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LEGAL PROCESS IN COMPARATIVE NEGLIGENCE CASES

ROBERT E. KEETON* AND SECTION THREE OF THE HARVARD LAW SCHOOL CLASS OF 1979*

Tort law has changed dramatically in the past few years. One of these changes has been the elimination of the "all or nothing" contributory negligence defense in favor of a comparative fault system. Recently, Pennsylvania adopted a statute providing for comparative negligence. In this Article, Judge Keeton and his coauthors address a number of difficult problems which judges will face when interpreting a comparative negligence statute such as Pennsylvania's. The authors set forth a useful theory of judging to aid a judge in his analysis of statutory construction generally and the problems of the Pennsylvania statute specifically.

Introduction

New conceptions of the purpose of a tort system have prompted state legislatures recently to enact a number of comparative negligence statutes.[1] Each of these statutes is distinctive and each will require judicial interpretation, or perhaps even legislative amendment, to resolve the difficult problems of its practical application.[2]

In the summer of 1976, Pennsylvania enacted one of these statutes,[3] and the problems involved in applying it are numerous. In answering an examination question based on an assumed statute almost identical with that enacted in Pennsylvania,[4] the

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* United States District Court Judge for the District of Massachusetts. The entire class contributed to this Article through their answers to an examination question given by Judge Keeton when he was Professor of Law at Harvard Law School. The following persons collaborated with the instructor in preparing this Article: James Berliner, Laura Carroll, Mary Fisher, Lee Hanson, Gary Herrmann, David Johnson, Saturnino Lucio, Michael Novey, John Roberts, Robert Shuftan, Anne Shuttee, George Soule, Thomas Storer, and Steven Thel.

1 *See, e.g.*, R.I. GEN. LAWS § 9-20-4 (1971 and Supp. 1978); WYO. STAT. ANN. § 1-1-109 (1977).

2 This will be so even if the Uniform Comparative Fault Act, approved by the National Conference of Commissioners on Uniform State Laws in August of 1977, proves to be extraordinarily influential. NCCUSL, UNIFORM COMPARATIVE FAULT ACT (Cum. Supp. 1980). *See* Wade, *A Uniform Comparative Fault Act — What Should It Provide?* 10 U. MICH. J. L. REF. 220 (1977).

3 PA. STAT. ANN. tit. 42, § 7102 (Purdon 1979).

4 The question asked the student, in the role of clerk to a trial judge, to prepare a memorandum identifying and recommending disposition of problems that may arise in the application of the assumed statute.

students in Section 3 of the Harvard Law School Class of 1979 identified more than twenty significant and debatable problems. This Article analyzes only a few of the more significant ones and recommends solutions for them.[5]

The text of the Pennsylvania statute follows, with bracketed numbers inserted for later reference:

> [1] In all actions brought to recover damages for negligence resulting in death or injury to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or his legal representative [2] where such negligence was not greater than the causal negligence of the defendant or defendants against whom recovery is sought, [3] but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.
>
> [4] Where recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed.
>
> [5] The plaintiff may recover the full amount of the allowed recovery from any defendant against whom such plaintiff is not barred from recovery. [6] Any defendant who is so compelled to pay more than his percentage share may seek contribution.

* * *

I. JUDGING IN A STATUTORY CONTEXT

The objective of this Article is not merely to analyze the Pennsylvania statute, or even the comparative negligence doctrine; more broadly, this Article tries to test the usefulness of a theory about judging as well. The following, therefore, summarizes a suggested theory on how a judge should proceed when a comparative negligence statute is urged as controlling[6]:

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5 Dissenting co-authors were invited to record their views in footnotes. As with judicial opinions, however, dissents are ordinarily inspired by conviction rather than doubt, and the absence of a recorded dissent should not be interpreted as an affirmation of the majority position by every co-author.

6 The suggested guidelines for judging are adapted from a memorandum prepared for the Federal Appellate Judges Conference in Phoenix, Arizona, Oct. 29, 1976, and are based upon views stated in R. KEETON, VENTURING TO DO JUSTICE 94-95 (1969), and Statutes, Gaps and Values in Tort Law (Roy R. Ray Lecture, Southern Methodist University School

1. If the statute addresses the issue at hand and plainly resolves it in a constitutionally permissible way, then apply the mandate of the statute.

2. If the issue at hand is one beyond that core area — that is, if the statute does not address and resolve it — then defer to the statute's manifestations of principle and policy to the extent that they are relevant.

3. Subject to the first two propositions, seek to resolve the issue at hand in a way that produces the best total set of rules, including those rules within the core area of the statute and other cognate rules of law, whatever their source. In making a decision on the issue at hand, defer to the statute's manifestations of principle and policy to the extent that they are relevant, and consider as data all the strictly applicable statutory mandates and related judicial precedents. A proper decision should be consistent with an evenhanded system of rules for resolving both this issue and all cognate issues. Note that the judicial formulation of a rule when the statute does not provide a clear mandate need not constitute improper judicial legislation.[7] First, the legislature did not forbid such "legislating" and it may have assumed that judges would formulate rules to "fill in the gaps" in the statutory structure rather than blindly letting the status quo rule. Second, it has been the historical function of judges to "develop" law to the extent necessary to decide disputes before them — especially in such traditional common law areas as tort law.

4. In determining whether a statute addresses the issue at hand, dispense with unrealistic assumptions about the legislative process. Treat legislative history not as a statutory mandate but only as data; declarations in legislative history should be seen as no more than the *obiter dicta* of the legislative process. If it is necessary to resort to legislative history, apply paragraphs 2 and 3, not paragraph 1 above. Also, do not treat the legislature's failure to

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of Law, Feb. 24, 1978), also published in 44 J. OF AIR LAW & COMMERCE 1 (1978). H. HART & A. SACKS, THE LEGAL PROCESS, 1413-17 (tent. ed. 1958). *See also* Frankfurter, J., *in* Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951), and materials collected in R. ALDISERT, THE JUDICIAL PROCESS 170-235 (1976). A letter from Judge Aldisert to Mr. Keeton about the Pennsylvania statute inspired the examination question that led to this Article.

7 *See, e.g.,* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921). *But see* D'Amato, *Judicial Legislation,* 1 CARDOZO L. REV. 63 (1979).

provide a mandate as itself a (contrary) mandate. "Not speaking" to an issue may simply stem from time or resource constraints rather than a conscious policy. Similarly, failure to enact legislation will rarely be a significant datum, and when it is, paragraphs 2 and 3 again apply; just as with mandates for legislation, such failure to enact legislation should rarely be treated as a conscious legislative directive (paragraph 1).

Although a legislature can solve problems by appealing to a broader range of potential solutions than those available to courts, it cannot act in relation to every event. When the legislature has not acted (and thus, when there is no controlling statute), the court should aim for the best solution available to it.

The foregoing theory will be both applied and illustrated by the following analysis of the Pennsylvania statute. The authors believe that the theory is a useful way of thinking about and solving at least some of the problems of applying any comparative negligence statute.

II. Applying the Theory of Judging to Pennsylvania's Statute

A. *Multiple-Defendant Cases Involving One or More Defendants Less Negligent than Plaintiff*[8]

Problem 1. In an action by a plaintiff, P, against two defendants, D_1 and D_2, what judgment is to be entered if P's negligence is more than that of either D_1 or D_2 but is equal to or less than that of D_1 and D_2 combined?

Problem 2. In an action by P against D_1 and D_2, what judgment is to be entered if P's negligence is more than that of D_1 but equal to or less than that of D_2?

Problem 3. Are the answers to problems 1 and 2 affected by whether D_1 and D_2, apart from this statute, would have been subject to joint and several liability rather than merely to several liability for different parts or proportions of the damages? Would it make a difference whether two defendants both contributed to a single impact, caused separate impacts in quick succession, or caused separate impacts at widely separated times?

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8 The primary author of this section is Thomas P. Storer, who is one of the minority on the key issue that divided the group as explained in the text.

Underlying these three problems is a choice between two alternatives: (1) the *aggregation alternative* — allow the plaintiff to recover if, and only if, the combined negligence of all defendants equals or exceeds plaintiff's negligence and (2) the *individual comparison alternative* — allow the plaintiff to recover from any given defendant if, and only if, the negligence of that defendant, considered individually, equals or exceeds plaintiff's negligence. The aggregation alternative favors the plaintiff, for it permits the plaintiff to recover even against a less negligent defendant so long as the aggregate defendants' negligence is greater than the plaintiff's. In the same situation, however, the individual comparison would not permit the plaintiff to recover.

The words of the statute do not express a clear mandate or preference for either of the alternatives. Strict parsing of clause [2] may offer slightly stronger support for the aggregation alternative: the reference to "the causal negligence of the . . . defendants" suggests that the defendants' negligence is to be treated as a unit for the purpose of determining whether the plaintiff's negligence bars the action. On the other hand, this language may have been chosen with no purpose other than that of recognizing the possibility of multiple defendants.

Strict parsing of clauses [4] and [5], however, may offer stronger support for the individual comparison alternative. Under clause [4], liability is to be apportioned among "all defendants against whom recovery is allowed." Under clause [5], the plaintiff may recover the full allowed recovery from any defendant against whom the "plaintiff is not barred from recovery." One might therefore infer from clauses [4] and [5] that the plaintiff is "barred" and is not "allowed" a recovery against a defendant whose individual negligence is less than the plaintiff's negligence. In turn, both clauses might be read as merely recognizing other bars to recovery, such as immunity.

That the statute speaks so ambiguously on the choice between the two alternatives is strong evidence that it fails to address and explicitly resolve it. The suggested theory of judging therefore prompts consideration of which alternative — aggregation or individual comparison — best serves the principles and policies of the statute.

There is nonetheless ambivalence regarding the statute's prin-

ciples and policies. The statute seeks to mitigate the harsh results of the contributory negligence rule by allowing a negligent plaintiff to recover. But it also stops short of unqualified acceptance of the comparative negligence idea, under which even a plaintiff who is far and away the most negligent party might recover. The statute thus represents a compromise between two principles, "mitigation of contributory negligence" and "limited comparative negligence." The problem at hand poses a situation in which the two principles conflict — and the statute does not indicate a preference for either of them.

Even so, a choice between the two alternatives could probably be made if the policies underlying these principles could be better understood. Unfortunately, the limitation principle is ambiguous. It reflects a notion that a plaintiff does not deserve to be compensated for injuries that are "more the plaintiff's fault" than others' fault. The application of this notion in a simple two-party case is straightforward. But with multiple defendants, the result depends on the interpretation of the ambiguous phrase "more the plaintiff's fault." It may mean either "more . . . than the fault of all others combined" or "more . . . than the fault of each defendant individually" against whom plaintiff seeks recovery. The meaning of the notion thus depends on whose viewpoint is taken. The plaintiff has been harmed by a combination of forces that is more the fault of others than it is the plaintiff's; the fact that the responsibility is allocated among others does not alter the cogency of the plaintiff's claim. From the claimant's perspective, the plaintiff deserves to recover. From the perspective of any individual defendant, however, the argument that the plaintiff was more at fault than he was is not any less true because other defendants were involved.

There is no apparent reason in principle to prefer either of these viewpoints. Indeed, two state supreme court decisions regarding comparative negligence reach opposite conclusions by following without discussion precisely those contrary views just described.[9]

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9 In Schwenn v. Lorraine Hotel Co., 14 Wis.2d 601, 610, 111 N.W.2d 495 (1961), the Wisconsin Supreme Court reaffirmed its standing rule against aggregation in the following terms: "Otherwise, it would be possible for a plaintiff to recover from a defendant less negligent than himself. We cannot believe that the legislature intended such a result." The

Given the ambiguity not only of the statute's mandate, but also of its manifestations of principle and policy, the court applying the suggested theory of judging should make the choice between the aggregation and the individual comparison alternatives in order to produce the best total set of rules in the context of a limited comparative negligence system. As to what constitutes the "best" total set of rules, generally, the authors of this Article have been unable to agree. The majority favors the aggregation alternative, while the minority favors the individual comparison alternative.

Before these contrasting positions are explained, we present some illustrative cases:

Case A.1.

_A_ and _B_ drive at high speeds in opposite directions along a mountain road. A boulder falls from above into _A_'s path. _A_ swerves to avoid the boulder, and collides with _B_. Both fall over the embankment. _A_ suffers $50,000 damage and _B_ suffers $30,000 damage. If either _A_ or _B_ had been driving with due care, the accident would not have occurred. _A_'s negligence is two units, and _B_'s negligence is one unit. The boulder fell as a result of natural causes, and both parties are solvent.

* * *

Case A.2.

This case is the same as case A.1, except that the boulder fell as a result of contractor _C_'s negligent construction activity on the mountainside. _C_'s negligence is two units, and he is solvent.

* * *

Case A.3.

This case is the same as case A.1, except that the boulder fell as a result of farmer _F_'s negligent field clearing activity farther up the mountain. _F_'s negligence is two units, and he is insolvent.

To expedite future discussion, results of applying the aggregation and the individual comparison alternatives in these three cases follow.

Arkansas Supreme Court, however, permitted aggregation in Walton v. Tull, 134 Ark. 882, 893, 356 S.W.2d 20, 26 (1962): "We are not convinced that the legislature intended to go any further than to deny recovery to a plaintiff whose own negligence was at least 50 percent of the cause of his damage." It may be significant in the Arkansas court's evaluation of legislative intent that the statute interpreted in this opinion replaced an earlier statute which had embodied the pure form of comparative negligence.

Case A.1 presents a simple two-party dispute in which *A*'s negligence is 66.67 percent and *B*'s negligence is 33.33 percent of the total. In this case, there is obviously no choice to be made between the aggregation and the individual comparison alternatives, for there are no other parties whose negligence can be aggregated. The statute provides that *B* recover two-thirds of *B*'s damages from *A* and that *A* recover none of *A*'s damages from *B*. The result would be different under a pure comparative negligence statute, since *A* could recover one-third of *A*'s damages against *B* or offset this amount against *B*'s recovery, without regard to *A*'s greater negligence.[10] The following table summarizes the resultant allocation of loss, under the statute as well as under a pure comparative negligence statute:

TABLE 1: ALLOCATION IN CASE A.1

	Units of Negligence	*% of Negligence*	*Initial Damages*	*Application of Statute with or without Aggregation*			*Application of Pure Comparative Negligence*		
				Net Recovery	*Net Damages*	*% Damages*	*Net Recovery*	*Net Damages*	*% Damages*
A	2	66.67	$50,000	($20,000)	$70,000	87.5	($3,333)	$53,333	66.67
B	1	33.33	$30,000	$20,000	$10,000	12.5	$3,333	$26,667	33.33

The negligence of the solvent contractor in Case A.2 presents an additional complication. Because *B*'s negligence is less than either *A*'s or *C*'s individual negligence, *B* recovers four-fifths of *B*'s damage from *A* and *C* under either alternative; under the contribution system prescribed by the statute, this liability will be split evenly between *A* and *C*.

Under the individual comparison alternative, *A* can recover from contractor *C* but not from *B*. The statute is ambiguous as to whether *A*'s recovery would be reduced by two-fifths, which represents *A*'s share of the combined negligence of all parties, or by one-half which represents *A*'s share of the combined negligence of *A* and *C*, leaving *B* out of the calculation once it is determined *B* is not liable. The latter approach seems preferable, for there seems to be no reason why *B*'s negligence should affect the allocation of loss between *A* and *C* in a recovery in which *B* is not involved.

10 For analysis of set-off under the Pennsylvania statute, *see* text *infra* at Section D.

Under the aggregation alternative, the allocation will work out the same as it would under a pure comparative negligence statute. In summary, the allocation is as follows:

TABLE 2: ALLOCATION IN CASE A.2

Units of Negligence		*% of Negligence*	*Initial Damages*	*Application of Statute with Individual Comparison*			*Application of Statute with Aggregation*		
				Net Recovery	*Net Damages*	*% Damages*	*Net Recovery*	*Net Damages*	*% Damages*
A	2	40	$50,000	$13,000	$37,000	46.25	$18,000	$32,000	40
B	1	20	$30,000	$24,000	$ 6,000	7.5	$14,000	$16,000	20
C	2	40	$0	($37,000)	$37,000	46.25	($32,000)	$32,000	40

Only the insolvency of the third party, *F,* differentiates Case A.3 from A.2. The share of the total liability which would have been imposed on *F,* had *F* not been insolvent, will be allocated between the remaining parties by allocating the liability based on the negligence of the parties actually participating in the judgment.[11] Under the statute, the resulting allocation of loss follows:

TABLE 3: ALLOCATION IN CASE A.3

Units of Negligence		*% of Negligence*	*Initial Damages*	*Application of Statute with Individual Comparison*			*Application of Statute with Aggregation*		
				Net Recovery	*Net Damages*	*% Damages*	*Net Recovery*	*Net Damages*	*% Damages*
A	2	40	$50,000	($20,000)	$70,000	87.5	($3,333)	$53,333	66.67
B	1	20	$30,000	$20,000	$10,000	12.5	$3,333	$26,667	33.33
F	2	40	$0	$0	$0	0	$0	$0	0

Consider another hypothetical case:

Case A.4.

***A*, driving *B*'s car, strikes *C* in an accident that is jointly caused by the negligent driving of *A* and *C* and by *B*'s negligent failure to maintain the brakes on *B*'s car. The situation is not one in which *A*'s negligence would be imputed to *B* as a matter of law, nor vice versa. The negligence is allocated 25 percent to *A*, 35 percent to *B* and 40 percent to *C*.**

11 For an analysis of insolvency under the Pennsylvania statute, *see* text *infra* at Section C.

In this case involving a car which is negligently driven by *A* and negligently maintained by *B*, all of the authors agree that aggregation of *A* and *B*'s negligence is appropriate, and *C* should be permitted to recover from *A* and *B* despite each defendant's lesser negligence.

In the following set of two hypothetical cases, the authors again agree on the proper result of the first, but they disagree on the second.

Case A.5.

_X_ and _Y_ are involved in a two-car accident. _X_'s negligence is 10 units and _Y_'s is 9 units. _X_ suffered damages amounting to $_D_, while _Y_ suffered damages amounting to $_E_.

* * *

Case A.6.

The same as Case A.5 except that road conditions were poor at the time and place of the accident; the state's negligence is 1 unit.

Under the aggregation alternative, it will make a great difference if *X* can convince the jury that the state was at least 1 unit negligent in its maintenance of the road and that this contributed to the accident. This difference is illustrated in the following tables:

TABLE 4: ALLOCATION IN CASE A.5

	Units of Negligence	*% of Negligence*	*Initial Damages*	*Application of Statute with or without Aggregation*		
				Net Recovery	*Net Damages*	*% Damages*
X	10	52.6	$D	$\$\frac{10E}{19}$	$\$\left(D+\frac{10E}{19}\right)$	$\left[\frac{D+\frac{10E}{19}}{D+E}\right]$
Y	9	47.4	$E	$\$\frac{10E}{19}$	$\$\left(\frac{9E}{19}\right)$	$\left[\frac{\frac{9E}{19}}{D+E}\right]$

TABLE 5: ALLOCATION IN CASE A.6

	Units of Negligence	*% of Negligence*	*Initial Damages*	*Application of Statute With Individual Comparison*			*Application of Statute with Aggregation*		
				Net Recovery	*Net Damages*	*% Damages*	*Net Recovery*	*Net Damages*	*% Damages*
X	10	50	$D	$\$\frac{10E}{19}$	$\$\left(\frac{D + 10E}{19}\right)$	$\left[\frac{D + \frac{10E}{19}}{D + E}\right]$	$\$\frac{[D - E]}{2}$	$\$\frac{[D + E]}{2}$	50
Y	9	45	$E	$\$\frac{10E}{19}$	$\$\frac{9E}{19}$	$\left[\frac{\frac{9E}{19}}{D + E}\right]$	$\$\frac{[11E - 9D]}{20}$	$\$\frac{9[D + E]}{20}$	45
State	1	5	$O	$0	$0	0	$\$\frac{[D + E]}{20}$	$\$\frac{[D + E]}{20}$	5

The authors disagree as to which alternative — aggregation or individual comparison — produces the best overall results in the context of a statute mandating a limited comparative negligence system.

The majority of the authors believe that the aggregation alternative provides for a more equitable sharing of the loss in multiple-defendant situations. The results reached under the individual comparison alternative appear strikingly inequitable, for example, in Cases A.2 and A.3. In both cases, *A* and *B* each suffered a loss which would not have occurred but for the negligence of the other. Under the individual comparison alternative, however, *B* can recover from *A*, even though *A* cannot recover anything from *B*. This inequity would be even more striking in a case where the negligence of *A* and *B* are close, such as 1.99 units and 2.01 units of negligence, respectively. In Case A.3, under the individual comparison alternative, *B* bears just 12.5 percent of the loss, though *B's* negligence constituted 20 percent of the negligence of all parties, and 33.33 percent of the negligence of the parties participating in the recovery.

Although the majority prefer the aggregation alternative primarily because of its equity, the minority of the authors prefer the individual comparison alternative because of its consistency. Specifically, the minority reason that the legislature obviously wanted the plaintiff not to recover from a less negligent defendant in the simple two-party case, Case A.1. The limitation principle obviously holds sway in that situation. The minority point out that it would be anomalous for a plaintiff to recover absolutely nothing against a less negligent defendant in a simple two-party case when, under the aggregation alternative, that same plaintiff can recover against the same defendant if a negligent third party is involved. It seems unfair to that less negligent defendant that the fortuitous existence or non-existence of a third negligent party should determine liabilities. Although the statute concededly does not expressly mandate that the limitation principle dominate in a three-party case, consistency in the operation of the statute vis-à-vis that less negligent defendant and the general statutory purpose of limitation therefore lend credence to the minority's position.

The inconsistency is even more apparent in Case A.3, when the third party, *F*, is insolvent. To achieve the majority's results, the

minority must acknowledge the existence of *F* for determining the right of recovery but not the amount of recovery.

In Case A.6, the negligence of the state may be trivial, but that slight bit of state's negligence may permit *X* to recover from *Y,* in contrast with Case A.5, where the state was not negligent and no recovery from *Y* is permitted to *X*.

The minority acknowledge, however, that there is a limited class of cases, in which the aggregation alternative may give more consistent results. This is illustrated by Case A.4. The minority, though favoring individual comparison generally, believe that in Case A.4 it would be unreasonable to deny recovery to *C* against both *A* and *B* just because the responsibility for driving the car happened to be separated from the responsibility for maintaining it.

If a court chooses the individual comparison approach as its general rule, *both* the majority and minority thus suggest the following exception in light of the previous considerations: when one person was negligent with respect to a duty that would have been, in that person's absence, the duty of a second person, then the negligence of those two persons as defendants, should be aggregated in determining whether or not a third person shall recover from either of them.[12] This test is similar to the "common duty" rule sometimes used in determining whether defendants shall be held jointly liable. But it goes a step farther in that it depends not on the existence of a single indivisible duty, but on the fact that the duties involved are in most ordinary circumstances the responsibility of a single person.[13]

Obviously, neither the majority's nor minority's position is indisputably correct. The majority believe that equity is on the side of allocation according to causal responsibility. But equity may point the opposite direction as well: the legislature may have con-

12 It might also be appropriate in certain circumstances to aggregate the negligence of a defendant with that of the plaintiff. In case A.4, suppose that *B* sought to recover from *C*. One might reasonably argue for aggregation of *A*'s and *B*'s negligence to bar *B*. But such a result would seem incompatible with the clear mandate of the statute (*B* being less negligent than *C*), unless the circumstances were such that *A*'s negligence would be imputed to *B*.

13 The Wisconsin Supreme Court has permitted aggregation, relaxing its standing rule, in one case of a "common duty" type. Reber v. Hanson, 20 Wis. 632, 51 N.W.2d 505 (1962). That case involved the duty of both parents to protect their child. However, a recent decision indicates that the *Reber* case will be construed narrowly. Mariuzza v. Kenower, 68 Wis.2d 321, 228 N.W.2d 702 (1975).

sidered it inequitable to make a defendant compensate a plaintiff who is more negligent than the defendant is. On the other hand, desire for consistency may undermine the position held by the minority.

The statute is fundamentally a comparative negligence statute. Consequently, allocation according to loss is the crux of the statute. Thus, consistency with those cases in which the plaintiff recovers from a single, more negligent defendant may require that the plaintiff not be any the less compensated just because the perpetrators of the misfortune were plural rather than singular. Whether and to what extent the aggregation or individual comparison alternatives will dominate in judicial application of a comparative negligence statute are hard problems. The theory of judging presented earlier in this Article provides a framework in which a judge can resolve competing claims, but even it does not provide answers for all hard questions such as these.

B. *Contribution and Its Enforcement*[14]

Problem 4. Are independent actions to obtain contribution allowed under part [6], or is contribution allowed only among those against whom a judgment in favor of the plaintiff has been entered?

Problem 5. When the plaintiff is not negligent, will the principles of proration stated in parts [4] and [6] of the statute be applied to claims for contribution, or will liability be divided equally among the negligent defendants?

Clause [6] of the statute declares simply that a "defendant" may seek contribution if "compelled to pay more than his percentage." There is no statutory definition of the term "defendant." And even if "defendant" embraces only those sued by the plaintiff, the statute does not declare that tortfeasors who are not "defendants" have no rights or liabilities to contribution. In the absence of such definition or explanation, the argument for defining the statutory term of "defendant" narrowly and rejecting non-"defendants' " rights and liabilities to contribution is weak. The argument is even weaker in Pennsylvania since the state has a contribution statute, enacted before the comparative negligence statute, which

14 The primary author of this section is George W. Soule.

authorizes contribution among "joint tortfeasors,"[15] a term defined as including persons jointly or severally liable for the same injury, "whether or not judgment has been recovered against all or some of them."[16]

The policies and principles underlying the present statute provide further support for determining the availability of contribution regardless of the plaintiff's choice of defendants. The apparent purpose of the statute is to allocate fairly the burden of a loss among those who are causally negligent. A fair allocation of the loss is an allocation among all those responsible for the loss, not just those whom the plaintiff selects as "defendants." Moreover, if contribution is allowed only among those defendants against whom a judgment in favor of the plaintiff has been entered, the plaintiff will have substantial power to determine who shall bear the losses; under this construction, a plaintiff could abuse this power by colluding with unnamed defendants or by unfairly omitting defendants.[17] In a sound tort system, however, the allocation of losses should not depend on the whim of a plaintiff. Furthermore, the system of unrestricted rights and liabilities of contribution established by the proposed ruling is also consistent with tort policy goals of deterrence, equitable sharing by all wrongdoers, and effective loss distribution over a large segment of society.[18]

The incremental practical and procedural problems incident to broadening recognition of rights and liabilities of contribution to tortfeasors generally are not too great.[19] In a jurisdiction with a third-party practice rule similar to Rule 14 of the Federal Rules of Civil Procedure, a claim for contribution from one not a party to the original action can be asserted by third-party complaint.[20] The entire controversy can be resolved in one trial, and the judge or

15 PA. STAT. ANN. tit. 12, §§ 2082-2089 (Purdon 1967) *repealed and reenacted* as PA. STAT. ANN. tit. 421, §§ 8321-27 (Purdon 1979)).

