expense incurred in having to defend frivolous suits.\textsuperscript{215} Ohio Rule of Civil Procedure 11 is the solution to this problem. Employers will be reimbursed for costs and attorney fees pursuant to Rule 11, if the court deems that the suit is, in fact, frivolous. The absence of legislation in this area would motivate employers, who could be subject to substantial compensatory and punitive damages, to keep the workplace safe for their employees. On the other hand, attorneys who could be subject to Rule 11 sanctions will hesitate to bring an employment intentional tort action unless the case falls squarely within the \textit{Van Fossen/Fyffe} definition.

As a side note, because section 4121.80 created an intentional tort fund, the question has been raised as to what will happen to the over $40 million dollars that have since accumulated. Senate Bill 192 proposes to transfer the intentional tort fund to a Workers’ Compensation Intentional Tort Disbursement Fund.\textsuperscript{216} The Bureau of Workers’ Compensation will use the money from this disbursement fund to pay employers’ “attorneys for services provided under former section 4121.80 for attorneys’ fees filed on or before October 27, 1991,” as long as the total amount paid does not exceed $1,000,000.\textsuperscript{217} The bill also proposes to credit a prorated amount to employers who have paid into the intentional tort fund.\textsuperscript{218} The amount credited to these employers will be

\textsuperscript{213} Id. Since \textit{Harasyn v. Normandy Metals, Inc.} was decided prior to \textit{Brady v. Safety-Kleen Corp}, the \textit{Harasyn} court specifically noted that its holding should not be interpreted as expressing any comment on the validity of the intentional tort insurance fund created as part of section 4121.80 of the Ohio Revised Code. Id. at 966 n.5.

\textsuperscript{214} Id. at 964.

\textsuperscript{215} See supra note 87 (referring to section 4121.80(E), which created an intentional tort fund from which payments of awards and all legal fees incurred by employers in defending employment intentional tort suits would be made. \textit{OHIO REV. CODE ANN.} § 4121.80(E) (Baldwin 1990)).


\textsuperscript{218} Id.
reduced by any payments the Ohio Industrial Commission has made or will make to the employer's attorney or to an employee as a result of an action brought under former section 4121.80.\textsuperscript{219}

The problem raised by the disbursement fund proposal is twofold. First, as a result of the Ohio Industrial Commission's failure to implement a procedure by which damages in employment intentional tort actions could be determined, no payments have been made by the Commission to those employees whom the courts have deemed are entitled to them. Second, no payments will be made to employees entitled to damages because the court, in \textit{Brady}, decided that it is a constitutional violation to allow the Industrial Commission to determine the amount of damages that should be paid.\textsuperscript{220} Thus, while the proposal states that employees injured by their employers' intentional misconduct will be paid, in fact, no such disbursements can be made.

\section*{V. CONCLUSION}

It is imperative for the safety of Ohio's employees, that employers who engage in intentional harmful misconduct answer for their actions. This will not be achieved by passing yet another piece of legislation that is intended solely to preclude employees from seeking recourse for such acts. The threat that a mass exodus of businesses will occur if employees are allowed to recover for intentional torts outside of the workers' compensation system is a hollow one. If a few businesses do choose to relocate merely because new legislation is not enacted, it is likely that Ohio and its citizens will be safer without them.

Finally, Mike O. Brady lost his damage claim against Safety-Kleen Corporation.\textsuperscript{221} On remand, the district judge, in applying the \textit{Van Fossen/Fyffe} intentional tort definition, ruled that Brady did not show that Safety-Kleen knew of the risk that caused the injury, that it consciously exposed its employee to that risk, and that the injury was reasonably certain to result.\textsuperscript{222} Brady has appealed.\textsuperscript{223}

\begin{flushleft}
\textsuperscript{219} Id.
\textsuperscript{222} Id. at 16.
\end{flushleft}
BUSINESS GUIDES V. CHROMATIC
COMMUNICATIONS ENTERPRISES: WHERE DOES
THE CLIENT STAND UNDER FEDERAL RULE OF
CIVIL PROCEDURE 11?

J. David Brittingham

I. INTRODUCTION

Widespread concern with frivolous litigation and the abuse of the federal court system led to the amendment of Rule 11 of the Federal Rules of Civil Procedure in 1983. The rule had existed unchanged since its promulgation in 1938. In its original form,

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Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney’s individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party’s pleading, motion, or other paper and state the party’s address. Except when otherwise specifically provided by the rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion or other paper; that to the best of the signer’s knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney’s fee.

FED. R. CIV. P. 11.


Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his

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Rule 11 had not been effective at deterring litigation abuse, due primarily to the reluctance of courts to impose sanctions under the Rule's subjective certification standard of good faith. Under the original rule, a signed pleading was an attorney's certification that to the best of his knowledge, information, and belief, there was good ground to support the pleading. Confusion arose as to what triggered the Rule's use, what standard of conduct it imposed, and what sanctions were appropriate for a violation. The Rule was amended in an effort to better achieve the objective of curbing procedural abuses by promoting the imposition of sanctions.

The changes made in 1983 drastically shifted the focus of Rule 11. Most important were the amended rule's creation of an objective standard of reasonable inquiry and the mandatory imposition of sanctions for rule infractions. While Rule 11's application became much more frequent, it drew strong criticism due to the failure of the courts to apply it with uniformity and certainty. The Rule unquestionably established an objective standard for attorneys, but the judiciary was divided as to whether the same standard could be imposed upon their clients. Thus, some courts continued to use a subjective good faith standard when applying Rule 11 to violations by represented parties.

*See Fed. R. Civ. P. 11 advisory committee's notes.*

*See id.*

*See Fed. R. Civ. P. 11.*

The confusion surrounding Rule 11 received little guidance from the Supreme Court until 1989. Since 1989, the Supreme Court has interpreted Rule 11 three times, perhaps realizing the pervasive need for predictability in the Rule's application. In *Business Guides v. Chromatic Communications Enterprises,* the Supreme Court definitively established the standard of conduct Rule 11 requires of represented parties.

Justice O'Connor delivered the five-to-four majority opinion which holds represented parties to the same objective standard of reasonable inquiry that is mandated for attorneys. The majority also determined that Rule 11 is not a fee shifting statute and is therefore entirely consistent with the Rules Enabling Act.

This note will briefly track the historical development of Rule 11 principles and examine the substance and impact of the Rule in both its original and amended forms. Rule 11’s recent Supreme Court treatment will also be explored as a prelude to an examination of *Business Guides v. Chromatic Communications Enterprises* and its ramifications.

II. BACKGROUND

A. Early Development of Rule 11 Principles

Like many American legal concepts, the early principles and practices embodied by Rule 11 were of English origin. Pleadings changed from an oral form to a written form in fourteenth century England and the “onerous task of drafting these pleadings fell to the attorney ....” By the time of Sir Thomas More, the signature of counsel was required for all English bills in equity. While these early forms of pleading did require attorney certification, counsel’s signature only certified the pleading’s form, not its substance. By signing the pleading, an attorney certified that

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11 Sir Thomas More served as England’s and King Henry VIII’s Chancellor from 1529 to 1532. *Id.*
the required forms of pleading had been complied with "but did not attest the honesty or sufficiency of what was being asserted."14

Congress first addressed abuses of the judicial system by adopting legislation in 1813 which provided that "any attorney 'who multiplied the proceedings in any cause ... so as to increase costs unreasonably or vexatiously' could be held liable for 'any excess of costs so incurred.'"15 In 1838, United States Supreme Court Justice Joseph Story first interpreted a pleading's signature requirement as a certification of the document's substance.16 A treatise on equity pleading written by Story defined the signature requirement as a means of securing "'relevancy and decency in allegations'" and as "'guaranty of counsel ... [that] there is good ground for the suit in the manner, in which it is framed.'"17 Oddly enough, this position was later accepted through dictum by England's Supreme Court of Judicature in Great Australian Gold Mining Co. v. Martin.18 Thus the view was adopted that an attorney's signature on a pleading was a certification that there was good ground for the suit.19

Justice Story's interpretations of the signature requirement were incorporated as Rule 24 in the Equity Rules of 1842.20 The Rule required the signature of counsel on every bill as an affirmation of good ground.21 In 1912, Equity Rule 24 was replaced with a substantially similar rule which extended the signature

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14 Id. However, the English judicial system was somewhat concerned with the dishonesty of lawyers in suits from an early point in time. Though not vigorously enforced, the Statute of Westminster I, 3 Edw. 1 c. 29 (1275), made it a crime for officers of the court "to engage in 'any manner of deceit or Collusion in the King's Court, or to consent unto it in deceit of the Court.'" Risinger, supra note 10, at 17, n.37.

15 Schwarzer, supra note 1, at 182.

16 Woods, supra note 13, at 752.

17 Risinger, supra note 10, at 10 (quoting J. Story, Equity Pleadings, ch. 11, § 47 (1838)).

18 Woods, supra note 13, at 753. Great Australian Gold Mining Co. v. Martin, 5 Ch. D. 1 (1877), was subsequently cited by the Advisory Committee when Rule 11 was promulgated in 1938. See Fed. R. Civ. P. 11 advisory committee's notes (1982).

19 Woods, supra note 13, at 753.

20 Risinger, supra note 10, at 13.

21 Id. Equity Rule 24, 42 U.S. (1 How.) xlvii (1842) provided:

Every bill shall contain the signature of counsel annexed to it, which shall be considered as an affirmation on his part that upon the instructions given to him and the case laid before him, there is good ground for the suit, in the manner in which it is framed.

Risinger, supra note 10, at 13 n.25.
requirement to all pleadings and created an additional certification that the pleading was not interposed for delay. Despite the existence of the “good ground” standard, Equity Rule 24 played no part in any reported case or proceeding against a lawyer from 1842 to 1938, probably due to the fact that neither the 1842 nor the 1912 Equity Rules had any related enforcement provisions. Nevertheless, the substance of Equity Rule 24 was retained when the Federal Rules of Civil Procedure were created in 1938.

B. Rule 11 in 1938: The Former Rule

Rule 11 and the signature of counsel were first construed as a means to ensure “‘accountability’” in pleadings and as an “‘affidavit of merit’” for pleadings. An attorney was subject to appropriate disciplinary action for willful violations of the rule.

As published in 1938, the central elements of the Rule were the attorney’s certifying signature and a provision which called for the striking of sham and false pleadings. The concept of sham pleadings was also of English origin. Both England and America defined sham as meaning “good in form but false in fact and dishonestly pleaded for some unworthy purpose.” The 1938 Rule permitted the striking of any pleading that was not signed or that was signed with an intent to defeat the Rule’s purpose, but the Rule was rarely used to that end. Courts were reluctant to strike pleadings because it was considered a severe sanction.

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22 Id. at n.26. Equity Rule 24, 226 U.S. 655 (1912) provided:
Every bill or other pleading shall be signed individually by one or more solicitors of record, and such signatures shall be considered as a certificate by each solicitor that he has read the pleading so signed by him; that upon the instructions laid before him regarding the case there is good ground for the same; that no scandalous matter is inserted in the pleading; and that it is not interposed for delay.


23 Id. at 14.

24 FED. R. CIV. P. advisory committee’s notes (1982).

25 Woods, supra note 13, at 753.


27 Woods, supra note 13, at 753.

28 See Risinger, supra note 10, at 17.

29 Id. at 18.


that punished a client for the conduct of counsel. Likewise, the lack of a signature on a pleading was rarely the basis for striking the pleading as the courts "treated the deficiency as a technical error which they had implicit powers to correct."

An attorney's signature under the original version of Rule 11 certified that to the best of his or her knowledge, information, and belief, the pleading was supported by good grounds and was not introduced for delay. Courts interpreting the former Rule's certification requirement imposed upon signing counsel a subjective standard of good faith. Thus, the imposition of disciplinary action or sanctions first required a finding that the signing attorney acted in bad faith when the pleading was signed. Under this subjective certification standard, proof of good faith was enough to satisfy the Rule's requirements, regardless of how unreasonable an attorney's conduct actually was.

Rule 11 was rarely used to impose sanctions under the subjective standard because judges would have had to evaluate the intent of attorneys. Courts would go out of their way to find the requisite good faith needed to avoid imposing sanctions. With the subjective standard, an attorney could be convinced of the merits of even the most absurd position, if it advanced the client's position, and thus escape the reach of the Rule. Even when the factual basis of a pleading was proven to be false, Rule

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32 Id. at 292. The infrequent use of Rule 11 to strike was also due, in part, to other procedural devices that were and are still available when the sufficiency of a pleading's facts are questioned. These include a Rule 12(e) motion for a more definite statement and a Rule 56 motion for summary judgment. Woods, supra note 13, at 755.
33 Id. supra note 13, at 753.
36 Bloomenstein, supra note 31, at 293.
37 Id.
38 Between 1938 and 1976, courts imposed sanctions in only 11 reported cases. Id. at 292.
39 Id. at 293.
40 Id. at n.23.
41 See id. at 294.
11 sanctions were not imposed absent some other indication of bad faith.\textsuperscript{42}

Furthermore, a trial court's finding that an attorney acted in bad faith did not necessarily mean that sanctions would be imposed.\textsuperscript{43} Rule 11, as originally promulgated, provided only that sanctions may be imposed if an infraction occurred.\textsuperscript{44} Sanctions for a violating attorney were left to the discretion of the trial court judge.\textsuperscript{45} In effect, enforcement of the Rule was permissive.\textsuperscript{46} If disciplinary action were taken, the Rule gave little guidance to determine the nature and appropriateness of the sanctions.\textsuperscript{47} The general uncertainty of Rule 11's application gave rise to "considerable confusion as to (1) the circumstances that should trigger striking a pleading or motion or taking disciplinary action, (2) the standard of conduct expected of attorneys who sign pleadings and motions, and (3) the range of available and appropriate sanctions."\textsuperscript{48} A change in the Rule seemed inevitable.

\textbf{C. Amended Rule 11 of 1983: The Present Rule}

\textbf{1. The New Language of Rule 11}

By the early 1980s it became apparent that Rule 11 was a rarely used and ineffective means of curbing litigation abuse.\textsuperscript{49} The confusing applicability of the Rule's subjective certification standard was too vague to establish a workable formula.\textsuperscript{50} In 1983, Rule 11 was altered significantly with the intent of increasing attorney responsibility by reducing the reluctance of courts to impose sanctions for violations.\textsuperscript{51} The purpose of amending Rule 11 was to streamline the litigation process by eliminating the

\textsuperscript{43} Bloomenstein, \textit{supra} note 31, at 293.
\textsuperscript{44} \textit{FED. R. CIV. P.} 11 (1982).
\textsuperscript{45} \textit{See} Peeples, \textit{supra} note 35, at 388.
\textsuperscript{46} \textit{Id}.
\textsuperscript{47} \textit{Id}.
\textsuperscript{48} \textit{FED. R. CIV. P.} 11 advisory committee's notes.
\textsuperscript{49} Miller, \textit{supra} note 2, at 479. \textit{See also} \textit{FED. R. CIV. P.} 11 advisory committee's notes.
\textsuperscript{50} Miller, \textit{supra} note 2, at 480.
\textsuperscript{51} \textit{FED. R. CIV. P.} 11 advisory committee's notes.
abusive use of frivolous motions and pleadings.\textsuperscript{52} Attorneys were
to be deterred from abusing the legal process by the encouraged
and mandated imposition of court sanctions.\textsuperscript{53}

Rule 11 initially applied only to pleadings.\textsuperscript{54} As amended, the
Rule's signature requirement was extended to include all "plead-
ings, motions, and other papers."\textsuperscript{55} Preferably, courts are to iden-
tify specific papers that violate Rule 11, but at least one court
has affirmed the imposition of sanctions based upon the record
and the "bulk of filings."\textsuperscript{56}

Originally, Rule 11 was also applicable only to lawyers.\textsuperscript{57} The
amended Rule expanded the express duty to verify pleadings
beyond attorneys.\textsuperscript{58} All persons submitting signed papers to the
court became subject to Rule 11's requirements and could be
sanctioned, although the court could take into account the special
circumstances of pro se litigants.\textsuperscript{59}

Some aspects of the 1938 Rule were deleted. The present Rule
no longer contains the rarely-used provision for the striking of
sham and false pleadings.\textsuperscript{60} Likewise, the reference to a willful
violation that had been a prerequisite to disciplinary action has
been eliminated.\textsuperscript{61} This move away from an inquiry into the
subjective intent of the signing party draws attention to those
changes in the Rule which have been the most influential in
making it a tool of deterrence, the objective standard of reason-
able inquiry and the mandatory imposition of sanctions.

2. Rule 11's Objective Standard of Reasonableness

The standard of conduct under the 1983 version of Rule 11
differs greatly from its predecessor. The present certification
standard imposed upon signing parties is one of objective reason-

\textsuperscript{52} Id.
\textsuperscript{53} Id.
\textsuperscript{54} FED. R. CIV. P. 11 (1982).
\textsuperscript{55} Id.
\textsuperscript{56} Lupo v. Rowland & Co., 857 F.2d 482, 485-86 (8th Cir. 1988), cert. denied, 490 U.S. 1081 (1989) (upholding the imposition of sanctions by the trial court based upon the full record, rather than a specific document).
\textsuperscript{57} FED. R. CIV. P. 11 (1982).
\textsuperscript{58} Id.
\textsuperscript{59} FED. R. CIV. P. 11 advisory committee's notes.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
ableness under the circumstances. Therefore, an attorney's conduct is evaluated in terms of reasonableness, and subjective good faith will no longer provide "the safe harbor [from sanctions that] it once did." As the Advisory Committee noted, the "standard is more stringent than the original good-faith formula and ... it is expected that a greater range of circumstances will trigger its violation."

A signature upon a pleading, motion, or other paper certifies that the signer has fulfilled the affirmative duties imposed by Rule 11. Certification indicates that the signing party has made a reasonable inquiry into the matter of the paper submitted. When signed, the party attests that the paper is (1) well-grounded in fact, (2) warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law, and (3) not interposed for any improper purpose. Thus, the Rule's objective standard evolves into a three-pronged test. "Rule 11's three prongs function independently, and a person can violate Rule 11 by signing a paper in violation of any one of the prongs."

a. Reasonable Inquiry into Fact

Rule 11 affirmatively requires an investigation into both fact and law. This requirement of a reasonable inquiry prevents the possibility that an attorney may argue ignorance as a defense. A reasonable inquiry must precede the signature, and certification is tested as of the time the document is signed. "[T]he court must strive to avoid the wisdom of hindsight in determining

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42 Peeples, supra note 35, at 389. See also Fed. R. Civ. P. 11 advisory committee's notes; Eastway Constr. Corp. v. City of New York, 762 F.2d 243, 253-54 (2d Cir. 1985) (stating that amended Rule 11 replaces the prior subjective standard with one of objective reasonableness).
43 Eastway, 762 F.2d at 253.
48 Peeples, supra note 35, at 390-95.
49 Id. at 394.
50 ABA Guidelines, supra note 65, at 113.
52 ABA Guidelines, supra note 65, at 112-13.
whether the certification was valid ... and all doubts must be resolved in favor of the signer.”\(^{73}\)

Whether a factual inquiry was reasonable depends upon the circumstances.\(^{74}\) The court must weigh factors such as the amount of time the signer had to investigate the facts, the extent to which the signer had to rely upon the client for underlying facts, and the complexity of the factual and legal issues involved.\(^{75}\) The duty of inquiry may be regarded as nondelegable,\(^{76}\) but the standard is more concerned with the actual inquiry made, not the individual who made it.\(^{77}\) Thus, an attorney is not obligated to personally conduct the investigation and the standard may be satisfied if a reasonable acquisition of facts has been made by others.\(^{78}\)

Alternatively, an attorney’s obligation is not met by relying solely on the client’s assurance that facts exist.\(^{79}\) “A reasonable inquiry into fact ordinarily requires more than exclusive reliance on representations of fact made by a client.”\(^{80}\) Whether counsel may rely exclusively upon a client for facts will again depend on the relevant circumstances, such as the availability of alternate sources of information, the character of the client’s knowledge, and the history and duration of the attorney-client relationship.\(^{81}\) Likewise, counsel’s duty to conduct a reasonable inquiry into fact may require more than exclusive dependence on other counsel in evaluating the factual merit of an allegation.\(^{82}\) Nonetheless, the Rule only designates that an inquiry be reasonable, and a party cannot be held responsible for what might have been discovered after an exhaustive inquiry.\(^{83}\)

\(^{73}\) Id. at 112. See also Fed. R. Civ. P. 11 advisory committee’s notes.

\(^{74}\) ABA Guidelines, supra note 65, at 114. See also Fed. R. Civ. P. 11 advisory committee’s notes.

\(^{75}\) Id.

\(^{76}\) Schwarzer, supra note 1, at 187.

\(^{77}\) Burger-Smith, supra note 71, at 613.

\(^{78}\) Schwarzer, supra note 1, at 187. However, evidence upon which the signer relies must support a reasonable belief. An additional investigation may be necessary to verify that belief, especially if additional evidence is available. Peeples, supra note 35, at 392.

\(^{79}\) Schwarzer, supra note 1, at 187.

\(^{80}\) ABA Guidelines, supra note 65, at 115.

\(^{81}\) Id.

\(^{82}\) Id. at 116.