16 *Id.* § 2082 (repealed 1978) (current version at PA. STAT. ANN. tit. 421, § 8322 (Purdon 1979)).

17 *See, e.g.*, Werner, *Contribution and Indemnity in California*, 57 CAL. L. REV. 490, 504 (1969).

18 *Id.* at 516.

19 For the procedural aspects of contribution generally, *see* Gregory, *Procedural Aspects of Securing Tort Contribution in the Injured Plaintiff's Action*, 47 HARV. L. REV. 209 (1933) [hereinafter cited as Gregory].

20 *See* American Motorcycle Ass'n v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978), in which the California Supreme Court, having judicially adopted a

jury need make only one apportionment of causal negligence among the parties. This impleader action, as opposed to a separate action for contribution, has the advantages of obviating the need for multiple lawsuits and permitting issues incidental to the main action to be cleared up to the convenience of all parties.[21] If a single trial is impractical or inconvenient, the court in its discretion may sever the third-party action for a separate trial.[22]

In sum, a court acting in the context of the Pennsylvania comparative negligence statute should allow independent actions for contribution from persons not sued by the plaintiff.

Clause [6] of the statute permits a defendant who is "compelled to pay more than his or her percentage share" of damages, as calculated under clause [4], to "seek contribution." In contrast to other statutes that explicitly create detailed contribution schemes,[23] this brief provision leaves unanswered several basic questions concerning the scope and application of contribution rights. Clause [4] of the statute settles on a principle of proration according to fault, rather than on a principle of equal division. In contrast, contribution statutes commonly allocate losses among all contributing defendants in equal shares.[24] In such a contribution system, each defendant may ultimately be required to pay a share

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pure comparative negligence system, concluded first, that "joint and several liability" was preserved; concluded second, that the change to comparative negligence warranted reevaluation of indemnity and the allowance of "partial indemnity" in appropriate cases in lieu of an "all-or nothing" grant or denial of full indemnity; concluded third, that California's contribution statutes did not preclude the court from evolving a right of "comparative indemnity"; and concluded fourth, that under governing provisions of California's Code of Civil Procedure, a named defendant could file a "cross-complaint" against any person, whether already a party to the action or not, when he was seeking contribution in the traditional sense or seeking "total or partial indemnity." *See also* FED. R. CIV. P. 14.

21 Gregory, *supra* note 19, at 210.

22 FED. R. CIV. P. 14(a).

23 *See, e.g.*, MICH. COMP. LAWS ANN. §§ 600.2925a-600.2925d (Cum. Supp. 1979); TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Cum. Supp. 1978-79); UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT §§ 1-4 (1977 and 1980 Supp.).

24 One form of the equal division principle is incorporated into the UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT § 2. This section provides, "In determining the pro rata shares of tortfeasors in the entire liability (a) their relative degrees of fault shall not be considered; (b) if equity requires the collective liability of some as a group shall constitute a single share; and (c) principles of equity applicable to contribution generally shall apply."

The Commissioners' Comment to § 2 of the Uniform Act indicates that of the eighteen states in which the act has been adopted, only Arkansas, Delaware, Hawaii, South Dakota and Florida have incorporated a relative degree of fault rule into their contribution statutes.

calculated by dividing the recovery allowed by the number of defendants found liable to the plaintiff.[25]

Contribution apportioned according to fault is more consistent with the general purpose of a comparative negligence system than equal division. Both systems indeed allocate loss among the parties whose negligence caused those losses in amounts proportionate to their fault. To that end, the Supreme Courts in Maine and California have already recognized the great complementarity of a proportionate contribution rule and comparative negligence system.[26] The Maine court, in *Packard v. Whitten,*[27] was motivated by the legislature's adoption of a comparative negligence statute[28] to incorporate the principle of proportionate allocation into its common law system of contribution. The court reasoned:

> It is particularly appropriate that when recovery by a Plaintiff is measured on the basis of proportionate fault, as our Legislature determined it should be, the ultimate assumption of responsibility should rest on the same equitable basis. The philosophy underlying the two principles is the same although comparative negligence is in Maine a legislative creation while contribution is of judicial origin.[29]

Other courts, too, in states with[30] and without[31] a comparative negligence statute, have adopted the principle of contribution based on proportionate fault because of its equity and fairness.

That they have done so is not surprising. The application of this principle in a comparative negligence system causes little practical difficulty. Rather than apportioning the causal negligence only between the plaintiff and the group of defendants, the fact-finder would determine the percentage of causal negligence of the plaintiff and of each defendant. If the court or jury were to find a plaintiff free from negligence, it would then simply apportion the negligence among the defendants.

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25 W. PROSSER, LAW OF TORTS 310 (4th ed. 1971).

26 American Motorcycle Ass'n v. Superior Court, 578 P.2d 899, 899, note 20 *supra.*

27 274 A.2d 169 (Me. 1971).

28 ME. REV. STAT. ANN. tit. 14, § 156 (1980).

29 274 A.2d at 180.

30 Bielski v. Schulze, 16 Wis.2d 1, 114 N.W.2d 105 (1962).

31 Dole v. Dow Chemical Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 383 (1972). For comment on several aspects of this leading case, see Note, *Apportionment of Damages Among Joint Tortfeasors,* 41 FORDHAM L. REV. 167 (1972).

Because of this ease and equity, several states have already enacted statutes expressly incorporating provisions of proportionate fault.[32] Given the apparent fairness of such provisions, a court using the theory of judging outlined above should choose proportionate fault when not directed otherwise by legislation.

In Pennsylvania, however, the problem is somewhat complicated by a pre-existing contribution statute.[33] In applying this statute, Pennsylvania courts used the equal division principle.[34] Because that principle was not stated explicitly in the statute, the principle was not mandated; instead, the principle was chosen by courts as they filled the gaps in the statutory plan for contribution. This situation has been altered, however, by the enactment of the present comparative negligence statute, which explicitly applies the proportionate-fault principle rather than the principle of equal division when the plaintiff and two or more defendants are negligent. It would be anomalous to continue to apply the old principle of equal division between two defendants not equally at fault when the plaintiff is not negligent, while applying the new principle when the plaintiff is partly negligent. Thus, the courts should now apply proportionate allocation among defendants even when the plaintiff is not negligent. Rather than overruling previous decisions, such a result simply reflects the determination that earlier decisions no longer apply in the context of comparative negligence.

C. *Insolvency and Nonjoinder of Defendants*[35]

Problem 6. What is the effect of the plaintiff's failing to join as co-defendant one of the persons who would, if the issue were submitted to the factfinder, be found causally negligent? Can such a person be one of the "defendants against whom recovery is allowed" — part [4] — or a "defendant against whom such plaintiff is not barred from recovery" — part [5]?

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32 *E.g.*, N.Y. CIV. PRAC. § 1401 (McKinney 1976); MICH. COMP. LAWS ANN. § 600.2925a (1) (Cum. Supp. 1978-79); W. VA. CODE § 55-7-13 (1966); CAL. CIV. PRO. CODE § 875(a) (West Cum. Supp. 1975).

33 PA. STAT. ANN. tit. 12, §§ 2082-2089 (Purdon 1967) (repealed 1978) (current version at PA. STAT. ANN. tit. 42, §§ 8321-27) (Purdon 1979).

34 *See, e.g.*, Mong v. Hershberger, 200 Pa. Super. 68, 186 A.2d 427 (1962).

35 The primary author of this section is Gary A. Herrmann.

Problem 7. What is the effect of plaintiff's joining or failing to join as co-defendant a person who is insolvent and uninsured? For example, whether joined or not, how is the insolvent person's "percentage share" of the liability treated in determining whether another defendant has been "compelled to pay more than that defendant's percentage share"?

The statutory language offers no clear guidance as to Problems 6 and 7; in fact, various parts of the statute seem to offer contradictory answers.[36] The authors therefore conclude that, of necessity, the court must address these questions and should do so in the spirit suggested by guidelines 2 and 3 of the proposed theory of judging.

How should a court proceeding in conformity with these guidelines resolve the following case?

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36 Clause [4] of the statute declares that each of two or more defendants against whom "recovery is allowed" is liable for a proportion of damages based on a comparison with "the amount of causal negligence attributed to all defendants against whom recovery is allowed." Clause [5], however, says that "plaintiff may recover the full amount of the allowed recovery from any defendant against whom such plaintiff is not barred from recovery." Thus, under clause [5], a defendant may be ordered to pay much more than the amount for which that defendant is liable, according to clause [4]. Clause [6] adds that any defendant "compelled to pay more than that defendant's percentage share may seek contribution." The declaration that the defendant must "pay more" reinforces the inference that a defendant may be liable, in some sense, for more than the amount directed by part [4].

Reading clause [6] alongside clause [4] discloses another complication. Clause [4] states a method of calculating the "proportion of the total dollar amount awarded as damages" against a defendant. Clause [6], on the other hand, fails to state a method for calculating contribution. This contrast between clauses [4] and [6] leaves room for the alternative arguments that the method specified in [4] *does* — and *does not* — apply to contribution under part [6].

Another problem of meaning arises from the repeated use of "defendant" and derivatives of that term in clause [2], [4], [5], and [6]. Does this consistent use of "defendant" imply that persons who might have been joined as parties but were not are to be disregarded in all the calculations under various sections of this statute? Or is "defendant" used in a broader sense to include other persons whom any party to the litigation claims to have been a causal factor in the accident?

Consider one more perplexity about varied phrasing in different parts of the statute. In relation to problems 6 and 7 concerning nonjoined and insolvent persons, what is the significance of the shift from "the defendant or defendants against whom the recovery is sought" in clause [2] to "all defendants against whom recovery is allowed" in clause [5] and "any defendant against whom such plaintiff is not barred from recovery" in clause [6]? Was the shift from "recovery is sought" to "recovery is allowed" deliberate? If so, with what purpose in view? And is a "defendant against whom such plaintiff is not barred from recovery" the same as a defendant against whom recovery is "allowed"? Or were these different phrases deliberately used to achieve some special purpose?

Case C.1.

The negligence of P is 2 units. The negligence of D_1 is 3 units. The negligence of D_2 is 5 units but D_2 is insolvent.

The negligence of C is x units, but C is not a resident of the state in which the action is filed, and cannot be served with effective process, and is not made a party to the action.

We submit that the final outcome in Case C.1 should be a recovery by P against D_1 for 60 percent of P's loss, which is the proportion of D_1's negligence to the total negligence of P and D_1 together. Neither is likely to recover anything from poor D_2 as a practical matter, and it will be difficult for P, D_1 or D_2 to recover anything from C. The proposed outcome thus distributes the loss according to the relative negligence of the remaining parties (the plaintiff and the solvent defendant). This distribution scheme is the most faithful to the legislative mandate for cases which do not involve insolvency and nonjoinder. With another scheme, the total impact of insolvency and nonjoinder would fall arbitrarily on P or on D_1. The recommended allocation is set forth in Table 6:

TABLE 6: ALLOCATION IN CASE C.1

Units of Negligence		*% of Negligence*	*Initial Damages*	*Application of Statute As Recommended*		
				Net Recovery	*Net Damages*	*% Damages*
P	2	$\frac{2}{10 + X}$	$Y	$.6Y	$.4Y	40
D_1	3	$\frac{3}{10 + X}$	$0	($.6Y)	$.6Y	60
D_2 (insolvent)	5	$\frac{5}{10 + X}$	$0	$0*	$0*	0*
C	x	$\frac{x}{10 + X}$	$0	$0**	$0**	0**

* Subject to levy on unsatisfied judgment obligation up to $.5Y or 50%.

** Subject to being sued.

Procedurally, the court should, on motion of D_1 supported by proof of the insolvency of D_2, enter an order limiting P's levy of

execution to 60 percent of P's damages. This would leave on the record the partially satisfied judgment, so that later proceedings for collection against D_2 would be possible, at the instance of either P or D_2, if it should appear that collection might be effected. This outcome would also leave P and D_1 free to proceed in a separate action against C. Of course, C would not be bound on the principle of *res judicata* by the findings in the previous action.

Additional problems are presented when there are persons who could be but are not made parties, when a party is insolvent, and when there is both nonjoinder and insolvency. These problems are greatly complicated by the fact that the statute mandates a limited rather than pure system of comparative negligence. And the increasing difficulties can best be illustrated by comparing outcomes of a pure system with outcomes of a limited system in a series of hypothetical cases. As Cases C.2 through C.4 indicate, the relative allocation of liability between the plaintiff and solvent defendant (D_1) is substantially affected by the status — joinder or nonjoinder, solvency or insolvency — of the third-party defendant (D_2). Cases C.5 through C.7 then indicate that, even if D_2 is insolvent, both the amount of his damages (Cases C.5 and C.6) and the extent of his percentage liability for the accident (Case C.7) substantially affect the allocation of loss between P and D_1, despite the fact that the relative negligence of P and D_1 remain constant. It is recommended in all cases that the burden of D_2's insolvency should be fairly allocated between P and D_1 in proportion to their relative percentages of negligence.

Case C.2.

***R* is driving down a highway, paying insufficient attention to the road. When a stray cat darts in front of the car, *R* swerves and collides with *S*, who is also driving down the road. The jury finds that *R* was twice as negligent as *S*, that *R* suffered $50,000 damages and *S* $30,000.**

The Pennsylvania statute mandates a recovery of $20,000 (⅔ × $30,000) for S. R does not recover for damages done to him under the statutory scheme. S is thus left to bear only $10,000 of the total loss of $80,000. In contrast, under a pure system of comparative negligence, S would bear $26,667 (⅓ × $80,000), being entitled to

a net recovery of $3,333 from *R*. The allocation is demonstrated in Table 7:

TABLE 7: ALLOCATION IN CASE C.2

	Units of Negligence	*% of Negligence*	*Initial Damages*	*Application of Statute*		
				Net Recovery	*Net Damages*	*% Damages*
R	2	66.67	$50,000	($20,000)	$70,000	87.5
S	1	33.33	$30,000	$20,000	$10,000	12.5

* * *

Case C.3.

Assume that instead of a cat, the accident was precipitated by a man *T*, who started to cross the highway and caused *R* to swerve. *T* suffers no injury, but a jury finds that he was 40 percent responsible for the accident. *R* is still found to have been twice as negligent as *S*, so that *R* is charged with 40 percent of the responsibility, and *S*, 20 percent. *R* and *S* suffered the same injury as in Case C.2.

In Case C.3, if *S* sues *R* and *T* jointly, *S* can collect $24,000 from them jointly and severally, and after contribution each defendant will be responsible for $12,000, which is 40 percent of *B*'s $30,000 in damages. However, because *S* and *T* together are more negligent than *R*, *R* under the aggregation alternative of the statute can successfully counterclaim and recover $30,000 ($50,000 - .40 × $50,000) against them jointly and severally; contribution distributes this liability, charging *S* $10,000 and *T* $20,000. *S*'s net recovery is thus $14,000 ($24,000 - $10,000). *S* bears $16,000 of the damages; *T* and *R*, $32,000 each. Note that *R* is $38,000 better off and that *S* is $6,000 worse off than in Case C.2 just because the third agency was *T* rather than a cat, to whom negligence cannot be attributed. And *S*'s share of the negligence is now 20 percent in this case, as compared to 33 percent in Case C.2. These differences arise because *T*'s participation not only allows *R* to collect from *T* but also allows *R* to collect some of *R*'s damages from *S*, making the scheme operate in this instance as a pure comparative negligence system would. This seems a fairer result than the one produced by the statute in Case C.2 — illustrating the point that a pure comparative negligence system is fairer than a limited one.

But this result (Outcome A) is subject to challenge because it depends on aggregating the negligence of *S* and *T* to allow *R* to recover against *S* as well as *T*.

If instead, the negligence of *S* and *T* is not aggregated, *R* cannot recover against *S*. Because this allocation (Outcome B) is less equitable, Outcome A appears preferable in these circumstances.

It is nonetheless debatable whether Outcome A or Outcome B is more compatible with the total set of directives in the statute which adopt not a pure but a limited form of comparative negligence. A majority of the authors recommend aggregation generally on the grounds that the alternative principle yields inequitable results in relation to the cases examined here. Even one who disapproves of aggregation in general may believe it is justified in cases such as Case C.3, in which *R* and *S* are both claiming against each other. That is, the argument for aggregation against *S* is strengthened when in the same case *S* is allowed aggregation in the sense of being allowed to recover against both *R* and *T*, jointly and severally. The allocations under Outcomes A and B are set forth below in Table 8:

TABLE 8: ALLOCATION IN CASE C.3

	Units of Negligence	*% of Negligence*	*Initial Damages*	*Application of Statute Under Aggregation Alternative Given Contribution (Outcome A)*			*Application of Statute Under Individual Comparison Alternative (Outcome B)*		
				Net Recovery	*Net Damages*	*% Damages*	*Net Recovery*	*Net Damages*	*% Damages*
R	2	40	$50,000	$18,000	$32,000	40	$ 8,000	$42,000	52.5
S	1	20	$30,000	$14,000	$16,000	20	$24,000	$ 6,000	7.5
T	2	40	$0	($32,000)	$32,000	40	($32,000)	$32,000	40.0

* * *

Case C.4.

This case is the same as Case C.3, but *T* is an insolvent 15-year-old negligently chasing a baseball.

If *T* is not joined as a party and the court holds that *T*'s participation is irrelevant in the action between *R* and *S*, the result then would be exactly the same as in Case C.2 above. As explained

below, however, it may be argued that *T*'s participation should be taken into account if either *R* or *S* wishes to assert and prove that participation.

If *T* is joined as a party but it is proved on the record and before judgment is entered that *T* is insolvent, then the court could respond to the collectibility of any judgments between *R* and *S* in five different ways (hereafter referred to as Outcomes A through E).

In Outcome A, the court would hold that the collectibility of any judgments between *R* and *S* should be the same as for Case C.2.

Outcome B would hold that, under clause [5] of the statute, *R* and *S* can collect their entire claims from each other. Thus *R* owes *S* $24,000 (80 percent of $30,000), but *S* owes *R* $30,000 (60 percent of $50,000), so that *S* pays *R* a net amount of $6,000. *S* will have a claim for $20,000 contribution against *T* and *R* and a claim for $12,000 against *T*. If these claims were collectible, the final outcome would be the same as Outcome A in Case C.3. But these claims for contribution are in fact worthless, since *T* is insolvent. So Outcome B seems unjust. The only difference between this case and Case C.2 is that an insolvent youth rather than a cat ran into the street, but the result differs for *R* and *S* by $26,000. The participation of an insolvent party has had two effects: first, it has caused the scheme to operate more nearly as a pure comparative negligence system, and second, it has caused each claimant (*R* and *S*) to bear the risk of insolvency of the third participant in proportion to how much the insolvent party would have to pay the other claimant. Thus *R* bears the risk that *T* will be unable to make good *T*'s share of the injury to *S*, and *S* bears the risk of *T*'s share of the injury to *R*.

Under the Outcome B, the negligence of *S* and *T* was aggregated to allow *R* to recover against *S*. Outcome C proceeds on the same theory as Outcome B except that the negligence of *S* and *T* is not aggregated. As a result, the allocation is as follows:

For *R*, $50,000 + (4/5 × $30,000), or $74,000.
For *S*, $30,000 − (4/5 × $30,000), or $6,000.

This seems even more strikingly unjust than either Outcome A or Outcome B. It is what happens, however, when the court both refuses to aggregate and places the risk of insolvency of one defendant exclusively on other defendants.

Outcomes B and C, in contrast, represent the results of imposing only the risk of insolvency of one party on the other defendants. This imposition raises the question whether the risk of insolvency should be allocated entirely to defendants or should also be shared by the plaintiff.

One might argue that placing the insolvency risk entirely on defendants, as in Outcomes B and C, is supported by analogy to the way defendants are treated generally in cases of joint and several liability. This analogy is subject to challenge. The rules of joint and several liability were developed for cases in which an innocent plaintiff is injured by the fault of two or more persons.

In those cases, it seems fair and appropriate to place the risk of insolvency of any defendant upon the remaining defendant or defendants rather than upon the innocent plaintiff but not so when the plaintiff is also negligent. Under the contributory fault rule, the plaintiff would have recovered nothing and the present problem could not arise; it arises only when comparative negligence is introduced. It must be remembered, however, that the underlying principle of comparative negligence is one of proportionally allocating the loss rather than imposing it entirely on either the plaintiff or the other defendants. Allocating this risk proportionally in Case C.4 produces Outcomes D and E.

Outcome D proceeds on two principles: that the negligence of *S* and *T* cannot be aggregated and that the risk of insolvency of *T* is to be borne by *R* and *S* in proportion to their negligence.

The following allocation results:

For *R*, \$50,000 + (2/5 × \$30,000) + (2/3 × 2/5 × \$30,000), or \$70,000.

For *S*, \$30,000 + (4/5 × \$30,000) + (1/3 × 2/3 × \$30,000), or \$10,000.

Outcome E proceeds also on two principles, that the negligence of *S* and *T can* be aggregated and that the risk of insolvency of *T* is to be borne by *R* and *S* proportionally to their negligence.

The following allocation results:

For *R*, \$50,000 - (3/5 × \$50,000) + (2/5 × \$30,000) + (2/3 × 2/5 × \$30,000) + (2/3 × 2/5 × \$50,000), or \$53,333.

For *S*, \$30,000 - (4/5 × \$30,000) + (1/5 × \$50,000) + (1/3 × 2/5 × \$30,000) + (1/3 × 2/5 × \$50,000), or \$26,667.

Under a pure comparative negligence system, the same result would be reached as in Outcome E. One might therefore argue that it is inconsistent with this statute, which plainly declares that when only two parties are involved and one is more negligent than the other, the pure principle does not apply. The issue reduces to this question: when a third person is negligent but insolvent, should the case be treated as the statute treats a two-party case in which only one is entitled to recover, or should it be treated as the statute treats a three-party case involving two injured parties, in which both parties are entitled to recover? The statute does not address this question nor manifest any principle or policy for resolution of this case; therefore, in applying the provisions, the court must attempt to select the most appropriate result in the situation it confronts.

The only guidance is the statutory directive for a limited rather than a pure comparative negligence system establishing two separate principles — one for proportional allocation and the other for a limited application of this principle — without precisely defining the scope of the limitation. In these circumstances, a majority of the authors recommend that the court choose proportional allocation over the principle of limitation, because the former generally provides a fairer outcome and one more compatible with what appears to be the major thrust of the statute. Allocations under the five outcomes are summarized in Table 9:

TABLE 9: ALLOCATION IN CASE C.4

	Units of Negligence	*% of Negligence*	*Initial Damages*	*Net Damages after Application of Statute Under: Outcome A*	*Outcome B*	*Outcome C*	*Outcome D*	*Outcome E*
R	2	40	$50,000	$70,000	$44,000	$74,000	$70,000	$53,333
S	1	20	$30,000	$10,000	$36,000	$ 6,000	$10,000	$26,666
T	2	40	$0	$0	$0	$0	$0	$0

* * *

Case C.5.

This case is the same as Case C.4 except that *T* has been injured by the accident, and his damages amount to $50,000.

Will the result between *R* and *S* be affected by the extent of *T*'s damages, even though *T* is unable to recover anything from either *R* or *S*?

T can counterclaim against *R* and *S* jointly and severally for $30,000 (if apportioned, $20,000 against *R* and $10,000 against *S*). If *R*'s and *S*'s claims are used to offset *T*'s liability to *R* and *S*, then *R* and *T* will have exactly offsetting claims. *S* will be entitled to recover $4,000 against them jointly and severally, being entitled to 80 percent of $30,000 ($24,000) less 20 percent of $100,000 ($20,000). If *S* is allowed to collect this entire amount from *R*, thereby imposing the risk of *T*'s insolvency entirely on *R*, *S* bears $26,000 and *R* bears $54,000 of the losses (Outcome B). If, instead, the risk of *T*'s insolvency (and inability to pay $2,000 of the $4,000) is apportioned (2/3 to *R* and 1/3 to *S*), *S* can collect only $2,000 plus 2/3 of the other $2,000 or $3,333, with *S* bearing $26,667 and *R* bearing $53,667 of the losses (Outcome C). Note that if Outcome B were chosen, the effect of *T*'s injuries would have been to produce outcomes different from Outcomes B and C in Case C.4. Outcome A, the same for *R* and *S* as in Outcome A of Case C.4, would result from holding that *T*'s participation should be disregarded, since *T* cannot recover and no one can recover as a practical matter against *T*. Outcome C results from allocating the risk of *T*'s insolvency proportionally between *R* and *S*. This corresponds to Outcome E in Case C.4 and is similarly recommended, for it avoids the anomalous situation in which the mere severity of *T*'s injuries changes the allocation of loss between *R* and *S*. The allocations under Outcomes A, B, and C are shown in Table 10:

TABLE 10: ALLOCATION IN CASE C.5

	Units of Negligence	*% of Negligence*	*Initial Damages*	*Net Damages After Application of Statute Under:* *Outcome A*	*Outcome B*	*Outcome C*
R	2	40	$50,000	$70,000	$54,000	$53,333
S	1	20	$30,000	$10,000	$26,000	$26,667
T	2	40	$50,000	$50,000	$50,000	$50,000

This analysis of Case C.5 and the following cases presupposes the principle of aggregation. In Case C.5, thus, *R* is allowed to claim against *S* as well as against *T*. Other outcomes would result in these cases if the individual comparison principle were applied.

Case C.6.
This case is the same as Case C.4 except that *T*'s damages total $70,000.

In this case, *T* suffers enough of an injury to permit him to collect a net recovery from the other parties. Under Outcome B, *S* will make no payment and will recover nothing, having exactly offsetting claims. *R*, however, will be worse off than in Case C.4, since he will owe *T* $10,000. The reason is that the total damages resulting from the combined negligence of *R*, *S*, and *T* are greater, and *R*'s allocated portion is correspondingly greater. The impact of *T*'s insolvency has been eliminated since *T*'s own damages are so high that they exceed his allocated share or responsibility; thus, *T*'s counterclaim has the effect of making him entirely solvent in relation to this law suit. As a consequence, *R* no longer bears any burden of *T*'s insolvency; but this "advantage" to *R* in Case C.6 compared with Case C.5 which saves him $1,333, is outweighed by the added burden of *R*'s allocated share of *T*'s increased damages (40 percent of $20,000, or $8,000), for a net disadvantage to *R* of $6,667. Thus, *R*'s allocated share is increased from $53,333 in Case C.6 (under Outcome B). For *S*, as well, the disadvantage of proportional responsibility for *T*'s more severe injuries in Case C.6 (20 percent of $20,000, or $4,000) is only partly offset by the saving of $667 over Case C.5 because of *T*'s present solvency. Thus *S* bears $3,333 more in Case C.6 for a total of $30,000 (under B), as compared to his burden of $26,667 in Case C.5 (under Outcome C). The allocations are summarized in Table 11:

TABLE 11: ALLOCATION IN CASE C.6

	Units of Negligence	*% of Negligence*	*Initial Damages*	*Net Damages After Application of Statute Under:* *Outcome A*	*Outcome B*
R	2	40	$50,000	$70,000	$60,000
S	1	20	$30,000	$10,000	$30,000
T	2	40	$70,000	$70,000	$60,000

This comparison between Cases C.5 and C.6 (Tables 10 and 11) shows that the severity of one party's injuries may affect the outcome for the other parties. But that possibility is inherent in com-

parative negligence itself and not just in a particular form of comparative negligence.

Another facet of comparative negligence is the fact that the percentages of total negligence attributed to one person may affect the outcome for other parties. This is true even in a pure comparative negligence system. For example, in Case C.3, a pure system allocates $32,000 of loss to *R*, $16,000 to *S*, and $32,000 to *T*. In contrast, consider the following case:

Case C.7.
This case is the same as Case C.3 except that *T*'s negligence is 7 units rather than 2 units.

In Case C.7, a pure system would allocate $16,000 of loss to *R* and $8,000 to *S*, with the remaining $56,000 allocated to *T*.

The effect on other parties may be even more striking under a limited system. For example, in Case C.7, although *T*, even if injured, plainly would not be able to recover anything from *R* and *S*, it is debatable whether *R* could recover against *S*. Thus, if *R* were allowed to recover against *S* as well as against *T* (Outcome A), the allocation of loss would be as follows:

For *R*, $50,000 - (8/10 × $50,000) + (2/10 × $30,000), or $16,000.

For *S*, $30,000 - (9/10 × $30,000) + (1/10 × $50,000), or $8,000.

For *T*, (7/10 × $50,000) + (7/10 × $30,000), or $56,000.

However, if *R* were precluded from recovery against *S* but were allowed seven-tenths recovery against a solvent *T* (Outcome B), the allocation would be as follows:

For *R*, $50,000 - (7/10 × $50,000) + (2/10 × $30,000), or $21,000.

For *S*, $30,000 - (9/10 × $30,000), or $3,000.

For *T*, (7/10 × $50,000) + (7/10 × $30,000), or $56,000.

Note the contrast between these figures and those resulting under the statute in Case C.3.

The effect of comparative negligence on the incentive structure of the claims system is profound. So too is the special effect of the choice among possible outcomes under a limited comparative negligence statute, such as the one under examination here. For ex-

ample, if, contrary to our recommendations, a court were to adopt Outcome A in Cases C.4, C.5, and C.6, *T*'s presence in the lawsuit would be of no concern to *S* except insofar as *S* might fear (or hope) that *T*'s evidence and advocacy would tend to throw more (or less) blame on *S*. In contrast, *R* would very strongly desire *T*'s presence if there were any hope of collecting from him (as in Case C.3), or of persuading the court to adopt Outcome B or Outcome C (as in Case C.4), even though *T*'s high damages (as in Cases C.5 and C.6) might be an offsetting disadvantage.

It is noteworthy that the recommended outcome (allocating the risk of insolvency in proportion to the negligence of the remaining parties) is the same in Cases C.4 and C.5, thus removing any incentive for either *R* or *S* to fight over the degree of negligence of an admittedly negligent but insolvent third party. It has been suggested above that this outcome is the most equitable result; it also avoids an incentive for complicating the lawsuit with issues about the degrees of negligence of insolvent persons whose participation in the lawsuit would be more nominal than real and whose presence would add complexity without contributing to the probability of a better outcome.

The problem of partially solvent parties should be met in similar fashion: the risk that they will be unable to meet their obligations should be spread among other parties in proportion to the negligence of the other parties.

D. *Effects of Liability Insurance*[37]

Problem 8. When two persons have liability insurance and are allowed to recover against each other because they are equally negligent, are their recoveries set off so only one recovers against the other for the net balance, to be paid by the other's liability insurer? Or does each recover a judgment for 50 percent of his damages, to be paid by the other's liability insurer?

Clause [2] of the statute provides that a plaintiff may recover if the plaintiff's negligence does not exceed the defendant's. In cases in which the defendant counterclaims and the jury finds the parties to be equally negligent, both parties can recover. If liability in-

37 The principal authors of this section are Lee Hanson, John G. Roberts, and Steven S. Thel.

surance is involved, the question arises as to whether each insurer must cover the whole liability of its policyholder, or only the net liability after recoveries are set off. The interests of the insured and the insurer will obviously conflict on this issue, raising a possible conflict of interest for the attorneys involved.

The question of relative negligence is in turn a difficult one. If juries tend to want to award damages to both parties, the set-off situation will arise often. Consider the following case.

Case D.1.
Suppose a jury finds that *A* and *B* were equally negligent, that *A* had suffered $50,000 in damages, and that *B* suffered $20,000 in damages.

Each party would be liable for 50 percent of the other's loss: *A* would be liable for $10,000 of *B*'s loss, and *B* for $25,000 of *A*'s. If set-off were not allowed, *B*'s insurer would pay *A* $25,000 and *A*'s insurer would pay *B* $10,000, leaving half the total loss, $35,000, uncovered by insurance. The allocation is summarized in Table 12 on the following page.

Under a set-off system, the burden of loss is considerably greater on both parties. In either a set-off or non-set-off system, each party is left to cover the amount of his own damages attributable to his negligence, either out-of-pocket or with his own first-party personal injury and collision insurance.

Unfortunately, very little statutory or judicial treatment of the set-off issue is available as guidance.[38] Statutory responses to the set-off issue have varied. Some states have allowed[39] and some

38 This paucity of treatment is understandable. Only within recent years has the principle of comparative negligence begun to replace the previously well-entrenched rule that contributory negligence is a complete bar to recovery. Moreover, of those jurisdictions that have rejected the defense of contributory negligence, a substantial number have adopted a modified rule under which the claimant can recover only if the claimant's negligence is less than the defendant's. Only in those states that have embraced the pure form of comparative negligence (permitting recovery if the plaintiff is not wholly at fault) and in those, such as Pennsylvania, allowing both parties to recover if each is 50% negligent, does the set-off problem arise. CONN. GEN. STAT. ANN. § 52-572(h) (West Supp. 1979); MASS. GEN. LAWS ch. 231, § 85 (Supp. 1979); MONT. REV. CODES ANN. § 58-607.1 (Cum. Supp. 1979); NEV. REV. STAT. § 41.141 (1977); N.H. REV. STAT. ANN. § 507:7-a (Supp. 1977); N.J. STAT. ANN. § 2A 15-5.1 (Cum. Supp. 1979-80); ORE. REV. STAT. § 18.470 (1977); TEX. REV. CIV. STAT. ANN. art. 2212a, § 1 (Vernon Cum. Supp. 1978-79); VT. STAT. ANN. tit. 12, § 1036 (1973); WIS. STAT. ANN. § 895.045 (West Cum. Supp. 1979-80).

39 Texas explicitly allows set-off, without mentioning insurance companies specifically. TEX. REV. CIV. STAT. art. 2212a, § 2(f) (Vernon Cum. Supp. 1978-79).

TABLE 12: ALLOCATION IN CASE D.1

	Units of Negligence	*% of Negligence*	*Initial Damages*	*Application of Statute Assuming Insurance*						*Application of Statute Assuming No Insurance*		
				Without Setoff			*With Setoff*					
				Net Recovery	*Net Damages*	*% Damages*	*Net Recovery*	*Net Damages*	*% Damages*	*Net Recovery*	*Net Damages*	*% Damages*
A	1	50	$50,000	$ 25,000	$25,000	35.7	$15,000	$35,000	50.0	$15,000	$35,000	50
B	1	50	$20,000	$ 10,000	$10,000	14.3	$0	$20,000	28.6	($15,000)	$35,000	50
A's insurer	0	0	$0	($10,000)	$10,000	14.3	$0	$0	0	$0	$0	0
B's insurer	0	0	$0	($25,000)	$25,000	35.7	($15,000)	$15,000	21.4	$0	$0	0

have prohibited[40] set-offs, but few legislators have explicitly addressed the issues by statute.[41] Similarly, courts in Mississippi,[42] Florida,[43] and Texas[44] have been divided in their approach to the set-off issue. Neither the Pennsylvania statute nor cases decided in other jurisdictions provide a clear answer to the set-off problem.

Searching for guidance elsewhere, one could analogize to contract law, which typically provides for set-off.[45] In this regard, one

40 Both Oregon and Rhode Island have adopted comparative negligence statutes that prohibit set-off. R.I. GEN. LAWS § 9-20-4.1 (Cum. Supp. 1978); ORE. REV. STAT. § 18490 (1977).

41 For example, New York, in adopting a pure comparative negligence doctrine, failed to include a set-off provision. N.Y. CIV. PRAC. § 1411 (McKinney 1976). The Judicial Conference which recommends legislation to improve the operation of the judicial system in New York stated, however, that "it is the intent of the proposed legislation that no . . . insurer shall apply as a set-off to payment pursuant to a policy of insurance any amount by which a recovery against its insured was diminished by reason of a counterclaim . . . pursuant to this article." A commentator suggested that the legislature should have codified the Judicial Conference's comment as part of the statute to avoid future litigation of the question. McLaughlin Commentary to N.Y. CIV. PRAC. C1411:3 (McKinney 1976). However, Professor Adolf Homburger, Chairman of the Judicial Conference Advisory Committee, has written that "[a]fter careful deliberation, the Advisory Committee considered it most unlikely that any court would hold otherwise and, for that reason alone, refrained from including in its draft a specific provision prohibiting the insurer from applying the insured's recovery as a set-off in reduction of its obligation." Homburger, *The 1975 New York Judicial Conference Package: Class Actions and Comparative Negligence,* 25 BUFFALO L. REV. 415, 437 (1976).

42 The Mississippi Supreme Court in Johnson v. Richardson, 234 Miss. 849, 108 So.2d 194 (1959), allowed set-off in applying Mississippi's pure comparative negligence statute, but made no reference to liability insurance.

43 The Florida Supreme Court in Hoffman v. Jones, 280 So.2d 431, 439 (Fla. 1973) adopted comparative negligence judicially, and held that "the court should enter one judgment in favor of the party receiving the larger verdict, the amount of which should be the difference between the two verdicts." This is in keeping with the long recognized principles of "set-off" in contract litigation. The Florida court also did not refer to liability insurance. Just a year later, a Florida court of appeals, in Bournazian v. Stuyvesant Insurance Co., 303 So.2d 71 (Fla. App. 1974), limited the applicability of the *Hoffman* set-off rule to reciprocal verdicts involving the same parties. The court of appeals specifically disallowed set-off between insurance companies, stating that "the fact that there were offsets among the parties doesn't diminish the responsibility of the liability insurance carriers." *Id.* at 73. The court reasoned that set-off benefits only the insurance companies and violates a strong public policy of providing accident victims reasonable access to liability insurance benefits.

44 A Texas intermediate appellate court, in Willingham v. Hagerty, 553 S.W.2d 137 (Tex. Civ. App. 1977), applied the directive of the Texas statute on the set-off issue. Plaintiff and defendant were each found 50% negligent. The applicable statute provided that in such cases the party "liable for the greater amount is entitled to a credit toward his liability in the amount of damages owed him by the other claimant." TEX. REV. CIV. STAT. ANN. art. 2212a, § 2(f) (Vernon Cum. Supp. 1978-79). The court interpreted the phrase "is entitled to" as a mandatory directive that the awards be set-off against each other, as otherwise "the party liable for the lesser damages [would have] an option to bar any recovery by the claimant, [and] the legislative purpose is thwarted." 553 S.W.2d at 140.

45 This was apparently the approach of the courts in Hoffman v. Jones, *supra* note 43, and in Johnson v. Richardson, *supra* note 42. However, in neither of these cases is any reference made to liability insurance.

could argue that statutory provisions which generally provide for set-offs in counterclaims should be read to apply to cases where a comparative negligence statute applies and the parties have liability insurance. In drafting such a general provision, however, a legislature probably would not be contemplating the comparative negligence issue — especially if the jurisdiction had not adopted comparative negligence by that time — and may have intended merely to secure the practical benefit of an award to a defendant with a successful counterclaim.[46] Legislators might have considered it both more fair and administratively more convenient for courts to award one net judgment than to allow both parties to attempt collection of their respective judgments. When liability insurance is a factor, however, the advantages deriving from administrative convenience may be less significant than considerations of fairness and of allocation of the financial burdens among not only the parties but the insurers as well.

Liability insurance policies are of little help in reaching a decision on whether to allow set-offs. The language of the policies typically requires the insurer "to pay all amounts which the insured shall become legally obligated to pay,"[47] and such general language offers little guidance to a court.

The expectations of the contracting parties do not suggest a satisfactory answer either. In relation to most cases thus far litigated, because the applicable insurance policies were written while the doctrine of contributory negligence was a complete bar to recovery, no recovery at all was expected in this situation. That the contracting parties did not contemplate the introduction of comparative negligence is not to say, however, that the liability of insurance companies should not be affected by the change. The contracts were written with knowledge that negligence law is constantly changing, that the legislature has altered the law, and that it has left the problem of set-offs to the court.

In the absence of a statutory mandate with respect to the set-off issue, considerations of policy appear to weigh against permitting set-off when liability insurance is involved.[48]

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46 Leflar and Wolfe, *Panel on Comparative Negligence and Liability Insurance.* 11 ARK. L. REV. 71, 79 (1956-57).

47 *See, e.g., id.* at 73. A typical contractual provision appears in R. KEETON, BASIC TEXT INSURANCE LAW at 658 (1971).

48 NCCUSL, UNIFORM COMPARATIVE FAULT ACT § 3, *supra* note 2, did not permit set-

The incongruity of allowing insurers to reduce their liability with monies due to the insured for injuries suffered by him, has also led a number of commentators[49] to oppose allowing set-off when liability insurance is involved. Allowing a set-off between insurance companies also runs counter to one of the general policy goals which motivated the adoption of comparative negligence statutes — compensating the victim for his injuries.[50]

In support of the set-off system, it might be argued that liability insurance costs and concomitant premiums will rise if set-off is not allowed. The studies, however, do not indicate that refusing to allow set-off will seriously increase costs. In a survey of recent studies of insurance rates in comparative and contributory negligence jurisdictions, the author concluded that "the likelihood of any significant change in automobile liability insurance rates which can be attributed to a change to comparative negligence is slight."[51] It can be inferred from these studies that liability insurance companies will not need the protection of a set-off provision in order to prevent costs and therefore premiums from soaring.

Even if liability insurance premiums would rise as a result of forbidding set-off, it is not likely that the insured public would suffer on balance. Under a set-off system, a party would be left with a greater amount of loss to self-insure or otherwise insure. In the absence of empirical evidence, it cannot be said that a non-set-off system would result in significantly higher total premiums to the insured for comparable coverage.

Another justification for disallowing set-off is prevention of inevitable conflicts of interest between the policyholder and the insurer in settlement negotiations.[52] If a set-off is available, insurance companies representing both sides of negotiations may follow their self-interest by pressing for liability figures for each

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off when the parties were covered by liability insurance. The section was amended in 1979 to bar set-off generally except as provided by agreement of the parties.

49 *See, e.g.*, Homburger, *supra* note 41; George and Walkowiak, *Blame and Reparation in Pure Comparative Negligence: the Multi-Party Action,* 8 SOUTHWESTERN U. L. REV. 1 (1976), and Flynn, *Comparative Negligence: the Debate,* 8 TRIAL 49, 52 (May/June 1972).

50 *See, e.g.*, Prosser, *Comparative Negligence,* 41 CALIF. L. REV. 1, 1-2 (1953).

51 Todd, *The Prospect of Automobile Insurance Rate Changes under Comparative Negligence,* 36 TEX. B.J. 1157 (1973).

52 Concerning the effect of settlement of reciprocal claims generally, *see* KEETON § 7.10, *supra* note 47.

party which will "cancel out" and result in smaller net insurer liability.

A number of complications remain to be resolved by the courts or the legislature. One such problem is the effect of insufficient liability insurance of one of the two parties.[53] It would be unfair to permit the uninsured party *B* to recover from the insurer of the insured party *A* yet deny *A* any recovery if *B* is insolvent. Section 3 of the Uniform Comparative Fault Act[54] provides that in such a case, if *A* owed *B* $60,000 and *B* owed *A* $50,000, *A*'s insurer would compensate *B* the net sum of $10,000, and would compensate *A* the amount saved by reason of the set-off ($50,000). *A* would receive the amount due him as compensation for injuries resulting from *B*'s negligence, and would not suffer due to *B*'s lack of insurance; rather, he would be protected by reason of having obtained adequate liability coverage.

A remaining issue is whether prohibiting set-off only when insurance companies are involved would survive an equal protection attack.[55] In view of strong public policy arguments, the courts would probably find the requisite rational basis for different treatment of insurance companies.

Clearly, the presence of liability insurance presents many complications, which drafters of the comparative negligence statute probably did not contemplate. Set-off is one of those close issues which must eventually be confronted in a comparative negligence jurisdiction and, on balance, it seems preferable to disallow set-offs where liability insurance is involved.

E. *The Last Clear Chance Doctrine Under Comparative Negligence*[56]

Problem 9. Will the doctrine of last clear chance still be applied under the statute?

This doctrine permits a contributorily negligent plaintiff to

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53 No problem is presented if neither is adequately insured, for in such a case, general set-off principles may be justly applied.

54 NCCUSL, UNIFORM COMPARATIVE FAULT ACT § 3, *supra* note 2. See also illustration No. 7 of the accompanying Commissioner's Comment.

55 For a discussion of this issue, *see* V. SCHWARTZ, COMPARATIVE NEGLIGENCE at 323 (1974) [hereinafter cited as SCHWARTZ].

56 The primary authors of this section are James E. Berliner and Anne K. Shuttee.

recover full damages when the defendant had the last opportunity to avoid the injury. Because the doctrine was designed to mitigate the harshness of the contributory negligence defense, it is necessary to decide whether retention of the doctrine under a comparative negligence system makes sense.[57] In Pennsylvania, the judiciary has refused to embrace the doctrine by name but has accepted complementary doctrines.[58] Nor has the legislature addressed the matter in its tort statute.[59] Therefore, to decide what path Pennsylvania must follow, focus must be on determining the "best" rule structure.

Whether retention of anything similar to the last clear chance doctrine is "best" depends on the form of comparative negligence adopted. Thus, the courts of states which adopted a "pure" comparative negligence system have abolished the last clear chance doctrine as superfluous; while the courts of some states which have

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57 *See* PROSSER, *supra* note 25, § 66; Fleming, *Last Clear Chance: A Transitional Doctrine,* 47 YALE L.J. 704 (1938); Cushman v. Perkins, 245 A.2d 846 (Me. 1968). *See also* SCHWARTZ, *supra* note 55, § 7.1 (1974).

58 Pennsylvania has repudiated the last clear chance doctrine by name. Kasanovich v. George, 348 Pa. 199, 34 A.2d 523 (1943). This does not end the matter, because the principle of the last clear chance doctrine often appears in some other guise. Sherman, *An Analysis of Pennsylvania's Comparative Negligence Statute,* 38 U. PITT. L. REV. 51, 77 (1976) [hereinafter cited as Sherman]. The "discovered peril" doctrine, for example, is one substitute for the last clear chance doctrine adopted by the Pennsylvania courts.

59 Connecticut, on the other hand, expressly abolished the doctrine by statute. CONN. GEN. STAT. ANN. § 52-572h(c) (West Supp. 1979). Arkansas once rejected the doctrine, 1955 Ark. Acts, No. 191, but its current statute does not explicitly do so, ARK. STAT. ANN. §§ 27-1763 to 27-1765 (1979). Georgia applies the doctrine to plaintiffs with the last clear chance. GA. CODE ANN. § 105-603 (Cum. Supp. 1979). *See also* Curt v. Ziman, 140 Pa. Super. Ct. 25, 17 A.2d 802 (1940) (however, the court held the doctrine inapplicable in this case); Lehman v. McLeary, 229 Pa. Super. Ct. 508, 329 A.2d 862 (1975). Also proximate cause reasoning has been used by the Pennsylvania courts in a way analogous to the last clear chance doctrine. McFadden v. Pennzoil Co., 341 Pa. 433, 19 A.2d 370 (1941); Naugle v. Reading Co., 145 Pa. Super. Ct. 341, 21 A.2d 109 (1941); *see also* Sherman, *supra* note 58, at 77. The Pennsylvania Supreme Court held in Coleman v. Dahl, 371 Pa. 639, 92 A.2d 678, 680 n.2 (1952), that although the doctrine of the last clear chance was not recognized in the state, it was useful "in determining whose negligence, as between two independent tortfeasors was the proximate cause of the injury." If the plaintiff's conduct was found not to have been the proximate cause, the plaintiff's conduct was said to be merely a condition of the injury. Thus, in Pennsylvania, as elsewhere, the underlying notion of the doctrine of the last clear chance has retained significance.

The notion that the doctrine of last clear chance is a rule of proximate cause can be traced in part to reasoning found in the case generally regarded as originating the doctrine, Davies v. Mann, 152 Eng. Rep. 588 (Ex. 1842). If last clear chance is indeed seen as a rule of proximate causation and not as a rule of apportioned liability based on comparative fault, a court would not find the rule to be preempted by a comparative negligence statute. *See, e.g.,* Vlach v. Wyman, 78 S.D. 504, 104 N.W.2d 817 (1960).

adopted the "least-pure" form of comparative negligence retain the doctrine.[60] The courts of the states which have adopted a limited form of comparative negligence system have split; but the modern trend, with which the authors agree, is to find the last clear chance doctrine no longer applicable.[61]

One cannot reach such a result, however, without first confronting the arguments for retaining the last clear chance doctrine within a comparative negligence system.[62] The first argument is that the courts should not abolish the doctrine without express direction from the legislature.[63] When the comparative negligence statute is silent as to the doctrine, the courts, it is argued, can best follow legislative intent by not abolishing the doctrine themselves. Second, if the last clear chance doctrine is by nature a rule of proximate cause, it is compatible with comparative negligence, since the statute compares the parties' *causal* negligence and the plaintiff's negligence may not be causal in the situations where the last clear chance doctrine would apply. Third, the doctrine is not inconsistent with comparative negligence, because the latter notion does not suggest that a defendant has no duty to avoid hurting a party who is in a position of inextricable peril. The fourth argument is that the doctrine is still useful in states which have adopted a limited form of comparative negligence, where plaintiff's contributory negligence may still in some cases constitute a total bar to recovery.[64]

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60 *See* Li v. Yellow Cab Co. of California, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Hoffman v. Jones, *supra* note 43. Prior to Hoffman v. Jones, Florida statutorily recognized comparative negligence in a few types of cases and in Loflar v. Nolin, 86 So.2d 161 (Fla. 1956), the court held that the justification for the last clear chance doctrine disappeared with the adoption of the comparative negligence statute. For those states retaining the doctrine, *see, e.g.,* Bezdek v. Patrick, 170 Neb. 522, 103 N.W.2d 318 (1960); Vlach v. Wyman, *supra* note 59.

61 *Compare* Cushman v. Perkins, 245 A.2d 846, *supra* note 57 (last clear chance no longer applicable); Britton v. Hoyt, 63 Wis.2d 633, 218 N.W.2d 274 (1974) (not applicable); Burns v. Ottati, 513 P.2d 469 (Colo. App. 1973) (not applicable) *with* Grayson v. Yarbrough, 103 Ga. App. 243, 119 S.E.2d 41 (1961) (doctrine still applicable and not incompatible with comparative negligence).

62 SCHWARTZ, *supra* note 55, § 7.2. It should be noted that Professor Schwartz does not find these arguments persuasive.

63 *See generally* Kennedy, *Form and Substance in Private Law Adjudication,* 89 HARV. L. REV. 1685, 1751-66 (1976).

64 See NCCUSL, UNIFORM COMPARATIVE FAULT ACT, *supra* note 2, Prefatory Note. The Note recognizes the anomaly, however, that a plaintiff may be better off if his negligence exceeds that of a defendant, as then the last clear chance doctrine would come into play and give him full damages.

There are cogent answers to these arguments. In the first place, a statutory omission does not ordinarily signify a deliberate legislative mandate. That silence in the statute simply means the legislature did not consider the problems.[65] Moreover, it would be "out of character" for a comparative negligence statute designed to mitigate the effects of the contributory negligence rule to embrace the harsh "all-or-nothing" results of the last clear chance doctrine. Indeed, the unambiguous intent to apportion loss according to relative fault would be partially frustrated by retaining the last clear chance rule, where one party is made fully liable for the damages attributed to the negligence of both.[66]

The proximate cause argument is also defective. The notion that the last clear chance doctrine is a rule of proximate cause is out of line with modern conceptions of proximate causation.[67] Several acts of negligence may combine to be the proximate causes of an accident. The fact that one party is the last human wrongdoer does not mean that he is the sole tortfeasor. Moreover, to ignore the plaintiff's negligence is to substitute one harsh and arbitrary doctrine (last clear chance) for another equally unfair rule (the contributory negligence bar to recovery).

The last clear chance doctrine may thus be seen as a device conceived to relieve the hardship of the contributory negligence bar. As such, it is only a crude form of comparative negligence in disguise.[68] With the adoption of a genuine comparative negligence system, then, the justification for last clear chance disappears; comparative negligence reduces the hardship of the contributory negligence bar and is superior since it does not merely substitute an equally arbitrary rule. The factors that were once considered in determining whether a party had the last clear chance will remain to be considered by the triers of fact in apportioning damages.[69] The doctrine should therefore be subsumed under the general process of allocating liability in proportion to negligence.[70] Reten-

65 Certainly the number of cases under which comparative negligence would be applicable would be fewer, and the result might be seen as contrary to the intent of the legislation. *See* SCHWARTZ, *supra* note 55, § 7.2.

66 *See* PROSSER, *supra* note 25, § 66.

67 MacIntyre, *The Rationale of Last Clear Chance,* 53 HARV. L. REV. 1225 (1940).

68 Cushman v. Perkins, *supra* note 57.

69 *See* Li v. Yellow Cab Co. of California, 13 Cal. 3d at 826, 119 Cal. Rptr. at 874; Britton v. Hoyt, *supra* note 61.

70 Britton v. Hoyt, *supra* note 61.

tion of the doctrine would not only defeat much of the purpose of comparative negligence legislation, but would also result in a windfall to a plaintiff who was clearly contributorily negligent.

The last clear chance doctrine should be abolished as well in "limited" comparative negligence jurisdictions where the plaintiff's contributory negligence may still act as a total bar, *e.g.*, where it is greater than 50 percent. As a practical matter, the party with the last clear chance is often the guiltier party. It would be unfair to place the entire burden on the defendant in cases where a reckless or grossly negligent plaintiff is injured just because the defendant had the last clear chance.

Whatever harshness exists in making the plaintiff bear full loss in cases in which he is more negligent than the defendant with the last clear chance stems from the legislature's refusal to adopt a "pure" comparative negligence rule. To retain the last clear chance doctrine as an escape from this harshness would only result in a greater wrong to a less negligent defendant.