\(^{83}\) Miller, supra note 2, at 488.
Speculation may not be presented as fact, nor can a baseless statement or deliberate misstatement. But the Rule is not entirely unforgiving. "Isolated factual errors do not ordinarily warrant the imposition of sanctions if the pleading, motion, or other paper as a whole is well grounded in fact."85

Despite the emergence of amended Rule 11's objective standard, some subjective elements still remain. A signer certifies that "to the best of his knowledge, information, and belief," the document is well supported.86 Thus, certification would also seem to relate to the attorney's own beliefs which should be judged by a subjective standard.87 Yet, the reasonableness of that belief is determined objectively by considering whether a lawyer could have appropriately believed that the document was well-grounded in fact based upon a reasonable inquiry.88 Thus, Rule 11's remaining subjective language has been de-emphasized by the judicial underscoring and use of an objectively reasonable standard.89

b. Reasonable Inquiry into Law

A signing attorney is required to reasonably investigate the law used to support a pleading, motion, or other paper.90 An objective inquiry must reveal that the paper is warranted by existing law.91 A position is warranted by existing law if it is supported by a nonfrivolous legal argument.92 Only when an argument is obviously and wholly without merit will it be considered frivolous.93

A necessary extension of requiring that a pleading be warranted by existing law is a duty of candor towards the court. In addition to investigation, counsel is expected to fully and fairly state controlling law.94 "A lawyer must not misstate the law, fail to

84 ABA Guidelines, supra note 65, at 118. See, e.g., In re Kelly, 808 F.2d 549, 551-52 (7th Cir. 1986); Frazier v. Cast, 771 F.2d 259, 265 (7th Cir. 1985).
85 ABA Guidelines, supra note 65, at 118.
86 See Miller, supra note 2, at 485.
87 FED. R. CIV. P. 11.
88 Miller, supra note 2, at 485 n.25.
89 Id. See also ABA Guidelines, supra note 65, at 118.
90 Miller, supra note 2, at 485.
91 See ABA Guidelines, supra note 65, at 113. See also FED. R. CIV. P. 11.
92 ABA Guidelines, supra note 65, at 113.
93 ABA Guidelines, supra note 65, at 119. A nonfrivolous legal argument is one that is likely to succeed on the merits or one on which reasonable persons could differ as to whether it would succeed on the merits. Id.
94 Id.
95 Schwarzer, supra note 1, at 193.
disclose [known] adverse authority not disclosed by his opponent... or omit facts critical to the application of the rule of law relied on." Furthermore, Rule 11 is violated if a signer fails to uncover controlling law that would have been disclosed with a reasonable inquiry. The court will again consider the reasonableness of the inquiry in light of the relevant circumstances.

A paper that is not warranted by existing law can be warranted by a good-faith argument for the extension, modification, or reversal of existing law. Nonetheless, a litigant cannot advance an argument as being warranted by existing law, when in reality the argument is one that seeks a change in existing law. Courts have held that a paper should clearly state an attempt to extend, modify, or reverse existing law. Sanctions should be imposed when counsel fails to indicate that an argument is being made to change the law in order to misinform the court that the argument is supported by existing law.

The use of terms such as "good faith argument" again call attention to the Rule's retention of subjective language and elements. Such language would seemingly indicate that questions of subjective good faith may still be relevant in evaluating arguments for the extension, modification, or reversal of existing law. Despite the subjective slant of the language, however, courts have interpreted "good faith argument" objectively. In theory, the question is "whether a reasonable inquiry would reveal a good faith argument" to change the law. In practice, however, mixed issues of law and fact make it difficult to determine which standard should apply.

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96 Id. The same principles are acknowledged by the ABA's Rules of Professional Conduct. Model Rules of Professional Conduct Rule 3.3 (1990).
97 Peeples, supra note 35, at 392.
98 ABA Guidelines, supra note 65, at 116.
99 FED. R. CIV. P. 11.
100 Peeples, supra note 35, at 393.
102 Bloomenstein, supra note 31, at 317.
103 See Peeples, supra note 35, at 393.
104 See Woods, supra note 13, at 766-67.
105 Peeples, supra note 35, at 393.
106 Id.
107 Woods, supra note 13, at 767.
c. Proper Purpose

Under amended Rule 11, a signature certifies that a pleading, motion, or other paper has not been "interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."\textsuperscript{108} Unlike the reasonable factual and legal inquiries required by Rule 11, the examination of purpose focuses on the motive behind the pleading or paper submitted.\textsuperscript{109} That is not to say that the court should delve into an attorney's subjective intent.\textsuperscript{110} The trial court should be able to determine from the record and the surrounding circumstances whether a document has been submitted for an improper purpose.\textsuperscript{111}

A pleading has violated Rule 11 when it has been interposed for some purpose other than achieving success on the merits and, as a result, there has been harassment, delay, or additional litigation costs.\textsuperscript{112} For example, improper purpose may be manifested by excessive persistence of a claim after repeated adverse rulings, or the pursuit of economic, social or philosophical goals that seek to expend an opposing party's resources, rather than succeed on merit.\textsuperscript{113}

Despite the adversity visited upon an opposing party, the courts should objectively test the signer's purpose, instead of judging the consequences of the signer's act from the subjective viewpoint of the opponent.\textsuperscript{114} Furthermore, a signing party may be sanctioned for filing papers with an improper purpose even if the documents are well-grounded in fact and law.\textsuperscript{115}

Whether a signing party's Rule 11 obligations continue beyond initial filing is not clear. The reasonableness of an attorney's actions are to be tested when the questioned papers are signed.\textsuperscript{116}

\textsuperscript{108} FED. R. CIV. P. 11.
\textsuperscript{109} Bloomenstein, supra note 31, at 302.
\textsuperscript{110} Schwarzer, supra note 1, at 195.
\textsuperscript{111} Id. The court can be guided by its litigation experience, its knowledge of jurisdictional bar standards, and its familiarity with cases before it. Id.
\textsuperscript{112} Bloomenstein, supra note 31, at 302-03.
\textsuperscript{113} Id. at 304-05.
\textsuperscript{114} ABA Guidelines, supra note 65, at 121.
\textsuperscript{115} Id.
\textsuperscript{116} Id. at 112.
Conversely, a paper that was reasonable when signed may become unreasonable due to subsequent developments. ABA standards for practicing under Rule 11 expressly state that no continuing duties exist. Yet, the ABA does require that each newly-signed paper meet Rule 11 requirements and that each paper accurately reflect the results of intervening inquiries, thus implicitly imposing a continuing duty under the Rule.

The courts have not been aligned as to whether a signer's certification requirements continue beyond filing. Some courts have found an implicit obligation to update claims or defenses that have become untenable after later disclosures. Others have not imposed a continuing duty to update, correct, or withdraw papers that subsequently do not satisfy the requirements of the rule.

3. Sanctions Under Amended Rule 11

Under the prior version of Rule 11, the decision to levy sanctions was left to the discretion of the courts. When the rule was changed in 1983 the imposition of sanctions became mandatory. In the event of an infraction, the trial court must levy sanctions, but still retains discretion "to tailor sanctions to the particular facts of the case, of which it should be well acquainted." Sanctions may be imposed by motion or sua sponte "upon the person who signed [the paper], a represented party, or both." Thus, the rule no longer applies uniquely to attorneys, and under appropriate circumstances clients may be sanctioned as well.

Although Rule 11 now mandates sanctions for violations, the penalties used must be appropriate to the specific case. Among

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117 Schwarzer, supra note 1, at 189.
118 ABA Guidelines, supra note 65, at 112.
119 Id. at 113.
120 See id. See also Nemeroff v. Abelson, 620 F.2d 339, 350-51 (2d Cir. 1980).
121 See ABA Guidelines, supra note 65, at 112. See also Oliveri v. Thompson, 803 F.2d 1265, 1274 (2d Cir. 1986) cert. denied, 480 U.S. 918 (1987); Thomas v. Capital Sec. Serv., Inc., 836 F.2d 866, 874 (5th Cir. 1988).
123 The amended language states that the court "shall impose ... an appropriate sanction" on the violating party. FED R. Civ. P. 11.
124 FED. R. Civ. P. 11 advisory committee's notes.
125 FED. R. Civ. P. 11.
126 FED. R. Civ. P. 11 advisory committee's notes.
many factors that a court may consider are the good faith of the
offender, the knowledge of the offender, and the extent to which
an offender pursued a frivolous argument. Thus, the subjective
bad faith of an offender may still be evaluated in terms of
determining the nature and severity of sanctions.

The Rule expressly allows for a popular form of sanctions: an
order to pay the opposing party's reasonable expenses and attor-
ney's fees. The expenses and fees awarded must be caused by
the violation. Additionally, a guilty party under Rule 11 should
be forced to pay only reasonable, rather than actual expenses and
fees. Thus, actual fees will only be awarded if they are reason-
able as well. Injured parties may also have a duty to mitigate
costs and expenses.

The choice of sanctions should be governed by using the least
severe sanction that adequately serves the purpose. Alternative
forms of sanctions are available to the trial court. A reprimand
may suffice for a first-time violator. Flagrant and repeated
violations on the part of counsel could be punished more severely
by possible suspension or disbarment. Dismissal is also a viable
option but should only be used when the case is meritless, rather
than to punish attorney conduct. Sanctions may vary depending
on the offending party. "Sanctions should be allocated among the
persons responsible for the offending ... paper, based upon their
relative culpability.'

Regardless of who the offending party is, due process requires
that they be given fair notice and the opportunity to be heard
before sanctions are imposed. To avoid satellite litigation, the
scope of sanction proceedings should be limited to the record and

\[128\] ABA Guidelines, supra note 65, at 125-26.
\[131\] Schwarzer, supra note 1, at 202.
\[132\] Peeples, supra note 35, at 400.
\[133\] Id.
\[134\] Id.
\[135\] Schwarzer, supra note 1, at 201.
\[136\] Id.
\[137\] See id. at 204.
\[138\] Burger-Smith, supra note 71, at 632-33.
\[139\] ABA Guidelines, supra note 65, at 124.
\[140\] Schwarzer, supra note 1, at 198.
additional discovery should be conducted only in extraordinary circumstances.  

The imposition of sanctions upon a party is appealable, but circuit courts have disagreed as to the appropriate standard of appellate review for Rule 11 sanctions. Many circuit courts have treated sanctions deferentially because of the trial court's familiarity with the case, the parties, and the attorneys. The District of Columbia Circuit has used an abuse of discretion standard for evaluating the factual basis and purpose of filings, while reviewing de novo a pleading's legal sufficiency. Other courts have followed the three-tiered standard established by the Ninth Circuit in Zaldivar v. City of Los Angeles. Under Zaldivar, the trial court's findings of factual determinations are reviewed under a clearly erroneous standard, the legal conclusions that the facts violate Rule 11 are reviewed de novo, and the appropriateness of the sanctions levied are reviewed under an abuse-of-discretion standard. The dissimilar standards of review applied by the appellate courts exemplify some of the differing reactions to amended Rule 11.

4. Reaction To Amended Rule 11

Rule 11 has drawn varied reactions since its amendment in 1983. Some believe that the "new certification standard of Rule 11 has solidified into a reasonably harmonious and workable

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141 FED. R. CIV. P. 11 advisory committee's notes.
142 ABA Guidelines, supra note 65, at 130.
143 See Cooter & Gell v. Hartmax Corp., 110 S. Ct. 2447, 2457-56 (1990). The following text, accompanying notes 144-47, outlines disagreements which arose among the circuits as to the standard of review on appeal of an award of Rule 11 sanctions. The issue has now been resolved by the Supreme Court in Cooter & Gell. See discussion infra part II.D.1 and accompanying notes.
144 Burger-Smith, supra note 71, at 624. See also O'Connell v. Champion Int'l Corp., 812 F.2d 393, 395 (8th Cir. 1987).
146 780 F.2d 823, 828 (9th Cir. 1986); See Kale v. Combined Ins. Co. of America, 861 F.2d 746 (1st Cir. 1988) (explaining the standard set forth in Zaldivar and collecting various other standards applied by the circuits in reviewing the award of Rule 11 sanctions).
147 Zaldivar v. City of Los Angeles, 780 F.2d 823, 828 (9th Cir. 1986).
Supporters of the amended Rule suggest that close adherence to its requirements “will ultimately improve the quality of federal practice . . . .”\textsuperscript{149} They believe that, in its amended form, Rule 11 has effectively deterred abuses and has streamlined litigation without inhibiting creative and zealous advocacy.\textsuperscript{150}

However, Rule 11’s effect upon adversarial zeal is one area that has drawn negative criticism as well. Critics contend that attorney creativity has been impeded by the very real threat of sanctions under the Rule’s objective standard.\textsuperscript{151} The belief is that attorneys have become discouraged from taking on controversial cases and will be “unwilling to take federal cases which do not clearly promise recovery.”\textsuperscript{152} Some believe that this chilling effect will extend to a plaintiff’s willingness to bring suit.\textsuperscript{153}

Other criticisms of Rule 11 are of the Rule’s apparent creation of additional litigation,\textsuperscript{154} despite the urging against such satellite litigation by the Advisory Committee.\textsuperscript{155} Rule 11 has substantially increased the volume of motions in district courts and appeals in circuit courts.\textsuperscript{156} Requests for sanctions extend litigation because papers must be filed and a hearing on the matter must be held.\textsuperscript{157} “Even where the court is able to limit the scope of satellite proceedings, some additional cost and time are involved.”\textsuperscript{158}

Regardless of the positions taken by advocates and critics, neither can deny Rule 11’s increased presence and use. The days of leniency for Rule 11 violations are over.\textsuperscript{159} As of 1988, it was estimated that the number of reported decisions enforcing Rule

\textsuperscript{149} Miller, supra note 2, at 505. It should be noted that Mr. Miller served as the Reporter to the Advisory Committee on Civil Rules when the 1983 amendment was developed. \textit{Id.} at 479.


\textsuperscript{150} See Peeples, supra note 35, at 403.


\textsuperscript{152} \textit{Id.}

\textsuperscript{153} See Woods, supra note 13, at 773.

\textsuperscript{154} \textit{Id.} at 772.

\textsuperscript{155} \textit{Fed. R. Civ. P. 11} advisory committee’s notes.


\textsuperscript{157} See Woods, supra note 13, at 772.

\textsuperscript{158} \textit{Id.}

11 had exceeded 600 and that many more rulings were unreported. However, the Rule's frequent application has not always been uniform and has thus created another source of controversy.

Some circuits have held that when sanctions have been properly granted, reasonable expenses and attorney's fees incurred defending the grant of sanctions on appeal may be recovered under Rule 11. Others have held to the contrary. The courts of appeal have also been split on whether Rule 11 sanctions may be imposed after an action has been dismissed.

Another area of inconsistency is the allocation of monetary sanctions between attorneys and clients. Confusion has arisen as to when sanctions can be appropriately imposed upon a client, an attorney, or both, and how liability should be allocated when both are at fault for a violation. Some courts have sanctioned client and counsel without considering respective degrees of fault, or alternatively have let the parties determine degrees of fault among themselves. Others have distinguished client sanctions from attorney sanctions when the lawyer was misled by the client.

160 Schwarzer, supra note 156, at 1013.
161 Id. at 1016. Often what a judge finds to be objectively reasonable is a product of the judge's subjective determination. Id. Some courts continued to use a standard of subjective good faith after the 1983 amendment. See Nelson v. Piedmont Aviation, Inc., 750 F.2d 1234 (4th Cir. 1984), cert. denied, 471 U.S. 1116 (1985). By 1986, all circuits had adopted an objective standard for attorneys. Burger-Smith, supra note 71, at 612.
162 See Muthig v. Brant Point Nantucket, Inc., 838 F.2d 600, 607 (1st Cir. 1988).
163 See Basch v. Westinghouse Elect. Corp., 777 F.2d 165, 175 (4th Cir. 1985), cert. denied, 476 U.S. 1108 (1986) (holding fees and expenses incurred defending appeal should not be awarded when the appeal was not frivolous nor brought to harass the adversary or delay court proceedings).
164 See ABA Guidelines, supra note 65, at 129. See also McLaughlin v. Bradlee, 803 F.2d 1197, 1205 (D.C. Cir. 1986); Johnson Chemical Co. v. Home Care Prods., Inc., 823 F.2d 28, 31 (2d Cir. 1987). The issues discussed in the text accompanying notes 162-64, relating to the propriety of awarding fees and costs to a party successfully defending an award of Rule 11 sanctions on appeal and to the availability of Rule 11 sometimes after dismissal, have recently been resolved by the Supreme Court in Cooter & Gell. See discussion infra part II.D.1.
166 Id.
167 Id. at 798-99. See also Willys v. Coastal Corp., 855 F.2d 1160 (5th Cir. 1988), aff'd on other grounds, No. 90-1150, 1992 WL 36849 (U.S. 1992).
as to the accuracy of relevant facts. A necessary consequence of this dispute is the debate over what standard of conduct should apply to a client under Rule 11.

An argument has been made that the use of Rule 11 to award monetary sanctions is a form of fee shifting which violates the Rules Enabling Act. The Rules Enabling Act permits the Supreme Court to prescribe general rules of civil practice and procedure, provided that such rules do "not abridge, enlarge or modify any substantive right." In the United States, the "American Rule" ordinarily prevents a prevailing party from collecting attorney's fees from the loser. In Alyeska Pipeline Service Co. v. Wilderness Society, the Supreme Court held that only Congress has the power to create exceptions to this rule and Congress has done so specifically under certain statutory provisions. The inherent power of the Court has also been used to create exceptions for "willful disobedience of a court order" or when a losing party has "acted in bad faith, vexatiously, wantonly or for oppressive reasons." However, the Court generally cannot create a rule that allows for an award of attorney's fees, absent legislation. Certain critics believe that Rule 11 is in contrast to this rule of law.

Rule 11's frequent and inconsistent use since 1983 has obviously led to questions of predictability. Despite the lack of uniformity in Rule 11’s application by the federal trial and appellate courts,
the Supreme Court has only recently begun to address some of the rule's problems.

D. Recent Supreme Court Treatment on Rule 11

1. Cooter & Gell v. Hartmax Corp.

In 1990 the Supreme Court answered several questions concerning Rule 11 in *Cooter & Gell v. Hartmax Corp.* The Court began by stating that Rule 11 would be interpreted according to its plain meaning. The original Rule's failure to curb litigation abuses was recognized, and the Court affirmed Rule 11's central purpose of deterring baseless filings in federal court. Noting the Rule's potential to spawn satellite litigation, the Court nonetheless gave effect to Rule 11's goal of deterrence.

Speaking for the Court, Justice O'Connor further determined that the grant of a voluntary dismissal pursuant to Federal Rule of Civil Procedure 41(a)(1)(i) does not bar the imposition of Rule 11 sanctions. She stated that Rule 11 is violated at the time the paper is signed and such a violation cannot be expunged with a voluntary dismissal. If litigators could purge their violation by taking a dismissal, they would lose all incentive to adhere to Rule 11's strict requirements.

*Cooter & Gell* also established the appropriate standard of appellate review to be used in evaluating Rule 11 sanctions. Cognizant of the varying standards adopted by the circuit courts,

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178 110 S. Ct. 2447 (1990). *Cooter & Gell v. Hartmax Corp.* involved a petitioner who at the trial court level filed a notice of voluntary dismissal under Rule 41(a)(1)(i). Before the dismissal became effective, respondent moved for Rule 11 sanctions and oral argument was made on the motion. The original complaint was dismissed, but the district court found petitioner's prefiling inquiry to be grossly inadequate and granted respondent's motion for Rule 11 sanctions. *Id.* at 2452.

179 *Id.* at 2453.

180 *Id.* at 2454.

181 *Id.*

182 Rule 41(a)(1)(i) provides in pertinent part: "an action may be dismissed by the plaintiff without order of the court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs . . . ." *Fed. R. Civ. P.* 41.


184 *Id.*

185 *Id.* at 2457.
the Court held that "an appellate court should apply an abuse of discretion standard in reviewing all aspects of a district court's Rule 11 determination."\footnote{186}

Attorney's fees and expenses incurred on appeal were precluded from Rule 11 sanctions under \textit{Cooter & Gell}.\footnote{187} The Court dictated that Rule 11 does not apply to appellate proceedings and only permits an award of expenses caused by the filing at the trial level.\footnote{188} The Court held that litigant conduct on appeal is more appropriately governed by Federal Rule of Appellate Procedure 38.\footnote{189}

While not specifically addressed as an issue before the Court, it was concluded in \textit{Cooter & Gell} that Rule 11's purpose was consistent with the Rules Enabling Act's grant of authority.\footnote{190} The Court stated, in dictum, that Rule 11 was not a fee shifting statute,\footnote{191} and although the question was not answered definitively, the Justices seemed to be leaning in the direction of approval.

2. Pavelic \& LeFlore v. Marvel Entertainment Group

\textit{Pavelic \& LeFlore v. Marvel Entertainment Group}\footnote{192} was actually decided seven months prior to \textit{Cooter \& Gell} but did not address as many pressing Rule 11 issues. In fact, \textit{Pavelic \& LeFlore} was the first Supreme Court case to hold that Rule 11 should be interpreted by its plain meaning.\footnote{193}

The central concern of the Court in \textit{Pavelic \& LeFlore} was whether Rule 11 sanctions could be imposed not only on the individual signing attorney, but against the attorney's law firm as well.\footnote{194} In reviewing Rule 11's plain meaning and deterrent

\footnotesize{\textbf{Id.} at 2457-61. \footnote{186} \textbf{Id.} at 2461-62. \footnote{187} \textbf{Id.} \footnote{188} \textbf{Id.} \footnote{189} \textbf{Id.} \footnote{190} \textbf{Id.} \footnote{191} \textbf{Id.} \footnote{192} \textbf{Cooter \& Gell v. Hartmax Corp., 110 S. Ct. 2447, 2454 (1990).} \footnote{193} \textbf{Id.} at 2462. \footnote{194} 493 U.S. 120 (1989). Defendants in a copyright infringement action filed a Rule 11 motion for costs and attorney's fees after a verdict was returned in their favor. The district court awarded monetary sanctions and imposed the penalty on both the individual signing attorney and the law firm on whose behalf he signed. \textbf{Id.} at 122. \footnote{193} \textbf{See id. at 123.} \footnote{194} \textbf{See id. at 122.}
purpose, the Court concluded that a lawyer's responsibilities under the Rule are personal and nondelegable.\textsuperscript{195} Thus, sanctions imposed under Rule 11 apply only to the signing individual and are not extended to law firms on the basis of partnership and agency principles. \textsuperscript{196}

An equally pressing issue was considered by the court of appeals in \textit{Pavelic \& LeFlore}, but did not reach the Supreme Court.\textsuperscript{197} The question was whether a client should be held to the same objective standard that is required of lawyers under Rule 11.\textsuperscript{198} In \textit{Calloway v Marvel Entertainment Group},\textsuperscript{199} the Second Circuit objected to a district court ruling that a represented party should indeed be held to the same objective standard as attorneys.\textsuperscript{200} Thus, according to the Second Circuit, clients are bound by the prior subjective good faith standard and should only be sanctioned when they have knowingly and willingly violated the Rule.\textsuperscript{201} In contrast, the Fourth and Ninth Circuits have favored using an objective standard for both attorneys and represented parties.\textsuperscript{202}

Thus, although the Supreme Court has recently focused on the interpretation of amended Rule 11, many vital questions remained unanswered. What standard of conduct is required of represented parties under Rule 11? If the standard mandated is objective, is Rule 11 a judicially legislated fee shifting statute that is prohibited by the Rules Enabling Act? These are the issues which the Court resolved in \textit{Business Guides v. Chromatic Communications Enterprises}.\textsuperscript{203}

\begin{itemize}
\item \textsuperscript{195} \textit{Id.} at 125.
\item \textsuperscript{196} \textit{Id.}
\item \textsuperscript{198} \textit{Id.} at 1474.
\item \textsuperscript{199} 854 F.2d 1452 (2d Cir. 1988), \textit{rev'd sub nom on other grounds, Pavelic \& LeFlore}, 493 U.S. 120 (1989).
\item \textsuperscript{200} \textit{Id.} at 1474-75.
\item \textsuperscript{201} \textit{Id.}
\item \textsuperscript{202} See \textit{Cleveland Demolition Co., v. Azcon Scrap Corp.}, 827 F.2d 984, 987-88 (4th Cir. 1987); \textit{Business Guides v. Chromatic Communications Enters.}, 892 F.2d 802, 811 (9th Cir. 1989).
\item \textsuperscript{203} 111 S. Ct. 922 (1991).
\end{itemize}
III. BUSINESS GUIDES V. CHROMATIC COMMUNICATIONS ENTERPRISES

A. Facts and Disposition of the Case

The petitioner, Business Guides, Inc., is a subsidiary of a leading publisher of trade magazines and a producer of specialized retail trade directories.\textsuperscript{204} By deliberately planting bits of false information, known as "seeds," Business Guides attempts to prevent competitors who produce similar publications from copying its directories.\textsuperscript{205} Two types of seeds exist: those that alter accurate listings by transposing numbers in an address or zip code and those that are wholly fictitious listings describing nonexistent businesses.\textsuperscript{206} The presence of a seed in a competitor's directory is considered by Business Guides to be evidence of copyright infringement.\textsuperscript{207}

The respondent, Chromatic Communications Enterprises, is a family-run business that operated out of its president's garage.\textsuperscript{208} Chromatic published a directory of computer and software retailers that rivaled the directory of Business Guides, but sold for considerably less.\textsuperscript{209}

In October of 1986 Business Guides, through its counsel Finley, Kumble, Wagner, Heine, Unterberg, Manley, Myerson, and Casey (hereafter referred to as "Finley Kumble"), filed an action against Chromatic in the United States District Court for the Northern District of California.\textsuperscript{210} The action claimed copyright infringement and sought a temporary restraining order (TRO).\textsuperscript{211} The TRO application was signed by an attorney with Finley Kumble and by the president of Business Guides on behalf of the corporation.\textsuperscript{212} Business Guides submitted sealed affidavits that charged Chromatic with copyright infringement, as evidenced by ten seeds

\textsuperscript{204} Id. at 925.
\textsuperscript{205} Id.
\textsuperscript{206} Id.
\textsuperscript{207} Id.
\textsuperscript{209} Id.
\textsuperscript{211} Id.
\textsuperscript{212} Id.
in Chromatic’s directory. The ten listings that Chromatic had allegedly copied were identified, but the seed in each listing was not pinpointed.

Three days before the TRO hearing, Finley Kumble was asked by the court to specify what was incorrect about each listing identified. Finley Kumble contacted Business Guides's Research Director, Michael Lambe, and for the first time asked about the details of the alleged ten seeds. Lambe responded by retracting Business Guides’s copying claims as to three of the seeds.

The district court considered the retraction suspicious and conducted its own investigation into the copying allegations. The district court judge’s law clerk spent one hour telephoning the businesses named in the alleged “seeded listings” and discovered that nine of the ten listings contained no incorrect information. It was later revealed that the remaining listing in question was a fictitious business that had been submitted to Chromatic by a Business Guides employee using a fake name.

Unaware of the district court's investigation, Finley Kumble prepared a supplemental affidavit of Lambe which pinpointed the supposedly seeded information in each of the seven remaining listings. Lambe signed the affidavit before it was submitted to the court.

The district court denied the TRO application based upon its investigation and referred the matter to a magistrate to determine whether Rule 11 sanctions were appropriate. The magistrate conducted two evidentiary hearings in which Business Guides and Finley Kumble were asked to explain why their allegations were meritless. Both parties contended that the baseless claims were a coincidence. At a third evidentiary hearing, the parties

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212 Id.
213 Id.
214 Id.
215 Id.
216 Id.
217 Id.
218 Id.
219 Id.
221 Id.
222 Id. at 926.
223 Id.
224 Id.
225 Id.
explained that the mistakes occurred due to a departure from the normal methods used in compiling the "master seed list." The magistrate found this defense to be more acceptable, but nonetheless recommended that both the client and the law firm be sanctioned.

Sanctions for filing the initial TRO application were recommended for Business Guides because they "failed to conduct a proper inquiry, resulting in the presentation of unreasonable and false information to the court." Sanctions were not urged for Finley Kumble concerning the TRO application because counsel relied on information provided by its sophisticated client and had been led to believe there was a dire need to act quickly. Sanctions were suggested for both parties for failing to further inquire as to the accuracy of the seed allegations after a cursory look by Michael Lambe revealed that some of the claims were invalid. The magistrate also recommended sanctions for both parties' use of the "coincidence defense" during the evidentiary hearings.

The district court agreed with the magistrate's requirement of objective reasonableness and invited Chromatic to move for Rule 11 sanctions. Chromatic moved for sanctions against both parties, but later withdrew the motion with respect to Finley Kumble because the firm had dissolved and filed for bankruptcy. Business Guides's copyright infringement action was dismissed and monetary sanctions were imposed to cover Chromatic's legal expenses and costs.

The Ninth Circuit upheld the trial court's conclusion that Business Guides was subject to a standard of reasonable inquiry and affirmed the sanctions based upon the TRO application and Michael Lambe's supplemental affidavit. The Ninth Circuit reversed the sanctions that had been imposed based upon the oral representations made to the magistrate. The Supreme Court

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226 Id.
227 Id.
228 Id.
229 Id.
230 Id.
231 Id.
232 Id. at 927.
233 Id.
234 Id.
235 Id.
236 Id.
granted certiorari "to determine whether the Court of Appeals properly held Business Guides to an objective standard of reasonable inquiry."237

B. Opinions of the Case

1. The Majority

Business Guides v. Chromatic Communications Enterprises was decided by the Supreme Court on February 26, 1991, by a five-to-four majority.238 Justice O'Connor delivered the opinion of the Court which affirmed the judgment of the Ninth Circuit.239 The majority first echoed earlier its decisions by once again noting Rule 11's deterrent purpose and stating that the Rule would be interpreted literally.240

Contrary to the arguments made by Business Guides, the Court concluded that a natural reading of Rule 11 would subject any party who signs a motion, pleading, or other paper to the Rule's certification standard.241 Rule 11 applies to attorneys, represented parties, and pro se litigants: "all signers, not just attorneys, are on notice that their signature constitutes a certification as to the contents of the document."242 Thus, as a represented party, Business Guides was indeed subject to the certification standard of Rule 11.243

Having concluded that Rule 11 certification applies to clients, Justice O'Connor addressed the issue of whether the same objective standard adopted for lawyers should be used.244 Again, she found the answer in the plain language of the rule.245 Rule 11 states unambiguously that any signer must perform a reasonable inquiry or be subject to sanctions, making "no distinction between the state of mind of attorneys and parties."246 Thus, when a represented party signs a pleading, motion, or other

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237 Id.
238 Id. at 924.
239 Id. Justice O'Connor was joined by Chief Justice Rehnquist and Justices White, Blackmun, and Souter. Id. at 924-25.
240 Id. at 928.
241 Id. at 929-30.
242 Id. at 930.
243 Id. at 931.
244 Id.
245 Id.
246 Id. at 932 (quoting Business Guides v. Chromatic Communications Enters., 892 F.2d 802, 809 (9th Cir. 1989)).
BUSINESS GUIDES

paper, the party certifies that a reasonable factual and legal inquiry has been made into the document's merits. An objective standard of conduct is mandated for all signers, clients as well as attorneys.

After establishing the use of an objective standard for clients, the Court continued by definitively confronting the challenge of Rule 11 sanctions as a violation of the Rules Enabling Act. Recalling a unanimous 1987 decision, the majority first noted that "Rules which incidentally affect litigants' substantive rights do not violate [the Rules Enabling Act]... if reasonably necessary to maintain that system of rules." The Court reasoned that Rule 11 is necessary to maintain the integrity of federal practice and procedure and that its effect on substantive rights is indeed incidental.

Justice O'Connor further noted that Rule 11 sanctions are not related to the outcome of litigation or concerned with a claim's success. Instead, sanctions are concerned with the relevant prefiling inquiry required by the Rule. Additionally, attorneys' fees are not mandated by Rule 11, and a successful movant under the Rule is not necessarily entitled to them. The Rule simply calls for an appropriate sanction under the circumstances.

2. The Dissent

Justice Kennedy filed the dissenting opinion in Business Guides. As interpreted by Justice Kennedy, the central purpose of Rule 11 is to control the conduct and practice of attorneys and pro se litigants who engage the federal court system. He believed that the sanctioning of a represented party who errs as to the facts, but nonetheless acts in good faith, is an abuse of

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247 Id. at 933.
248 Id.
249 Id.
250 Id. at 934 (citing Burlington Northern R.R. Co. v. Woods, 480 U.S. 1, 5 (1987)).
251 Id.
252 Id.
253 Id.
254 Id.
255 Id.
256 Id. at 935 (Kennedy, J., dissenting). Justice Kennedy was joined by Justices Marshall and Stevens. Justice Scalia joined as to Parts I, III, and IV of the dissenting opinion.
257 Id.
discretion. Thus, the dissent urged for a subjective standard of good faith in applying Rule 11 to clients.

Justice Kennedy's reading of Rule 11 suggests that the certifying signature of "an attorney or party" correlates to an earlier reference in the Rule to the signatures of attorneys and "unrepresented" parties, and therefore only applies to counsel and pro se litigants. Justice Kennedy further believed that had the drafters of Rule 11 intended to subject clients to the certifying duties required of a signer, a plain statement to that effect would have been included in the Rule.

Justice Kennedy also analogized Business Guides to the recent decision of Pavelic & LeFlore. He recalled the Court's prior holding "that the duties imposed by Rule 11's certification requirements attach to an individual signer, rather than an entity the signer represents." Justice Kennedy noted that the majority contradicted itself by eliminating the responsibility of a law firm for its signing individuals, while three months later imposing liability on an entire corporation for the acts of certain individuals who signed on its behalf.

The dissent further questioned the use of Rule 11 sanctions in light of the Court's rule-making authority under the Rules Enabling Act. According to Justice Kennedy, the majority's use of Rule 11 encroached into matters that should have been left to Congress. He saw the duty created by the Court as one which subsequently "redistributes litigation costs," similar to the fee shifting theory rejected in Alyeska Pipeline.

Finally, Justice Kennedy voiced the belief that "an attorney must violate Rule 11 before a represented party can be sanctioned." He felt that it had not been shown by the record that a Finley Kumble attorney had signed a paper in violation of the

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258 Id.
259 See id.
260 Id.
261 Id. at 937-39.
262 Id. at 939.
263 Id.
264 Id. at 939-40.
265 Id. at 940.
266 Id.
267 Id. at 941.
268 Id. at 942.
Rule. In closing, Justice Kennedy reiterated his opposition to the majority on the issue which was the very crux of the case, the requirement of an objective standard of conduct for represented parties who have violated Rule 11.

IV. ANALYSIS

A. The Quest for Uniformity and Predictability: The Plain Meaning of Rule 11

The very essence of Rule 11 is to deter baseless filings and abuses of the federal court system through the imposition of sanctions on persons who engage in such activities. In its prior form, Rule 11's subjective certification standard contributed to its infrequent application and did very little, if anything, to facilitate the Rule's purpose. The rare use of Rule 11 to achieve its deterrent end was the catalyst which sparked amendments to the Rule in 1983. However, if Rule 11 is to ever achieve its objective, it is essential that it be applied with uniformity and predictability; something that the courts have failed to do.

The holding in Business Guides takes a positive step towards giving Rule 11 some aspect of uniformity. Coupled with the other recent, albeit belated rulings, the Court is finally moving in a direction which may eventually make the application of the Rule more predictable. By confirming prior mandates concerning the Federal Rules of Civil Procedure, the Court appropriately interpreted Rule 11 by its plain meaning. Naturally read, Rule 11 requires that all signers be held to an objective standard of certification.

To adopt a double standard of certification for attorneys and clients would impede the Rule's progress toward a deterrent end by mandating that one foot be left in the past. The use of both a subjective and an objective standard would only aggravate and perpetuate the Court's uneven application of Rule 11 since it was amended. Contrary to the Court's prior commitment to adhere to plain language, Justice Kennedy wants to define the term "signer" implicitly as a word which refers exclusively to attorneys. In doing so, he ultimately advocates the use of a double

Id.
standard. To read in a double standard where one does not exist, however, hinders what should be one of the primary goals of the court system, the uniform and predictable application of the law.

Despite the holding of the Court, Rule 11’s plain language still remains curiously unbalanced. A signer’s subjective good faith may still be relevant when he or she is asserting a “good faith argument for the extension, modification, or reversal of existing law ....”270 Apparently, a party could conduct a reasonable inquiry into law and fact and conclude honestly, but mistakenly, that his or her position is supported by an argument for a change in the law.271 The courts have sought to minimize the Rule’s subjective language by emphasizing the objectiveness of one’s belief in their position.272 Nevertheless, Rule 11’s retention of subjective language in itself sends mixed signals to potential litigators. These confused signals would only be heightened by implicitly finding additional elements of subjectivity that do not exist in the language of the Rule. The effort of the Court in Business Guides to stress the uniform use of one objective standard is a move in the right direction.

As helpful as the basic holding of Business Guides may have been, the Court disappointingly opened a new avenue of potential inconsistency and uncertainty. Justice Kennedy aptly noted the contradictions in the majority’s application of Rule 11 under agency and partnership principles.273 Business Guides seems to be in contrast with Pavelic & LeFlore, which held that a law firm may not be sanctioned under Rule 11 for violations of an individual attorney who signs on the firm’s behalf. The signature of a corporate employee on the corporation’s behalf would seem to be an analogous situation. Nonetheless, the Court sanctioned the business entity of Business Guides, Inc., despite the fact that the Rule 11 violations were due to the signatures of certain individual employees. Such a stance would almost seem to indicate a bias on the part of the Court in favor of the legal profession, even though lawyers should know Rule 11’s potential effects better.

270 FED. R. CIV. P. 11.
271 See Miller, supra note 2, at 485.
272 Id.
than anyone else. In any event, the differing opinions of the two cases create a hint of unclarity as to the rule's application to the corporate setting.

B. The Attorney-Client Relationship After Business Guides

*Business Guides* makes perfectly clear that all parties, including those represented by counsel, will be expected to meet Rule 11's objective requirements of reasonable inquiry. Therefore, a client's notice of those requirements could become essential. Imposing an objective standard on clients may subsequently increase the duties of counsel under Rule 11.

Some commentators have noted that a pro se litigant should not be sanctioned for unreasonable conduct unless the party was aware that his or her conduct did not conform to Rule 11 and that, if continued, the conduct would lead to sanctions. Should not the same reasoning apply to represented parties? If so, the duty of providing such notice to the client will undoubtedly fall upon attorneys. Ordinary clients cannot be expected to otherwise be familiar with what is required of them by the Federal Rules of Civil Procedure. Thus, in addition to the affirmative duties placed upon counsel by Rule 11, an attorney may also be obligated to inform clients of their equal duties under the Rule and the potential ramifications if these duties are not met.

One must wonder what will happen to the lawyer who fails to provide a client with adequate notice of his or her Rule 11 duties, and the rule is then subsequently violated. Will the attorney be subject to disciplinary action? Will the attorney be liable for malpractice if client sanctions are imposed? What will be considered adequate notice? *Business Guides* does little to resolve these issues.

On the other hand, query whether an awareness or understanding of legal rules and concepts is really necessary for clients to meet their Rule 11 obligation of performing a reasonable inquiry into the facts. Logic would seem to dictate that a party should at least fully and objectively investigate the relevant facts before engaging in litigation and a costly court proceeding.

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274 Bloomenstein, *supra* note 31, at 323.
The equal standard imposed by *Business Guides* upon both clients and attorneys may also raise potential concerns regarding attorney-client privilege. Both parties must be prepared to prove that they have conducted a reasonable prefiling investigation. Such proof may require a revealing of confidences or trial strategy. A further conflict may arise when both client and attorney are to be sanctioned and an allocation of fault must be made. A lawyer is permitted to disclose confidential information as a defense to a client-attorney controversy or an accusation of wrongful conduct. This type of situation may chill a client's willingness to completely divulge all pertinent information.

Parties who proceed without counsel are held, pursuant to Rule 11, to an objective standard of reasonableness. A court may show some leniency, however, when considering the status of the pro se litigant under the circumstances. The applicable standard is that of a reasonable person in the pro se litigant's position. It would thus seem fair to ask what a reasonable person in the client's position would have done. Despite the sense of this reasoning, Justice Kennedy would impose a more difficult standard on those acting pro se than he would on the client who acts with the benefit of counsel. Such a double standard would permit a represented party to file a frivolous suit without conducting a reasonable inquiry into the facts. The party could then seek shelter from Rule 11 sanctions behind an assertion of good faith. Conversely, those acting without an attorney could not use the defense of good faith. As the Court in *Business Guides* properly recognized, the logic of a double standard again fails.

C. Shifting the Costs of Litigation

The *Business Guides* majority appropriately noted Rule 11's central goal of deterring court abuse and de-emphasized the use of the rule as a means of shifting litigation costs. The argument

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275 See generally, Schwarzer, *supra* note 1, at 199.
276 See *id.* (general discussion of the problems which arise when courts attempt to allocate sanctions between counsel and client).
278 See *Woods*, *supra* note 13, at 769.
279 See *ABA Guidelines*, *supra* note 65, at 114.
280 *Id.* at 114-15.
281 *Id.* at 115.
that Rule 11 is a fee shifting statute in violation of the Rules Enabling Act is not supportable. The intent of Rule 11 is not to reward parties who prevail in their suits upon the merits. Instead, the Rule's aim is to ensure that a reasonable prefilig investigation of the merits has indeed been made. The inquiry is focused on the pretrial stages of the suit, rather than the suit's outcome.

While Rule 11 does expressly permit the imposition of monetary sanctions, such sanctions are not mandatory, nor are they exclusive. The district court has the power to fashion an appropriate sanction and may alternatively use other penalties such as a reprimand, injunctive relief, or dismissal.²⁸²

Monetary sanctions may often have the most deterrent effect, particularly when a client rather than an attorney is to be sanctioned. A public reprimand would likely go far in deterring lawyers from violating Rule 11, but represented parties may be less concerned with such a penalty. In most cases, a healthy financial slap is probably more effective in making clients aware of the seriousness of their misconduct. In any event, if reprimands and dismissals were the primary forms of sanctions used, little argument could be made that Rule 11 is a fee shifting statute. Those optional sanctions are readily available to trial court judges.