F. *Assumption of Risk*[71]

Problem 10. Will assumption of risk continue to be recognized independently, or will factors previously treated under this rubric now be taken into account only in assessing the parties' negligence?

The Pennsylvania statute says nothing explicitly about assumption of risk. So under the theory of judging presented in this Article, consideration must be given to whether the principles and policies underlying the doctrine of assumption of risk are consistent with the principles and policies underlying the statute.

1. The Current State of the Assumption of Risk Doctrine

According to the *Restatement (Second) of Torts,*[72] a plaintiff has voluntarily assumed the risk of any injury to him when he (1) knows of a given risk; (2) understands and appreciates the fact of encountering it in a particular situation; and (3) still voluntarily exposes himself to it. In assumption of risk, it is the subjective stand-

71 The primary authors of this section are Mary Fisher, David L. Johnson, Robert L. Shuftan, and Anne K. Shuttee.

72 RESTATEMENT (SECOND) OF TORTS § 496 (1966).

ard of what the plaintiff knew and understood of the plaintiff's conduct which must be proved by a defendant seeking to invoke the defense. Similarly, the plaintiff's exposure to risk must be "voluntary" in a meaningful subjective sense. If, through the defendant's tortious conduct, the plaintiff has no reasonable alternative to exposure to a given risk, then the plaintiff cannot be said to have "voluntarily" assumed that risk. If this notion of "imposed hard choice" is pushed far enough, it will almost completely negate the defense of assumption of risk.

There are several senses in which a plaintiff has been said to have assumed a risk that led to injuries. A person may contract so as expressly to assume a given risk. For instance, one may acknowledge a given occupational hazard in an employment contract and agree to assume it. Courts have thus on occasion found the elements of an express assumption of risk defense, or alternatively, refused to give effect to an express assumption of risk on public policy grounds.[73]

The authors believe that the express assumption of risk doctrine retains validity in the face of a comparative negligence statute. An express assumption of risk consensually releases the defendant from a duty of reasonable care, and where there is no duty, there can be no negligence on the defendant's side to compare with the reasonableness of the plaintiff's conduct.

Arguments for retaining assumption of risk are somewhat less forceful in the context of "implied" assumption of risk. Under this branch of the assumption of risk doctrine, an individual who knowingly and voluntarily encounters a risk is treated in the same way as one who has expressly assumed it. Such voluntary encountering of risk may be either reasonable or unreasonable. When a plaintiff reasonably encounters a risk, it may be argued that the plaintiff's conduct does not come under the coverage of a comparative negligence statute, as by definition, the plaintiff did not encounter the risk in a negligent fashion. As there is no negligence on the plaintiff's part to compare with that of the defendant, the comparative negligence statute is inapplicable. The

73 In cases in which a hospital patient expressly agreed to assume the risks of medical treatment, such assumption of risk may be held to be either not truly "voluntary" or contrary to public policy. *See, e.g.*, Tunkl v. Regents of University of California, 60 Cal. 2d 92, 383 P.2d 441, 32 Cal. Rptr. 33 (1963).

defense of a voluntary and reasonable implied assumption of risk, it might thus be argued, continues to operate as a complete bar to plaintiff's recovery after adoption of comparative negligence.

On the other hand, unreasonable encountering of risk constitutes negligence; as the statute was drafted to apportion liability in cases where the plaintiff is contributorily negligent, an unreasonable encountering of risk would not constitute a complete bar to recovery. It seems anomalous, however, to allow a plaintiff who has negligently assumed the risk to collect partially, while denying any recovery at all to one whose conduct conformed to the standard of care. It might, therefore, follow that the defense of reasonable assumption of risk is abolished entirely or that both reasonable and unreasonable assumption of risk should be subsumed into the comparison of negligence. The following discussion examines what legislatures and the courts have done with this problem in three states. Among them, these states have adopted three types of comparative negligence statutes: "pure" comparative negligence (Mississippi), "limited" comparative negligence (Wisconsin), and "slight-gross" comparative negligence (Nebraska).

The Mississippi "pure" comparative negligence statute was first adopted in 1910.[74] The Mississippi Supreme Court preserved part of the assumption of risk defense even in the face of a pure comparative negligence statute.[75] By drawing a distinction between "carelessness," which was subsumed under the statute, and "venturousness," which was not, the court retained the assumption of risk defense to ban venturous plaintiffs from recovery.[76] Despite this standard, the future of the assumption of risk defense in

74 Today, the statute remains relatively unchanged as MISS. CODE ANN. § 11-7-15 (1972):

> In all actions hereafter brought for personal injuries, or where such injuries have resulted in death or injury to property, the fact that the person injured, the owner of the property, or the person having control over the property may have been guilty of contributory negligence shall not bar recovery, but damages shall be diminished by the jury in proportion to the amount of negligence attributable to the person injured, or the owner of the property, or the person having the control over the property.

75 Saxton v. Rose, 201 Miss. 814, 29 So.2d 646 (1974). The doctrine was declared to be in "full force" except as between master and servant. 201 Miss. at 823, 29 So.2d at 649.

76 *Id. See also, e.g.,* Strand Enterprises v. Turner, 223 Miss. 588, 78 So.2d 769 (1955); Ideal Cement Co. v. Killingsworth, 198 So.2d 248 (Miss. 1969); Dendy v. City of Pascagoula, 193 So.2d 559 (Miss. 1967); Mississippi Export Railroad Co. v. Temple, 257 So.2d 187 (Miss. 1972).

Mississippi is in some doubt. In *Braswell* v. *Economy Supply Co.*,[77] the Mississippi court questioned whether its earlier distinction between contributory negligence and assumption of risk had been useless, or wrong. Now acknowledging that in many instances the two doctrines — far from being distinct — blend into each other, the court held that in such cases of overlap, the less severe doctrine of comparative negligence should govern. Reasonable assumption of risk may still be a complete defense in Mississippi, however.

Wisconsin took the lead in 1931 when it developed one of the earliest "limited" comparative negligence statutes providing recovery for a plaintiff whose negligence was not so great as that of a defendant.[78] Climaxing several years of development in case law, the Wisconsin Supreme Court in *Gilson* v. *Drees Bros.*[79] abolished the implied assumption of risk defense.[80]

The "slight-gross" "comparative" negligence system of Nebraska provides yet another paradigm for analysis. In this slight-gross system, the plaintiff is not barred by his contributory negligence if his negligence is slight and defendant's negligence is gross.[81] As plaintiff is barred from liability under this statute when he is significantly negligent, the assumption of risk defense is rendered superfluous in a number of situations. A plaintiff who would be found to have negligently assumed the risk often will be barred by his contributory negligence from recovery anyway. Thus, the Nebraska courts have been insulated by the "slight-

77 281 So.2d 669 (Miss. 1973).

78 More recently, the statute was modified to allow recovery even if plaintiff's negligence equalled the defendant's. WIS. STAT. ANN. § 895.045 (West Supp. 1979-80).

79 19 Wis.2d 252, 120 N.W.2d 63 (1963).

80 *See also* Bishop v. Johnson, 36 Wis.2d 64, 152 N.W.2d 887, 890 (1967) ("contributory negligence of a nature which was formerly called assumption of risk is subject to the same rules of compensation as any other type of negligence").

81 NEB. REV. STAT. § 25-1151 (Cum. Supp. 1978) provides:

> In all actions brought to recover damages for injuries to a person or to his property caused by the negligence or act or omission giving rise to strict liability in tort of another, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery when the contributory negligence of the plaintiff was slight and the negligence or act or omission giving rise to strict liability in tort of the defendant was gross in comparison, but the contributory negligence of the plaintiff shall be considered by the jury in the mitigation of damages in proportion to the amount of contributory negligence attributable to the plaintiff; and all questions of negligence or act or omission giving rise to strict liability in tort and contributory negligence shall be for the jury.

gross" form of comparative negligence from squarely confronting problems which must be confronted under the Pennsylvania statute.[82]

2. Assumption of Risk Doctrine in Pennsylvania Before the Comparative Negligence Statute

Although courts in Pennsylvania have paid lip service to the theory that assumption of risk and contributory negligence are separate defenses, in practice the distinction is frequently blurred. Pennsylvania has traditionally recognized two forms of assumed risk. In its primary or strict sense, assumption of risk is said to involve a "voluntary exposure to an obvious or known danger which negates liability."[83] Under this concept, recovery is barred because the plaintiff is assumed to have relieved the defendant of any duty to protect him.

The secondary type of assumption of risk is frequently equated with contributory negligence, as it involves a failure to use reasonable care for one's own safety. Under this type of risk, recovery is barred because of the plaintiff's departure from the standard of reasonable conduct, regardless of the defendant's misconduct.[84] Since the secondary sense of assumption of risk has been essentially merged with contributory negligence, it appears that this aspect of assumption of risk is virtually abolished.

The primary form of assumption of risk might be retained, however, since it is not so patently inconsistent with legislative intent to eliminate the contributory negligence defense. Primary assumption of risk may be either express, as in a written or oral agreement, or implied. The express assumption of risk may sound

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82 *See, e.g.,* Whitcomb v. State Federal Saving and Loan Association,190 Neb. 26, 205 N.W.2d 652 (1973), in which plaintiff's act of crossing a raised threshold which was "open and obvious" and which the plaintiff had previously observed many times before was deemed "contributory negligence." As the negligence was found to be more than "slight," the choice between applying assumption of risk analysis or contributory negligence analysis was rendered academic.

There are situations, however, in which the assumption of risk defense would change the result, *e.g.,* products liability cases, Melia v. Ford Motor Co., 534 F.2d 795 (8th Cir. 1976). Presumably, assumption of risk also retains validity in the classic situations, such as where a plaintiff is hit by a stray ball or a hockey puck at an athletic event.

83 Pritchard v. Liggett & Myers Tobacco Co., 350 F.2d 479, 484 (4th Cir. 1965).

84 *See* Stephenson v. College Misericordia, 376 F. Supp. 1324 (1974). Joyce v. Quinn, 204 Pa. Super. Ct. 580, 205 A.2d 611 (1964).

in contract rather than tort,[85] and so may survive a statute addressing itself to the tort theory of negligence. Implied assumption of risk, in the primary sense, presents a different problem. The legislature did not in so many words abolish this defense. The question then arises as to whether the reasonable plaintiff is to be barred from recovery on an implied assumption of risk theory, when the negligent, unreasonable plaintiff is not. Strong reasons of public policy suggest that reasonable behavior ought not to be penalized where unreasonable actions, as in the secondary aspect of assumption of risk, do not necessarily prevent recovery. It might, therefore, be concluded that the comparative negligence statute abolishes not only contributory negligence and the secondary sense of assumption of the risk, but also implied assumption of risk in the primary sense.

3. Recommendations

1. The courts of Pennsylvania should follow the precedents of the Wisconsin courts, which construed a similar statute, by merging "the defense of assumption of risk into the general scheme of assessment of liability in proportion to fault in those particular cases in which the form of assumption of risk involved is no more than a variant of contributory negligence."[86]

This rule is easily administered. Under both negligent assumption of risk and contributory negligence, it is the unreasonableness of the plaintiff's behavior that is weighed against the care of the defendant. Clearly, a plaintiff may be even more negligent in undertaking a risk knowingly than in doing so through carelessness, and thus in practice, the elements of assumption of risk may indicate a greater degree of unreasonableness. A fact-finder may take such a distinction into account in allocating liability under the statute. This recommended merger of implied unreasonable assumption of risk and contributory negligence also seems consistent with previous Pennsylvania case law.

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85 *See* F. HARPER & F. JAMES, THE LAW OF TORTS, (Vol. 2) § 21.7 (1956).

86 *Cf.* Li v. Yellow Cab Co. of California, *supra* note 60, 13 Cal. 3d at 825, 532 P.2d at 1241, 119 Cal. Rptr. at 873 (1975), from which the quoted language is borrowed. In that case, however, the court was dealing with the issue in the context of a judicially-created pure comparative negligence statute, rather than the present context.

If assumption of risk were allowed to stand as a separate defense apart from contributory negligence, the distinction would result in inequities. An illustration is the case of an accident in which a guest sues both the driver of the car in which the guest was riding and the driver of the other car. If assumption of risk is held to be an absolute bar, then a guest may not be able to sue the driver of the host car if the guest knowingly rode in danger (thus showing in such a case "consensual conduct").[87] However, because the guest cannot be said to have assumed any risk with respect to the driver of the other car, the guest can still sue that driver under the comparative negligence statute. Such a disparity might also frustrate the Pennsylvania statute's system of contribution among joint tortfeasors. In this case, one of those tortfeasors would be beyond direct recovery, and the other, though perhaps less guilty, might have to bear the entire burden of plaintiff's damages (less plaintiff's own contributory negligence with respect to the other driver).

2. "Reasonable assumption of risk" should be eliminated as a defense, and a plaintiff confronted with this relatively rare charge should be able to recover fully against a negligent defendant.

3. Express assumption of risk, when not contrary to public policy and when truly voluntary, should be the sole variety of the defense allowed to stand.

G. *Doctrines of Aggravated Fault*[88]

Problem 11: Are the doctrines which distinguish between negligence, gross negligence, and willful and wanton conduct still in effect under the statute?

In response to the often harsh results of the system of contributory negligence,[89] several states adopted differing degrees of negligence so that a plaintiff only slightly at fault could still recover in full.[90] Although these modifications of contributory negligence, together with the doctrine of last clear chance,[91] re-

87 *See* SCHWARTZ, *supra* note 55, at 171.
88 The primary author of this section is Laura L. Carroll.
89 RESTATEMENT (SECOND) OF TORTS, § 467 (1966).
90 *Supra* note 58, at 99-100.
91 *See* section E *supra.*

lieved the plaintiff of the high degree of care required to obtain a recovery, they were not entirely satisfactory. Rather than allocating the burden of damages according to relative fault, these modifications fully compensated a plaintiff who was, after all, partially negligent. The doctrine of comparative negligence allows a more equitable distribution of damages between the parties. Many states which have adopted the doctrine of comparative negligence had previously adopted one or more of the modifications of contributory negligence. The question thus arises whether those doctrines retain any vitality under comparative negligence.

With respect to the notion of gross negligence,[92] there is little controversy. Gross negligence is usually defined as "very great negligence," which nevertheless falls "short of a reckless disregard of consequences, and differ[s] from ordinary negligence only in degree, and not in kind."[93] Thus, the proof of gross negligence will be identical to that of negligence, differing only in that the defendant's negligence will ordinarily be shown to be greater than the plaintiff's, although not different in kind, under gross negligence.

Gross negligence seems especially easy to discard when a system of comparative negligence is adopted.[94] Gross negligence is only a shorthand way of saying that one party is considerably more negligent than the other, and such a general and vague guideline becomes superfluous in a comparative negligence system in which the jury will render exact percentages of the relative fault of each party. The concept of gross negligence thus could only confuse the jury's efforts to determine more exact degrees of fault.[95]

Whether the doctrine of willful or wanton conduct will be main-

92 The concept of gross negligence has had its greatest use under automobile guest statutes. Under these statutes, a driver ordinarily is liable to a passenger only for some degree of aggravated negligence or misconduct, often labelled "gross negligence." The theory is that a passenger receiving a gratuitous ride lacks a right to demand ordinary care from the driver. PROSSER, *supra* note 25, § 34, at 186.

93 *Id.* at 183.

94 The New Jersey Superior Court has so held in Draney v. Bachman, 138 N.J. Super. 503, 351 A.2d 409 (1976). The Oregon Supreme Court has similarly held in Johnson v. Tilden, 278 Ore. 11, 562 P.2d 1188 (1977), under the Oregon modified comparative negligence statute which states that contributory negligence will not bar recovery if the *fault* of plaintiff was not greater than the combined fault of defendants. The court was uncertain, however, whether it would have found gross negligence to be included within negligence, if the statute had read "negligence" instead of "fault."

95 PROSSER, *supra* note 25, § 65, at 426.

tained in a comparative negligence system is a considerably more difficult question, for the doctrine has been given an extremely broad range of definitions by the states and has been often unevenly applied by the courts. Many authorities contend that, unlike gross negligence, willful and wanton conduct differs in kind and constitutes a wholly separate theory of action. The purported distinction between willful and wanton conduct, on the one hand, and ordinary negligence, on the other, rests on the issues of intent or conscious indifference. Prosser defines willful and wanton conduct as follows:

> [T]he actor has intentionally done an act of an unreasonable character in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a conscious indifference to the consequences, amounting almost to willingness that they should follow; and it has been said that this is indispensable.[96]

This definition suggests misconduct bordering on an intentional tort, and thus in a contributory negligence system, the plaintiff's negligence ordinarily does not bar recovery from a willful and wanton defendant,[97] just as contributory negligence does not bar recovery for an intentional injury.[98]

Under a comparative negligence statute that does not specify otherwise, it could be argued that comparative negligence only applies to those negligence claims to which contributory negligence was formerly a bar. It would then follow that comparative negligence does not apply to willful and wanton conduct, since contributory negligence was not formerly applicable to it.

Although thirty-two states now have some form of comparative negligence, only twenty-two have a "modified" comparative negligence statute similar to Pennsylvania's.[99] Of these, most have

96 *Id.* § 34, at 185.

97 RESTATEMENT (SECOND) OF TORTS § 503(1) (1966).

98 *Id.* § 481.

99 Seven states have adopted "pure" comparative negligence, and two allow recovery when plaintiff's negligence was slight and defendant's gross. The remaining states either follow Pennsylvania, in allowing plaintiff to recover if his negligence was *not greater than* defendant's (*i.e.*, 50% or less) or allow plaintiff to recover if his negligence was *less* than defendant's. Those allowing recovery when plaintiff's negligence is not greater are: CONN. GEN. STAT. ANN. § 52-572h (West. Supp. 1979); HAWAII REV. STAT. § 663-31 (1976); MASS. GEN. LAWS ANN. ch. 231, § 85 (Supp. 1979); MONT. REV. CODES ANN. § 58-607.1 (Cum. Supp. 1979); NEV. REV. STAT. § 41.141 (1977); N.H. REV. STAT. ANN. § 507.7-a (Supp. 1979); N.J. STAT. ANN. § 2A: 15-5.1 (West Supp. 1979-80); ORE. REV. STAT. § 18.470 (1977);

not yet dealt with the issue of whether willful and wanton conduct is still a viable doctrine.[100] A New Jersey Superior Court, however, in *Draney* v. *Bachman,*[101] ruled specifically that comparative negligence was not to apply to willful and wanton conduct. The court's definition of willful and wanton conduct closely resembles Prosser's[102] in its inclusion of conscious indifference:

> It must appear that the defendant with knowledge of existing conditions, and conscious from such knowledge that injury will likely or probably result from his conduct, and with reckless indifference to the consequences, consciously and intentionally does some wrongful act or omits to discharge some duty which produces the injurious result.[103]

The court in *Draney* held that it would "no longer ascribe different legal significance to different degrees of negligence," so that gross negligence, which differed from plain negligence only in degree, would not have "continued viability under our new statute."[104] On the other hand, the court argued that willful and wanton conduct differed in kind from negligence of any degree, and thus has been "elevated to the status of a separate tort."[105]

S.C. CODE § 15-1-300 (1976) (only in automobile cases); TEX. REV. CIV. STAT. ANN. art. 2212A, § 1 (Vernon Cum. Supp. 1978-80); ARK. STAT. ANN. §§ 27-1764 to 27-1765 (1979); COLO. REV. STAT. § 13-21-111 (1973); IDAHO CODE § 6-801 (1979); KAN. STAT. ANN. § 60-258a (1976); ME. REV. STAT. ANN. tit. 14, § 156 (Cum. Supp. 1978-79); N.D. CENT. CODE ANN. § 9-10.07 (1975); OKLA. STAT. ANN. tit. 23, § 11 (West Cum. Supp. 1978-79); UTAH CODE ANN. § 78-27-37; WYO. STAT. § 1-1-109 (republished ed. 1977). These states differ regarding whether plaintiff's degree of negligence is to be compared with all defendants' combined negligence, or with each defendant's negligence.

100 The federal courts in two circuits have considered this issue. In applying state law, both courts observed that two states' courts (Arkansas and Oregon) had not yet acted on this issue, but then predicted how willful and wanton conduct would be treated, with completely opposite results. In Billingsley v. Westrac Co., 365 F.2d 619 (8th Cir. 1966), the court did " 'not agree that willful and wanton disregard or misconduct is an area of law entirely distinct and apart from negligence, [quoting from Harkrider v. Cox, 232 Ark. 165, 334 S.W.2d 875, 877 (1960)]. . . . We note, too, the added factor that the purpose of a comparative negligence statute is thwarted whenever there is a judicial characterization of an act as something other than negligence." In Ryan v. Foster & Marshall, Inc., 556 F.2d 460, 465 (9th Cir. 1977), on the other hand, the court observed that "if the Oregon legislature had intended gross negligence [which is closer to willful and wanton conduct in Oregon, i.e., 'conscious indifference to or reckless disregard of the rights of others,' ORE. REV. STAT. § 30.115 (1977)] in ORS 18.470, its comparative negligence statute, it would have been easy to do so."

101 138 N.J. Super. 503, 351 A.2d 409 (1976).

102 *See* note 95 *supra.*

103 138 N.J. Super. at 511, 351 A.2d at 415, *quoting from* McLaughlin v. Rova Farms, Inc., 56 N.J. 288, 266 A.2d 284, 293 (1970).

104 351 A.2d at 413.

105 351 A.2d at 414.

For this court, then, willful and wanton conduct more nearly resembles an intentional tort than negligence, and the cause of action for such conduct is unaffected by the state's comparative negligence statute.

It can be argued that despite the "intentional" element of "willful and wanton conduct," it is really only another, higher degree of negligence, similar to gross negligence, but more egregious. If such conduct does only differ in degree from ordinary negligence, then the arguments in favor of abolishing gross negligence in a comparative negligence system would be equally applicable. The Wisconsin Supreme Court adopted this position in its decision in *Bielski* v. *Schulze.*[106] In Wisconsin, "gross negligence" was the term used to describe willful and wanton conduct which displayed "actual or constructive intent to injure."[107] Despite the intent element, the court noted the difficulty of pinpointing the nature of willful and wanton conduct, variously defining it as "such a degree of rashness or wantonness which evinced a total want of care," or "a willingness to harm although such harm may not have been intended" or "little less than an intentional wrong," or "willingness to perpetrate injury"[108]— all of them vague definitions which could lead to inconsistent results. In practice, Wisconsin courts had solved the problem by mechanically applying certain rules, *e.g.,* that acting negligently while intoxicated constitutes willful and wanton conduct as a matter of law.[109] While this is a simple enough test, it nonetheless does not necessarily result from the "intentional" nature of the misconduct.

The *Bielski* court noted that the purpose of the doctrine of willful and wanton conduct was to overcome the contributory negligence defense in order to permit recovery when the defendant had a higher percentage of negligence; to fulfill that purpose, it believed adoption of a comparative negligence system would be particularly appropriate.[110] Thus, there would be no need for the concept of "willful and wanton conduct" in a comparative

106 16 Wis.2d 1, 114 N.W.2d 105 (1968).
107 16 Wis.2d at 15, 114 N.W.2d at 112.
108 16 Wis.2d at 1, 114 N.W.2d at 105.
109 *See, e.g.,* Twist v. Aetna Casualty & Surety Co., 275 Wis. 174, 81 N.W.2d 523 (1957).
110 Bielski v. Schulze, *supra* note 106, 16 Wis.2d at 16, 114 N.W.2d at 113.

negligence system. The court also observed that willful and wanton conduct should not be retained as a separate tort — with absolute rather than relative fault — simply to deter wrongdoers, because potential tortfeasors would not even be aware of the nuances of the rule structure which awards civil damages, and thus no deterrence would result. Instead, "the protection of the public from such conduct . . . is best served by the criminal laws of the state,"[111] whose function it is to punish wrongful behavior rather than to distribute loss.

Although several scholars[112] have favored treating willful and wanton conduct as different in kind from ordinary negligence, there are good reasons for adopting the *Bielski* holding. First, where there are practical difficulties in consistently applying a definition of misconduct that is worse than negligent but less than intentional, the comparative negligence doctrine provides for the exact allocation of percentages of negligence, and thus avoids the confusion and arbitrary line-drawing involved in choosing between negligence and willful-and-wanton characteristics. Although the *Draney* court purported to find a considerable difference between the two concepts, it admitted that "there is no simple formula that could describe with exactness the difference between negligence and willful and wanton misconduct."[113] In *Draney*, for example, an intoxicated driver crashed into a utility pole. Given the driver's intoxicated state, most of the intent involved related to the intent to consume intoxicants and to produce the consequences that the actor recognized as certain. The plaintiff's proof was quite unlike the state-of-mind showing required for an intentional tort; instead, the proof served only to accentuate the greater risk-taking of the defendant. If the proof required is almost identical to that required for negligence, there appears to be little reason to differentiate the penalties so completely. Of course, if the plaintiff were completely blameless, the defendant would pay full damages, whether labelled negligent, or willful and wanton, under a comparative negligence regime.

Secondly, if the *Draney* decision were followed, most plaintiffs

111 *Id.*

112 *See, e.g.*, PROSSER, *supra* note 25, § 34 at 185, § 34 at 185, § 65 at 426; RESTATEMENT (SECOND) OF TORTS § 502(1) (1966); Sherman, note 58 *supra,* at 70.

113 Draney v. Bachman, *supra* note 94, 138 N.J. Super. at 513, 351 A.2d at 414.

would plead willful and wanton conduct, in the hope that the concept's vagueness would help them obtain a full recovery.[114] Such a result would obviously tend to undermine the purpose of comparative negligence, which is to apportion damages according to the fault of both parties.

Thirdly, the reason for creating degrees of negligence, like willful and wanton conduct, was to mitigate the severity of the contributory negligence bar to recovery. That reason no longer applies under a comparative negligence system.

Finally, as the *Bielski* court noted, the argument that a deterrent effect is served by retaining the distinction is dubious.[115] Similarly, the argument that an almost intentional wrongdoer must not benefit from the plaintiff's contributory negligence[116] relies heavily on the questionable deterrence rationale and overlooks the moral argument that the plantiff will benefit despite plaintiff's wrongdoing.

The situation in Pennsylvania is admittedly more complex than that in Wisconsin or in New Jersey. First of all, there is support in Pennsylvania for distinguishing between "willful misconduct," which is committed with an accompanying specific intent to do harm, and "wanton misconduct," which is conduct "accompanied by a conscious indifference to the consequences."[117] Under this distinction, willful misconduct is very close to intentional tort, but not identical to it, since "intent to do harm" does not refer to the more precisely defined consequences that one must intend in an intentional tort. Wanton misconduct occupies all the remaining gray area which has been examined.