One must also wonder where the dissenters of *Business Guides* were during the decision of *Cooter & Gell*. In *Cooter & Gell*, they seemed to have no difficulty in finding Rule 11 to be consistent with the Rules Enabling Act as it applied to attorneys. Only when a signing client became the certifying party did the Justices become concerned that Rule 11 may in some way ericoach upon individual substantive rights. Again, the dissenters were futilely trying to establish a double standard for lawyers and clients that cannot be found in the plain meaning or language of the rule.

Rule 11 cannot effectively curb abuses of the court system unless it is applied with uniformity and predictability. The use of a double standard of certification not only fuels already existing confusion, but also represents a return to the past in which the safe harbor of good faith perpetuated the Rule's rare use. Read plainly, Rule 11 tells attorneys, represented parties, and pro se litigants alike that they must conform to the Rule's requirements or face its sanctions. The logic of Rule 11 is sound; act reasonably

²⁸² See ABA Guidelines, *supra* note 65, at 124.
and objectively so that the court systems do not become needlessly tied up at everyone's expense.

V. CONCLUSION

Rule 11 in its original form proved to be an ineffective means of deterring litigation abuse. Too many courts were reluctant to impose sanctions under the Rule's unworkable standard of subjective good faith.

When Rule 11 was amended in 1983, the drafters hoped to discourage court reluctance by drastically changing the Rule's focus. The imposition of sanctions is no longer left to the discretion of the trial court. If a Rule 11 infraction occurs, sanctions are mandatory.

Equally important, if not more so, was the move away from Rule 11's former subjective standard. Under amended Rule 11, parties signing pleadings, motions or other papers to be submitted to a court are required to conduct a reasonable inquiry into the merits of their claim before filing. Thus, Rule 11 has shifted to the use of an objective standard of conduct.

The amended Rule brought with it an increase in its use and the imposition of sanctions. However, Rule 11's frequent application since 1983 has been plagued by a lack of uniformity and predictability. The courts at the trial and appellate levels often differed on the Rule's interpretation, and many confusing questions were raised. Only recently has the Supreme Court attempted to answer at least some of these questions.

Whether the objective standard that is required of attorneys by Rule 11 should also be imposed upon clients has been a divided issue. Some courts have seen fit to apply a double standard, holding represented parties to the old standard of subjective good faith. Other courts have adopted the objective standard for all signers. This division of the courts has only added to the Rule's controversy and uncertainty.

In 1991, the Supreme Court took a positive step toward eliminating some of the confusion that has surrounded Rule 11's application. The double standard adopted for attorneys and clients was eliminated in Business Guides v. Chromatic Communications Enterprises. The Business Guides majority held that all signers of pleadings, motions, or other papers under Rule 11, attorneys and clients alike, are subject to the Rule's objective standard of reasonable inquiry. The Court further determined
that to impose such a blanket standard did not make Rule 11 a fee shifting statute and that the Rule was therefore consistent with the Rules Enabling Act.

If Rule 11 is to achieve its objective of ridding the court system of frivolous and abusive claims, there must be some sense of uniformity and predictability in the way the Rule is applied. The lower courts have clearly lacked certainty in applying the Rule. The recent trend of the Supreme Court to review Rule 11 issues is perhaps an indication that the High Court has finally recognized a need to lend its guidance. The decision in *Business Guides v. Chromatic Communications Enterprises* was a needed move towards giving Rule 11 more certainty. But more questions will undoubtedly arise. We should hope that the Supreme Court will continue to answer them evenhandedly for the sake of the legal community as a whole.
INTRODUCTION

The irony of Justice Ranney’s statement of the intended policy of the Ohio Supreme Court concerning the rehearing of its decisions is that the situation may arise where the court must choose between the two goals he espouses. Sometimes the benefit to the parties of an end to litigation may be at odds with the determination of the rights of the others “standing behind them.” Nowhere is that irony more evident than in the court’s recent roller coaster ride over Episcopal Retirement Homes, Inc. v. Ohio Department of Industrial Relations.² The court was striving to establish a clear and reliable procedure for rehearing. The result, unfortunately, was a holding which failed to reflect the opinion of the majority of the justices.³

Episcopal Retirement Homes is important both for its contribution to substantive law and as it reflects the court’s struggle with the procedural question of rehearing. The substantive issues are important because of the significant financial interests in-

1 Longworth v. Sturges, 2 Ohio St. 105, 107 (1853). This decision includes one of the first judicial mentions of the question of rehearing in the Supreme Court of Ohio. The case establishes that there is no automatic right to a rehearing after the court has announced its holding, but that rehearing will be entirely at the discretion of the court, and “only upon good cause shown to the satisfaction of the court.” Id. at 106.

² 575 N.E.2d 134 (Ohio 1991), reh’g granted sua sponte, 578 N.E.2d 819 (Ohio 1991), motion to vacate sua sponte reh’g granted, 582 N.E.2d 606 (Ohio 1991).

involved. The dispute concerned the applicability of Ohio's prevailing wage law to the construction of health care facilities financed by tax-exempt bonds. The Episcopal Retirement Homes, Inc. (ERH), a nonprofit corporation, operates nursing homes. ERH wished to use tax-exempt hospital revenue bonds to renovate two facilities. The appellant, the Ohio Department of Industrial Relations, contended that the use of these bonds, which were issued in conjunction with the Hamilton County Hospital Commission, subjected the construction project to the Ohio prevailing wage law. The Ohio Supreme Court examined the statutes and held that Ohio's prevailing wage law did not apply to private health care providers using tax-exempt hospital bonds.

Episcopal Retirement Homes has made an important contribution to substantive labor and health care law. Even more compelling are the procedural issues the court encountered. In reaching its holding, the court took a long look at its power to reconsider decisions once they have been issued. With the exception of infrequent appeals to the United States Supreme Court, the Supreme Court of Ohio is the final judicial arbiter in the state. Its decisions are binding precedent for all of the state's lower courts. It is obvious that the decisions of the court must be final and decisive. The court, therefore, has been reluctant to grant rehearing of its decisions once rendered.

Exceptional situations do occasionally arise in which the court, in the interest of justice, will reconsider its holding. The usual case is one in which the court has obviously erred and seeks to correct itself. Another situation for reconsideration arises when the composition of the court has changed. Since the justices of

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5 Id.
6 Id. at 136.
7 Id. at 139.
8 Tishler v. Taxicabs of Cincinnati, Inc., 11 Ohio Op. 17, 18 (C.P. Hamilton County 1938) ("This court ... is bound by the decisions of our Court of Appeals, unless said decision is contrary to that of the Supreme Court of Ohio ... ".
9 Carey v. Kemper, 11 N.E. 130, 131 (Ohio 1887).
11 Id.
12 "Examination of the rehearing docket for early 1987 reveals that on fifteen occasions members of the new court voted to rehear determinations 'lawfully' made by the previous court in 1986." City of Rocky River v. State Employment Relations Bd., 535 N.E.2d 657, 659 (Ohio 1989) (Brown, J., concurring and citing each case in footnote three).
the Ohio Supreme Court are chosen in open political elections, swings in the court's viewpoint are to be expected. The impetus for rehearing may also arise, however, when a justice changes his mind, which occurred in Episcopal Retirement Homes. 13

This case raises questions central to the American system of justice. There is a perpetual tension between the court's desires to follow the established precedents (stare decisis) and its role in shaping and interpreting the law to reflect the needs of the current day. The tension between the desire to create stable and enduring legal rules to guide and direct behavior, and the need to let the law grow to cope with an evolving society, is often played out, as in this case, in the procedural rules of the court.

The issues of substantive law raised in this case are basically issues of statutory interpretation argued against a background of public policy. These substantive issues will be considered in Part One. Part Two will discuss the issue of rehearing and the crisis in court procedure which this issue generated.

PART ONE - SUBSTANTIVE LAW

I. FACTUAL BACKGROUND

Episcopal Retirement Homes, Inc. is a private, not-for-profit corporation that operates several nursing facilities for the elderly. 14 ERH wanted to renovate two of its facilities and decided

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13 "'This was a troublesome case for me right from the beginning.' [Justice] Resnick said, '.... It really wasn't a black-and-white issue, but I voted to get the case out. I researched the case after the opinion was already out. I felt I really was wrong.'...." Roger Snell, AFL-CIO's Role in High Court Action Questioned, AKRON BEACON JOURNAL, Oct. 13, 1991, at Al.

The sitting judges on a court deciding to sua sponte grant a rehearing in a case because of a realignment by one of the judges is not a common occurrence. In Gajkowski v. International Bhd. of Teamsters, 548 A.2d 533 (Pa. 1988), cert. denied, 490 U.S. 1022 (1989), the majority of justices had originally held that a local union was accountable for injuries inflicted to plaintiff during a strike. Justice Papadakos, who had aligned with the majority in the original decision, later joined the initial dissenting justices in granting a petition for reargument nunc pro tunc, although a previous petition had been denied and this subsequent petition was filed late. Id. at 534. Justice Papadakos noted that, despite the lateness of the petition, the Pennsylvania Supreme Court had, on prior occasions, acted even sua sponte to correct grievous errors. Id. His realignment with the initial dissenting justices resulted in a withdrawal of the Pennsylvania Supreme Court's original opinion and order, and a reinstatement of the superior court's holding in the local union's favor. Id. at 544.

to finance the project with hospital revenue bonds, issued pursuant to Chapter 140 of the Ohio Revised Code.\textsuperscript{15}

Chapter 140 of the Ohio Revised Code provides that a public hospital agency may issue revenue bonds.\textsuperscript{16} The advantage of these bonds is that they are tax-exempt.\textsuperscript{17} In order to assure tax-exempt status of the bonds, the nonprofit hospital agency must enter into a complicated agreement whereby the facility is leased to the governmental agency, then leased back to the nonprofit facility.\textsuperscript{18} The legislature authorized the use of these tax-free bonds “for the public purpose of better providing for the health and welfare of the people of the state by enhancing the availability, efficiency, and economy of hospital facilities and the services rendered thereby . . . .”\textsuperscript{19} In accordance with Chapter 140, ERH entered into a lease agreement, leasing its facilities to the Hamilton County Hospital Commission (hereinafter also referred to as the “County” or the “Commission”) for twenty years.\textsuperscript{20} The Commission then subleased the facilities back to ERH for the same time period.\textsuperscript{21}

The County issued $21 million of hospital facilities revenue refunding and improvement bonds.\textsuperscript{22} The repayment was to be made in the form of rent on the facilities under the sublease.\textsuperscript{23} In fact, the bond underwriter paid the money directly to a trustee for the bondholders and the County assigned its right to collect rental payments under the sublease to the trustee.\textsuperscript{24} Finally, ERH obtained an irrevocable letter of credit in favor of the trustee

\begin{itemize}
  \item \textsuperscript{15} \textit{Id.}
  \item \textsuperscript{16} \textit{Ohio Rev. Code Ann.} § 140.06 (Anderson 1990).
  \item \textsuperscript{17} Ohio law provides:
    \begin{quote}
      The obligations issued hereafter under section 133.08, 140.06, or 339.15 of the Revised Code or Section 3 of Article XVIII, Ohio Constitution, to pay costs of hospital facilities or to refund such obligations, and the transfer thereof, and the interest and other income from such obligations, including any profit made on the sale thereof, is free from taxation within the state.
    \end{quote}
  \item \textsuperscript{18} \textit{Id.} § 140.08 (Anderson 1990).
  \item \textsuperscript{19} \textit{Id.} §§ 140.03, 140.05 (Anderson 1990).
  \item \textsuperscript{20} \textit{Id.} § 140.02 (Anderson 1990).
  \item \textsuperscript{21} \textit{Id.}
  \item \textsuperscript{22} \textit{Id.}
  \item \textsuperscript{23} \textit{Id.}
  \item \textsuperscript{24} \textit{Id.}
\end{itemize}
and granted a security interest in the facility to the trustee as further security for the payment of the debt. The County’s participation was largely formal, with no financial risk and no use of public money.

The Ohio Department of Industrial Relations (ODIR), through its director, notified ERH that, in ODIR’s opinion, projects financed by Chapter 140 bonds were subject to Ohio’s prevailing wage law. ERH sought a declaratory judgment, arguing that the Ohio prevailing wage law did not apply. ERH asked the court for a temporary restraining order and preliminary injunction against ODIR.

The Hamilton County Common Pleas Court agreed with ERH, holding that renovation and construction projects financed by Chapter 140 bonds were not subject to Ohio’s prevailing wage law. The Hamilton County Court of Appeals affirmed the decision. The Supreme Court of Ohio granted a motion to certify the record.

II. THE OPINION

A. The Majority View

The majority opinion, written by Chief Justice Moyer with Justices Holmes, Wright and Resnick concurring, affirmed the decisions of the two lower courts, stating in the syllabus:

25 Id.
26 Id. Ohio prevailing wage law provides that a minimum hourly rate must be paid on all projects that are public improvements. OHIO REV. CODE ANN. § 4115 (Anderson 1991). The Code defines “public improvements” as “all buildings, roads, streets, alleys, sewers, ditches, sewage disposal plants, water works, and all other structures or works constructed by a public authority of the state or any political subdivision thereof or by any person who, pursuant to a contract with a public authority, constructs any structure for a public authority of the state or a political subdivision thereof.” Id. § 4115.03(C) (emphasis added).

The opinion of the Ohio Attorney General had for some time been that projects funded in whole or in part through Chapter 140 bonds were subject to Ohio’s prevailing wage law. Op. Att’y Gen. No. 84-010 (1984).
28 Episcopal Retirement Homes, Inc. v. Ohio Dep’t of Indus. Relations, No. A-8803264 (C.P. Hamilton County Nov. 9, 1988).
Construction projects financed with R.C. Chapter 140 bonds are not "public improvements" as defined in R.C. 4115.03(C), and are therefore not subject to the prevailing wage law.\(^{30}\)

The chief justice based the opinion on the five arguments set forth below.

1. **ERH's renovation projects were not carried out "pursuant to a contract with a public authority."**\(^{31}\)

   The majority noted that the Ohio prevailing wage law applies to all projects constructed as "public improvements."\(^{32}\) Thus, in order to fall under Chapter 140, ERH's renovation must be constructed "pursuant to a contract with a public authority."\(^{33}\) The court then examined the lease and sublease between ERH and the Hamilton County Hospital Commission to determine whether it constituted a contract with a public authority.

   A distinction was drawn between the general description of the duties of the parties as enumerated in the lease and sublease and the details of "plans and specifications necessary for construction."\(^{34}\) Specifics of work timetable, monetary remuneration, and other contractual elements critical to a construction project were absent from the lease and sublease.\(^{35}\) The sublease specifically authorized ERH to enter into construction contracts as it deemed necessary or advisable "for any acquisition, installation, equipping, constructing, renovations and conversions...[.]"\(^{36}\) The majority concluded that the lease and sublease between ERH and the Hamilton County Hospital Commission did not constitute a construction contract and, therefore, would not bring the project under the Ohio prevailing wage law. The court stated,

   ERH's projects are not being constructed pursuant to the lease or the sublease. These documents are not the animating force for the construction and renovation. They are no more than a mechanism for securing repayment of the bond proceeds. The county

\(^{30}\) *Episcopal Retirement Homes*, 575 N.E.2d at 135.

\(^{31}\) *Ohio Rev. Code Ann.* § 4115.03(C) (Anderson 1991). *See supra* note 26 and accompanying text.

\(^{32}\) *Episcopal Retirement Homes*, 575 N.E.2d at 137.

\(^{33}\) *Id.* *See supra* note 26 and accompanying text.

\(^{34}\) *Episcopal Retirement Homes*, 575 N.E.2d at 137.

\(^{35}\) *Id.*

\(^{36}\) *Id.* (quoting section 3.02 of the sublease).
had no involvement in the planning or approval of the construction and renovation. ERH negotiated the work details with the contractors, and was solely responsible for overseeing the construction of the contracts it negotiated. Thus, ERH did not agree to construct its projects “pursuant to a contract with a public authority.”

2. **ERH's renovation projects were not public improvements constructed "for a public authority."

The majority's second point is also based on the language of the Ohio prevailing wage law. Section 4115.03(C) of the Ohio Revised Code applies to construction projects which are constructed "for a public authority." The meaning of this phrase is crucial to the majority decision. The justices held that, “[c]onstruction of a project 'for a public authority' necessitates that the public authority receive the benefit of the construction, either through maintaining a possessory or property interest in the completed project or through the use of public funds in the construction of the project."

Having defined "for a public authority," the court then examined the lease and sublease to see if they created the required proprietary benefits or monetary liabilities to the County. It was conceded that the ERH project benefited the public in a general way, that is, by providing jobs in the county and improving health care for the county's aged. However, the majority asserted, “benefiting the public and benefiting a public authority are separate and distinct functions.” It was ERH who would receive the benefit of the improved facilities and the benefit of the increased property values.

In property terms, the court viewed ERH's lease to the County and the County's simultaneous sublease back to ERH as primarily formal. They placed particular emphasis on the County's assign-
ment, at closing, of all its rights and interests in the sublease to the trustee.\textsuperscript{46} What little "possessory interest the County may have had for the fleeting moment between the execution of the lease and the sublease,"\textsuperscript{47} the majority stated, "was completely extinguished when the County signed the sublease."\textsuperscript{48} The County's one remaining possessory interest, the right to obtain possession should ERH default on the sublease, along with all other rights under the sublease, was assigned to the trustee by the assignment agreement.\textsuperscript{49}

Turning to the monetary prong of its "for a public authority" test, the majority noted that no public funds were used in the renovation project. The funds originated with the underwriter and were paid directly to the trustee.\textsuperscript{50} The County never held or controlled the bond money, nor did the County undertake any financial liability for repayment.\textsuperscript{51} Since no public money was used, and since the County incurred no financial risk, the court concluded that the issuance of Chapter 140 bonds by the Hamilton County Hospital Commission did not make the ERH renovation a project "for a public authority," so as to require adherence to the Ohio prevailing wage law.\textsuperscript{52}

3. The enforcement of Ohio's prevailing wage law in the construction of hospital and nursing home facilities would be at cross purposes with the thrust of Chapter 140 to lower construction costs for those facilities.\textsuperscript{53}

Next the court examined the appropriateness of applying the Ohio prevailing wage law to ERH's renovation project in light

\textsuperscript{46} Id.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Id.
\textsuperscript{53} Id. The majority states that, [t]he bonds are not backed by the full faith and credit of the county because R.C. Chapter 140 bonds are not general obligations, debt, or bonded indebtedness of the county. (See R.C. 140.06[C].) The county has no right to levy taxes to pay debt service on the bonds, has assumed no risk, and would suffer no loss upon default. (See R.C. 140.06[C].) The debt service on the bonds is payable solely from the rental payments owed by ERH. In the guaranty agreement, ERH unconditionally guarantees to the trustee that it will make full and prompt payment of debt service on the bonds.

Id.
of the stated purpose of Chapter 140 of the Ohio Revised Code
to better provide "for the health and welfare of the people of
the state by enhancing the availability, efficiency, and economy
of hospital facilities and ... services ..."4 The majority reasoned
that to allow nonprofit hospital agencies to lower their construc-
tion costs through the use of tax-exempt bonds and then to
increase their costs by insisting that they pay prevailing wages
"works at cross purposes."5

4 The doctrine of expressio unius est exclusio alterius
militates against the application of Ohio's prevailing wage law.

According to the legal doctrine of expressio unius est exclusio
alterius, when interpreting a statute, if the legislature has in
some instances specifically mandated compliance, its failure to
act in other similar cases may be interpreted as intentional.56
The majority cited two specific instances since the enactment of
Chapter 140 in which the General Assembly has expanded the
circumstances under which the Ohio prevailing wage law would apply to construction projects financed by bond issues.\textsuperscript{57}

First, in 1975 the General Assembly specifically added provisions to various bond financing statutes to require that prevailing wages be paid.\textsuperscript{58} Amended Substitute Senate Bill No. 104 amended several sections of the Ohio Revised Code that have financing mechanisms similar to those in Chapter 140.\textsuperscript{59} In each case the beneficiaries of the bond issues were private entities and the issuers were public authorities. The court emphasized, though, that Ohio Revised Code Chapter 140, enacted in 1971, "has never been amended to require that prevailing wages be paid on projects financed with hospital revenue bonds."\textsuperscript{60}

An even stronger \textit{expressio unius est exclusio alterius} argument is made regarding the 1980 expansion of the definition of public

\textsuperscript{57} \textit{Episcopal Retirement Homes}, 575 N.E.2d at 138.

\textsuperscript{58} \textit{Id.}

\textsuperscript{59} Am. Sub. S.B. No. 104, 1975 Ohio Laws, 249, 251 (1975) provides in pertinent part, Sec. 122.452. The Ohio Development Financing Commission shall not enter into any agreement for granting a loan or issuing a mortgage unless the agreement specifies that all wages paid to laborers and mechanics employed for work on such projects shall be paid at the prevailing rates of wages of laborers and mechanics for the class of work called for by such project, which wages shall be determined in accordance with the requirements of chapter 4115. of the revised code for determination of prevailing wage rates, provided that the requirements of this section do not apply where the federal government or any of its agencies furnishes by loan or grant all or any part of the funds used in connection with such projects and prescribes predetermined minimum wages to be paid to such laborers and mechanics; and providing further that should a non-public user beneficiary of the project undertake, as part of the project, construction to be performed by its regular bargaining unit, employees who are covered under a collective bargaining agreement which was in existence prior to the date of the commitment instrument undertaking to insure a mortgage or grant a loan then, in that event, the rate of pay provided under the collective bargaining agreement may be paid to such employees.

Amended Substitute Senate Bill No. 104 amends 25 sections of the Ohio Revised Code, most of which concern the financing of pollution control facilities, solid waste disposal facilities and other facilities for industry, commerce, distribution and research, to enable the Ohio water development authority to provide revenue bond assistance for projects whereby electric power, steam, and other resources may be recovered by the combustion of solid waste, and to declare an emergency.

\textit{Id.} at 249.

The similarity between the bond assistance provided in the sections amended here and the health care bonds as issued in \textit{Episcopal Retirement Homes} is unmistakable.

\textsuperscript{59} \textit{Episcopal Retirement Homes}, 575 N.E.2d at 138.
improvements in the Ohio prevailing wage law itself.\(^1\) The majority concluded that,

Since the General Assembly specifically mentioned other Revised Code sections and failed to include R.C. Chapter 140 in its prevailing wage requirement, we apply the doctrine of *expressio unius est exclusio alterius*, and hold that the General Assembly did not intend for the prevailing wage statutes to apply to R.C. Chapter 140 financings.\(^2\)

5. *Section 140.051 of the Revised Code clearly contemplates an exemption.*

Finally, the majority found in the express language of Chapter 140 a statement that private hospital agencies, such as ERH, should be exempt from statutory restrictions ordinarily imposed upon public agencies, when private hospital agencies enter into agreements with public hospital agencies in order to procure tax-free bonds.\(^3\) Chapter 140.051 states that "[a]ny requirement of competitive bidding, other restriction, or other procedures that are imposed on a public hospital agency with respect to contracts is not applicable to any contract entered into pursuant to this section."\(^4\)

\(^1\) Id., House Bill 584, enacted in 1980, revised § 4115.032 of the Ohio Revised Code to read.

Sec. 4115.032. Construction on any project, facility, or project facility to which sections 122.452, 122.80, 165.051, 166.02, 1441.13, 1728.07, or 3706.042 of the Revised Code apply is hereby deemed to be construction of a public improvement within Section 4115.03 of the Revised Code. All contractors and subcontractors working on such projects, facilities, or project facilities shall be subject to and comply with sections 4115.03 to 4115.16 of the Revised Code and the Department of Industrial Relations shall and any interested party may bring proceedings under such sections to enforce compliance.


\(^2\) Episcopal Retirement Homes, 575 N.E.2d at 138-39.

\(^3\) Id.

\(^4\) OHIO REV. CODE ANN. § 140.051 (Anderson 1990). The statute states,

If the costs of the hospital facilities are to be paid with funds derived from revenue obligations issued pursuant to section 140.06 of the Revised Code and with other funds derived from the non-profit hospital agency, a public hospital agency, pursuant to negotiation and in the manner determined in its sole discretion by the governing body of the public hospital agency, may enter into a contract for the acquisition, construction, improvement, equipment, or furnishing of a hospital facility that is to be leased pursuant to section 140.05 of the Revised Code by a public hospital agency to a non-profit hospital agency. Any requirement of compet-
Thus, the majority considered the language of the statute and examined the actions of the legislature in order to determine its intent. The majority then concluded that the use of hospital revenue bonds to finance the construction of a private health care facility did not bring the project within the requirements of the Ohio prevailing wage law.65

B. The Dissent

Justice Douglas wrote the dissent, in which Justices Sweeney and H. Brown joined.66 He took issue with the majority opinion with respect to its interpretation of the applicable statutes.67 He also feared that the decision reached by the majority would have policy ramifications for collective bargaining in the building trades, a result which far exceeds the intention of the majority.68

While the majority focused on Chapter 140 of the Ohio Revised Code which grants nonprofit health care providers an opportunity to benefit from tax-exempt bonds, the dissent chose instead to focus on section 4115.03, the Ohio prevailing wage law.69 Justice Douglas argued that the General Assembly's intent in enacting section 4115.03 was to foster and encourage collective bargaining in the building trades on private sector construction projects in order to promote the peaceful and equitable resolution of disputes involving wages.70 In his view, the majority opinion weakens the effect of the Ohio prevailing wage law by straying from both the intent of the General Assembly and the Ohio prevailing wage law as the courts have developed it.71

65 Episcopal Retirement Homes, 575 N.E.2d at 139.
66 Id.
67 Id.
68 Id.
70 Episcopal Retirement Homes, 575 N.E.2d at 139 (Douglas, J., dissenting). Justice Douglas cites State ex rel. Evans v. Moore, 431 N.E.2d 311 (1982), which asserts: "Above all else, the primary purpose of the prevailing wage law is to support the integrity of the collective bargaining process by preventing the undercutting of employee wages in the private construction sector." Id. at 313.
71 Episcopal Retirement Homes, 575 N.E.2d at 139 (Douglas, J., dissenting).
Based on this general interpretation of the spirit and purpose of the prevailing wage law, the dissent attacked the distinctions drawn by the majority between "benefiting the public and benefiting a public authority." Justice Douglas emphasized the requirement that the bonds be issued through and in cooperation with a "public hospital agency." In order to comply with Chapter 140, ERH had to enter into a complicated and protracted lease and sublease arrangement with a public hospital agency, the Hamilton County Hospital Commission. Arguing substance over form, Justice Douglas approved of the insistence by the Ohio Department of Industrial Relations that the project was within the purview of the Ohio prevailing wage law:

"Recognizing that this "use" of a public entity implicitly (if not explicitly) smelled like, walked like and quacked like an improvement for the public, the Director of the Ohio Department of Industrial Relations notified appellee that the renovation and construction projects were subject to the prevailing wage law."

The dissent also found error in the majority's interpretation of the clause in Ohio's prevailing wage law requiring construction "pursuant to a contract with a public authority ...." The majority found that since neither the lease nor the sublease "sets forth plans and specifications necessary for construction," then the construction was not actually carried out pursuant to the lease or sublease. This interpretation of the requirements of the statute, Justice Douglas asserted, is far too broad. He argued that any expansion of the statute should be made in favor of the legislature's purpose in creating the prevailing wage law, that is, to encourage collective bargaining, not to limit its application. Identical criticism is leveled at the majority's second

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72 Id. at 140.
73 Id.
74 Id. at 139 (Douglas, J., dissenting).
75 Id.
76 Id.
77 Id.
78 Id. at 140.
79 Episcopal Retirement Homes, Inc. v. Ohio Dep't. of Indus. Relations, 575 N.E.2d 134, 140 (Ohio 1991) (Douglas, J., dissenting) (basing his argument for the liberal interpretation of the prevailing wage law on Ohio statutory and case law which requires that remedial statutes should be interpreted liberally).

As a general rule, remedial statutes are entitled to a liberal construction in favor of the remedy provided by law, or in favor of those who are given the
argument wherein "for a public authority" was interpreted to require that the public authority receive benefit "either through maintaining a possessory or property interest in the completed project ...."80

The dissent dismissed the majority's limiting construction of the phrases "pursuant to a contract with a public authority" and "for a public authority" in the prevailing wage statute for one "liberally in favor of [the statute's] intended purpose."81 The dissent therefore had no difficulty finding that the requirements of the two phrases had been met. The dissent focused on the General Assembly's stated purpose in enacting the legislation which permitted ERH to benefit from the issuance of tax-free bonds.82 Section 140.02 of the Ohio Revised Code states that: "The authorizations granted in this chapter ... are granted for the public purpose of better providing for the health and welfare of the people of the state by enhancing the availability, efficiency, and economy of hospital facilities and the services rendered thereby ....."83 The dissent argued that unless a project is for the benefit of the public, which is served by the public authority under whose auspices the bonds are granted, it would not qualify for tax-free bonds under Ohio Revised Code Chapter 140.84 Con-

remedy, to accomplish the purpose for which they are designed. The purpose of the rule of liberal construction of remedial statutes is to prevent the failure of a remedy attaching to a legal right otherwise granted.

The Revised Code specifically provides that remedial laws and all proceedings under them shall be liberally construed in order to promote their object and assist the parties in obtaining justice.

85 OHIO JUR. 2d Statutes § 300 (1977) (citations omitted); see also OHIO REV. CODE ANN. § 1.11 (Anderson 1990).
86 Episcopal Retirement Homes, 575 N.E.2d at 140. Justice Douglas states that: R.C. 4115.03(C) does not contain either of the requirements set forth by the majority. To arrive at the result reached by the majority, one needs to read into and considerably expand the language of the statute. Rather than doing so for the purpose of seeking a way to avoid the prevailing wage law, it is our obligation to construe the statute liberally in favor of its intended purpose, since the provisions of R.C. Chapter 4115 are remedial in nature and remedial laws are required to be liberally construed.

Id.
87 Id.
88 Id.
89 OHIO REV. CODE ANN. § 140.02 (Anderson 1990).
90 Episcopal Retirement Homes, 575 N.E.2d at 140 (Douglas, J., dissenting) ("I would think that a fair reading of this clear purpose clause would lead even the casual reader to the conclusion that the General Assembly devised this financing scheme to further a public purpose and that the public does receive the benefit of the construction." Id.).
versely, if a project qualifies for financing under Chapter 140, it must by definition confer benefit upon the public and the public authority.

The greatest alarm raised by the dissent is the prediction that the holding in *Episcopal Retirement Homes* will lead to the complete destruction of the Ohio prevailing wage law. The fear is that the holding creates a road map for any public authority that seeks to avoid paying the prevailing wage on its construction projects.

Henceforth, it would seem, any public authority desiring to avoid its responsibilities under the prevailing wage law need only contract with a straw man to see to it that a public facility is erected. It would then be up to the straw man to enter into a contract for the actual construction of the facility. Because, according to the majority, the public authority did not enter into a contract for the actual construction, the project would be exempt from the prevailing wage law. The possibilities are endless and opening wide this door would tend to eviscerate the legislative intent...

In the view of the dissent, the issue is a simple one. ERH's renovation project was a result of a contract with a public authority. The fact that one party to the contract was a private not-for-profit corporation does not erase the public nature of the renovation and does not exempt ERH from the requirement of paying the prevailing wage.

### III. ANALYSIS OF SUBSTANTIVE ISSUES

Episcopal Retirement Homes, Inc. disputed the interpretation of the prevailing wage statute made by the Ohio Department of Industrial Relations. The Ohio prevailing wage law requires that workers who construct public improvements should be paid a prevailing wage. Chapter 140 of the Ohio Revised Code allows private health care agencies, such as ERH, to finance their renovation projects through the use of tax-exempt bonds. Since

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83 Id.
84 Id.
85 Id.
86 Id.
87 Id.
88 Id.
89 Id.
90 Id. at 136.
ERH cannot issue the bonds, the statute requires that they be issued through the auspices of some public health care provider, in this case the Hamilton County Hospital Commission. The role of the county agency is largely formal, providing the official power to issue the bonds. The statute further requires that ERH lease the facility to the Commission. The facility is simultaneously leased back to ERH, which proceeds about the daily business of operations.

The question before the court was whether the bonds and the requisite lease and sublease turn the Episcopal Retirement Homes renovation project into a "public improvement." The decision was a close one, especially in light of subsequent actions by the court. Persuasive arguments and significant interests of economy and public welfare are had by both the majority and the dissent. In the end, the majority opinion seems the better view in light of the statutory language, the intent of the legislature in enacting and amending the statutes, and the significant public policy concerns involved.

A. Statutory Language

In order to qualify as a public improvement, and therefore to become subject to the Ohio prevailing wage law, the project must be "constructed by a public authority of the state or any political subdivision thereof or by any person who, pursuant to a contract with a public authority, constructs any structure for a public authority ...." The plain meaning of the language seems to

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* Id.
* Id. §§ 140.03, 140.05, 140.06 (Anderson 1990).
* Id. § 140.05 (Anderson 1990).
* The court's struggles with finality in its holding are the topic of the second half of this note. See infra Part Two.
* OHIO REV. CODE ANN. § 4115.03(C) (Anderson 1990).
* Courts are generally bound by the plain meaning of the language of a statute, see, e.g., United States v. Oregon, 366 U.S. 643 (1961), unless to do so would lead to an absurd result, Wilderness Society v. Morton, 479 F.2d 842 (D.C. Cir.) (en banc), cert. denied, 411 U.S. 917 (1973). Where the language is unclear, courts may use legislative history as an aid to interpretation of the statute. See generally Board of Educ. v. Mergens, 496 U.S. 226 (1990) (construing the Equal Access Act which provides for after-school Bible clubs in public secondary schools). Mergens is an excellent example of the use of legislative history to support all sides of a controversial issue.
indicate that the law is directed at government agencies, when they undertake construction projects on their own behalf, and at the contractors which they hire to actually construct the projects.

When the Hamilton County Hospital Commission entered into the lease/sublease agreement, it was for the primary purpose of assisting ERH in obtaining favorable financing, through the issuance of tax-exempt bonds, rather than for the purpose of having ERH construct a facility for the County. The County's involvement was largely formal. The majority's argument that the County received no proprietary or possessory interest in the completed project is well-taken. If the project is "for a public authority," then it would seem that the public authority should benefit in some more concrete way than simply through the general benefit to the community of lowered nursing care costs.

The lease/sublease agreement was constructed with particular care to minimize the involvement of the County in the project. The sublease creates an intermediary, the trustee, to whom the County assigns all of its interest. The majority appropriately takes notice of the additional separation this arrangement places between the County and ERH.

B. Legislative Intent

The majority relied upon a two-step analysis to discover whether the General Assembly intended the prevailing wage law to apply to construction projects financed by bonds issued pursuant to Ohio Revised Code Chapter 140. The first argument focuses on the stated purpose of Chapter 140 of the Ohio Revised Code, which is to better provide "for the health and welfare of the people of the state by enhancing the availability, efficiency, and economy of the hospital facilities and the services rendered thereby ...." The majority argues that to require ERH to pay the prevailing wage would work at "cross-purposes" to the expressed legislative intent in section 140.02 of the Ohio Revised Code.

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100 *Episcopal Retirement Homes*, 575 N.E.2d at 137; *see supra* text accompanying note 40.
101 *Id.*
102 *Id.* at 137.
103 *Episcopal Retirement Homes*, 575 N.E.2d at 136.
Code,\textsuperscript{105} The argument has only limited appeal. It cannot be properly argued that in granting reduced financing costs, the General Assembly therefore intended further economy at the expense of the Ohio's construction tradesmen.\textsuperscript{106}

The majority's second argument, based on legislative intent, is more persuasive. Chief Justice Moyer reviewed several amendments to selected code sections, which amendments specifically require that some projects financed by tax-exempt revenue bonds be subject to the prevailing wage law.\textsuperscript{107} He argued effectively that if the General Assembly had intended the prevailing wage law to apply to Chapter 140, it would have included Chapter 140 in its amendments.\textsuperscript{108}

Perhaps the best argument regarding legislative intent comes from section 140.051 of the Ohio Revised Code, which specifically states that "[A]ny requirement of competitive bidding, other restrictions, or other procedures that are imposed on a public hospital agency with respect to contracts is not applicable to any contract entered into pursuant to this section."\textsuperscript{109} It would seem that the requirement of paying the prevailing wage might well be one of the "other restrictions or procedures" which should be required of a public hospital agency but from which a private agency should be excluded.\textsuperscript{110}

\textbf{C. Public Policy}

The public policy issues involved in this case, though not directly addressed by the majority and somewhat exaggerated

\begin{itemize}
  \item \textsuperscript{105} \textit{Episcopal Retirement Homes}, 575 N.E.2d at 138.
  \item \textsuperscript{106} Motion for Rehearing of \textit{Amicus Curiae}, The Ohio State Building and Construction Trades Council (OSBCTC), at 7, Episcopal Retirement Homes, Inc. v. Ohio Dep't of Indus. Relations, 582 N.E.2d 606 (Ohio 1991). The OSBCTC argues:
  \begin{itemize}
    \item It has undoubtedly always been the public policy of this state that public improvements be made in the most efficient and cost effective manner. It has never been the public policy of this state that savings on public construction projects be had at the expense of the working men and women of this state. A result of this Court's opinion is to allow ERH to (1) obtain below market rate financing for its project, and (2) undercut the wages prevailing in the Hamilton County private construction market.
  \end{itemize}
  \begin{itemize}
    \item \textit{Id.}
  \end{itemize}
  \item \textsuperscript{107} See \textit{supra} notes 58-62 and accompanying text.
  \item \textsuperscript{108} \textit{Episcopal Retirement Homes}, 575 N.E.2d at 138.
  \item \textsuperscript{109} \textit{Ohio Rev. Code Ann.} § 140.051 (Anderson 1990) (emphasis added).
  \item \textsuperscript{110} \textit{Amicus Curiae}, The Ohio State Building and Trades Council, apprised the court that section 140.051 had been declared unconstitutional because of flawed legislative procedures. \textit{Hoover v. Board of Comm'rs}, No. 82CV-05-2987 (C.P. Franklin County Apr. 16, 1991). The Ohio Supreme Court, of course, has the power to review the holding of the Franklin County Common Pleas Court, but apparently chose not to address the holding.
\end{itemize}
by the dissent, play a significant role in the decision. The competing interests are the desire to help contain the soaring costs of health care and the need to maintain protection for the prevailing wage and the collective bargaining process. It is the importance of this decision to the public at large which attracted the involvement in the case of various *amicus curiae*, the Ohio Hospital Association, the Association of Ohio Philanthropic Homes & Housing for the Aging, the Ohio State Building and Construction Trades Council and eventually the Ohio AFL-CIO.

Health care costs are rising dramatically. The decision in this case has wide financial effect. "[T]he issue presented ... is exceedingly important to the appellee, to other non-profit health and nursing care providers, and to the elderly, ill and injured citizens of Ohio, whose health care costs will increase [if the

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111 Episcopal Retirement Homes, 575 N.E.2d at 136.
113 Some indication of the potential impact of the decision in *Episcopal Retirement Homes* is provided by an examination of the difference in construction and financing costs the application of the prevailing wage law would cause for construction projects involved in that case. A study of the difference was described by *amicus curiae*, the Association of Ohio Philanthropic Homes & Housing for the Aging (AOPHA). AOPHA first analyzed the results if Episcopal Retirement Homes would be forced to forego bond issue financing and seek conventional financing.

For example, in the case of Appellee ERH, Chapter 140 revenue bonds has resulted in an effective interest rate of 6.75 percent amortized over 20 years for the project (4.5 million dollars) at issue in the case at bar. This compares with a prime interest rate during the applicable period, the best rate which appellee could reasonably have obtained, of approximately 10% from non-tax-exempt financing. The total dollar savings in interest payments made over the 20 year loan period which the Chapter 140 bonds enable Appellee to obtain on the same principal involved, therefore, amounts to roughly $2,210,277, assuming no change in interest rates.

Brief of *Amicus Curiae*, Association of Ohio Philanthropic Homes & Housing For the Aging, at 6-7, Episcopal Retirement Homes, Inc. v. Ohio Dep’t of Indus. Relations, 582 N.E.2d 606 (Ohio 1991) (citations omitted). The AOPHA then analyzed the effect of having to pay prevailing wages on the projects.

To fund the same project under prevailing wage requirements, however, would require an additional estimated amount of $400,000 in up front capital. The interest payments over the 20 year loan period for this additional principal would total another $329,954. Thus the real cost to Appellee for the entire loan package under the prevailing wage requirements would exceed the current cost of $729,954. These additional costs are not costs which ERH can absorb and still provide facilities and services as originally contemplated. Imposition of these additional costs will result in a diminution of ERH’s ability to serve the elderly public, a result contrary to that intended by Chapter 140.

*Id.* at 7 (citations omitted).
prevailing wage law is applied]." \(^{114}\) Chapter 140 of the Ohio Revised Code was originally intended by the legislature to lower health care costs. This same intention must have been in the minds of the majority of justices when they ruled in favor of helping to curtail hospital construction costs.

Unquestionably, health care for the aged is one of the most dynamic sectors in the current economy. While health care costs are rising, demand for health care and health care facilities is also on the rise. \(^{115}\) Health care facilities account for a significant portion of construction work in today's economy. The dissent's concern for the effect of excluding private health care facilities from the prevailing wage law is understandable.

Justice Douglas, however, unnecessarily raises the alarm that the majority's decision will create a mechanism by which any \textit{public authority} may avoid its responsibilities under the prevailing wage law. \(^{116}\) The argument is that if ERH is permitted to avoid the prevailing wage law, then any public agency could avoid the prevailing wage law on its own projects, by contracting with a "straw man." \(^{117}\) This straw man would stand in the same relationship to the public agency as ERH does to the County. If the County removed itself from directly contracting for the construction project, the County or any other public authority could avoid the prevailing wage law. \(^{118}\)

However, the scheme envisioned by the dissent can be distinguished from the holding in this case. It is difficult to imagine

\(^{114}\) Reply Memorandum in Support of Motion to Vacate Rehearing Entry of Appellee, ERH, at 1, Episcopal Retirement Homes, Inc. v. Ohio Dep't of Indus. Relations, 582 N.E.2d 606 (Ohio 1991).