The Pennsylvania courts in several decisions have stressed that if a defendant "had reason to know" that the plaintiff "was in a

114 In this regard, *see* a more recent New Jersey decision, Carney v. Gordon and Wilson Co., 153 N.J. Super. 109, 379 A.2d 263 (1977), in which plaintiffs claimed error in the lower court's failure to instruct regarding willful and wanton conduct since they sought to bar any contributory negligence defense. The court, in allowing only the negligence claim, nevertheless highlighted the vagueness of the willful and wanton conduct standard: such conduct "signifies something less than an intention to hurt . . . Since 'differences in the gravity of fault cannot be stated with mathematical precision,' the focus must be on the 'seriousness of the actor's misconduct.' " 153 N.J. Super. at 113, 379 A.2d at 264-265. *See also* Billingsley v. Westrac Co., *supra* note 100.

115 *See* text accompanying note 111.

116 Annot., 78 ALR.3d 339, 390 (1977).

117 Evans v. Philadelphia Transportation Co., 418 Pa. 567, 212 A.2d 440 (1965).

potentially perilous . . . position," he may be found guilty of wanton misconduct without a showing of actual knowledge.[118] This "reason to know" rule does not focus on the intent necessary for an intentional tort, but rather on the careless or reckless attitude one associates with a high degree of negligence.

On balance, the authors believe it would be best to subsume both "willful" and "wanton" misconduct into the comparative negligence calculus rather than retain them as separate doctrines. Separate doctrines are no longer necessary under a system where contributory negligence is not a bar to recovery and they do not comport with the general thrust of a *comparative* negligence system.

Conclusion

As comparative negligence becomes an increasingly popular concept, more states may be expected to adopt statutes incorporating the doctrine. Because the full ramifications of the concept are still unclear, courts will be forced to resolve difficult problems of application in the future.

In order to expedite that application, this Article has presented a theory of judging designed to suggest the proper relationship between the legislature and the judiciary in the interpretation of a statute. The theory has also been drawn to provide a useful and systematic framework for analyzing and comparing the various authors' views regarding the problems discussed in the Article.

We hope that the Article will aid in future judicial interpretation of the Pennsylvania statute, other comparative negligence statutes, and statutes in general.

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118 Wilson v. Penn. Railroad Co., 421 Pa. 419, 428, 219 A.2d 666, 672 (1966); Saaybe v. Penn. Central Transportation Co., 438 F. Supp. 65 (E.D. Pa. 1977); Williams v. Philadelphia Transportation Co., 219 Pa. Super. 134, 280 A.2d 612 (1971); Fugagli v. Camasi, 426 Pa. 1, 229 A.2d 735 (1967).

THE SPEEDY TRIAL PLANNING PROCESS

KENNETH MANN*

Since the late 1960's, both Congress and the Judiciary have become increasingly aware of extensive delay in the criminal justice system. In order to address those problems, Congress responded by enacting the Speedy Trial Act of 1974.

The Act constituted a substantial mandate to the courts to accelerate their trial process and required specific time limits for trials as well as regional fact-finding and coordination. While various regional groups were able to generate some empirical findings about local trial delay, Mr. Mann shows there were major problems in achieving the goals of the bill. By means of personal interviews and a special Mail Survey, Mr. Mann reveals that many of the groups had inadequate time and resources to examine their local idiosyncrasies. At the same time, many of the groups failed to realize their information-gathering purposes because of reliance on standardized guidelines and undue dominance by local judicial officers on the planning groups.

Consequently, Mr. Mann argues that concrete institutional standards need to be established to give guidelines to those entrusted with altering the criminal justice system. Before any conclusions about the bill may be drawn, Mr. Mann urges comprehensive analysis of various regional problems under the Act.

Introduction

By the latter half of the 1960's, lengthy trial delay and excessive case backlogs had become chronic problems for the federal criminal justice system.[1] Despite efforts in some jurisdictions to institute new rules and procedures to ameliorate the situation,[2]

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1 The development of chronic problems of delay in the federal criminal justice system is a relatively recent phenomenon. In 1960, the Administrative Office of the Uhited States Courts reported that although civil dockets in the federal district courts were becoming seriously backlogged, these courts were generally able to keep their criminal dockets current. 1960 ANNUAL REPORT 62 (1960) [hereinafter cited as 1960 ANNUAL REPORT] The serious problems in the annual docket developed during the 1960's, as the number of pending criminal cases in the federal district courts more than tripled. ADMINISTRATIVE OFFICE OF THE U.S. COURTS 1977 ANNUAL REPORT 9 (1977) [hereinafter cited as 1977 ANNUAL REPORT.]

2 The first detailed, specific response to the problem of federal court delay came in the Second Circuit. At the conclusion of its opinion in the 1971 case of United States ex rel. Frizer v. McMann, 437 F.2d 1312 (2d Cir. 1971), the Court of Appeals announced that it

speedy judicial process continued to deteriorate in the first half of the 1970's.[3] Finally, after several years of consideration[4] and in response to a continued bleak outlook, Congress enacted the Speedy Trial Act of 1974.[5] This legislation initiated a process

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was issuing rules to ensure the prompt disposition of criminal cases in that circuit's district courts. The nine rules, issued pursuant to the statutory power granted to the Judicial Council of each circuit by 28 U.S.C. § 332(d) (1970), set forth scheduling priorities, time limits, procedures for calculating time periods, and sanctions which would apply to the processing of criminal cases in that circuit.

At the same time that the Second Circuit plan was undergoing initial implementation, a Judicial Conference committee was considering an amendment to the Federal Rules of Criminal Procedure designed to remedy the nationwide criminal justice delay situation. The result of this effort was the promulgation of Rule 50(b) of the Federal Rules of Criminal Procedure which became effective on October 1, 1972, after having been approved by the Supreme Court and transmitted to Congress in accordance with 18 U.S.C. § 3771 (1970). In order to aid the ninety-four district courts in implementing the new rule, the Judicial Conference distributed a Rule 50(b) Model Plan in August 1972. The districts then utilized this model to develop their own plans, which were finally put into use in January 1973.

Many of the provisions in the Second Circuit and Rule 50(b) plans had their origins in the *Standards Relating to Speedy Trial* developed in the mid-1960's as part of the American Bar Association Project on Minimum Standards for Criminal Justice.

For further discussion of these Speedy Trial Act precursors, *see* Note, *Speedy Trials: Recent Developments Concerning a Vital Right,* 4 FORDHAM URB. L.J. 351 (1976); Poulos & Coleman, *Speedy Trial, Slow Implementation: The ABA Standards in Search of a Statehouse,* 28 HASTINGS L.J. 357 (1976).

3 An indication of the extent of the problem of criminal justice delay at that time was clearly manifest in statistics compiled from the Federal District Courts. On June 30, 1960, the pending criminal caseload was 7,691 cases; on June 30, 1972, after steady yearly increases, that figure had risen to 25,438 cases, a 330% increase. 1960 ANNUAL REPORT, *supra* note 1, at 106; 1977 ANNUAL REPORT, *supra* note 1, at 9.

4 Congress first began serious consideration of speedy trial legislation in 1970. Senator Ervin (D-N.C.) and others introduced a speedy trial bill in June 1970, but no action was taken during that session. S. 3936, 91st Cong., 2d Sess. (1971). The following year the bill was reintroduced, and extensive hearings were held in the Subcommittee on Constitutional Rights of the Senate Judiciary Committee. *Hearings on S. 395 before the Subcomm. on Const. Rights of the Sen. Comm. on the Judiciary,* 92d Cong., 1st Sess. (1971). This bill also failed to achieve final approval during the 92d Congress. Finally, in early 1973, Senator Ervin introduced S. 754, a successor bill from the first two efforts, which was reported out to the full Senate from the Judiciary Committee and passed by a voice vote on July 23, 1974. *See Speedy Trial: Hearings on S. 754 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary,* 93rd Cong., 1st Sess. (1973) [hereinafter cited as *Senate Speedy Trial Hearings*]. A similar bill had been introduced in the House of Representatives and referred to the House Judiciary Committee, which held hearings on it in September and finally reported it out to the full House in late November. *Speedy Trial Act of 1974: Hearings on S. 754, H.R. 7873, Before Subcomm. on Crime of the Comm. on the Judiciary of the House of Representatives,* 93d Cong., 2d Sess. (Sept. 12, 18-19, 1974) [hereinafter cited as *House Speedy Trial Hearings*]. The House bill was brought up for debate on December 20, 1974, the last day of the session, and passed by a voice vote after some heated discussions and last-minute modifications. The Senate quickly concurred in the House amendments and the bill was sent to the President for his signature. For a general description of the substance of the Act, *see* Frase, *The Speedy Trial Act of 1974,* 43 U. CHI. L. REV. 667 (1976).

5 Pub. L. No. 93-619, 88 Stat. 2076 (1974) *codified at* 18 U.S.C. §§ 3161-74 (1976). The Act was recently amended by Pub. L. No. 96-43, 93 Stat. 327 (1979). *See* note 9 *infra.*

which Congress hoped would reverse the trend toward greater delay and backlogs by determining and eliminating the underlying causes of these problems in the federal courts.[6]

The Act contained two distinct components. The first[7] set forth in detail the substantive goals of the bill, including the establishment of specified time limits for processing cases and sanctions for failure to comply with these standards. In brief, the Act required the federal courts to reduce from 250 to 100 days the maximum case processing time between arrest and trial, allowing only specified exceptions to these requirements. To enforce these standards, Congress provided for the strictest form of sanction — case dismissal.[8] However, the substantive requirements were structured to take full effect only after the expiration of a four-year phase-in period ending on July 1, 1979.[9]

While the provision of the substantive component indicated clearly the goals which Congress sought to achieve in the speedy trial area, the means for attaining these goals were not specifically set forth. Instead, rather than attempting to determine the underlying causes of delay and to prescribe specific solutions by the terms of the Act itself, Congress decided, through the second, "procedural" component, to delegate the responsibility for these tasks to a set of local district planning groups established by the Act.[10] The groups were directed to make regular reports to Con-

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6 *Reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7401, 1417. *See* 18 U.S.C. § 3165(b).

7 18 U.S.C. § 3165. The two components referred to are both within Title I of the Act. Title II of the Act, not considered in this article, authorized the establishment of ten pretrial service agencies in representative districts on a demonstration basis. The function of these agencies is to compile the information necessary for the setting of bail conditions and to supervise persons released from custody prior to trial. *See* 18 U.S.C. §§ 3152-56 (1967).

8 18 U.S.C. § 3162. In its final form, the sanction provision required dismissal, but permitted the judge to determine whether reprosecution on the same charges would be allowed, considering such factors as the seriousness of the offense, the circumstances leading to dismissal, and the impact of a reprosecution on the administration of justice. *See* Note, *Dismissal With or Without Prejudice Under the Speedy Trial Act: A Proposed Interpretation,* 68 J. CRIM. L. 1 (1977).

9 The imposition of the dismissal sanction for failure to meet the Act's deadlines was suspended until July 1, 1980 by the Speedy Trial Act Amendments of 1979, Pub. L. No. 96-43, 93 Stat. 327 (1979). The amending legislation made some other notable changes in the operation of the time limit structure, merging the 10-day indictment to arraignment and the 60-day arraignment to trial intervals into a single 70-day indictment to trial interval, and refining certain excludable time provisions.

In addition, many of the reporting and data collection requirements were altered or expanded. These changes are noted where relevant in the subsequent discussion.

10 18 U.S.C. § 3168 (1976), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7417.

gress during the phase-in period specifying the additional resources required by the districts and describing the various procedures being developed by the courts to meet the substantive time limits set forth in the Act.[11]

The planning approach established by the Speedy Trial Act represents a relatively unique legislative mechanism for instituting comprehensive reform in the judicial system.[12] Accordingly, this Article seeks to evaluate the success of the Speedy Trial Act planning process to determine whether it provides a promising mechanism which can be used to deal with other systemic problems of the federal justice system. Part I of the Article describes briefly the basic structure of the planning process and examines the underlying reasons which prompted Congress to utilize this unique approach to judicial reform. Part II analyzes the context into which the Act's planning structure was placed and considers the significant obstacles which threatened to stifle the potential of the process at the outset. With this background, Parts III and IV evaluate the performance of the national bodies and the local planning groups, respectively, to determine how successful this experiment in judicial reform proved to be. This evaluation is based largely on extensive efforts by the author to obtain first-hand accounts from members of the various groups,[13] as well as on critical analysis and comparison of the reports, guidelines, and plans pro-

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11 18 U.S.C. §§ 3166(d), 3167, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7418.

12 Only two federal legislative antecedents to the general type of planning process established by the Act can be found. First, the Criminal Justice Act of 1964, Pub. L. No. 85-455,78 Stat. 552 (1974), *codified at* 18 U.S.C. § 3006A *et seq.* (1976), made it obligatory for each district court to submit a plan relating to the provision of counsel to indigent defendants within the district. Second, the Safe Streets Act of 1978, Pub. L. No. 90-351, 82 Stat. 197, 42 U.S.C. § 3701 *et seq.* (1968), provided that the council of representatives from state law enforcement agencies were required to submit comprehensive plans for "improvement of law enforcement throughout the state."

See also note 2 *supra.*

13 The author conducted several personal interviews with reporters and other members of various planning groups and with several persons responsible for implementation and administration of the Act's requirements in the Administrative Office and other national bodies. In addition, a mail survey [hereinafer cited as Mail Survey] was conducted between December 1978, and March 1979, which attempted to elicit comments from planning group reporters throughout the country regarding the problems, successes, and general operation of the groups within their districts. Thirty of the seventy-eight reporters to whom questionnaires were sent responded by mail or telephone. Transcripts and copies of this material, referred to throughout the Article, are on file with Yale Law School.

Because of the candid nature of many of the responses, various reporters are identified only by region in order to preserve the anonymity and confidentiality of their comments.

vided by groups at each level of the planning structure.[14] Finally, the Article concludes with an assessment of the success of the process through its first four years and proposals for the future.

I. Structure and Purpose of the Speedy Trial Act Planning Process

A. *Structure and the Planning Process*

The Speedy Trial Act specified two fundamental functions for the various participants in the planning process. First, the planning groups, with the help of the district courts, court clerks, and Federal Judicial Center (F.J.C.) personnel, were directed to make qualitative studies of the causes of existing delay and backlogs in the federal criminal justice system.[15] In preparing these studies, the planning groups were also directed to examine reporting problems which might arise during the phase-in of decreasing time limits established by the Act.[16]

Second, the groups were instructed to formulate proposals for administrative and procedural changes which could be implemented at the local level to facilitate compliance with the new time limits.[17] Thus, in addition to the responsibility for conducting the fundamental research, the planning groups were also given the responsibility of analyzing this data and making substantive proposals which could ultimately be introduced at the legislative level.[18]

To help the local groups fulfill these research, planning, and

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14 All comments on the district plans are based upon the author's survey of nineteen Speedy Trial Plans submitted in 1976 and fourteen Plans submitted in 1978. These districts, selected for representative geographical and size characteristics, included: District of Arizona; Northern, Central, and Southern Districts of California; District of Columbia; District of Connecticut; Northern District of Illinois; Northern District of Indiana; District of Maryland; District of Massachusetts; Eastern District of Michigan; Eastern, Western, and Southern Districts of New York; Northern District of Ohio; Eastern and Western Districts of Pennsylvania; District of South Carolina; and District of Vermont. The author reviewed additional Speedy Trial Plans from both 1976 and 1978, although on a less systematic basis, and finds no basis to suspect that there are major differences between those relied upon in this discussion and plans produced by other districts.

15 18 U.S.C. §§ 3166(c), 3169, 3170.

16 18 U.S.C. §§ 3166(d)-(e), 3167.

17 18 U.S.C. § 3166(a).

18 18 U.S.C. §§ 3166, 3167.

reporting functions, Congress also established a multi-level planning structure which was broad-based at the local level and hierarchically stratified to enable the circuit councils and the Judicial Conference to participate in supervisory roles.[19] In the planning groups, the Act called for inclusion of chief personnel from each of the branches of the federal criminal justice system: the chief judge of the district, the United States Attorney, the clerk of the court, the chief probation officer, a magistrate, and, where applicable, the chief federal public defender.[20] In addition, the statute provided for membership of a "person skilled in criminal justice research" to act as the group reporter.[21]

These local planning groups were the bodies with primary responsibility for identifying problem areas in each district, undertaking necessary research and evaluation efforts, and recommending specific reforms to be included in the official district plans. To aid the groups in these tasks, the clerk of each court was independently delegated a broad range of information-gathering responsibility and powers, and the F.J.C. was directed to function as a consulting resource.[22] The ambitious role envisioned by Congress for the planning groups is manifest in the wide range of tasks which the Act directed the groups to undertake. For example, the groups were told to study delay-related need for reform in areas "including but not limited to" the grand jury system, pretrial procedures, pretrial diversion programs, bail and pretrial detention, habeas corpus, the finality of criminal judgments, collateral attacks, appellate delay, sentencing procedures, and the "broad reach" of federal criminal law.[23] From this wide-ranging research, the groups were to create district plans which specified procedural techniques and local time limits for expediting cases.[24] In addition, the reports containing these plans were supposed to include de-

19 18 U.S.C. §§ 3168, 3169.

20 18 U.S.C. § 3168. The Speedy Trial Act Amendments of 1979, *supra* note 1, amended this section to require that the membership of each district planning group include an attorney in private practice with substantial experience in court litigation.

21 18 U.S.C. § 3168. For evaluation of the performance of various group reporters, *see* text of Section IV-B *infra*.

22 18 U.S.C. §§ 3169, 3170.

23 18 U.S.C. § 3168(b). The list of topics on which the planning groups were directed to focus reflected the wide variety of areas which witnesses had cited as causing or contributing to the existing delays and backlogs.

24 18 U.S.C. §§ 3169, 3170.

tailed statistical and qualitative information regarding the various areas studied.[25]

Although primary responsibility for plan development rested with the local groups, the district courts were given express authority to review and approve the plans in the first instance.[26] Once approved at this level, the plans were then to be sent to the appropriate circuit council for another review.[27] Finally, the Act empowered the Judicial Conference to review and to direct modification of the plans, even after circuit council approval.[28]

B. *Purpose of the Speedy Trial Planning Process*

Both the legislative history and the text of the Act itself provide substantial evidence that Congress intended the legislation to serve two ultimate purposes.[29] The most obvious goal was to prod the federal courts into making use of research findings and planning skills to resolve the critical delay and backlog problems of the criminal justice system.[30] In the view of many legislators, however, the more far-reaching goal was to establish a new mechanism for undertaking research and planning that would require the working

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25 18 U.S.C. §§ 3166(b)-(c). Each plan was to collect and report on a broad range of qualitative information, including but not limited to: "reasons for allowance of exclusion of time beyond district or statutory standards; reasons for failure to impose sanctions for noncompliance; effect of time limits and sanctions on the prosecution function, defense function, court administration, appellate system, and correctional process; reasons for detention prior to trial; and identification of cases which, due to special characteristics, deserved different limits as a matter of statutory classification."

In addition, the Act directed the planning groups to include an extensive collection of statistical information, such as: the number of matters presented to the local United States attorney for prosecution and the number of such matters transferred to other districts; the number of cases resulting in *nolle prosequi,* dismissal, acquittal, conviction, diversion, or other disposition; the extent of pretrial detention and release, measured by number of defendants in each group and by duration of custody or release prior to disposition; and, finally, the time span between arrest and indictment, indictment and trial, and conviction and sentencing.

26 18 U.S.C. §§ 3165(c)-(e), 3169.

27 The consideration at the circuit council level was not merely *pro forma.* For example, the Second Circuit Council's rejection of a section of the Speedy Trial Plan of the Eastern District of New York led to considerable conflict among judges at both levels. *See* J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURE (1977); Oakes, Book Review, 78 COLUM. L. REV. 2205 (1978).

28 18 U.S.C. § 3165(d).

29 *Reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7402, 7411, 7412, 7417.

30 REPORT OF THE HOUSE OF REPRESENTATIVES ON THE SPEEDY TRIAL ACT OF 1974, H.R. DOC. NO. 93-1508, 93d Cong., 2d Sess. 9 (Nov. 27, 1974) [hereinafter cited as HOUSE REPORT].

cooperation of all of the actors within the system.[31] As one sponsor of the Act noted:

> It is this planning group that constitutes the greatest innovation of the Speedy Trial Act. For the first time the Congress requires the participants in the criminal justice system to sit down and together study the problems of pretrial delay. One of the most salient facts established by the hearings on this bill was that there is no effective dialogue between these participants. Rather than working together, the participants accused each other as [sic] being the primary cause of delay: the judges accused prosecution of delay by reason of indictment overkill; prosecutors accused defense counsel because of their dilatory pre-trial motions; and defense counsel accused everybody. Section 3168 requires these people to sit down and work together for it is in the interest of all to have a criminal justice system administered efficiently and fairly. Although the planning group concept involves merging into one group functions uniquely distributed to each of the branches of government, because the problem of pre-trial delay is such a grievous one, the unique approach seems well warranted.[32]

Facts prompting Congress to adopt this unique planning approach are found in extensive records of hearings on speedy trial matters held before the bill's enactment.[33] Throughout months of testimony on the Act and on related legislative proposals in the criminal justice area, it became clear that the problems of backlog and delay were inextricably linked to other facets of criminal procedure and administration.[34] In view of this interrelationship, freely conceded by most commentators and legislators, there was little agreement on the proper methods for resolving the delay problems because of the varying effects each proposed method would have on the other facets. Witnesses presented a wide variety of proposals before different congressional committees,[35] including creation of new judgeships, modification or expansion of current plea-bargaining procedures, establishment of summary pretrial procedures, and several other ideas.[36] Many of these proposals had, in

31 *Reprinted in* [1974] U.S.CODE CONG. & AD. NEWS 7411.

32 120 CONG. REC. 41776 (1974) (remarks of Rep. Cohen).

33 Excerpts *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7401, 7414, 7421. *See House Speedy Trial Hearings,* note 4 *supra.*

34 [1974] U.S. CODE CONG. & AD. NEWS at 7414.

35 *Id.* at 7442-7451. *See generally* hearings cited note 33 *supra.*

36 *Senate Speedy Trial Hearings,* note 4 *supra,* at 144 *et seq.; House Speedy Trial Hearings, see* note 4 *supra,* at 337 *et seq.*

fact, been acted upon in various jurisdictions or previously been considered independently by earlier study commissions or congressional committees.[37] Thus, in considering specifically the area of speedy trials, Congress came to a realization that the prior, piecemeal approach to reform in this area had not been successful.[38]

In addition, Congress came to the equally important realization that it lacked the information necessary to address the differing needs and problems of each of the local districts.[39] Furthermore, it was clear from the often conflicting testimony, that no group currently operating within the federal criminal justice system was even capable of generating the objective, comprehensive data necessary to deal with such problems.[40] Thus, as the House Judiciary Committee Report remarked:

> The Committee believes that whatever the real causes of delay are within the Federal court system that they can be remedied only by the concerted action of those who are responsible for operating the system—lawyers, the Justice Department and the courts. H.R. 17409 is premised upon this conclusion. The Congress cannot predetermine what is necessary in order to reduce delays and increase the efficiency of the courts, nor can it make advance commitments for resources before a better understanding of the problems is achieved. The planning process of H.R. 17409 charges all parts of the system with the responsibility of working together to find solutions for delay. Until the causes of delay are better understood by the criminal justice system, the most worthwhile approach to the problem of delay is in improving the lines of communication between the components of the system.[41]

It appears that Congress was inspired by the hope that the local planning groups and district courts could succeed, where Congress had failed, in developing a comprehensive and effective solution to these fundamental problems. The scope and nature of the Act's information or planning activities underline Congress' hope that the

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37 *Hearings on Federal Bail Procedures Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary,* 88th Cong., 2d Sess. (1964); A.B.A. Project on Minimum Standards for Criminal Justice, Standards Relating to Speedy Trial (approved draft, 1968).

38 HOUSE REPORT, note 30 *supra,* at 11.

39 *Id.* at 23.

40 *See generally* hearings cited note 33 *supra.*

41 H.R. REP. NO. 1021, 93d Cong., 2d Sess. 45-54 (July 18, 1974).

Act could stimulate system-wide reform. Rather than immediately imposing its own limits on the system as it existed, Congress anticipated that the planning mechanism would yield findings which, in turn, would provide the basis for substantial procedural, policy and administrative changes clearly necessary to accommodate the time limits desired.[42]

II. Obstacles Facing the Planning Process

An accurate assessment of the success or shortcomings of this experiment in judicial reform is possible only if the context in which it took place is understood. Because the Speedy Trial planning process required the development of some new and radically different relationships among members of the criminal justice system and threatened many traditional concepts within that system, it was only natural that significant opposition from some quarters would appear immediately. Indeed, Congress was exposed to this opposition in the testimony of several witnesses even before the legislation was finally adopted. Accordingly, it is important to examine the effects this opposition had on the form and operation of the Act. In addition, the following discussion considers other factors which constituted significant obstacles that the planning process had to overcome to operate effectively. In large measure, a group's success or failure in getting past these initial problems determined its ultimate performance in attempting to fulfill the goals established by the Act.

A. *Initial Opposition of the Federal Judiciary*

During hearings on the Act, spokesmen for the federal judiciary testified almost uniformly in opposition to the planning process established by the Act.[43] Judge Alphonso Zirpoli, testifying on behalf of the Judicial Conference before the House Subcommittee on Crime, expressed the opinion that the planning and reporting procedures were "cumbersome, time-consuming, unrealistic and

42 18 U.S.C. §§ 3166(a), 3166(d), 3167.