\(^{115}\) At the time Episcopal Retirement Homes was argued there were approximately 75,000 licensed nursing home beds in the State of Ohio. Brief of \textit{Amicus Curiae}, Association of Ohio Philanthropic Homes & Housing For the Aging, at 4, Episcopal Retirement Homes, Inc. v. Ohio Dep't of Indus. Relations, 582 N.E.2d 606 (Ohio 1991). About 18\% of these are operated by nonprofit organizations such as ERH. \textit{Id.} at 4. In the years ahead these numbers are likely to increase drastically. In Ohio, as elsewhere in the country, the fastest growing population group is persons over the age of 85 years. \textit{Id.} at 5. In 1980, there were 76,817 persons over the age of 85 in Ohio. By the year 2010, this group is projected to grow by 117\%, to 166,964. \textit{Id.} at 5. Given the fact that 19,659 of the group were adjudged moderately or severely disabled in 1980, one can project a population of disabled as high as 43,000 in two decades. \textit{Id.} at 5. Renovations among nonprofit nursing care providers is likely to grow substantially in the next two decades. \textit{Id.} at 5.


\(^{117}\) \textit{Id.}

\(^{118}\) \textit{Id.}
that the County, for example, in order to avoid paying the prevailing wage on street repair work, would create a separate private agency to whom the County would lease or give the highway. The idea of the County giving away its property interests in its streets, bridges, buildings, and sewers to private agencies, in order to avoid paying prevailing wage on its construction projects, is a bit of a straw man itself.\textsuperscript{19}

\section*{PART TWO - REHEARING}

The substantive issue of this case, whether Ohio's prevailing wage law applies to projects financed with Revised Code Chapter 140 bonds, though of tremendous monetary significance to the health care providers and building tradesmen in the state, turns on rather narrow principles of statutory interpretation. The procedural events following the judgment entry on August 14, 1991, present much more difficult and fascinating questions concerning standing before the court, finality of judgments and due process.

\section*{I. SUBSEQUENT PROCEDURE}

On August 26, 1991, the last day on which a motion for rehearing could be filed under the rules of the Supreme Court of Ohio,\textsuperscript{120} the Ohio State Building and Construction Trades Coun-

\textsuperscript{19} The Ohio First District Court of Appeals has determined not to be deceived by "straw men." "In view of the legislature's clear expression of intent contained in the prevailing-wage law, courts have a duty to enforce the law even in those situations where the parties resort to a strawman or various lease-back devices." Harris v. City of Cincinnati, No. C-900607, slip op. at 16 (Ohio Ct. App. Apr. 1, 1992) (Gorman, P.J., concurring).

\textit{Harris} involved the construction of Tower Place, a shopping mall in downtown Cincinnati. Harris v. City of Cincinnati, No. C-900607, slip op. at 4 (Ohio Ct. App. Apr. 1, 1992). Although there were no revenue bonds involved, the case does resemble \textit{Episcopal Retirement Homes}. The City purchased the property from the developer and leased it back to the same developer. \textit{Id.} at 4. The ODIR informed the City and the developer that the department had determined that the prevailing wage should apply. \textit{Id.} at 5-6. The trial court determined that the prevailing wage would not apply. \textit{Id.} at 3. The court of appeals reversed, applying the \textit{Episcopal Retirement Homes} test. \textit{Id.} at 10-12. First, the court decided that the Tower Place project was constructed "pursuant to" a contract with the City, because the City remained involved in the planning and approval of the construction plans. \textit{Id.} at 10. Then the court held that the project was constructed "for a public authority." \textit{Id.} at 11. Still following \textit{Episcopal Retirement Homes}, the court noted that the City maintained fee ownership of the property and has expended $6.5 million of public funds to make the purchase. \textit{Id.} at 12.

\textsuperscript{120} \textit{OHIO SUP. CT. PRAC. R. IX.}
cil (OSBCTC) filed a motion for rehearing.\textsuperscript{121} OSBCTC had been granted amicus curiae status in the case and had presented a brief and oral argument supporting the defendant, the Ohio Department of Industrial Relations.\textsuperscript{122} On the same day, the Ohio AFL-CIO, which had not previously participated in the case, filed a motion for leave to file a motion for rehearing, also as amicus curiae.\textsuperscript{123} Neither ERH nor ODIR had filed a motion for rehearing. But because a motion for rehearing had been filed by someone, the clerk of the supreme court did not issue the mandate of the court.\textsuperscript{124}

On October 8, 1991, the court announced that "a rehearing is granted \textit{sua sponte} as to all issues in this case. This cause is to be decided on the merit briefs previously filed."\textsuperscript{125} \textbf{Sua sponte} rehearing was made possible when Justice Resnick joined the three dissenters in the original opinion of the court and created a new four-to-three majority.\textsuperscript{126} ERH then moved to vacate the \textit{sua sponte} rehearing. On December 6, 1991, a second and final shift of position occurred when Justice Herbert R. Brown joined Chief Justice Moyer, Justice Holmes and Justice Wright.\textsuperscript{127} This new majority granted ERH's motion to vacate the \textit{sua sponte} rehearing.\textsuperscript{128} The mandate of the court finally was issued, leaving unchanged the judgment entry of August 14, 1991.

\textbf{II. DECISION TO VACATE REHEARING}

Justice Herbert R. Brown's decision to join with Chief Justice Moyer and Justices Holmes and Wright in granting ERH's motion to vacate the \textit{sua sponte} rehearing brought finality to the litigation. At the same time, Justice Brown's dissent in the original decision and Justice Resnick's dissent to the vacation of rehearing raised serious doubt that the holding of the case actually reflected

\begin{thebibliography}{99}
\bibitem{121} Episcopal Retirement Homes, Inc. v. Ohio Dep't of Indus. Relations, 582 N.E.2d 606, 609 (Ohio 1991) (Resnick, J., dissenting).
\bibitem{122} \textit{Id.}
\bibitem{123} \textit{Id.}
\bibitem{124} \textit{Id. at 606} (Moyer, C.J., concurring).
\bibitem{125} Episcopal Retirement Homes, Inc. v. Ohio Dep't of Indus. Relations, 578 N.E.2d 819 (Ohio 1991).
\bibitem{126} \textit{Id.}
\bibitem{127} Episcopal Retirement Homes, Inc. v. Ohio Dep't of Indus. Relations, 582 N.E.2d 606, 606 (Ohio 1991).
\bibitem{128} \textit{Id.}
\end{thebibliography}
the majority opinion of the court with regard to the prevailing wage law and Revised Code Chapter 140 projects. The ruling was terse:

No party has sought a rehearing from our final judgment announced on August 14, 1991. See 61 Ohio St. 3d 366, 575 N.E.2d 134. No new argument and no new evidence have been presented to us since the final judgment was announced on August 14, 1991. Accordingly, the motion to vacate the sua sponte rehearing ordered October 8, 1991, in 62 Ohio St. 3d 1427, 578 N.E.2d 819, is hereby granted.

Fortunately, the ruling does not stand alone. Four justices were moved to write opinions: Chief Justice Moyer and Justice Holmes concurring, and Justices Douglas and Resnick dissenting.

A. Justice Resnick's Dissent

Justice Resnick's opinion is considered first, as it was her decision to reconsider her August 14, 1991, position which created the new four-to-three majority that called for rehearing. Justice Resnick initially addressed the issue of the effect of a rehearing motion filed by a nonparty. "Rule IX of the Supreme Court Rules of Practice does not on its face require that a party be the movant in a motion for rehearing."

SECTION 1. Motion for Rehearing. A motion for rehearing shall be filed within ten days after the announcement of the decision. Such motion must be confined strictly to the grounds urged for rehearing and must not constitute a reargument of the case. Notice of such motion shall be served on opposing counsel who shall have five days to file his [or her] memorandum contra.

Clearly the rule does not specifically mandate that a motion for rehearing be filed by a party. By court order the Ohio State Building and Construction Trades Council had been granted amicus curiae status in this appeal and had a real interest in the case. Justice Resnick argued that if OSBCTC's motion for

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129 Id. at 608 (Douglas, J., dissenting).
130 Id. at 606.
131 Id. at 609 (Resnick, J., dissenting).
132 Id.
133 Ohio Sup. Ct. Prac. R. IX.
135 Id.
rehearing was not allowed, its members would have "no avenue for aggressively asserting their rights . . . ." The defendant, the Ohio Department of Industrial Relations, has the responsibility for enforcement of the prevailing wage law on behalf of construction workers. The Director of ODIR, however, had decided not to contest the decision of the court. Justice Resnick stressed that "there is no prohibition in the express language of Rule IX of the Supreme Court Rules of Practice, and because the amicus curiae had a real interest in this case, this court could properly consider the merits of the motion for rehearing filed by amicus curiae."

Justice Resnick conceded, though, that despite these reasons in support of an amicus curiae's right to move for rehearing, the new majority of the court, which she had created, opted to avoid the issue. The new majority did so by "cho[sing] to exercise its inherent authority to correct a miscarriage of justice and proceed to sua sponte rehear the case."

Justice Resnick focused the remainder of her dissent upon the controversy surrounding the issuance of the mandate. The mandate is the final order in the case, signaling finality of the court's decision. The rules of court require that the clerk automatically issue the mandate ten days after the decision,

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136 Id.
137 Id. (citing OHIO REV. CODE ANN. §§ 4115.10, 4115.13 (Anderson 1990)); see also Harris v. Van Hoose, 550 N.E.2d 461 (Ohio 1990) (syllabus) ("The Director of the Department of Industrial Relations is authorized, under R.C. 4115.10(C), to enforce prevailing wage claims on behalf of all employees who do not pursue their claims through R.C. 4115.10(A) or (B).”).
138 Episcopal Retirement Homes, 582 N.E.2d at 609 (Resnick, J., dissenting). In the interim between ODIR's original filing of its intention to enforce the prevailing wage law and the decision not to contest the court's decision, a new director of ODIR had been named by the new Governor, George Voinovich.
139 Id. at 609-10.
140 Id. at 610.
141 Id.
142 Id. at 610-11.
144 Justice Holmes said:

The mandate of this court is its final command in the case, issued to the courts below, directing them to act in compliance with the decision and entry of this court. It is the principal means by which the determinations of this court are effectuated. By issuing the mandate, we finalize our decision and the case is then completed. Once final, our decision, as previously mentioned, become res judicata to the parties.

Id. at 661 (Holmes, J., dissenting).
unless a motion for rehearing has been filed. Justice Resnick pointed out that the clerk had never issued the mandate in this case. This, she argued, is evidence that a valid motion for rehearing was pending, and that the court "unequivocally had jurisdiction to act." In Justice Resnick's opinion, the inherent authority to correct judgments when justice requires is included within the court's jurisdiction. She concluded that "[t]he citizens, the bench and the bar of Ohio cannot afford the luxury of waiting for another case identical to this one to come before us."  

B. Chief Justice Moyer's Concurrence

Justice Resnick raised several questions in her dissent that prompted Chief Justice Moyer to write a concurring opinion. Chief Justice Moyer noted that there was considerable confusion concerning the issuance of the mandate. Counsel for ERH had received, with his copy of the judgment entry, a copy of the mandate signed by the chief justice. Chief Justice Moyer explained that it is customary for the clerk to prepare the mandate at the same time as the judgment entry. The chief justice signs both and a complementary copy of the mandate is sent to the attorneys for the parties, "solely to apprise the parties of the amount of recoverable costs." The actual issuance of the mandate:

The Rule specifically provides:

SECTION 2. Issuance of Mandate. Ten days after the announcement of a decision on the merits, unless a motion for rehearing is filed, the Clerk shall issue a mandate in conformity to the entry of the Court. If a motion for rehearing is filed and denied, the mandate shall issue at the same time as the decision on the motion for rehearing.


Id.

Id. (citing City of Rocky River v. State Employment Relations Bd., 535 N.E.2d 657, 658 (Ohio 1989)).

Id. at 610-11.

Id. at 611.

Id. at 610 (Resnick, J., dissenting) ("Indeed, what is irregular and improper is the issuance of a mandate with the original decision. While this practice is apparently employed by this court on a regular basis, it is totally unauthorized by Rule IX of the Supreme Court Rules of Practice, and misleading to the parties." Id.).

Id.

Id. at 606 (Moyer, C.J., concurring).

Id.
date takes place when the clerk delivers it to the court below.\textsuperscript{154} In this case the clerk did not issue the mandate ten days after the judgment entry was signed, because a motion for rehearing was filed within those ten days.\textsuperscript{155} Justice Moyer concluded that “[t]he Clerk acted properly in holding the mandate because the validity of a motion for rehearing by an \textit{amicus} is a question for the court and not the Clerk.”\textsuperscript{156} The ruling of the case makes clear that the majority held that an \textit{amicus} does not have standing to make a motion for rehearing.

\textbf{C. Justice Douglas’s Dissent}

Justice Douglas focused on the irony of the results in this case:

Coming now to the bottom line in this case, we find that at least four members of this court say that the opinion of the court in Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations (1991), 61 Ohio St.3d 366, 575 N.E.2d 134, is an incorrect statement of the law as it involves the prevailing wage law and R.C. Chapter 140 bonds. Yet, curiously, that opinion stands for the “guidance” of the bench and bar of Ohio. Sometimes truth is stranger than fiction!\textsuperscript{157}

To avoid such undesirable consequences, Justice Douglas argued in favor of a strong inherent power of the court, “\textit{on its

\textsuperscript{154} Id.

\textsuperscript{155} Id.

\textsuperscript{156} Id. at 606-07.

\textsuperscript{157} Id. at 609 (Douglas, J., dissenting). The First District Court of Appeals has decided to play it safe and construe the holding in Episcopal Retirement Homes very narrowly.

There, the Supreme Court, in a 4-3 decision, held that hospital bonds were not public improvements because of the mechanism of R.C. Chapter 140 under which the legislature expressly granted public and non-profit hospital agencies authority to construct and upgrade facilities with tax-exempt obligations. Therefore, according to the Episcopal Homes majority, R.C. Chapter 140 hospital bonds are a separate legislative category for purposes of prevailing-wage law.

Harris v. City of Cincinnati, No. C-900607, slip op. at 16 (Ohio Ct. App. Apr. 1, 1992) (Gorman, P.J., concurring in part and dissenting in part) (emphasis added). In a footnote Judge Gorman continued:

In the court’s decision to vacate the rehearing order in Episcopal Retirement Homes, Inc. (1991), 62 Ohio St. 3d 1214, 1218-21, 582 N.E.2d 606, Justice Resnick’s dissent and Justice Brown’s concurrence may signal that the minority is now the majority, but the court did not address the issue again because of procedural grounds.

\textsuperscript{Id. at 16 n.1.}
own motion, [to] reconsider one of its prior pronouncements."^{158} He strongly supported Justice Resnick's advocacy of the power of the court to rehear its decisions *sua sponte.*^{159} He advocated a "rule of four," whereby the majority of the court would have the inherent power to decide when a rehearing should be permitted.^{160}

Finally, Justice Douglas cited *Tuck v. Chapple,*^{161} a landmark rehearing case. Justice Douglas noted that *Tuck* stands for the proposition "that any rehearing granted (by rule or *sua sponte*) and any decision of the court to set aside or modify one of its judgments during term is fully within the power of the court."^{162}

**D. Justice Holmes's Concurrence**

In his short concurrence, Justice Holmes provided the clearest elucidation of the three-sentence holding of the court^{163} with regard to rehearings. First he addressed the propriety of the motions for rehearing filed by *amicus curiae*, OSBCTC, and the motion for permission to file a motion for rehearing, filed by the Ohio AFL-CIO.^{164} His interpretation of Rule IX of the Supreme Court Rules of Practice was "that it applies only to parties and not to *amici* or friends of the court, who are nonparties."^{165} He noted that both the motion for rehearing and the motion to file a motion for rehearing were submitted by strangers to the action and not parties as contemplated by Rule IX.^{166}

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159 Id.

160 Id. at 607. In support of his contention, Justice Douglas cites numerous cases, both ancient and modern, asserting the "court's inherent power to protect the integrity of its proceedings." Id. at 608 (citing Royal Indem. Co. v. J.C. Penney Co., Inc., 501 N.E.2d 617, 620 (Ohio 1986)).

The difference between the jurisdiction of courts and their inherent powers is too important to be overlooked. In constitutional governments their jurisdiction is conferred by the provisions of the constitutions and of statutes enacted in the exercise of legislative authority. That, however, is not true with respect to such powers as are necessary to the orderly and efficient exercise of jurisdiction. Such powers, from both their nature and their ancient exercise, must be regarded as inherent.... Without such power no other could be exercised.


161 151 N.E. 48 (Ohio 1926).

162 Episcopal Retirement Homes, 582 N.E.2d at 609 (Douglas, J., dissenting).

163 See supra note 130 and accompanying text.

164 Episcopal Retirement Homes, 582 N.E.2d at 607 (Holmes, J., concurring).

165 Id.

166 Id.
also addressed the effect of a letter in support of these two motions which was directed to the members of the court by John Hodges, President of the Ohio AFL-CIO.\textsuperscript{167} He stated that "Hodges is also not a party to this action, and has no standing to file a motion for rehearing or a memorandum in support thereof."\textsuperscript{168}

As to the validity of a \textit{sua sponte} grant of rehearing, Justice Holmes was cryptic, but he left no doubt as to his opinion of its merit in this case: "There is no specific rule of practice by which this court may \textit{sua sponte} grant a rehearing of a final decision. And, particularly, there is no basis to permit such \textit{sua sponte}
action by the court in support of an improper motion for a rehearing filed by a nonparty.”

III. ANALYSIS OF THE RULING ON REHEARING

A. Standing of Amici Curiae

The terse language of the court’s grant of ERH’s motion to vacate sua sponte rehearing clearly answers some questions raised in the procedural labyrinth of Episcopal Retirement Homes, Inc. v. Ohio Department of Industrial Relations, but leaves others for further interpretation. One issue that was squarely settled is the standing of amicus curiae to bring motions for rehearing. The court clearly affirmed the well-reasoned judicial practice of reserving the right to request a rehearing to the litigating parties.

As Justice Resnick demonstrated in her dissent, Rule IX of the Ohio Supreme Court Practice Rules does not precisely articulate the necessity that the movant be a party. But an exami-

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169 Id.
170 Id. at 606. See also 4 AM. JUR. 2d Amicus Curiae § 6 (1962) (discussing generally standing of amicus curiae to move for rehearing).
171 Episcopal Retirement Homes, 582 N.E.2d at 609 (Resnick, J., dissenting). The plaintiff offered an interesting argument for the necessity that the movant be a party:

While Rule IX, Section 1 does not expressly state that motions for rehearing may only be filed by parties in the action, it does provide that the movant shall serve notice of such motion on “opposing counsel.” Both OSBCTC and AFL-CIO assert rights to seek rehearing under Rule IX, Section 1 as amicus curiae. However, an amicus curiae is literally a friend of the court, not an opponent of any of the parties in the action. The term implies the friendly intervention of counsel to call the Court’s attention to a legal matter which has escaped or might escape the court’s consideration. The status of an amicus curiae in a proceeding is advisory rather than adversary. Indeed, an amicus curiae which seeks to intervene in an action for the purpose of advocating on behalf of a party and not merely advising the Court should not be permitted to intervene. An adversarial role is inconsistent with the impartiality which clothes amicus curiae.

Thus, it would be absurd to conclude that Rule IX, Section 1 was intended to authorize a non-party amicus curiae to file a motion for rehearing, because the Rule expressly requires that the movant serve notice of the motion on “opposing counsel.” As an impartial friend of the Court, an amicus curiae has no “opposing counsel.” “Opposing counsel” can only refer to counsel for the party opposing the movant in the appeal, and, therefore the movant under Rule IX, Section 1 can only be a party to the appeal.

It might be argued, however disingenuously, that when the movant under Rule IX, Section 1 is an amicus curiae, “opposing counsel” means counsel for the party whose position as to affirmance or reversal the amicus curiae opposes. However, that would
amination of the role of *amicus curiae* in the appellate process reveals that it would be inappropriate to allow these nonparties the right to move for rehearing. Customarily the court will hear an *amicus curiae* "only for the purpose of assisting the court in a case already before it." The function of an *amicus curiae* is to bring to the court's attention "law or facts that may otherwise escape its consideration." The *amicus curiae* must accept the case as it already exists before the court. He has no right to institute proceedings and no control over the litigation. The obvious reason for the curtailed role of the *amicus curiae* is to preserve the rights of the parties to direct the process of litigation.

ERH correctly stated:

The Motions of OSBCTC and AFL-CIO demonstrate the mischief which would arise if "standerbys" were permitted to inject themselves in a case with a procedural motion filed under the guise of *amicus curiae*. Here, appellants elected not to avail themselves of a motion for rehearing. Whether they determined that there were no reasonable grounds for rehearing, were fearful that rehearing might result in a modified decision even more unfavorable to appellants' broader interests, or were simply of a mind that the litigation should be concluded, is quite irrelevant. Appellants decided not to seek rehearing. By permitting strangers to this case to initiate a procedural motion for rehearing, which appellants decided not to initiate, this Court will wrest from the parties the right to make their own strategic decisions in litigation and impose upon them obligations to continue litigation which as between the parties to the case has been finally concluded.

lead to an absurd result. Then the party whose position as to affirmance or reversal the *amicus curiae* seeks to support would be entitled to no notice of the motion. Moreover, although clearly a party to the case, the party whose position the *amicus curiae* seeks to support would have no right to respond to the motion, as only "opposing counsel" have a right to file a memorandum contra.