43 [1974] U.S. Code Cong. & Ad. News 7410, 7411. According to the minority on the committee: "It is important to note at the outset that the Speedy Trial bill has been strenuously opposed by both federal judges and federal prosecutors since its original introduction."

unworkable and, furthermore, counter to the concepts and purposes of the congressional intent, which led to the creation of the Judicial Conference, the Judicial Center and the Circuit Councils. . . ."[44] Judge Zirpoli argued that the question of procedures for expediting criminal cases should be left to the respective district judges and to the judiciary's national planning bodies.[45] Creation of independent local planning groups, with their broad delegations of authority, reversed the proper structure. Determination of time guidelines for processing cases should have remained a district court function, as under Rule 50(b),[46] while the research and planning tasks, which the Act gave mainly to the local groups, should have been left with the Judicial Conference, or with congressional committees, so that these functions could be properly coordinated on the national level.[47]

Judge Zirpoli was particularly disturbed at the prospect that planning groups might interfere with court policy planning, traditionally the exclusive domain of the judges. He noted the "probable chaotic effect" that such interference would have on the basic functions of the courts, an effect "not only on the independence of the judiciary but also on its inherent power to make local rules for the dispatch and management of its business."[48] In addition, he was disturbed that the courts, already being forced to cope with unwelcomed planning groups, were given new tasks by the Act which were legislative or administrative, but not judicial, in character.[49]

Rowland Kirks, then Director of the Administrative Office, reinforced many of Judge Zirpoli's criticisms in testimony before the same subcommittee.[50] Kirk's primary criticism was that passage of the Act was both premature and disruptive, in view of the planning which was already taking place within the district courts and the Judicial Conference under the auspices of Rule 50(b).[51] In Kirks' view, imposition of the new planning regime would completely

44 *House Speedy Trial Hearings,* note 4 *supra,* at 365 *et seq.*
45 *Id.* at 368.
46 *See* note 2 *supra.*
47 *House Speedy Trial Hearings,* note 4 *supra,* at 371.
48 *Id.* at 374.
49 *Id.*
50 *Id.*
51 *Id.* at 177 (statement of Rowland Kirks).

nullify the progress which, he claimed, the districts were beginning to make in relieving courts of the existing backlogs.[52]

In addition, Kirks was highly critical of the fact that the version of the legislation existing at the time he testified made no provision for supervision by the national bodies.[53] In its early form, he argued, the bill did not recognize the necessary role of the Judicial Conference in establishing uniform standards in some areas or the need for centralized uniform control, particularly for budgetary purposes.[54] Under the Rule 50(b) scheme, such guidance and control did exist since district courts were required to modify their plans when directed to do so by the reviewing panel, consisting of the Circuit's Judicial Council and the chief judge at the district whose plan was under review, or by the Judicial Conference.[55] Ultimately, Judge Zirpoli and Mr. Kirks succeeded in having the new speedy trial legislation amended to include provisions, virtually identical to those under Rule 50(b), giving the Circuit Councils and the Judicial Conference supervisory roles.[56]

However, even the clear delineation of a supervisory role for the federal judiciary's national administrative organs did not entirely mollify judicial opposition to the Act's new planning mechanism. The inclusion of non-judicial persons in the planning groups remained an integral part of the bill, and members of the judiciary continued to perceive this feature as a serious threat to the power and independence of individual district judges.[57] Finally, in addressing the overall structure of the Act before the first phase of the time limits went into effect, Chief Justice Burger observed:

> We oppose [The Speedy Trial Act] because we are apprehensive that the rigidity it contained would lead to unfortunate consequences. . . . It does not seem unreasonable to me that judges would be thought as capable of drafting sound rules of management as the Congress is capable of making rules for its internal affairs and procedures with which they are, of course, intimately familiar.[58]

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52 *Id.* at 178.
53 *Id.* at 179.
54 *Id.* at 180.
55 *See* FED. R. CRIM. P. 50(b) (1972).
56 *See* 18 U.S.C. § 3165(d).
57 *See, e.g.,* note 58 *infra.*
58 *What the Justices are Saying . . .* 62 A.B.A.J. 992 (Aug. 1976).

It is obvious, then, that formulation and initial implementation of the planning process lacked judicial support. The significance of this is two-fold. First, as was shown previously, strong criticism by spokesmen for the judiciary of early drafts of the legislation brought about some changes in the ultimate formulation of planning mechanisms. Even more important, as will be shown in a later section, is the fact that many chief judges, designated as heads of the district planning groups and ultimately responsible for officially approving the district plans, would be forced to administer an Act they opposed in order to effectuate its local planning process. To the extent that a judge maintained his opposition, the ability of that district's planning group to fulfill the congressional mandate would clearly be affected. Consequently, in evaluating the sources of the planning process established by the Act, the initial opposition of the federal judiciary is a factor which must be carefully considered.

B. *The Tension Between National and Local Interests*

In August 1975, the Administrative Office of the United States Courts (A.O.) began distributing documents[59] composed in collaboration with the F.J.C., the Judicial Conference Committee on Criminal Law (Judical Conference Committee), or both. The first such document, entitled "Guidelines to the Administration of the Speedy Trial Act of 1974," was aimed to assist parties in implementing the Act:

> The Committee on the Administration of the Criminal Law undertakes to set forth tentative advisory interpretations of the Act to the end that the courts may have a uniform approach to their task of gathering statistics, measuring time intervals and carrying out their administrative duties.[60]

The Guidelines analyzed each section of the Act with the apparent aim of clarifying ambiguities and facilitating uniform interpretation. Most of the section descriptions, however, were so brief that they could not realistically have been expected to resolve the

59 The series of documents distributed to the planning groups eventually took the format of a set of numbered directives and advisory opinions. They were issued under the letterhead of the Administrative Office. The first numbered document was dated Sept. 17, 1975. Thus, the Guidelines predated the numbering system.

60 Comm. on the Admin. of the Criminal Law of the Judicial Conference of the United States, Guidelines to the Administration of the Speedy Trial Act (1976) [hereinafter cited as Guidelines].

many complex issues which would undoubtedly arise as the Act was applied in future cases. Still, the commentary did serve as a mirror, reflecting those issues which particularly disturbed the F.J.C., A.O., and Judicial Conference Committee personnel.[61]

The commentary regarding the planning process sections was fairly sparse, but the comments clearly suggested a continuing concern with "overactive" planning groups. For example, with respect to the section requiring a "continuing study of the administration of criminal justice" in the districts and relevant plans,[62] the Guidelines' only substantive statement was that although the Act "makes the planning group responsible for initial formulation of the plan, final responsibility for the plan rests with the district courts subject to the approval of the reviewing panel."[63] Under section 3165(b), describing the main goals for the planning process "to accelerate the disposition of criminal cases," the commentary's only substantive suggestion was that "the planning process must respect the statutory admonition to avoid prejudice to the prompt disposition of civil litigation."[64] As to the section mandating approval of district plans by a reviewing council of the circuit and submission to the A.O.,[65] the commentary emphasized that "the annual reporting requirement placed on the Administration Office makes it imperative that uniform reporting methods be prescribed by the Administrative Office for use in each district."[66]

These standardized Guidelines appear to have been motivated by three distinct interests. First, the A.O. was clearly interested in having data collected in a uniform manner so as to facilitate interdistrict comparisons. Second, it was interested in developing a uni-

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61 One such issue was indicated by the commentary to the section which permitted tolling of the time limits when necessary to promote the "ends of justice." 18 U.S.C. § 3161(h)(8). For illustration, the Guidelines suggested that (h)(8) might apply where the granting of a motion of severance would bring a defendant out from under the exclusion provided by 18 U.S.C. § 3161(h)(7) (exclusion to cover period when a defendant is joined for trial with a codefendant as to whom time for trial has not run and no severance motion has been granted). The commentary reflects the concern that a case against a defendant, formerly covered by the (h)(7) exclusion, could not realistically proceed to immediate prosecution upon granting of a motion for severance.

62 18 U.S.C. § 3165(a).

63 Guidelines, note 60 *supra,* at 49.

64 *Id.*

65 18 U.S.C. § 3165(c).

66 Guidelines, note 60 *supra,* at 49.

form organization for district planning reports that would simplify its statutory duty of summarizing and reporting to Congress on the contents of ninety-four separate plans. Finally, the A.O. sought to promulgate a set of nationally uniform rules to aid the district judges in interpreting the Act's sections.

The first interest was expressly set forth in the final version of the Act which delegated authority to the A.O. to design and require the use of standardized reporting forms.[67] Accordingly, an intitial goal of the A.O. was to develop and distribute these forms in time for the districts to utilize them in preparation of the 1976 plans.

In contrast to the specific provisions regarding data collection and reporting, the Act did not deal conclusively with the second or third interests. As a result, both of these caused anxiety among personnel at the A.O. and especially among the Judicial Conference Committee members during the initial implementation stages.[68] Despite the fact that the Conference Committee officially issued the Guidelines, drafting of the Guidelines was delegated to the A.O. and the F.J.C. Because the Act originated outside the Judicial Conference without its support, it is not surprising that the Conference was openly reluctant to issue guidelines for the purpose of implementing standards for which they had no instinctive sense.

Unfortunately, the A.O. and F.J.C. personnel were not accustomed to guiding judges in a planning process. According to one A.O. staff member:

> It was unique for this Committee to be interpreting substantive issues that would later be decided in the courts. And many of the provisions of the Act were simply so new that there was no clear standard for us to refer to in suggesting interpretive guidelines.[69]

It is not clear that Congress intended any of the national administrative bodies to provide detailed interpretations of the Act to the local groups. The postponement of sanctions and gradual application of time limits suggest an expectation that interpretations

67 18 U.S.C. § 3166(e).

68 The Guidelines, note 60 *supra,* and the Recommended Outline, note 86 *infra,* addressed these issues.

69 Interview with Diane Cole, Administrative Office of the United States Courts, in Washington, D.C. (Apr. 4, 1978). Ms. Cole was a member of the A.O. staff who worked with the Judicial Conference Committee in drafting the guidelines.

would be worked out on a local basis and over the entire phase-in period as courts became aware of the ramifications of the Act's requirements for each particular district. Nevertheless, the Judicial Conference Committee felt that interpretive directions from the national level were necessary from the very beginning, whether for the purpose of limiting the effects of the decentralized planning process or to prevent confusion and conflict within and among the districts.[70]

Thus, the tension between the interests of the national bodies in promoting uniformity and the apparent mandate of the Act to encourage diversity and localized focus among the planning groups was evident from the beginning. As subsequent discussion indicates, the existence of this tension had substantial impact on the ability of the groups to fulfill the goals of the Act. In considering the usefulness of the planning approach embodied in the Act, it is necessary to keep this tension in mind.

C. *Inadequate Funding for Planning Groups*

Appropriation for funds by Congress and allocation of these funds by the A.O. raise a central question about how well Congress appreciated the scope of its goals for the districts and how seriously the districts pursued those goals. The $2.5 million appropriated by Congress to fund the planning process could not have supported major study efforts in all ninety-four districts.[71] While major studies in each district were probably unnecessary, Congress did not clarify where more extensive planning would be appropriate; and this vagueness was in distinct contrast to the provision of Title II of the Act regarding specific allocation of money for experimentation with the pretrial release program.[72] Perhaps Congress expected a process of natural selection which would lead to a high allocation in large and backlogged districts and a minimal allocation in other districts.[73] In such an event, more ambitious

70 *Id.*

71 18 U.S.C. § 3171.

72 Title II specified the ten districts for which the funds for that program were authorized. *See* note 6 *supra.*

73 That this was, in fact, a considered expectation is somewhat questionable, however, inasmuch as the initial distribution of funding was identical for all districts, whether they had two judges or twenty and whether they had an extensive existing backlog or were completely caught up.

projects would likely have occurred in the more problematic districts. Still, it is not clear that the original appropriation would have even covered a sufficient number of "test" projects had the districts been active in developing programs of research and study along the lines set forth by Congress.

As of September 30, 1976, after the first plan was due at the A.O., forty-nine districts had received no more than the $5,000 initial grant which was automatically disbursed.[74] Only six districts received $20,000 to $25,000 in additional funds,[75] raising a question of how criteria were established for making the supplemental grants. The Eastern District of Michigan, for example, received no additional funds, even though Judge Feikens of that District had told the House Subcommittee that the District's heavy caseload probably would prevent its compliance with the limitations of the Speedy Trial Act.[76] On the other hand, Puerto Rico received $20,000 and the Virgin Islands $25,000 in supplementary grants.[77] Delaware, with the nationwide highest median time interval from filing to disposition of defendants, received only $1,000 in additional funds.[78]

By September 1976, the A.O. had disbursed to the local planning groups only about one-third of the money appropriated by Congress for planning, and in March 1978, $500,000 remained in the planning appropriation fund.[79] According to A.O. personnel, inaction at the local level produced both the failure to exploit available funds and the skewed variation in funds distribution.[80] However, a different explanation for the absence of additional funding requests was provided by some planning group reporters,

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74 ADMIN. OFF. OF THE U.S. COURTS, REPORT ON THE IMPLEMENTATION OF TITLES I AND II OF THE SPEEDY TRIAL ACT OF 1974 (1976) [hereinafter cited as A.O. REPORT I].

75 *Id.*

76 *House Speedy Trial Hearings,* note 4 *supra,* at 240.

77 *See* note 74 *supra.*

78 *House Speedy Trial Hearings,* note 4 *supra,* at 324.

79 *See* note 74 *supra.*

80 Interview with Norbert Halloran, Administrative Office of the U.S. Courts, in Washington, D.C. (April 4, 1978). Mr. Halloran observed:

> Where requests were made, so were appropriations. Our feeling is that people in the districts didn't know what to do with the funds. Most of them settled for the initial $5,000 grant and never made any request. Except in one instance where a reporter made a request for $100,000, we approved just about every application for funds.

who indicated that the attitude of the A.O. was against districts applying for additional funds in many cases.[81] In light of these comments, the failure of the planning process to take advantage of available appropriations appears to have been two-fold. On the one hand, it appears that the A.O. and F.J.C. should have assisted districts in designing appropriate projects, even if this meant hiring consultants and commissioning studies within the districts, in order to achieve the research goals mandated by Congress.[82] Thus, the national bodies of the judiciary could have stimulated efficient use of the funds on the local level. On the other hand, it is equally true that the planning groups should have been more persistent in requesting funds to underwrite research and study because they had an independent mandate for action. Such an attitude would arguably have either caused greater outlay by the A.O. or created a considerable problem of insufficient funds. It appears the districts did not petition either the A.O. or Congress with a large number of well-justified requests.

III. Evaluation of Performance at the National Level

In addition to the issuance of the Guidelines discussed above,[83] the A.O. distributed a series of twenty-three memoranda to the planning groups between September 1975 and July 1978.[84] These memoranda covered a wide range of topics, including procedures for data collection and dissemination of district court opinions interpreting substantive provisions of the Act, and recommendations for procedures to facilitate compliance with the limits and

81 For example, one reporter stated:

> The A.O. met with all the reporters in our circuit and led us to believe that it wouldn't be worthwhile to apply for funds unless our district was obviously one in which backlog and delay were major problems. I kind of got the idea that they were discouraging us from requesting additional support, so I settled for what was given to us. I also wasn't sure that it was my role to bring up before the planning group the subject of funding.

Interview in New Haven, Ct. (Oct. 15, 1977).

82 It should be noted that some planning group reporters expressed the opinion that the A.O. and F.J.C. were themselves limited in their ability to aid the planning groups by a lack of funds. One reporter suggested that "some funding should be specifically allocated to the A.O. and the F.J.C. in order to better support and coordinate planning group activities, including the provision of technological support." Mail Survey, note 13 *supra*.

83 *See* Section II(c) of the text *supra*.

84 *See* note 59 *supra*.

reporting requirements on the district level.[85] In this latter category, two advisory memoranda had particularly major significance.

The first of these was No. 9, the "Recommended Outline for District Plans under the Speedy Trial Act."[86] Composed by A.O. and F.J.C. personnel, this report was distributed to the planning groups about five months after the groups were first convened and five months before the first set of district plans were to be submitted. The Outline was designed expressly to permit easy access to the information which A.O. personnel felt was most important in preparation for their subsequent report to Congress. A.O. personnel were fearful of receiving scores of plans with different organizational schemes.[87] Accordingly, they emphasized the importance of having a general framework which would make it possible to find specific information in each report without having to look at the entire report.[88] In creating the suggested Outline, the A.O. considered the mandates in the text of the Act, but chose to request material substantially more limited in scope. The Outline asked for information in seven areas: (1) comparison of current performance of the system with the permanent time limits under the Speedy Trial Act (which could and in most instances, would, be based on statistics supplied by the A.O.); (2) statement of time limits adopted by the court and procedures for implementing them (the entire contents of which were later supplied by the A.O. and F.J.C. as a "Model Plan"); (3) experience with the interim time limits (the "90 day" limit on pretrial incarceration); (4) changes in practices and procedures designed to improve efficiency or otherwise facilitate compliance with the Act; (5) additional resources needed to achieve compliance with the permanent time limits; (6) additional resources needed on a temporary basis, if any, to elimi-

85 In commenting on this material, one reporter stated, "My best recollection is that I was flooded with material, some of which was useful and most of which was perhaps of a latent value which I failed to discern . . . None of us on the planning group could conscientiously study and assimilate the plethora of reports, releases, statistical compilations and guidelines that filled our mailboxes." Mail Survey, note 13 *supra.*

86 Ad. Off. of the U.S. Courts, Speedy Trial Advisory No. 9: Recommended Outline for District Plans Under the Speedy Trial Act (Jan. 16, 1976) [hereinafter cited as Recommended Outline].

87 *See* note 46 *supra.*

88 *Id.*

nate backlog; and (7) recommendations for changes in statutes, rules, and administrative procedures.[89] No provision was made for information which the A.O. did not feel was sufficiently important to merit a separate heading. Thus, there was no obvious place to consider such items as case preparation problems experienced by the prosecution or defense counsel, scheduling difficulties facing judges under the Act's time limits, problems arising because of a district's administrative structure, or impact on the civil backlog.[90] As a result, a great amount of crucial material was not

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89 The information contained in the 1978 district plans, while not fulfilling completely the broad research goals set forth in the Act, generally appeared to meet the requirements of the outline. Thus, the plans reported, among other things, the following reforms, innovations and experiences:

1) Improved Tracking in the Clerk's Office. Almost every district reported development of substantially new and more efficient methods of tracking the flow of events in criminal cases. These methods include "early warning" systems to inform judges of the approach of key dates in a case and improved procedures of accounting for jail time of defendants in pretrial custody.

2) Initiation and Expansion of Diversion Programs. To help ease the caseload burden on the United States attorney, some districts have established pretrial diversion programs and others have expanded preexisting programs in this area.

3) Development of New Criteria for Determining Prosecution Rate. In addition to increased use of pretrial diversion programs, district plans show that prosecutors are setting new standards for seeking indictments and negotiating guilty pleas with the goals of achieving a ready-for-trial status more expeditiously on those cases which go to trial and of establishing more flexible plea procedures for cases disposed of in this manner.

4) Improvement of Coordination between Federal Agencies and United States Attorneys. Federal agencies which conduct prearrest investigation are cooperating more with United States attorneys. Arrests are less likely to take place long before a case is ready for trial.

5) Initiation of More Efficient Assignment Procedures. At least one district, for example, has initiated a new plan for efficiently distributing cases which are likely to demand large amounts of time. Other districts have developed assignment procedures which prevent any judge from having to handle an excessive number of complex cases at any one time.

6) Expanded Use of Magistrates. Many districts have increased the use of magistrates by permitting them to exercise a wider range of their statutorily authorized powers than before. In addition, many districts have requested additional magistrate positions.

7) Streamlining of Motion Practice. In virtually every district, new rules and procedures for conducting discovery and submitting pretrial motions have been established.

8) Aid to Defense Attorneys. While the impact of the Act on defense attorneys has been largely ignored, at least two districts had plans for facilitating more efficient defense preparation. In the Western District of New York, for instance, a defense attorney manual was to be developed.

90 With respect to this last item, the 1979 amendments, *supra* note 9, specifically change the reporting requirements of the Act to require courts to report the impact of the Speedy

provided for in the suggested Outline and, presumably, did not reach Congress or the Judicial Conference in the A.O.'s initial report.[91]

The second major memorandum was the "Model Plan for Achieving Prompt Disposition of Criminal Cases," (Model Plan),[92] which was sent out to each district a month after the Recommended Outline. It was initially formulated by a working group of A.O. and F.J.C. personnel and was revised and approved by the Judicial Conference Committee.[93] According to the cover letter accompanying it, the Model Plan, "with such modification as each district deem[ed] appropriate," was designed as an aid to help the groups fulfill the Act's reporting requirements.[94] While intended only to be an aid, distribution of the plan had the effect of relieving the planning groups and district courts of the central part of their delegated tasks.[95] Thus, to the extent that the Model Plan failed to deal adequately with certain difficulties that districts would face in implementing new time limits, it led many groups to ignore these problems in their consideration of potential procedural innovations. One example of this effect was the recording of "excludable time."[96] Section 9(b) of the Model Plan merely stated that the clerk of the court would be responsible for determining and registering excludable periods, and section 9(c) pro-

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Trial requirements on civil calendars and change the planning requirements of § 3166 to take into account the same problem.

91 A.O. REPORT I, note 74 *supra.*

92 Ad. Off. of the U.S. Courts, Speedy Trial Advisory No. 11: Model Plan for Achieving Prompt Disposition of Criminal Cases (Feb. 18, 1976) [hereinafter cited as Model Plan].

93 *Id.*

94 *Id.*

95 For example, a planning group reporter from a major Southeastern district stated:

> The substance of the plan was affected very little by any of the Planning Group members. In the district in which I served, as Planning Group member for the interim plan and as Reporter for the final plan, the substance of the plan was adopted as drafted by the Administrative Office of the United States Courts. It was presumed, almost irrebuttably, that the plan drafted by the "A.O." was to be the plan submitted by our district. Any changes to such plan were to be looked on with grave suspicion. Obviously, since the substantive plan tracked the Speedy Trial Act almost verbatim, little in the way of innovation occurred.

Mail Survey, note 13 *supra.*

96 18 U.S.C. § 1361 states that certain periods of delay shall be excluded in computing the time within which a case must proceed to trial. There are fourteen specifically defined "excludable" events, and an additional exclusion "in the interests of justice." The 1979 Amendments, *supra* note 8, refine some existing excludable periods and add some new provisions.

vided that the parties could stipulate to the accuracy of these docket entries made by the clerk.[97] No provision, however, was made for communication of these facts to the Judge, who presumably would need early notice of excludable time on each case in order to control his calendar properly. Inasmuch as the Model Plan was described by the Judicial Conference Committee as proposing "procedural techniques" which would allow districts to comply with the Act's limits, omission of any procedure to ensure judicial awareness of the running of time on a case, and especially the applicability of excludable time rules, is troublesome.[98] Of course, nothing prevented the individual districts from considering matters such as this on their own; and some districts did.[99] But, the very existence of the Model Plan tended to diminish any incentive on the part of the planning groups to exercise their responsibility to confront issues independently.

In evaluating the performance of the national bodies, particularly the A.O. and the Judicial Conference Committee, it is thus instructive to consider these two documents — the Recommended Outline and the Model Plan. With respect to the former, it appears that use of such a generalized outline was ultimately counter-productive. The brevity and vagueness of the Outline provided too little guidance to the local groups to aid them in choosing goals or in determining where to focus attention and resources.[100] While it might have been a proper approach for the A.O. to issue such an outline had there been active local initiative and a genuine commitment to the planning concept at the local level, the widespread absence of these conditions distorted the generalized outline into an instrument for "bureaucratic" reporting — merely filling in the blank spaces, rather than developing

97 *See* note 92 *supra.*

98 Indeed, one of the major obstacles to accurate assessment of the progress of districts in complying with the time limits of the Act appears to be the failure of judges to account carefully for events which give rise to excludable time under the Act. *See* Misner, *District Court Compliance With the Speedy Trial Act of 1974: The Ninth Circuit Experience,* 1977 ARIZ. ST. L.J. 1 (1977).

99 For example, the court clerks in Massachusetts and in the Southern District of New York initiated a procedure for making available to the judges status reports of cases on the calendar which indicated time elapsed and potential excludable periods. *See* Mail Survey, note 13 *supra.*

100 Notwithstanding this lack of guidance, however, it does appear that the local groups were active in the process of implementing many of the changes in procedure and policy that have come in the wake of the Act. Thus, while the planning group members may not

and executing innovative procedures for studying the unique characteristics of the district.[101] It appears that the Outline directly contributed to the failure of many districts to address the full range of questions posed by Congress in the Act.[102]

Moreover, the Outline unfortunately created the impression in the districts that it was exhaustive, although the A.O. apparently meant it only to highlight the summary conclusions.[103] At the time of distribution, few of those involved in the planning process had any real notion of how to proceed with the novel tasks of evaluation and planning for court management.[104] Given the short period of time between distribution of the Outline and the date the first plans were due, a set of national guidelines was bound to be heav-

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have had an overall view of the problems or the ability to formulate systematic resolutions, the benefical changes which have occurred suggest that members had begun to develop ideas as to the causes of delay and methods of solving them. Accordingly, in judging the planning group concept one must distinguish between the study and reporting functions and the communication and coordination functions. The district plans indicate that the former functions were not generally fulfilled, while achievement appears to be widespread with respect to the latter. Mail Survey, note 13 *supra.*

101 The District of Columbia Plan exemplifies this perfunctory approach. Section II of the Plan, responding to the A.O. outline request for a "comparison of current performance of the system with the permanent time limits under the Speedy Trial Act," stated:

> While the court has experienced a steadily improving record of prompt disposition of cases in recent years, the current performance levels are substantially short of the permanent time limits mandated by the Speedy Trial Act. Approximately one-half of the indictments, more than one-half of the arraignments, and one-fourth of the trials, guilty pleas, and dismissals must be accelerated to comply with the statutory requirements which will become applicable in 1979.

1976 Speedy Trial Plan 2 (D.D.C. 1976). *See* note 14 *supra.* No other section of the plan contained any more detailed evaluation or review of district problems or difficulties encountered by judges, prosecutors, or defense attorneys. For example, Section IV of the plan reported on "Experience with Interim Time Limits" by stating only that "there has been little observable impact in this District." Section VI set forth a request for six additional assistant U.S. attorneys, three secretaries, and six deputy marshals, but gave no supporting explanation. Similarly, Section VII suggested that the time limits be lengthened, but gave no reasons for this position. Section VIII, containing the statistical data tables, met only the bare minimum requirements of the A.O. guidelines. In short, the District of Columbia Plan provided a clear example of the difficulties engendered when a local planning group with little initiative relied heavily on the model outline.

102 *See* note 147 *infra.*

103 As one planning group reporter noted:

> I came onto this job without having any idea what to do, how to go about collecting data. First of all, I had to familiarize myself with the court. I relied heavily on the A.O.'s outline because at that early stage in the planning process I needed some kind of direction about what was expected of me [and] of our district.

Interview with planning group reporter in New Haven, Ct. (Oct. 15, 1977).

104 Another reporter observed that, in his group, the lack of a model or concept of the planning process did not preclude discussion of problems or discovery of solutions, but the substantive changes made were the result of "primarily trial and error."

ily relied upon.[105] What the A.O. apparently perceived as only a general table of contents was utilized as a schematic device for discharging a burdensome responsibility.

Local planning groups, charged with the ambitious planning mandate of the Act, might have faced the challenge of thoroughly studying their districts if the national groups had left them to their own means. But the A.O. feared that much leeway on the local level would hamper its summary and review roles and therefore was reluctant to facilitate local autonomy.[106]

Conversely, it might be argued that once the national bodies decided to provide the Outline, they should have made it very comprehensive, discussing each issue which Congress wanted to be examined or at least suggesting a priority for ordering these tasks.[107]

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105 The Recommended Outline was distributed on Jan. 16, 1976. The first District Plan was due Jan. 1, 1976, pursuant to 18 U.S.C. § 3165. This left only a short period for preparation of the first report.

106 This feeling was clearly reflected in the cover letter which accompanied the outline:

> In recommending this standard outline, we recognize that various district courts will have quite diverse problems in complying with the Speedy Trial Act, and that the substance of the district court plans will be correspondingly diverse. We believe, however, that some uniformity in presentation is desirable, particularly with respect to those features of the plans that require attention of national policy-making bodies such as the Congress or the Judicial Conference. We therefore urge the district courts to follow the outline as closely as feasible . . . .

Recommended Outline, note 86 *supra.*

It is significant to note that the tension between uniformity and local autonomy was also evident on the circuit level. For example, during the planning period the Second Circuit Council established limitations on the extent to which district plans would be permitted to deviate from circuit-wide standards. (*see* WEINSTEIN, note 27 *supra*). Subsequently, after submission of the 1978 plans, the Second Circuit Council, through its Speedy Trial Subcommittee, adopted uniform guidelines for the entire circuit. It is not clear, however, that the adoption of uniform standards rather than standards established by the individual districts is consistent with the Act's mandates. The tension between the A.O.'s approach and local innovation is also reflected in the following observation by a reporter:

> When one speaks about the Administrative Office and the Speedy Trial Act, in my view it must be understood that the Administrative Office does not see or did not see the Act in the same light as I. I think that the Speedy Trial Act was a novel act which gave planning ability to each individual district. The Administrative Office and Federal Judicial Center did not or do not see the Act in that way. Perhaps their view is colored by the fact that they see themselves as the planners for the Federal judiciary. One must also recall that during the legislative birth of the Act, the Administrative Office was opposed to the creation of the planning groups. In a more particularized way, the Administrative Office's plan did not deal with the day-to-day problems which the courts face.

Mail Survey, note 13 *supra.*

107 When asked why this was not done, one member of the Speedy Trial staff at the A.O. described the following obstacles:

> First of all, we were not given authority in the Speedy Trial Act to do anything more than design forms for collecting data and review the district plans for

Such an active approach, however, would clearly have exceeded both the mandate set out for these groups by the Act and the role which they desired. As a result, the Outline represented a "middle" position without directly confronting the issue of what was most desirable for the national groups to do.

The use and consequences of the Model Plan technique raise a serious question as to whether the "local" planning process envisioned by Congress could be successfully stimulated by a "model plan" approach.[108] Assistance and direction could have been supplied without giving the districts a ready-made plan, allowing them to fulfill the technical requirements of the Act but still necessitating the need for self-initiated investigation seemingly envisioned by the Act. For example, one alternative might have been to propose methods of inquiry which the districts could have pursued to obtain the information essential to resolve problems of implementing time limits of the Act.

In the final analysis, the major documents issued by the national bodies failed to provide effective guidance to the districts to help them carry out their congressional mandate. This failure appears most pronounced in the areas of research and planning techniques, particularly because these tasks were most important in formulating adequate district reports. Indeed, there are some indications that the A.O. did not want innovative reporting by the dis-

making a summary report to Congress. Our authority emanates from two sources: the Judicial Conference and the Acts of Congress. If Congress expected us to exert leadership in this matter then they should have said as much in the Act. And we had no right to take a more active role in the name of the Judicial Conference — right from the founding of the A.O. the judges made it clear that they didn't want a "man on horseback." So you see, we really didn't have the right to be more active. Another problem, and we considered this, is that the districts would have rebelled if we had been any more specific or any more affirmative in directing the making of the district plans. If we had listed things like . . . "examine the problems of the U.S. Attorney" and "make an analysis of the impact on civil backlog" the districts, judges in the districts, would have called up and asked us what right we have to ask these kinds of questions. Anyway, all these questions were in the Act itself and thus already asked, *we* shouldn't have had to do this. Finally, we were not optimistic about the planning groups being able to do much in the way of examining the problems of the district for the plans which were due in '76. Let's face it, they didn't have the time or the data. You can't blame the reporters for not having come up with much more, they didn't have the conditions they needed. So it would have been a perfunctory exercise to pose all those questions.

Interview with Diane Cole, Administrative Office of the U.S. Courts, in Washington, D.C. (Apr. 4, 1978). *See* note 85 *supra.*

108 Mail Survey, note 13 *supra.*

tricts.[109] In the section of the Outline calling for a comparison of current performance with the permanent time limits, the A.O. specifically instructed the planning groups to provide very general reports:

> This section of the plan should present the court's principal findings about the gap, if any, between current standards and the 1979 time limits. It is contemplated that the plan should set forth only the major conclusions; there is no need to include in the plan the full detail that may be developed in papers presented to the planning groups or the court.[110]

The "full detail that may be developed in papers presented to the planning groups or the court" would have included the substance of research findings and a concomitant account of methodologies by which they were developed. Without this type of material, there could be no real exposition of the manner in which districts reached their conclusions, no thorough comparisons by Congress of the substance of reports from different districts, and no sharing among the districts of research strategies following submission of the 1976 plans.

IV. Evaluation of Performance at the Planning Group Level

A. *Standards of Evaluation*

Several measures could be used to evaluate the work of the planning groups. The most obvious standard is the detailed list of tasks specified in the Act.[111] A planning group which followed these guidelines would attempt to execute all the tasks in the paragraphs and subparagraphs of the Act, in spite of the improbability of satisfactorily looking at all of the issues simultaneously. Such a group would organize the collection of statistical data and would study or commission studies of the Act's impact on each branch of the federal judicial system. Ultimately, it would take responsibility for examining and reporting on the status of as many of the issues identified by Congress as possible.[112]

109 *See* Section II(b) of the text.

110 Ad. Off. of the U.S. Courts, Recommended Outline (Jan. 19, 1976).

111 18 U.S.C. § 3166.

112 None of the districts surveyed evaluated the full range of issues suggested by Congress in the Act, even in the 1978 plans. For example, no district conducted a controlled study of the impact of the Act on the U.S. Attorney's office or on defense counsel. Similarly, other issues which went unexamined in nearly every district included: differences in

A second measure of planning group performance could be taken from within the districts themselves, rather than from the Act. This standard would be based on the district's recognition of its own distinctive problems of compliance with the time limits for case disposition. Instead of attempting to address all the issues specified by Congress, a good planning group by this standard would specify *local planning goals* based upon the special needs and characteristics of the district. Using this "internal" standard, a district would create its own measuring rod. For instance, a district planning group convinced that Congress had been overambitious and unrealistic in setting out planning tasks, might decide to concentrate its resources on a thorough study of a select number of problems instead of carrying out a superficial investigation of each of the matters referred to in the Act. The members of the planning group might decide that, at least temporarily, there appeared to be no problem with certain issues identified by Congress for examination, *e.g.*, the pretrial diversion program or motions practice, but that they expected to run into difficulties handling civil cases at a satisfactory pace. Accordingly, this planning group would attempt to evaluate the impact of the Speedy Trial Act on the civil docket in order to frame proposals to prevent or alleviate unjustified delay in this area.[113] In this sense, the planning group itself would have tailored the district's research and study goals. The group would first identify a problem area. After the planning group had adequately examined the district's characteristics and its distinctive problem areas, evaluation of the planning group's work would focus on the quality of investigation and reporting completed in these areas.

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judges' procedures relating to delay and speed; the relationship between grand jury schedules and difficulties in meeting the arrest-indictment interval; the impact of the Act on declination policies in the U.S. Attorneys' offices and the related implications for Federal law enforcement; and, the overall effect on the "quality of justice" of the pressure to move quickly to disposition considering, for example, effects on case preparation ability of the defense and the prosecution, and on the ability of judges adequately to consider motions and opinions.

113 This area went largely unexamined in the districts surveyed. While a few districts mentioned variations in the civil backlog during the phase-in of the Act's limits, only one district analyzed its civil docket in detail to determine changes in the rate at which civil cases were being handled by judges.

The requirements for the additional July 1, 1980 report under the 1979 Amendments, note 8 *supra,* specifically require the courts to report the impact of the Speedy Trial requirements on civil calendars.

This form of evaluation would subscribe to the congressional intention of giving the planning groups more responsibility than simply identifying problem areas; it would indeed appear to satisfy the mandate that the planning groups explore the causes of problems and test ways of resolving them. But it does deviate from the Act's express listing of planning tasks and rejects the notion that each district must make a comprehensive evaluation of all issues regardless of local conditions.[114]

A third measuring rod for evaluating the work of the planning groups was provided by the F.J.C., the A.O. and the Judicial Conference Committee through the Speedy Trial Directives and Advisory Material.[115] As described above, these three national administrative bodies of the U.S. courts composed a proposed uniform Outline setting out standardized sections and topics of reporting for district plans, enumerated substantive issues to be examined therein, and distributed standardized reporting forms for the collection and transmission of Speedy Trial data. This "model" framework, reviewed in more detail below, constituted an independent standard for the evaluation of planning activities.

With these three potential standards in mind, this analysis now turns to the evaluation of the planning group's performance.

B. *The Role of Group Reporters*

To put the planning process in motion, planning groups had to select nonstatutorily designated members, plan group meetings, and divide tasks among group members. The following description of this process is based largely on information supplied by planning group reporters. While it is necessarily a limited picture, it is one which originated from within the planning process.

Not all groups restricted their membership to the minimum statutory size. In the Northern District of Illinois, for example, the chief judge included in the group a circuit judge, two additional district judges, four private attorneys, a chairman of a law-related foundation, and two additional attorneys, one from the U.S. At-

114 Notwithstanding the failure of most of the nineteen districts examined to address some of the clearly important issues raised expressly in the Act, one 1976 Speedy Trial Plan and a few 1978 plans demonstrated that at least a few districts dedicated a substantial amount of time and resources to fulfilling the legislative mandate. *See* note 143 *infra.*

115 *See* text accompanying note 159 *infra.*

torney's office and another from the Federal Public Defender's office.[116]

Choosing members for the planning groups posed no apparent problem, except in selecting appropriate planning group reporters. The Act called for a person experienced in criminal justice research.[117] The data collection and analysis tasks that were part of the planning group's mandate virtually required a reporter who was both a lawyer and a social scientist.[118] In many districts, finding someone of this professional mixture was impossible. In other districts, chief judges preferred to choose practitioners and law professors who were familiar to them rather than risk taking on an unknown personality,[119] a decision which naturally limited the field of candidates.

The A.O. also reported that many districts were not able to obtain a person experienced in criminal justice research who was willing to forego appearance in federal courts, as required by the federal conflicts of interest rules.[120] Nonmetropolitan districts, in particular, had trouble finding a person with the "right qualities," as defined by the respective district. But even some metropolitan districts could not find anyone who met the criteria used in the district.[121] Because of these problems, districts finally chose reporters who in many instances were not the kind of person envisioned by the Act. Whether such a choice in a given district was a result of the conflicts of interest rule, a lack of appropriate

116 N.D. Illinois, Speedy Trial Plan (1976), note 14 *supra.*

117 18 U.S.C. § 3168.

118 [1974] U.S. CODE CONG. & AD. NEWS 7444 (letter of Rowland F. Kirks):

> That provision of this section which provides that a person skilled in criminal justice research and planning will act as a reporter for the group may be extremely difficult to fulfill in a large number of districts, and this provision should, therefore, under any circumstances, be deleted. Not only are those skilled in criminal justice research and planning scarce particularly in the more rural districts, but also it should be noted that such person's position with the planning group might raise a conflict of interest. . . .

119 Of the thirty planning group reporters responding to the mail survey or personally interviewed, twenty were law professors, four were private practitioners, four were social scientists, and two were magistrates.

120 A Department of Justice ruling made it a violation of federal law to hold a paid position as planning group reporter pursuant to 18 U.S.C. § 201; letter from Anthony Partridge of the A.O. to planning groups (Feb. 15, 1977).

121 One reporter commented: "I have been a professor of criminal law and procedure for twenty years. That experience, however, in no way qualified me to deal with statistical information. Nor did it qualify me to assess the impact of the Act on the day-to-day operations of the various functionaries of the criminal process in the District. Fortunately, the Clerk was a lawyer, and he and I worked closely." Mail Survey, note 13 *supra.*

remuneration, the selection process in the district or simply the absence of qualified persons remains unclear. One may easily speculate, however, that some reporters did not have enough time, and others did not have the knowledge, experience, or self-confidence to motivate research in the setting of the planning groups.

For those who ultimately became active parts of the planning process, as well as for those who did not, the initial exposure to the planning process was often disorienting. First, under the Act, these reporters were required to work with other group members who, unlike the reporters, were active participants in the day-to-day operation of the court system. Consequently, these other members had worked with or opposite one another and had a common reference point not possessed by someone whose main professional role was outside the system.

Second, the reporter faced an immediate task of determining what his role should, or could, be. This required detailed study of the statutory framework of the Act, particularly the details of the planning group mandate. Even more importantly, it required a determination of precisely what the chief presiding judge, as head of the group, expected the reporter's role to be.

With respect to the former task, the reporter was assisted by the series of circuit-wide orientation meetings conducted by the A.O. and F.J.C.[122] The latter task was more difficult, requiring a gradual assessment of the group's operation through individual meetings with the chief judge and other members of the group, and attendance at planning group meetings. In addition, the reporter could seek reactions to proposals and other material prepared by him from other group members.

The typical planning group had its first meeting without a clear sense of what should occur.[123] In many groups, there was apparently a general discussion of the Act's requirements and the nature of the planning process, followed by a general resolution to make certain that the formal demands on the districts to prepare and submit Speedy Trial plans would be met.[124]

122 Six orientation meetings were held for planning group members in September and October, 1975. *See* note 123 *infra*.

123 This conclusion was made on the basis of analysis of responses to the Mail Survey and discussions conducted in the context of the Seminar on the Speedy Trial Act, Yale Law School (Fall term 1977).

124 *Id.*

Responses of planning group reporters indicated that, on the average, there were two or three planning group meetings before submission of the 1976 Speedy Trial Plan and one or two additional meetings prior to submission of the 1978 plan.[125] Significantly, it appears that most planning groups did not meet for more than a year after approval of the 1976 plan.[126]

In examining the activities of the planning groups, it is useful to distinguish two separable functions: (1) intra-district exchange of ideas and communications; (2) research, monitoring and reporting on district developments. Both of these group functions appeared to be substantially dependent on the attitudes and activities of two members of the group, the chief or presiding judge and the planning group reporter. Thus, where the chief judge was willing to facilitate interaction among the group members, the communication function of the group tended to be successful. Conversely, where he was not, that function was markedly less successful.[127] Similarly, where the planning group reporter was highly motivated and had the requisite skills, detailed examination and analytic reporting of district characteristics occurred.[128] But, where the reporter was preoccupied with other commitments or not prepared for research tasks, reporting tended to be pro forma and uninformative.[129]

C. *Intra-District Communication*

The planning group mechanism was designed to establish a forum in which members of the courts could come together and resolve problems of the district collectively. In a position to act as fairly neutral observers of this interactive process, planning group reporters have documented what appears to be varying success in realizing Congress' goals. In some groups, discussions and formal

125 *Id.*

126 Some of the reporters stated that after the 1976 Plan had been completed, members of the group took the view that preparation of the 1978 Plan could be handled solely by the reporter. One reporter noted: "Initially, we had good attendance and discussion by most members but as time went on — especially in the 1978 planning cycle — we barely had the three-fourths necessary to make spending decisions." Mail Survey, note 13 *supra.*

127 Mail Survey, note 13 *supra.*

128 *See* note 143 *infra.*

129 It is significant that reporters were remunerated on a part-time hourly basis. The amount of time they could commit to planning tasks was thus limited by full-time employment commitments to other jobs, as well as by the planning budget in the district.

actions such as promulgation of new local rules, marked a tangible advance in district communication and management.[130] However, in other districts there were serious obstacles to effective planning group communications, such as non-attendance by defense attorneys, reluctance on the part of prosecutors to volunteer information,[131] and unfavorable attitudes on the part of the judges.[132] Indeed, based on the responses of thirty planning group reporters questioned for this Article, the attitude of the chief judge appears to have been the critical factor in determining the dynamic of the planning group.[133]

Thirteen of the reporters responding to the survey stated that the presiding judges in their districts were a negative force on the planning process, either because of their hostile attitude to the Speedy Trial Act generally or because of their opposition to receiving input on issues of "court policy" from non-judges.[134] Whether or

130 *See* note 137 *infra.*

131 According to persons at the A.O., some U.S. Attorneys were reluctant to raise in the planning group forum any discussion of declination policy, deferred prosecution, plea bargaining and magistrate level prosecutions. These areas have been traditionally viewed as within the exclusive jurisdiction of the prosecutor and, as such, were generally not subject to group analysis despite their obvious connection to caseloads, backlogs and delay. As one reporter observed:

> The department of justice as well as the U.S. Attorney's Office, did very little, perhaps reflecting a certain ambivalence about the Act itself. Another problem is that the prosecutors see themselves as independent of the court, and are reluctant to discuss their internal processes and problems with outsiders. Perhaps Congress should require each Office to submit its own "plan" or report, so as to encourage a greater sense of responsibility for problems within the prosecutor's immediate control. However, given the lack of planning and research leadership from the Department of Justice, the quality of such plans would probably vary widely.

132 Mail Survey, note 13 *supra.*

133 *See* note 137 *infra.*

134 One reporter from a small district remarked:

> The district plan was essentially worked up with very little input from members of the Speedy Trial Act panel. The reporter for the plan for the district . . . and a research assistant essentially drafted the interim and final plan. Although members of the planning group were canvassed and their opinions were solicited, as a practical matter they had very little input. This was not because of any unwillingness on the part of [the reporter] to solicit their assistance or to consider their views. It was because the chief judge . . . let his feelings be known as to what he would accept and what he would not. His position was very conservative and some of the innovative suggestions . . . were summarily rejected by the judge. His personality was such that it deterred members of the planning committee as essentially satisfying congressional requirements but of no significance otherwise. [T]he planning process . . . was perfunctory, dominated by the judge and the plan was the work product of the reporter who acted more as an instrument of the chief judge than might have been the case in other districts.

Mail Survey, note 13 *supra.*

not judges actually exercised their authority to prevent open, and perhaps critical, discussion of a district's existing procedures, it is clear that many reporters felt both insignificant and timid in the group context. This phenomenon comports with the customary view that judges are the focal point of a district court's operations, and by virtue of their status have substantial control over the other participants in the system. Marked deference toward the judicial officer appears to have dampened free interchange of ideas among many of the planning group members.

A distinctly different picture emerged from groups in which the judge had either a positive attitude toward the Act generally or was interested in encouraging contributions and criticisms from non-judge members.[135] In these groups, reporters and other group members indicated that the Act's goal of better intra-district communication was clearly realized.

A reporter from an urban district experienced a similar problem:

> In our district we have a very strong chief judge who seemed to be preoccupied with other matters. I guess it would be fair to say that he was hostile to the planning process . . . negative in general to speedy trial. He felt the Congress had no right to move into the judicial sphere. The chief judge simply rejected any suggestion brought up in the group context. The whole concept of the planning process would be very appropriate if the chief judge could somehow be removed from the controlling position which he holds. Our judge was a dominant figure who wanted to keep people out of the process. It would have been much different had there been a dominant figure who wanted to get people into the process. I could see this because when I visited the members individually they expressed what they would have said in open meetings.

Mail Survey, note 13 *supra.*

And another reporter from one of the largest urban districts said:

> I found that getting much accomplished at the meetings was difficult. One thing that I can clearly identify is the tendency of the non-judges to clam up in the presence of judges. Now, it wasn't without exception, but it was pretty close. I don't think there was any meeting held at which there were fewer than three of the judges present . . . they tended to be senior judges, not senior status, but very influential judges. I just wasn't able to get an interchange going. It was more people knitpicking over my draft — rather than a communal effort. On the other hand, I got some ideas and good information from various other agencies when I went to them directly.

Mail Survey, note 13 *supra.*

135 Thus, one reporter commented:

> The Chief Judge . . . , chairman of our planning group, consistently called on every member of the group and actively sought out each person's ideas, reactions, criticism, and suggestions at every stage of our work. Of course certain members of our group, *i.e.,* the marshall and the probation officers, occupy a role of subservience to the judge. While this role was reflected in their participation in our discussions, it was offset by their cooperative, "can do" attitudes towards adjusting their routines to accommodate the Act. Again, this cooperative spirit was, in my evaluation, a direct result of the positive, professional attitude displayed by our district judges.

Mail Survey, note 13 *supra.*

Thus, the primary factor which determined the success of a given planning group in this area was the attitude of the presiding judge. Because there was no practical way of protecting the planning process from the effects of an antagonistic judge, success in the districts depended, more often than not, on the nature of judges' personalities.[136]

D. *Research, Monitoring, and Reporting*

In all but three of the thirty districts surveyed, the reporter stated that he alone took full responsibility for collection of statistical information, analysis of district characteristics and writing a draft of the plan.[137] To the extent that the reporting sections of the district plan deviated from the Model Plan sent out by the A.O. and F.J.C., the reporter was often guided or instructed by the chief judge.[138] Similar control by the judge was exercised with respect to resource requests. In many districts, the reporter

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136 The following response of one reporter is characteristic of several other responses indicating that some judges tended to discount the work of the planning group to a great extent:

> So after I had prepared a draft and it was approved by the planning group I got a rude shock. I found that while we were preparing our draft in the framework of the group, the Chief Judge who had not even participated in its meetings was doing the same thing, independently. I called the judge and talked to his clerk and said wait a second, the law requires that the planning group approve the plan. The clerk told me that I was wrong, that the final responsibility lies with the Chief Judge. "He takes cognizance of what the planning group has done and he will probably use a lot of your language, but he doesn't have to." The chief judge's plan was broader and more flexible. There were lot of rules in mine. He felt that the same thing could be done under his plan, but it wouldn't be obligatory. He had a framework, I had specific rules. When I read over his plan I could see that he had used a lot of my ideas but he had not used them in the same way. He toned them down, he wanted to leave room for the court to work in a flexible manner. What irked me about the whole thing is that the planning group never had a word to say about the situation. They had voted on my plan, not on his.

Mail Survey, note 13, *supra.*

137 One reporter described the preparation process as follows:

> The actual drafting of the plan was done exclusively by myself and the clerk of the court, in consultation with the Chief Judge. We were not able to effectively involve [sic] any of the other members of the planning group in the research, planning, or drafting work which preceded each meeting; it was not just that they were unwilling (though most were), but also that no one could figure out any useful tasks for them to do. We started out in 1975, with a subcommittee organization, set up by the Chief Judge, but after struggling with these committees for several months, we gave up; we were wasting too much time trying to figure out what each committee should be doing.

Mail Survey, note 13 *supra.*

138 In regard to the Chief Judge's instructing the reporter what to put into the plan, the following account was given:

became primarily a clerk to the chief judge. While this allowed the reporter to have a significant impact when the judge gave the reporter discretion, it reduced the reporter to little more than a secretary where this discretion was not given.[139] One reporter, who had a relatively free hand at the outset of the planning process, described his work as follows:

> As reporter, I performed basically three tasks. Prior to preparation to [sic] the first district court plan, I interviewed the district judges and the head of each of the associated agencies — the clerk of court, the chief probation officer, the U.S. Marshal, the United States Attorney — and prepared a report reflecting the likely impact of the act on their respective offices. I also drafted the district court plan, basically by reviewing, and I would like to think, improving on the model plan proposed by the administrative office. In addition, the judges also asked me to investigate both the legal and practical ramifications of certain procedural matters then under consideration by the Justice Department and the judicial conference which might upset the court's ability to comply with the act. Following approval of the original district court plan by the planning committee and the court, my obligations as reporter were few. I advised the judges of any court decisions or administrative office interpretations which seemed to be of particular importance to our operation. I also drafted the revised plan which the court adopted last spring. Otherwise, there was no real need for my services.[140]

While all reporters used the data base supplied to the districts by the A.O. and F.J.C., it was up to the district judge as to how much independence the reporter could have in analyzing the data or in adding to it. If the planning process were an open one, the reporter was often able to collect additional quantitative and qualitative

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> I would have to say that we probably didn't need any additional research on Speedy Trial issues because the ... District ... was not having a great problem in complying. We didn't show any problem to start with. I can tell you that the problem was deliberately inflated in the first plan. The statistical analysis of the court's case load showed that there was a significant drop in the felony prosecutions and this indicated that we could expect to continue with our good record. However, the statistics showed also that misdemeanor cases had shot up very far. I wanted to separate these out in a graphic report that would be included in the plan, but the judge said we should aggregate them so that we would have a better chance of getting more judges.

Mail Survey, note 13 *supra.*

139 *See, e.g.,* note 140 *infra.*

140 Mail Survey, note 13 *supra.*

data from the group members and their staffs.[141] Moreover, in those groups, the members were generally more accessible. It was also more likely that the reporter would have substantive reforms to report on, because such an open process was more likely to generate change or be open to changes suggested by the reporter.

Where the process was a closed one, however, the reporter's role was generally restricted to presenting data supplied by the A.O. and F.J.C.[142] Thus, in this situation, some reporters apparently were relegated to doing perfunctory administrative duties or merely arranging figures. Still, it appears that there were a few reporters who attempted to do independent analysis and collect qualitative information from members, despite the absence of support from the chief judge.[143] In several of these districts, court clerks appear

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141 Reporters in a few districts responded that they were able to gather important information from judges, prosecutors, and defense attorneys in private talks outside the planning group meetings. One reporter stated, "I had certain advantages because of my status — even judges defer a bit to professors. I could ask questions and provide suggestions. I could communicate things from the U.S. Attorney's Office to the judges which the U.S. Attorney did not feel free to do directly." Mail Survey, note 13 *supra.*

142 Only two District Plans (1976) and three District Plans (1978) examined in any detail the impact of the Act, as mandated by Congress, on prosecution and defense. *See* note 14 *supra.*

143 One district that went substantially beyond the proposals in the A.O. Outline in 1976 was the Northern District of Illinois. Its Plan thoroughly reviewed the district data on compliance, comparing current performance to the permanent limits. In addition, the plan expressly considered the potential impact of the Act's criminal priorities on the civil calendar. The plan indicated that other studies had also been conducted, such as an analysis of individual practices of judges, an examination of the effect of the district's individual calendar system in expediting cases, a study of differences in litigation strategies related to type of defense counsel, and a review of the "volatility" of case filings. Finally, the plan discussed the resource needs of the district, using econometric and efficiency models to determine the "productivity" and the judgeship needs of the district. On the basis of this extensive research, the plan concluded with a description of various procedural changes that had been implemented to aid compliance and with suggestions as to necessary amendments to the Act.

The completeness of the plan is somewhat remarkable in view of two factors. First, the overall planning process in the Northern District of Illinois was not particularly successful. According to the reporter, Prof. Richard Frase, planning group meetings were rare and poorly attended. As a result, the analysis section of the report was compiled entirely by Prof. Frase and the clerk of the court.

The second interesting feature, given the thoroughness of the plan's analysis, is the strong recommendation for repeal of the Act contained in the plan's recommendations section. In arriving at this position, the judges of the district concluded that their experience, reflected in the analysis of the plan, clearly required them to advise against further implementation of the Act's procedures and limits.