172 Id.
173 4 AM. JUR. 2d Amicus Curiae § 3 (1962).
174 Id.
175 City of Columbus v. Tullos, 204 N.E.2d 67 (Ohio Ct. App. 1964).
176 Id.
177 Id.
178 Motion of Appellee, Episcopal Retirement Homes, Inc., To Strike Motion for Rehearing of Ohio State Building and Construction Trades Council and To Strike Application
The greatest potential for catastrophe in the *Episcopal Retirement Homes* case arises in the context of the motion of the Ohio AFL-CIO for *amicus curiae* status for the purpose of filing a motion for rehearing. The union had never been a party to the case, nor had it been granted *amicus curiae* status during the original proceedings. The dissent argued that since the union had a genuine interest in the outcome of the case, and since its interests were not being defended by its lawful advocate, the Ohio Department of Industrial Relations, the union should be granted *amicus curiae* status and the right to move for rehearing.\(^1\) The Ohio AFL-CIO had made no appearance in the case up to that point. To grant the union the right to move for rehearing in the case would open the decisions of the Supreme Court of Ohio to challenge from anyone who was unhappy with the court's decision and whose rights may be effected by that decision.\(^2\) This would change the face of litigation in the state. The supreme court would be deluged with the motions of non-parties who were adversely affected by a ruling. The fundamental concept that the role of the courts is to decide controversies of individual parties based on the particular facts of the dispute would be replaced by a rush of interest groups to reargue legal issues on rehearing. Parties would lose control of their cases. This result would be intolerable and for these reasons it was properly rejected by the majority.

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\(^1\) See *Episcopal Retirement Homes, Inc. v. Ohio Dep't of Indus. Relations*, 582 N.E.2d 606 (Ohio 1991) (Resnick, J., dissenting).

\(^2\) "Such a practice not only prejudices the parties to the action who are bound by the decisions of this Court, but also demeans the entire appellate process by treating this Court's decisions as mere *trial balloons* issued for purposes of discussion and further debate." Motion of Appellee, *Episcopal Retirement Homes, Inc.*, To Strike Motion for Rehearing of Ohio State Building and Construction Trades Council and To Strike Application for Leave to File Motion for Rehearing of Ohio AFL-CIO, at 9, *Episcopal Retirement Homes, Inc. v. Ohio Dep't of Indus. Relations*, 582 N.E.2d 606 (Ohio 1991) (No. 90-1051) (emphasis added).
B. Sua Sponte Rehearing

The guidance of precedent and the holding of the court in this case clearly deny the rights of amici curiae to request rehearing of an Ohio Supreme Court decision. It was surely for this reason that the court, on October 8, 1991, decided to avoid the issue of amicus curiae standing and instead voted four-to-three "to exercise its inherent authority to correct a miscarriage of justice and proceed to sua sponte rehear the case." The history of the court's inherent power to reexamine its own decisions is much less certain. While the holding in this case may be interpreted as pointing the way toward a clear resolution of the question of sua sponte rehearing, the holding is nonetheless still ambiguous in this regard.

1. The Right To Rehearing: Longworth v. Sturges

One of the first issues settled by the Supreme Court of Ohio concerning rehearing of its decisions was whether parties had an automatic right to rehearing. In Longworth v. Sturges the court established that rehearing of its decisions would not be an automatic right, but would only be allowed at the discretion of the justices. The court followed the United States Supreme Court's holding in Brown v. Aspden. The Ohio Supreme Court quoted with approval the opinion of Chief Justice Taney in that case:

If this court should adopt a practice analogous to that of the English chancery, we should soon find ourselves in the same predicament; and we should be hearing over again at a second term almost all the cases which we had heard and adjudged at a former one, and upon which our own opinions would have been definitely made up upon the first argument. We deem it safer to adhere to the rule we have heretofore acted on. And no re-argument will be granted in any case, unless a member of the court who concurred in the judgment desires it; and when that is the case, it will be ordered without waiting for the application of counsel.

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181 See discussion supra part III.A.
182 Episcopal Retirement Homes, 582 N.E.2d at 610 (Resnick, J., dissenting).
183 Longworth v. Sturges, 2 Ohio St. 105 (1853).
184 Id. at 106.
186 Longworth, 2 Ohio St. at 107 (quoting Brown, 55 U.S. (14 How.) at 27 (emphasis added)).
The *Longworth* court stated that it intended to adopt for Ohio the same practice utilized by the United States Supreme Court,\textsuperscript{187} that is, the Ohio Supreme Court itself would decide which cases to rehear. In addition, if one of the members of the majority decided that a case should be reconsidered, rehearing should follow regardless of whether it had been expressly requested by the parties. The *Longworth* court concluded:

We do not intend, in coming to this conclusion, to deprive ourselves of the power of controlling our own journal during the term of the court. If, therefore, any matter of fact has been overlooked in making a decision, it can be brought to our attention, and any necessary correction can be made. Much less do we intend to deny to this court the power possessed by all courts, of setting aside judgments [sic] and decrees obtained by fraud, mistake or irregularity.\textsuperscript{188}

This early posture on rehearing by the Ohio Supreme Court was premised on the principle that rehearing is a function of the court's inherent power to control its docket and to police its errors. The power of the court to *sua sponte* rehear a case seems to be implicitly if not explicitly mandated by the holding in *Longworth*.

2. *Inherent Powers Tempered by Judicial Restraint: Tuck v. Chapple*

A significant case in this century on the issue of rehearing is *Tuck v. Chapple*,\textsuperscript{189} decided in 1926. *Tuck's* importance is evinced by the fact that each side in *Episcopal Retirement Homes* cited it as authority for its position.\textsuperscript{190} In *Tuck* the defendant in error argued that the court could not rehear a case after the end of

\textsuperscript{187} Id.
\textsuperscript{188} Id. (emphasis added).
\textsuperscript{189} 151 N.E. 48 (Ohio 1926).
\textsuperscript{190} Compare *Episcopal Retirement Homes, Inc. v. Ohio Dep't of Indus. Relations*, 582 N.E.2d 606, 609 (Ohio 1991) (Douglas, J., dissenting) ("Thus, *Tuck* really stands for the proposition that any rehearing granted (by rule or *sua sponte*) and any decision of the court to set aside or modify one of its judgments "during term" is fully within the power of the court.") with *Motion of Appellee, Episcopal Retirement Homes, Inc., To Strike Motion for Rehearing of Ohio State Building and Construction Trades Council and To Strike Application for Leave to File Motion for Rehearing of Ohio AFL-CIO, at 5-6, Episcopal Retirement Homes, Inc. v. Ohio Dep't Indus. Relations*, 582 N.E.2d 606 (Ohio 1991) (No. 90-1051) ("The Court ... acknowledged that it will not exercise rehearing jurisdiction after the time for the filing of a motion for rehearing under its rules ....").
the term in which it was decided.\textsuperscript{191} It was submitted that if the term had ended, the court had lost jurisdiction over the case and would be barred from rehearing entirely.\textsuperscript{192} The court in \textit{Tuck} acknowledged that the General Code of Ohio prohibited the modification of a judgment after term.\textsuperscript{193} However, the court specifically "den[ied] the power of the Legislature to so limit its jurisdiction."\textsuperscript{194} While acknowledging its intention to "conform to the policy of the state, as expressed by legislation," the court asserted that "its jurisdiction is derived from the Constitution."\textsuperscript{195} The constitution confers "such \textit{inherent jurisdiction} as is necessary to enable [the court] to function \ldots."\textsuperscript{196} This is the source of Justice Douglas's contention that \textit{Tuck} supports the inherent power of the court to rehear cases \textit{sua sponte}.\textsuperscript{197}

\textit{Episcopal Retirement Homes} cited \textit{Tuck} for the proposition that even though the court has an inherent jurisdictional power to decide if and when it will reconsider its decisions, the \textit{Tuck} court clearly announced its intention to be bound by its own rules of practice:

\begin{quote}
In the furtherance of justice, [the court] exercises the jurisdiction to grant rehearings. But that litigants and all others may know when its judgments become a finality,\textsuperscript{198} it has refused to exercise such jurisdiction to set aside or modify its judgments after term, where no application or motion to the judgment has been filed "within thirty days after the announcement of the decision" or
\end{quote}

\begin{flushright}
\textsuperscript{191} \textit{Tuck} v. \textit{Chapple}, 151 N.E. 48, 49 (Ohio 1926).  \\
\textsuperscript{192} \textit{Id.}  \\
\textsuperscript{193} \textit{Id.}  \\
\textsuperscript{194} \textit{Id.}  \\
\textsuperscript{195} \textit{Id.}  \\
\textsuperscript{196} \textit{Id.} (emphasis added).  \\
\textsuperscript{197} \textit{Episcopal Retirement Homes, Inc. v. Ohio Dep't of Indus. Relations}, 582 N.E.2d 606, 609 (Ohio 1991) (Douglas, J., dissenting).  \\
\textsuperscript{198} The court's summary of the procedural history in \textit{Tuck v. Chapple} gives a good view of how elusive finality can be:
\begin{quote}
On June 2, 1925, a motion to require the Court of Appeals of Cuyahoga county to certify the record in these cases was sustained by this court. On November 17, 1925, these cases were dismissed \textit{sua sponte} for want of prosecution. On November 20, 1925, a motion to reinstate on general docket was filed. On December 29, 1925, the motion to reinstate was denied. On December 31, 1925, application for rehearing was filed. On January 19, 1926, the application was allowed.
\end{quote}
\end{flushright}
petition filed after term within a time analogous to the provisions of section 11580, General Code.199

The court in Tuck held that although it has the inherent power to regulate its own proceedings, which is superior even to statutory restrictions, in the interest of fairness to litigants, it would abide by its own procedural rules.200 This is a valuable guideline, which seems to be at the heart of the final decision in Episcopal Retirement Homes.

3. City of Rocky River v. State Employment Relations Board201

The judicial restraint called for in Tuck v. Chapple has been difficult to achieve. Particularly in the last decade, the court has been tempted to reconsider decisions under a variety of circumstances, occasionally having to tenuously distinguish its actions from its rules of procedure. Rule IX of the Rules of Practice of the Supreme Court of Ohio requires that the clerk issue the mandate ten days after the announcement of the decision, unless a motion for rehearing is filed.202 If a motion for rehearing is filed, and the court denies that motion, the mandate should be issued at the same time as the decision on the motion.203 The issuance of the mandate indicates that the decision of the court is final and becomes res judicata.204

In City of Rocky River v. State Employment Relations Board205 the court bitterly divided over whether to grant a rehearing. After the decision of the court, the appellee filed timely motions for rehearing and/or clarification.206 The court issued a clarification but "flatly denied a rehearing on the merits."207 The appellee then filed a "Motion for Reconsideration of the Denial of Motion

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199 Id. (citations omitted). The thirty days referred to is the time allowed for under Rule XX of the then operative Rules of Practice of the Supreme Court of Ohio. Under the current rules the period is shortened to ten days. Ohio Sup. Ct. Prac. R. IX.
200 Tuck v. Chapple, 151 N.E. 48, 49 (Ohio 1926).
201 535 N.E.2d 657 (Ohio 1989).
202 Ohio Sup. Ct. Prac. R. IX.
203 Id. § 2.
206 Id. at 660 (Holmes, J., dissenting). Coincidentally the movant was a labor union.
207 Id.
for Rehearing." The court granted this motion. The majority justified this by stating that the judgment had not been finalized until the issuance of the clarification. The dissent strongly objected to the characterization of a clarification as an action on the merits.

Although the majority in Rocky River was careful to distinguish its action from a granting of a second motion for rehearing, Justice H. Brown, writing for the majority, proceeded to cite with approval cases where just such a manipulation of Rule IX of the Rules of Practice of the Ohio Supreme Court had occurred:

This court and its predecessors have reversed decisions after the denial of a motion to rehear. Such was the case in Wisniewski v. Wisniewski (1985), 20 Ohio St. 3d 20, 20 OBR 137, 485 N.E.2d 248 (rehearing denied on October 23, 1985; rehearing granted, case allowed, and case reversed by a vote of five to one on October 30, 1985).

Other examples cited by Justice Brown included instances where the court treated a second motion for rehearing as a "motion for clarification," as a motion to "amend," or simply granted certiorari under a different case number. In each of these cases, rehearing was allowed after a motion for rehearing had been denied.

Finally in Rocky River, Justice Brown addressed the question raised by the dissent that rehearing was actually the result of a change in the composition of the court following elections. He

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206 Id.
207 Id. at 657.
208 Id. at 661. (H. Brown, J., concurring).
209 Id. at 660 (Holmes, J., dissenting). Justice Holmes warned of the effect of accepting the majority's argument:

We would be faced with the anomaly that cases could be kept alive in this court by interminable pleadings, with finality of actions being a sham and a potential doubling of our motion caseload. More importantly, from the standpoint of stability of the law, we could have reversals of the decisional law of this court following the election of a new judge or judges.

210 Id. at 658.
211 Id. (citing OAMCO v. Lindley, 503 N.E.2d 1338 (Ohio 1987)).
212 Id. (citing Newsome v. Newsome, No. 85-819, 1985 WL 9933 (Ohio Ct. App. Mar. 28, 1985)).
213 Id. (citing Viock v. Stowe-Woodward Co., 517 N.E.2d 544 (Ohio 1987)).
214 Id.
215 Id. at 658-59.
proceeded to cite fifteen cases where the incoming 1987 court, substantially reconstituted after elections, had reheard cases just decided by the outgoing 1986 court.\textsuperscript{218}

The majority and dissent in \textit{Rocky River} each presented a good summary of the opposing attitudes concerning rehearing. Justice Brown argued:

The fact is that no precedent governs the procedural matter which is before us .... There is nothing unlawful in the grant of a motion [for rehearing] which is pending before us, where the grant expresses the will of the majority of the justices sworn to office on this court.\textsuperscript{219}

In his dissent, Chief Justice Moyer countered:

Finally, perhaps the most important conclusion to be drawn from the most recent vote in this case and all that has been written about that vote is that we should adopt a judicious and rational written procedure for the disposition of motions that are filed under the circumstances of the motion filed herein and those referred to in Justice Brown's concurrence.\textsuperscript{220}

Thus on the eve of \textit{Episcopal Retirement Homes}, the court was clearly split on the issue of rehearing, and the case did little to resolve the controversy.

4. \textit{Episcopal Retirement Homes, Inc. v. Department of Industrial Relations and Beyond}

The ruling in \textit{Episcopal Retirement Homes} did not clearly address the issue of \textit{sua sponte} rehearing:

No party has sought a rehearing from our final judgment announced on August 14, 1991. No new argument and no new evidence have been presented to us since the final judgment was announced on August 14, 1991. Accordingly, the motion to vacate the \textit{sua sponte} rehearing ... is hereby granted.\textsuperscript{221}

In the first sentence of the above quote, the court reinforced established precedents concerning the standing of \textit{amici curiae}. The import of the second sentence is much less clear. The logic

\textsuperscript{218} Id. at 659 n.3.
\textsuperscript{219} Id. at 658.
\textsuperscript{220} Id. at 660 (Moyer, C.J., dissenting).
\textsuperscript{221} Episcopal Retirement Homes, Inc. v. Ohio Dep't of Indus. Relations, 582 N.E.2d 606 (Ohio 1991) (citations omitted).
in the holding seems to be that without new argument or evidence, rehearing is inappropriate. Since the only motions before the court, those of the nonparties, were invalid, it is obvious that no new argument or new evidence was presented. But does this necessarily require the inference that a grant of rehearing requires the presentation of a new argument or new evidence? Four members of the court had ordered a rehearing *sua sponte.*222

By its very nature *sua sponte* rehearing involves no new argument or new evidence presented by the parties. Does this mean that the court cannot therefore order rehearing *sua sponte*? This would seem to be too broad of a reading.

The concurring opinions offered little further explanation. Justice Holmes did address the issue briefly: “There is no specific rule of practice by which this court may *sua sponte* grant a rehearing of a final decision. And, particularly, there is no basis to permit such *sua sponte* action by the court in support of an improper motion for a rehearing filed by a nonparty.”223 This certainly does not resolve matters. As Justice Resnick pointed out, the vote for *sua sponte* rehearing was not based on the amicus curiae motions, but rather on the “inherent authority to correct a miscarriage of justice.”224 The dissent had argued that a rehearing should be held based on the court’s inherent power to review its own decisions. By choosing to focus on the lack of a valid motion before the court, the majority avoided the dissent’s argument and thus left the issue of *sua sponte* rehearing unresolved.

5. Rehearing and Due Process

The Ohio Supreme Court was created by the Ohio Constitution225 and was empowered to make rules governing its proceedings.226 It is inherent in the concept of separation of powers that once established, the court must be able to direct its own affairs.227 However, the court’s conduct is subject to the rights of citizens

223 Episcopal Retirement Homes, 582 N.E.2d at 607 (Holmes, J., concurring).
224 Id. at 610 (Resnick, J., dissenting).
225 Id.
226 OHIO CONST. art. IV, § 5(B).
227 Id.
as protected by the Ohio and United States Constitutions. 228

Historically, the Ohio Supreme Court has used the power to reconsider judgments sparingly. Rule IX of the Rules of Practice of the Ohio Supreme Court requires that motions for rehearing "must be confined strictly to the grounds urged for rehearing and must not constitute a reargument of the case." 229 In practice, that has translated to the court's willingness to recognize the practical necessity of correcting inadvertent errors in its decisions. 230 In a recent case both the appellee and the appellant moved for rehearing, stating that the court had misstated established law. 231 The court corrected its judgment. 232 This limited use of rehearing to correct obvious errors by the court seems altogether appropriate.

ERH did not contest the inherent power of the court to reconsider its judgments. 233 Rather, ERH argued that the power to order rehearing sua sponte should be limited to the same time period established for rehearing. 234 If the court has the power to reconsider a judgment, sua sponte, fifty-five days after entering judgment, then what would prevent the court from rehearing after an even longer arbitrary period? 235 The appellee concluded,

Under appellants' reasoning, this Court would have the power and jurisdiction to reconsider prior decisions at any time in its sole

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228 "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

229 "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety." Ohio Const. art. I, § 1.

230 "All Courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." Ohio Const. art. I, § 16.


233 See Reply Memorandum of Appellee, Episcopal Retirement Homes, Inc., In Support of Motion to Vacate Rehearing Entry, at 2, Episcopal Retirement Homes, Inc. v. Ohio Dep't of Indus. Relations, 582 N.E.2d 606 (Ohio 1991) (No. 90-1051).

234 Id. at 3.

235 Id. at 4.
discretion. Unquestionably, this Court’s rehearing jurisdiction is not unlimited, for if it were, either no judgement could be considered final, or final judgments could be arbitrarily vacated. Clearly, the former conclusion wholly undermines our system of jurisprudence and the latter runs afoul of the protections granted the citizens of this state by the Constitutions of Ohio and the United States.236

Some sort of limitation on the duration of the court’s *sua sponte* rehearing powers seems reasonable in light of the due process rights of litigants. The dissent in *Episcopal Retirement Homes* contended that the court needs an unlimited power to review its decisions in order that decisions of the court may reflect the opinion of the majority of the court.237 Justice Douglas was concerned that the opinion of the court in *Episcopal Retirement Homes* is “an incorrect statement of the law as it involves the prevailing wage law and R.C. Chapter 140 bonds.”238 What he meant, of course, was that in his opinion, a majority of the court would decide the case differently, if it were brought before the court today. But this phenomenon of a sitting court holding opinions which are contrary to the existing precedents is inherent in the very structure of the American judiciary. The role of the courts is to decide cases and controversies, that is, to determine the rights of specific litigants presented in specific factual situations.239 The Ohio Supreme Court, through the mechanism of certiorari, decides which cases it will consider. The court, however, is powerless to create rules of law in the abstract; that is the role of the legislature. The courts must be satisfied with interpreting the law in light of the actual cases presented by parties who have demonstrated a cause of action. For a court to exercise unlimited power to review its decisions *sua sponte* flies

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236 *Id.*
238 *Id.*
239 To invoke the jurisdiction of a court of justice it is primarily essential that there be presented to it a genuine and existing controversy calling for present adjudication involving present rights. In the absence of statutory enlargement, its duties and powers are therefore limited to determination of rights actually controverted in particular cases before it, and unless the cause of action upon which the plaintiff brings suit relates to such a controversy, the suit will not be entertained.

1 AM. JUR. 2D *Actions* § 56 (1964).
in the face of this traditional jurisdictional restriction. Consider, for example, the ramifications if the United States Supreme Court elected to reconsider *sua sponte* a controversial decision such as *Roe v. Wade*.240

**CONCLUSION**

The controversy between Episcopal Retirement Homes, Inc. and the Ohio Department of Industrial Relations arose over the issue of wages to be paid on a construction project.241 In order to finance a renovation of their facilities with tax-exempt hospital revenue bonds, ERH entered into an agreement with the Hamilton County Hospital Commission.242 Chapter 140 of the Ohio Revised Code enables a private health care provider such as ERH to have the advantage of tax-exempt bonds through a complicated lease/leaseback arrangement with a public health care provider.243

The Ohio Department of Industrial Relations argued that the contractual relationship between the County and ERH qualified the project as a “public improvement,” making it therefore subject to the Ohio prevailing wage law provided in section 4115.03(C) of the Ohio Revised Code.244 ERH contended that its relationship with the County was strictly formal.245 Further, they argued that the County’s assignment of its rights and duties to the trustee further isolated ERH from public action.246

Upon petition, the Ohio Supreme Court held by a four-to-three vote that the prevailing wage law did not apply.247 The court held that the project was essentially a private one.248 Although the general public benefited from the project, the project was

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242 Id. at 135-36.
243 Id.
244 Id.
245 Id. at 138.
246 Id.
247 Id. at 134.
248 Id.
not constructed “pursuant to a contract with a public authority” or “for a public authority,” the two-pronged test the court used to interpret the statute.\textsuperscript{249} The majority’s argument that the County’s role was largely formal is well-taken. To qualify as a public project, the County should have received a proprietary benefit or have been put at some monetary risk. One decisive factor was the careful drafting of the lease/leaseback agreement to distance the County from the project by assigning all of the County’s interests to a trustee.

Equally persuasive is the court’s argument based on legislative intent. While the General Assembly had specifically amended a number of similar bond issue statutes to bring them under the prevailing wage law, Chapter 140 has never been amended in this manner.

After the decision of the court had been issued, \textit{amicus curiae}, the Ohio State Building and Construction Trades Council, filed a motion for rehearing within the ten days required by the Rule IX of the Rules of Practice of the Ohio Supreme Court. Consequently, the clerk did not issue the mandate of the court.\textsuperscript{250} Almost two months after the original decision, four members of the court granted a rehearing, \textit{sua sponte}, as to all issues in the case.\textsuperscript{251} After another two months, the court by another four-to-three vote ruled that the nonparties lacked standing to be heard by the court. Therefore, since there were no new arguments and no new evidence before the court, ERH’s motion to vacate the rehearing order was granted.\textsuperscript{252}

The dissent argued vigorously that the court has the inherent power to conduct its own affairs, and thus the power to correct errors in its decisions.\textsuperscript{253} The dissent pointed out that the holding in the case did not reflect the views of a majority of justices on the substantive issue of the applicability of the prevailing wage law to Chapter 140 bonds.\textsuperscript{254}

\textsuperscript{249} Id.
\textsuperscript{250} Episcopal Retirement Homes, Inc. v. Ohio Dep’t of Indus. Relations, 582 N.E.2d 606, 606-07 (Ohio 1991).
\textsuperscript{251} Id. at 610.
\textsuperscript{252} Id. at 606.
\textsuperscript{253} Episcopal Retirement Homes, Inc. v. Ohio Dep’t of Indus. Relations, 575 N.E.2d 134, 139 (Ohio 1991).
\textsuperscript{254} Id.
There are no procedural rules for the exercise of *sua sponte* rehearing and the guidance from case law is uncertain.\(^{255}\) The ruling in *Episcopal Retirement Homes* does not create clear procedural guidelines. There seems to be a growing tendency in the past decade to justify the rehearing of cases, especially when the court is reconstituted after elections.\(^{256}\) In order to protect the integrity of the court and the due process rights of the litigants, the court could follow the wisdom its predecessors displayed in the early part of this century. In *Tuck v. Chapple*\(^{257}\) the court, while asserting the inherent power to reexamine its decisions, pledged to follow reasonable procedures, "that litigants and all others may know when its judgments become final."\(^{258}\) The court should adopt the same time limitations on *sua sponte* rehearing as it does on rehearing by motion. This restraint would surely enhance the public’s confidence in the court’s ability to deal fairly and impartially with complex and politically-charged issues.


\(^{256}\) Id.

\(^{257}\) 151 N.E. 48 (Ohio 1926).

\(^{258}\) Id. at 49.
BOOK REVIEW

The Fourth Estate and the Constitution: Freedom of the Press in America

by Lucas A. Powe, Jr.¹


Reviewed by Nancy R. Blankenburg

The framers of the United States Constitution created a system of government which, by its very nature, protected against unchecked exercises of power by the federal sovereignty upon its citizenry. They did so by creating three separate branches of government, each with different powers in order to check the others and to maintain a balance. It is doubtful, though, that the framers realized in 1791 that what was to become the First Amendment of the United States Constitution would be the government’s ultimate check.

James Madison, the father of the Constitution and of its First Amendment, wrote: “A popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both.”² The means of acquiring the popular information so essential to an informed citizenry and successful self-government was the press.³ Thus, the press essen-

³ Id. at 170.
tially became a totally autonomous fourth branch of government.\textsuperscript{4} According to Powe, though, the press's performance of its "Fourth Estate" function began less than thirty years ago.\textsuperscript{5} Powe writes, "[I]t is only a slight exaggeration to view 1964 as year zero for discussions of the constitutional issues that are currently central to the press' performance of its Fourth Estate functions."\textsuperscript{6}

In Powe's new book, \textit{The Fourth Estate and the Constitution: Freedom of the Press in America}, he explains and presents his views of the modern press and its Fourth Estate functions.\textsuperscript{7} In the book, Powe presents his analysis of the modern press in three sections. He begins with a historical look at the First Amendment. He then addresses the most debated contemporary legal issues involving the press: libel, prior restraint, access, and antitrust. Finally, Powe presents a discussion of models of freedom of the press which may help to explain many Supreme Court decisions.

Powe appropriately begins his historical analysis by looking at the libel action against John Peter Zenger.\textsuperscript{8} But he also looks at the contempt of court case involving Tom Patterson,\textsuperscript{9} a name not as well known to First Amendment scholars. Powe uses these two First Amendment cases to illustrate the minimum freedom which the First Amendment protects.\textsuperscript{10} In addition, Powe argues

\textsuperscript{4} \textit{Id.} at 260. Powe describes the press as the "Fourth Estate." The Fourth Estate model of the press was defined and legitimated by Justice Potter Stewart. Stewart stated that the First Amendment is "a fourth institution outside the government to check the potential excess of the other three branches." Potter Stewart, \textit{Or the Press}, 26 Hastings L.J. 631, 633-34 (1975).

\textsuperscript{5} \textit{Powe, supra} note 2, at ix.

\textsuperscript{6} \textit{Id.}

\textsuperscript{7} Powe is the first constitutional scholar to write a book dealing exclusively with post-1964 developments in the constitutional law of the Fourth Estate. \textit{Id.}

\textsuperscript{8} \textit{Id.} at 7-13. John Peter Zenger was a New York printer charged with seditious libel in 1735. The jury found him not guilty because he had printed the truth, even though at the time truth was not a defense. The Zenger case was the beginning of the colonists' realization of the need for a free press to criticize oppressive government. \textit{See J. Alexander, A Brief Narrative of the Case and Trial of John Peter Zenger} 8 (S. Katz ed., 1963).

\textsuperscript{9} \textit{Powe, supra} note 2, at 1-7. Tom Patterson was the owner-editor of the \textit{Denver Times} and the \textit{Rocky Mountain Daily News} who criticized Colorado Supreme Court decisions and Denver elections. He was charged with contempt of court and fined $1,000. The United States Supreme Court concluded that the First Amendment only protects prior restraint, not subsequent punishment, whether the material is true or false. Patterson v. Colorado, 205 U.S. 454, 462 (1907).

\textsuperscript{10} \textit{Powe, supra} note 2, at 13.
that the cases set forth the basic issue of the First Amendment: the right to publish the truth about the government, however critical, in order to spread the message to the public.  

Beyond this basic issue illustrated by the Zenger and the Patterson cases, the scope of the First Amendment's protection is a debate which is still going on today. The framers of the Constitution had little discussion on the scope of the First Amendment. Thus, the scope has been defined according to the events of the day. As a result, the First Amendment has had times of great freedom and times of great strain over the decades. Powe illustrates this point by discussing historical events which have both strained and stretched the scope of the First Amendment.

Powe is adamant about when the press emerged as the Fourth Estate. Powe cites *New York Times v. Sullivan*, *New York Times v. United States*, and the seven years between the two cases as the most dramatic era for freedom of the press. The author summarizes the two cases in one simple phrase. He states that *New York Times v. Sullivan* "protected falsity to protect truth" and *New York Times v. United States* then "protected the truth to expose official lies."

Powe goes on to take an in-depth look at the facts, theories, and results of the *New York Times v. Sullivan* and *New York Times v. United States* decisions. He comes to the conclusion

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11 Id.
12 Id. at 23. According to Powe, the framers did not have to decide the scope of the freedom of the press because no event forced the issue.
13 Id. at 16.
16 403 U.S. 713 (1971).
18 Powe, supra note 2, at 104.
19 Id. at 79-105. *New York Times v. Sullivan*, 376 U.S. 254 (1964), was a libel case. Louisiana government officials sued the *New York Times* for printing an advertisement which attempted to raise money for Martin Luther King, Jr.'s legal defense. The United States Supreme Court recognized that the traditional libel laws operating to protect public officials had a chilling effect on public debate. Id. Thus, the Court set forth four new rules to govern libel law, id. at 281, the most important rule being that public officials may not recover damages for defamatory falsehoods relating to their official
that the Supreme Court between 1964 and 1971 undid much of
the First Amendment law based on the "self-preservation" the-
ory. 20 As a result, Powe explains, the Supreme Court "entered
into a brand new era of law and dramatically constitutionalized
it." 21

Some First Amendment scholars, however, would argue that
defining the modern First Amendment had already built momen-
tum by 1964. 22 Powe contends that this theory completely over-
looks the fifteen years when the courts turned their heads and
ignored McCarthyism. 23 Thus, using 1964 as year zero for ana-
lyzing the press's performance of its Fourth Estate functions,
Powe delves into an in-depth discussion on what are viewed by
him to be "the most contentious contemporary issues" involving
this post-1964 press: libel, prior restraint, access, and antitrust. 24

Modern libel law was established by the Supreme Court in
New York Times v. Sullivan. 25 According to Powe, though, the
"wide-open discussions of public affairs without the fear of huge
liability for error has faded through the years." 26 At the same
time, Powe emphasizes that "those injured by press errors fare
no better, as virtually all libel plaintiffs take home nothing except
their loss in court." 27 Powe dubs this current state of libel law
as a "lose-lose situation." 28

Powe attributes the current state of libel law to the unexpected
turns of New York Times v. Sullivan. 29 Powe maintains that as a

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21 Id. at 89.
23 Powe, supra note 2, at 90.
24 Id. at 109.
26 Powe, supra note 2, at 110.
27 Id.
28 Id. at 121.
29 Id. at 113. See Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (The Court held that private figures involved in public events are not required to prove actual malice.); Herbert
result of the Court's decisions, the truth or falsity of the printed material has nothing to do with libel litigation. According to Powe, the plaintiff wants the falsehood to be corrected, but the law allows the press to stand on their story. As a result, it is easier for the press to win the case on privilege grounds rather than the truth. In addition, litigation does not restore the plaintiff's injured reputation. Powe contends that it is the press's conduct, rather than the plaintiff's reputation, that is on trial. He submits that this inflames the juries and invites punishment of the press. Lastly, the cost of the trial and the possibility of large damages puts a "chill" on the press even though most of the plaintiffs ultimately lose in court. What is the solution to this lose-lose situation facing both the plaintiffs and the defendants? Powe opines that New York Times v. Sullivan needs to be rethought.

The next issue Powe discusses is prior restraint. The First Amendment, according to Powe, clearly adopted Blackstone's common law rule which prohibited prior restraint. Powe points out that this rule, which is seen as a great protection of the freedom of the press, is "layered with ironies." One of these ironies, Powe explains, is that although prior restraint is prohibited, the First Amendment, according to Powe, clearly adopted Blackstone's common law rule which prohibited prior restraint. Powe points out that this rule, which is seen as a great protection of the freedom of the press, is "layered with ironies." One of these ironies, Powe explains, is that although prior restraint is prohibited, the First Amendment, according to Powe, clearly adopted Blackstone's common law rule which prohibited prior restraint. Powe points out that this rule, which is seen as a great protection of the freedom of the press, is "layered with ironies." One of these ironies, Powe explains, is that although prior restraint is prohibited, the First

v. Lando, 441 U.S. 153 (1979) (The Court held that in order to prove actual malice plaintiffs could, through discovery, obtain evidence about the reporters' and editors' states of mind.); Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986) (The Court concluded that plaintiffs in public figure cases had the burden of proving falsity.); Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (The Court held that satire would receive full constitutional protection under the First Amendment.).

Powe, supra note 2, at 121 n.29 (noting the relevant United States Supreme Court decisions).

Id. at 121.
Id.
Id.
Id.
Id. at 121-27.
Id. at 126.
Id. at 128-35.
Id. at 135-39. Powe sets forth and discusses the pros and cons of five possible changes in the rules established in New York Times v. Sullivan: (1) losing party at trial pays all of the legal fees, (2) change the actual malice standard to a negligence standard, (3) impose a limitation on damages to actual financial loss, (4) make libel suits declaratory judgment actions, (5) limit damages to proven actual damages and eliminate the actual malice standard.

Id. at 141.
Id.
Amendment permits subsequent punishment. The rationale for the rule is that prior restraint has a greater chilling effect on the freedom of expression. Powe thinks that the rationale is no longer valid because, as recent court cases have proven, the fear of subsequent punishment keeps the press from taking chances and printing controversial stories. Thus, Powe explains that, in the end, both prior restraint and subsequent punishment keep information from the public.

Powe sets forth another irony. He notes that "ever since the Supreme Court in 1931 created the modern doctrine in Near v. Minnesota, national security has been at the forefront of exceptions to the ban on prior restraint... The national security cases, however, are typically the ones where the rationale of no prior restraints has its central core—perceived seditious attacks on government policy." A final irony pointed out by Powe is that when prior restraints are legally permitted, they are not always effective. This is because the government lacks advance notice of the publication or because unenjoined sources remain free to disseminate the information.

The third issue that Powe discusses is the press's access to sources and information. New York Times v. Sullivan emphasized that discussion of public affairs must be "uninhibited, robust and wide open." But a prerequisite to this element of self-government is an informed public. The information needed is in the hands of the government, and the government then selectively furnishes this information to the press at its convenience. So where does

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41 Id. Powe uses as examples United States v. Morison, 844 F.2d 1057 (4th Cir. 1988), cert. denied, 488 U.S. 908 (1988) (Samuel Morison was convicted for espionage for providing Jane's Defense Weekly with a satellite photograph of a new Soviet carrier under construction at a Black Sea base), and the "Ivy Bells" episode where the Washington Post decided against printing in its entirety a story after being threatened with a criminal indictment by William Casey. Id. at 154-55.

42 Id. (However, Powe tends to ignore the fact that prior restraint actually freezes the press while subsequent punishment may possibly chill the press, a key difference to the press and to the public. Alexander M. Bickel, Mortality of Consent 61 (1975)).

43 283 U.S. 697 (1931).

44 Powe, supra note 2, at 141-42.

45 Id. at 141. Powe discusses United States v. Progressive, 467 F. Supp. 990 (W.D. Wis.), dismissed mem., 610 F.2d 819 (7th Cir. 1979), and the Pentagon Paper cases to illustrate his point. During both of these cases other newspapers published the information sought to be enjoined.


47 Powe, supra note 2, at 171.
that leave the press whose function it is to act as a check on the
government? Powe answers the question by looking at the impor-
tant relationship the press has had with its sources.

According to Powe, "the willingness of others to supplement the
official information—handouts is pejorative—is essential." Thus,
insiders leak information to the press. The problem, as Powe points
out, is that this process is not protected by the First Amendment
and, in fact, can be a criminal offense. Consequently, the people
who leak the information may be punished. On the other hand,
there is no law in the United States that makes publication of
government information, even if it is classified, a criminal offense.

What problems must the press face as a result of this situation?
First, as Powe argues, a chilling effect may result whether or not
the "leaker" is known or discovered. The fear of possible punish-
ment may keep a leaker from contacting the press. Second, if the
leaker is not known, the press may be forced to reveal its source.
This may also deter leakers from contacting the press or deter
the press from printing the information at all.

The solution to this catch-22 situation, according to the press, is
a general privilege to withhold the sources. Powe opines that a
blanket protection against disclosure would not be of service to
the press or to the public. He explains that a blanket protection
would fail to take into account relevant interests mandating disclo-
sure: criminal justice and the determination of actual malice in
libel suits. The courts seem to agree.

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48 Id.
50 Id. at 174. The leakers may be charged with theft or conversion or charged under the Official Secrets Act (18 U.S.C. § 641 (1988) (conversion), § 793 (unauthorized disclosure), and § 794 (disclosure to foreign government)).
51 Id. at 173.
52 Id. at 177-90. See Branzburg v. Hayes, 408 U.S. 665 (1972) (The Court held that the press had no constitutional privilege to protect criminal sources.) If the reporter refuses to reveal his source, he may be put in jail or, in a libel case, the judge may assume that the information is true.
53 Powe, supra note 2, at 190.
54 Id.
55 See Branzburg v. Hayes, 408 U.S. 665 (1972). Powe thinks that the Court in Branzburg reached a balanced solution to the catch-22 situation because it reflected the needs of a free press and the legitimate need to have access to the press's information. Powe, supra note 2, at 190.
The last issue that Powe discusses deals with the relationship between the press and antitrust law. Powe emphasizes that an important aspect of the freedom of the press is that the more press there is, the better the chances that the public will know all sides of the debate, and the better the chances that the public will be able to make their own informed decision. Powe fears that an homogeneous press is a threat to this philosophy.

Powe points out that media outlets are owned by a small number of people. Additionally, the number of competing newspapers is decreasing. The consequence, he submits, is that a few people may have an inordinate influence on public opinion and the public will not be informed on all sides of a debate. The solution, he contends, is two-fold: Federal Communications Commission (FCC) regulations and antitrust laws. Powe argues, however, that antitrust laws have not worked well to break up giant media groups.

The author, though, in most of this chapter seems to ignore what these media groups have brought to the news industry. He does, however, in one paragraph agree that the current state of the media market is not a horrible threat to press as we know it. Indeed, Powe seems to de-emphasize the breadth and amount of information available to the public today. The media may be owned by a few giant groups, but the number of outlets and the wide diversity of information is unprecedented. Considering these facts, it would appear that today's media can readily fulfill the public need for a variety of opinions and information.

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* Powe, supra note 2, at 210.
* Id. at 203.
* Id. Media outlets are radio and television stations, newspapers and magazines. Twenty-one companies listed in the Fortune 500 are media groups.
* Id. at 201-02. The majority of cities have only one newspaper. Newspaper chains own 77% of all newspapers.
* Id. at 204.
* Id. at 203-07. The FCC has limited the number of stations that a licensee can own on the same broadcast service. FCC has also stated that a party cannot own more than one station of each type—AM, FM, or television—in the same community.
* Id. at 208-12. The courts have used the Sherman Antitrust Act to curtail media monopolies. See, e.g., Associated Press v. United States, 326 U.S. 1 (1945).
* Powe, supra note 2, at 212.
* The public has grown from relying on local newspapers to having thousands of magazines, numerous radio and television stations, widely dispersed national newspapers (for example, the Wall Street Journal, USA Today, and the New York Times), and cable stations which include 24-hour news coverage.
In the last section of the book, the author discusses two different popular models of freedom of the press, postulated over time, which may help to explain past and future cases. The first model is the right-to-know doctrine. Powe suggests two problems with this model. First, that the freedom of the press is in the hands of a few privileged people who own the media outlets. As a result, sometimes the rights of the viewers, listeners, or readers become second to the rights of the broadcasters and publishers to offer their own views as opposed to all the possible views. Second, that the right-to-know doctrine invites public inquiries into the press’s performance of how well it is informing the public. As a result, Powe explains, the press may lose its autonomy.

The second model that Powe discusses is the Fourth Estate model. Under the Fourth Estate model the press is “autonomous, functioning as a watchdog on the government, publicizing abuses, and, one hopes, arousing the citizenry.” Embedded in this model is the autonomy of the press. The press is not required to answer to anyone and, more importantly, is not required to be fair.

The Fourth Estate model offers the potential of power and places the press in a place of privilege. Powe points out, though, that with this power comes responsibility. But to what end is the press held responsible for its actions? And should the press be held accountable for its actions? Should the press be evaluated on its performance of its Fourth Estate functions? According to Powe, the First Amendment does not put the press beyond question. In fact, Powe concludes, it is the tensions inherent in the press’s checking function that will ensure that the press will be questioned.

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65 Under the right-to-know doctrine, the press is in a privileged position and, as such, vindicates the citizens’ right to know what the government is doing. Id. at 235.
66 Id. at 246-55.
67 Id.
68 Id. at 257.
69 Id. at 234.
70 Id.
71 Powe cites Miami Herald v. Tornillo, 418 U.S. 241 (1974), to illustrate the importance of the press’s autonomy. In Tornillo, the Court held that a party has no right to reply to a newspaper editorial.
72 Powe, supra note 2, at 290.
73 Id.
74 Id. at 297.
75 Id.
The Fourth Estate and the Constitution: Freedom of the Press in America reminds its readers of the critical and complicated function of the press in the United States. Powe's analysis of the modern constitutional law of freedom of the press is both dense and authoritative. Although the author's views may be based on a theoretical perspective, his understanding of the economic, political, and journalistic reality of the workings and problems of the press gives the book a practical flavor. As such, it may widen the depth of understanding and appreciation for the struggles between the First Amendment as mere words, and the practical implications of those words in today's society for not only journalists and politicians, but for the public as well.