Of the 1978 plans reviewed, those of the Southern District of New York (S.D.N.Y.) and the Western District of Pennsylvania (W.D. Pa.) manifested an effort by the planning groups in those districts to go beyond the minimal planning and research goals set by the A.O. In this respect, the S.D.N.Y. pilot group was particularly significant.

to have provided essential assistance to the reporter in carrying out the data analysis procedures.[144]

It seems appropriate that the bulk of the research, monitoring, and reporting tasks were delegated by the groups to the reporters. First, other members of the planning groups could not be expected to be familiar with the technical skills of evaluative research. Furthermore, even those members who possessed the required skills were unable to devote necessary time to these functions, since they were often already burdened by heavy caseloads. Planning group reporters, presumably chosen from outside the system, should not have been subject to these disabilities, although there is evidence that many group reporters, in fact, were deficient in one or both of these areas.[145]

The survey of district plans suggests that reporters were often unable or ill-equipped to undertake independent analysis of local district characteristics.[146] Only infrequently did groups collect more than the minimal information suggested by the A.O. Recommended Outline.[147] The survey also indicated that a high proportion of districts adopted the Model Plan's procedural guidelines sent out by the A.O. and F.J.C., rather than develop their own local plans and guidelines specifically tailored to the district.[148]

A group of six judges was designated in the Southern District to test the 1979 time limits, while the other judges operated under the interim limits established by the Act. The idea of the pilot group, which originated in the Second Circuit Executive Office and the Speedy Trial Coordinating Committee of the Circuit Judicial Council, was to create a "laboratory" where a controlled study of the effect of the new criminal time limits on civil backlog could take place. The data and report developed as a result of the Pilot Group experiment clearly show that it represented one of the few examples of systematic study carried out under the planning mandate.

While the W.D. Pa. planning group did not carry out the same scale of research effort mounted in the S.D.N.Y., the 1978 W.D. Pa. plan did go beyond a mere preparation of statistical tables and cursory summaries, the mode of reporting reflected in A.O. reports and plans supplied by most other districts. The plan indicated that a significant amount of data "testing" had been undertaken in the district to make sure that information supplied by the A.O. to aid in evaluation of the district's progress would not lead to inaccurate conclusions.

144 This was particularly evidenced in the report of the Northern District of Illinois. N.D. Illinois, Speedy Trial Plan (1976), note 14 *supra.*

145 *See* note 142 *supra.*

146 *Id.*

147 All districts examined in the 1976-78 survey adapted the Model Plan procedures.

148 In 1976, 17 districts of those surveyed asked for additional resources, but only five presented data to justify the requests. In 1978, ten of the districts surveyed requested additional resources; only two districts presented data to justify the requests.

Conclusions

Selective review of the Speedy Trial planning process indicates that a district which actively carried out a planning program could generate empirical findings and recommendations that significantly improved understanding of the causes of court delay and the possibilities of overcoming them. Such a review also demonstrates, however, that there were several major problems in getting research and monitoring functions of the planning process to operate effectively and efficiently. Of the districts examined for this Article, few adequately investigated local characteristics enough to be able to submit a report which could enable Congress and the national judicial bodies to evaluate the resource needs, recommendations for statutory change, or the overall costs and benefits flowing from the implementation of the Act.

Moreover, even where recommendations and data were generated on the local level, it was difficult to comprehend their meaning because justification and explanation were generally inadequate. Thus, while the Speedy Trial Act appears to have provided for a rich source of data to be used to draw connections between individual district characteristics and overall delay, the necessary analysis still remains to be done before well-considered recommendations can be formulated.

In marked contrast to the widespread absence of research aimed at identifying causes of delay, many of the districts examined did implement significant changes in the conduct of criminal case processing which are likely to have substantial impact on the federal criminal justice system.

The survey of 1978 plans shows that judges, magistrates, court administrative personnel, and district attorneys in many districts responded to the new standards of the Act by making substantial changes in customary pretrial procedures, including enactment of local rules, reordering of case-processing priorities, and reformation of basic administrative procedures.[149]

These reports of changes in practices and procedures manifest a response which cannot be measured solely by looking at the research and study carried out by the groups or at the reports of

149 *See* note 89 *supra.*

decisions made by planning groups collectively. The Act seems to have stimulated innovation. Though it is difficult to establish empirically, it is not unreasonable to assume that the groups were a vital conduit for information that impressed on members of the criminal justice system that changes would have to be made in order to accommodate the time requirements of speedy trial.[150]

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150 Of the thirty reporters who were interviewed or responded to the mail survey, nineteen said that the groups should be remandated following expiration of the phase-in period, five stated that the groups were unnecessary and should not be remanded, and the rest were undecided or made no comment. In those districts where there was active communication, generation of ideas, and working cooperation among the groups, the positive impact of the collective endeavor would seem to justify the continued meetings of the planning groups. This view was generally supported by several reporters responding to the survey, as indicated by the following remarks:

> I believe that the planning aspect of the Speedy Trial Act is perhaps the most hopeful segment of any legislation I have seen in years and would urge Congress to renew the planning mandate. I think it is hard to redefine the planning task. Although the planning task in the Act is very broad, this has freed individual districts to define the mandate as they deemed proper [though] perhaps Congress need not require a planning group in each district.

Another reporter commented:

> I think the planning process will be much more important *after* next July 1st than it was in 1976 and 1978, because we will finally have a "live" problem to study. Whether we need to continue using planning *groups,* however, is another matter. I tend to think yes, because we will need to discuss research findings and the problems of implementation with all concerned; on the other hand, we might get "straighter" answers in private discussions, and there is a limit to how much time busy prosecutors, judges and counsel will be willing to devote to speedy trial planning. Perhaps the planning process should be authorized and funded by Congress, with a requirement of yearly or bi-yearly plans, but leave the exact mechanism of the process up to each Chief Judge.

Mail Survey, *supra* note 13.

However, other planning group members were less enthusiastic about the process and felt that continuation of the planning groups would not be particularly beneficial. As one magistrate reported:

> Finally, we were of the uniform opinion that the act was unnecessary and a useless waste of money — that the trial judges were fully able to protect *all* interests in speedy trials. Thus, we felt no need to continue with Planning Group input since it appears as if the Congress refuses to heed the advice offered by the persons most familiar with the application and administration of Federal Criminal Justice.

Mail Survey, note 13 *supra.*

Along the same lines, another reporter indicated that, based on the experiences of the planning group in his district, he felt the desired goals could be accomplished without the formal structure of the Act:

> Whether the planning group should be continued depends on the alternatives which exist in a particular district. Certainly the procedures of the district ought to be continually evaluated. However, the district judge, magistrate, clerk, and United States attorney are able to do this without the formality of a planning group. I am confident that the personnel of this district is [sic] willing and capable to continue to review procedures in an appropriately criticial fashion without the formality of a planning process.

Mail Survey, note 13 *supra.*

Furthermore, it may not have been awareness only that was achieved, but also a tacit coordination of adjustments.[151]

One major drawback of this mixture of success and failure, however, is the absence of knowledge of the impact of changes on the "quality of criminal justice" in federal district courts. If judges take less time to consider motions, how does this affect the interest in developing carefully considered legal standards and what does it mean for the party whose motion it is?[152] If prosecutors decline or defer prosecution on more cases, what does this mean for federal law enforcement and federal protection of the public?[153] If defense attorneys reduce the amount of time for in-

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151 For example, the 1976 Plan for the Northern District of Illinois stated:

> The working sessions of the planning group which led to the formulation of the 1976 District Plan have shown that there is considerable value, apart from the planning process itself, in bringing together the perspectives and experience of all of the participants in the Federal criminal justice system. These meetings have permitted important issues to be raised and discussed by representatives of all concerned parties, and there is literally no other form or opportunity for such discussion.

Mail Survey, note 13 *supra.*

152 In commenting on the manner in which he is able to cope with the speedy trial time limits, one judge in the Eastern District of New York stated:

> It's all a matter of work habits; look, I can move ahead to the 1979 limits now if I want to. It's a matter of working a bit harder, scheduling cases closer together, being stricter on granting continuances, and of communicating to the bar, in a way I know how, that things are just going to move along at a much faster pace in my courtroom. Perhaps there are other judges in this district who can't do it, and I don't know how the district as a whole will fare against the time limits, but I know I can handle my docket.

Interview in Brooklyn, New York (Jan. 27, 1978).

153 Many U.S. Attorneys and assistants expressed major complaints about the Act's general strictness regarding time limits, and some of them have spoken in detail about such problems outside of the planning groups. At least one U.S. Attorney in the Second Circuit indicated that the Act is grossly inconsistent with proper prosecutorial policy. He stated that the 60-day arraignment to trial limit could not be implemented in his district without severely disrupting patterns of case preparation and management developed over a long period for the purpose of maximizing his staff's ability to prosecute white collar crime. He cited, for example, the distinctive work pattern required by a complex crime involving large amounts of documentary evidence and the use of expert assistance for its analysis. This pattern required that the assistant commit large uninterrupted blocks of time, which is not possible if he is sporadically pulled away for emergency preparation of other cases. Thus, it was felt that one of the results of time limits would be to force cases to trial without proper consideration of case management contingencies of the prosecution. In addition, this prosecutor noted that the limits could force a complex case to trial at a time when the assistant who worked it up was involved in another case for which he could not obtain a continuance. Such situations could lead to dismissal of indictments in major cases, on the assumption that this type of case could not be passed on to another assistant who was not so integral to its preparation. Interview with U.S. Attorney Robert B. Fiske, S.D.N.Y., at Yale Speedy Trial Workshop, New York City (March 24, 1977). *See also* Report of the United States Attorney for the Southern District of New York to the Attorney General

vestigation of issues, how does this affect their ability properly to argue their defenses?[154] None of these questions can be answered without continuous monitoring and without district-wide studies of the impact of the time limits of the Speedy Trial Act.

Ultimately, the question to be considered is, what do these findings demonstrate about the concept of local planning as a vehicle for improving the functioning of the criminal justice system, and perhaps other systems which have both national and local dimensions? First, they suggest that legislation which asks persons to alter the very institutions in which they are day-to-day actors is more effective when it sets out obligatory and concrete institutional behavioral standards, *e.g.*, time limits with sanctions, and less effective when it mandates only abstract goals and aspirations. Second, they indicate that the more abstract and aspirational the planning goals, the greater is the necessity to rely on persons from outside the institution to undertake the envisioned planning tasks.

(Jan. 19, 1977). It is significant to note that the 1979 amendments, *supra* note 8, added a provision to 18 U.S.C. § 3167 requiring the Justice Department to file a one-time report before Jan. 1, 1980, detailing the impact of the Speedy Trial Act on the operation of the offices of U.S. Attorneys.

154 One defense attorney active in the federal courts of the Southern District of New York stated:

> If you get retained shortly before the indictment comes down, you now have to accomplish within a very limited period of time what the government has taken some three to five years to accomplish. And it puts you under a staggering burden, and it takes you and forces you to do what the government has not done during that period of time. And that is to put all other matters aside and to focus all of your attention and energy on one case. Now the problem with running a law practice and doing that, you can't do that. You can't simply, because an indictment has been filed, say to all the other clients who have equal right to your time, 'I have a crisis and for the next three months of my life I am not going to think about your problems, I am not going to tend to your problems, I am not going to worry about you.' That is really what the major problem is from the criminal defense attorney's point of view . . .
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> Very often you will not get into a case until very late in the game, either because the target of the investigation doesn't recognize his problem or because since it started off in a civil context, he had a civil lawyer tending to the problem for a long period of time, and only when a crisis develops towards the indictment does the civil lawyer come to him and say, 'I'm not competent to handle this problem anymore, you've got to go out and get yourself a criminal specialist.' Or because he hasn't even been notified that he is a target of the investigation, and only finds out at the very end of the investigation that he is a target, and will have to get a lawyer. It happens with enough frequency as to create a problem in my mind.

Interview in New York City (April 6, 1978).

In apparent response to this problem, the 1979 amendments, *supra* note 8, add a provision to existing 18 U.S.C. § 3161(c) which, absent a waiver, prohibits the trial of a criminal defendant less than thirty days after he first appears through counsel or elects to proceed pro se.

Looking at responses to the Speedy Trial Act at the district and national levels, one sees that the major impact so far has resulted from the forced adaptation of criminal justice personnel to stringent new standards, and not from the research, study, and evaluation of district problems on the subsequent comprehensive planning activities.

Faced with a demanding new institutional behavior standard — 100 days from arrest to trial — individual participants and subgroups in the system have been forced to take measures to bring work products into compliance with this mandatory standard. A self-searching for methods of compliance has stimulated innovation because no one told the members of the district courts *how* to comply with the new standard; they were told only that they had to do so or cases would be dismissed.

The kind of standards in the Speedy Trial Act which have been successful in motivating innovation were not present in Rule 50(b). Although a full comparison is inappropriate here, it is instructive to note that Rule 50(b), which was also fundamentally aimed at motivating local innovations through a local planning process, lacked a definite standard of institutional conduct.[155] Indeed, research indicating that Rule 50(b) allowed districts to draw up plans which would not force them to expedite cases was cited by Congress as a primary factor contributing to that Rule's ineffectiveness and to the need for imposed national standards.[156]

In contrast to their responsiveness to mandatory behavioral standards, this Article shows that many actors in the system were unable to "plan" innovation in the managerial sense of the term. They could not systematically locate problems and then design a coordinated program which would address the problems as interrelated. In their capacity as judges, prosecutors and defense attorneys, they apparently found research and planning tasks as incompatible with their "institutional sense of self." Moreover, there were no sanctions for failure to perform these tasks.[157] And

155 Rule 50(b) required that District Courts adopt their own standards. However, research on the implementation of the Rule showed that some courts adopted standards to fit their current processing time frames. In this manner the new Rule would not force a District to change its median processing time. This was stated straightforwardly by one federal judge in California who participated in his district planning process. Interview with the author (April 10, 1978).

156 *See Senate Speedy Trial Hearings* note 4 *supra,* at 220.

157 *See* 18 U.S.C. § 3162.

to the extent that study and evaluation was done, it was, in almost every instance, planned and executed by the planning group reporter, someone from outside the system.

In spite of these difficulties, findings reported in the 1976 plan of the Northern District of Illinois and the 1978 plan of the Southern District of New York demonstrate that the research and study aspects of planning can yield empirical data of fundamental importance to both local and national policymaking.[158] These instances of successful research efforts are important because the innovations that the districts are implementing are not going to tell Congress how to allocate additional resources, and whether the time limits should be enlarged. These successes must thus stand as precedents to motivate a renewed effort to identify causes and remedies of delay, and measure the costs and benefits of complying with the new time limits of the Act.[159] In deciding how to renew that effort, Congress, as well as the A.O. and F.J.C., must face the question of how to involve more committed persons in the planning process to do the kind of research and study essential to understanding and reducing delay in the criminal justice system.

The analysis of the operation of the Speedy Trial planning process during the "phase-in" period suggests several specific recommendations regarding the future of this approach. First, despite the numerous difficulties and shortcomings apparent in the initial period, the widespread advances in the areas of intradistrict communication and procedural innovation strongly support the view that the planning groups should be re-mandated for the future. Second, to resolve some of the difficulties and shortcomings encountered to this point, the roles of some members of the process should be clarified or altered. For example, to the extent that quantitative data collection is needed on the local level to facilitate monitoring, this function should be expressly delegated to the clerk of the court, rather than the planning group reporter. The latter's expertise should instead be focused primarily on developing and reporting information provided by participants in the planning group meetings. In addition, the reporters should be assisted in their responsibilities by establishment of a similar man-

158 *See* note 143 *supra.*

159 [1979] U.S. CODE CONG. & AD. NEWS 11160 (1970).

date to national bodies, such as the Department of Justice or the Judicial Conference of the United States, to promote active participation in the planning process.

Finally, the national judicial institutions already participating in the Speedy Trial planning process should be encouraged to expand and refine their evaluation techniques and research methods with two specific, but somewhat conflicting, goals in mind. First, the interaction between the national and local bodies must be such as to provide an incentive to the latter to innovate, both in terms of procedures and of reporting. At the same time, however, these national research institutions must be able to develop efficient and comprehensive data collection and reporting procedures if the information developed in the local districts is to be transmitted to Congress and, ultimately, translated into necessary legislation.

NOTE

SENTENCING REFORM OF S. 1437: WILL GUIDELINES WORK?

JOEL J. BERMAN*

Crowded prisons and demonstrable recidivism have prompted Congress and state legislatures recently to question the efficacy of rehabilitation in the penal system. Reports of wide disparity in sentencing and undue judicial subjectivity have caused not only lawyers but the prisoners themselves to doubt the equity of an individualized system of sentencing.

To meet the problem, Congress introduced S. 1437 in 1978 to establish sentencing guidelines and to decrease the amount of judicial discretion available under the current system. Although the bill died at the end of the 95th session, it was applauded as a welcome attempt at reform. Mr. Berman, however, suggests in this Note that Congress must outline precise sentencing philosophies and limit sentencing criteria before any new bill can adequately curtail the unwanted judicial discretion possible under current law.

Introduction

In the past decade, the general failure of the American penal system to rehabilitate offenders has brought into question the whole concept of indeterminate sentencing and the individualized treatment which an indeterminate sentencing system entails.[1] Of particular concern have been the total absence of any guidelines to restrain the broad discretion of judges in sentencing and the resulting inequitable treatment of similar offenders.[2] Such criticism of corrections practices has resulted in efforts to reform current sentencing schemes at both the state[3] and federal levels.

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1 *See* M. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1972); P. O'DONNELL, M. CHURGIN & D. CURTIS, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM (1977) [hereinafter cited as P. O'DONNELL]; A. VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976); TWENTIETH CENTURY TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976); D. FOGEL, WE ARE THE LIVING PROOF: THE JUSTICE MODEL FOR CORRECTIONS (1975); J. WILSON, THINKING ABOUT CRIME (1975); E. VAN DEN HAAG, PUNISHING CRIMINALS (1975); Vorenberg, *Narrowing the Discretion of Criminal Justice Officials,* 1976 DUKE L.J. 651 (1976), Pugsley, *Retributivism: A Just Basis for Criminal Sentences,* 7 HOFSTRA L. REV. 379 (1979).

2 FRANKEL, *supra* note 1, at 7-8.

3 For a listing of recent statutory modifications of state sentencing laws, *see* Zalman, *Making Sentencing Guidelines Work: A Response to Professor Coffee,* 67 GEO. L.J. 1005, 1005 n.1 (1979).

The most productive federal reform effort to date is embodied in S. 1437,[4] the "Criminal Code Reform Act of 1978," which passed the Senate on January 30, 1978, but died at the end of the second legislative session of the 95th Congress before reaching the floor of the House of Representatives.

Although much of S. 1437 is regarded as merely a recodification of the various federal criminal statutes,[5] the sentencing provisions comprise in many respects a radical departure from current sentencing practices. S. 1437 provides for appealability of sentences,[6] simplification of offense classifications,[7] and modification of the parole process,[8] all of which are important changes from present procedures. But perhaps the most profound sentencing provisions in S. 1437 are those creating a United States Sentencing Commission. Established and administered under proposed 28 U.S.C. §§ 991-998, the Sentencing Commission would be responsible for overseeing imposition of all sentences and the operation of the U.S. Parole Commission.[9] The Commission would, among other duties, conduct research,[10] establish policies for judges and the Parole Commission,[11] and — most importantly — issue sentencing guidelines for federal judges to follow when imposing sanctions on convicted offenders.[12]

Although S. 1437 and the sentencing provisions it contained failed to pass the 95th Congress, the issues raised by the bill are still of considerable import. At the federal level, both the House

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4 95th Cong., 2nd Sess. (1978). Because the bill is written as a recodification, references to provisions in the bill will hereinafter be to the proposed United States Code section numbering. Unless otherwise noted, sections within proposed United States Code title 18 may be found at section 101 of S. 1437; sections within proposed United States Code title 28 may be found at section 124 of S. 1437.

5 A major part of the intent of the sponsors of S. 1437 was to "clean up" the antiquated, haphazard, repetitious federal criminal laws. Although a number of Senators commented that over ninety percent of the bill was uncontroversial, implying that the bill was a mere recodification, the response to the controversial portion was nothing short of virulent. *See generally Reform of the Federal Criminal Laws: Hearings on S. 1437 and S. 31, S. 45, S. 181, S. 204, S. 260, S. 888, S. 979, and S. 1221 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary,* 95th Cong., 1st Sess. (1977) [hereinafter cited as *Hearings*].

6 Proposed 18 U.S.C. § 3725.

7 Proposed 18 U.S.C. Part II.

8 Proposed 28 U.S.C. §§ 591-594 (located at S. 1437 § 739).

9 Proposed 28 U.S.C. §§ 994, 995(a)(9)-(10).

10 Proposed 28 U.S.C. §§ 991(b)(2), 995(a)(12).

11 Proposed 28 U.S.C. § 994(a)(2).

12 Proposed 28 U.S.C. § 994(a)(1).

and the Senate are working on new versions of criminal code reform bills which include sentencing reform provisions similar to those in S. 1437.[13] Additionally, several states have already adopted reforms of their sentencing laws based on the Sentencing Commission model of S. 1437,[14] and more are considering doing so.[15] The idea of sentencing guidelines promulgated by the Sentencing Commission is a relatively new concept, however, with which there has been little actual experience. Thus careful thought should be given to the problems which this type of sentencing reform entails. This Note considers some of the difficulties inherent in S. 1437's provisions for Commission promulgation of sentencing guidelines.

I. CONTROLLING DISCRETION: THE CONCEPT BEHIND SENTENCING COMMISSION GUIDELINES

Among modern nations, the United States is unique in the virtually unfettered discretion its judges have in sentencing convicted criminal offenders.[16] Current federal law gives little guidance to sentencing judges;[17] based on little more than his or her own sentencing philosophy or sense of justice, each judge prescribes sentences within wide statutory ranges with often extremely high statutory maximums. The result of this absence of guidance has been gross disparities in the sentences handed down to similar offenders for similar conduct. One study of federal sentencing practices noted, as one example, that the average sentence for robbery

13 Two Senate bills, S. 1722 and S. 1723, 96th Cong., 1st Sess. (1979), were introduced September 7, 1979, and referred to the Senate Judiciary Committee. 125 CONG. REC. S12204-12 (daily ed. Sept. 7, 1979). In the House, a Judiciary subcommittee has concluded hearings and is marking up a criminal code reform bill similar to S. 1722, but no bill has been formally introduced yet. 65 A.B.A.J. 1484 (1979).

The sentencing provisions of S. 1722 are nearly identical to those of S. 1437. To the extent that substantive discrepancies between the two bills' sentencing provisions bear upon discussion in this note, the differences are so noted. *See* notes 51 and 69 *infra*.

14 1978 MINN. LAWS §§ 244.01-.11 (creates a sentencing commission to promulgate mandatory sentencing guidelines); 18 PA. CONS. STAT. ANN. §§ 1381-1386 (Purdon Supp. 1979) (creating a commission to promulgate non-mandatory guidelines).

15 Zalman, *supra* note 3, at 1005 n.1. Additionally, sentencing guidelines in some form have been voluntarily adopted by courts in several jurisdictions. Flaxman, *The Hidden Dangers of Sentencing Guidelines,* 7 HOFSTRA L. REV. 259, 259 n.5 (1979).

16 O'DONNELL, *supra* note 1, at 1.

17 FRANKEL, *supra* note 1, at 6-7.

18 O'DONNELL, *supra* note 1, at 4.

given in federal court was 60 months in Montana and 240 months, or four times as long, in the Northern District of West Virginia.[18]

At least one commentator has noted that this largely unreviewable discretion given to federal judges is perhaps the central evil in the sentencing system of federal courts.[19] However, the challenge of devising a method of controlling and systematizing judicial discretion without eliminating it entirely from the sentencing process has proved exceptionally difficult. Aside from a few pilot efforts,[20] reform has proved elusive.

The idea of using sentencing guidelines to reduce disparity in sentencing practices must be attributed to Judge Marvin Frankel. In his thought-provoking book criticizing existing sentencing practices,[21] Frankel recommended the creation of a Commission on Sentencing to supervise judicial imposition of sentences and to stimulate corrections research.[22] In 1974, Frankel's recommendations were put in the form of draft legislation when the Yale Law School clinical workshop on sentencing and parole issued its *Proposed Federal Sentencing Statute.*[23]

The Yale statute would have created a United States Commission on Sentencing and Corrections as an independent establishment of the judicial branch composed of seven commissioners appointed by the U.S. Judicial Conference,[24] with powers and duties similar to those of the Sentencing Commission established under S. 1437.[25] The Commission proposed by the Yale workshop provided the prototype for the sentencing reform provisions of several bills introduced in Congress between 1975 and 1977 which were precursors of S. 1437.[26]

Hearings on federal criminal law reform before the Senate Subcommittee on Criminal Laws and Procedure concerning S. 1437 and its predecessors spanned six years and filled nearly ten thousand pages of testimony. Some witnesses testifying on the sen-

19 FRANKEL, *supra* note 1, at 69.
20 *Id.* at 61-85.
21 FRANKEL, *supra* note 1.
22 *Id.* at 118-23.
23 O'DONNELL, *supra* note 1, at 96-127.
24 *Id.* at 111-15.
25 *Compare id.* at 112-14 *with* proposed 28 U.S.C. §§ 994, 995.
26 S. 2699, 94th Cong., 1st Sess. (1975); S. 181, 95th Cong., 1st Sess. (1977); S. 204, 95th Cong., 1st Sess. (1977). For a summary of the evolution of S. 1437, *see* S. REP. NO. 605, 95th Cong., 1st Sess. 10-15 (1977).

tencing provisions of the bills questioned the propriety and even the constitutionality of delegation to the Commission, a non-legislative agency, of Congress' role in setting national policy on sentencing.[27] Others felt that the congressional mandate to the Commission was vague, and they chafed at the enormous discretion granted to the Commission by the bills.[28] Still others questioned the wisdom of rushing headlong into a new and untried system of mandatory sentencing procedures.[29]

The proponents of the sentencing provisions in S. 1437 argued that a strong, independent sentencing commission was essential to sentencing reform. First, it was noted that sentencing is a subject too complex for an already overly-busy Congress to deal with in detail.[30] Second, the supporters of the bill argued that the relative political insulation of an independent commission would provide a more suitable forum for solving sentencing problems than the more politically sensitive legislature.[31] Moreover, the proponents argued that since the bill gave Congress veto power over any guidelines eventually promulgated,[32] Congress would be merely limiting, rather than surrendering completely, its supervision of sentencing policy. In the end, the advocates of an independent commission carried the day; although S. 1437 makes the Commission accountable to Congress, it is clear that the bill gives the Commission a fairly free hand.[33] The remainder of this Note explores some of the difficulties likely to be encountered by a sentencing commission under S. 1437 or a similar bill in attempting to create a system of sentencing guidelines.

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27 *Hearings, supra* note 5, at 9118 (statement of Thomas I. Emerson), 9135-36 (statement of John J. Cleary), 9236 (ACLU Suggestions Concerning S. 1437), 9385 (statement of Daniel Crystal), 9413 (letter of John M. Burkoff, June 9, 1977).

28 *Id.* at 9123-33 (statement of John J. Cleary). *See* Coffee, *The Repressed Issues of Sentencing: Accountability, Predictibility, and Equality in the Era of the Sentencing Commission,* 66 GEO. L.J. 975, 997-98 (1978).

29 *Hearings, supra* note 5, at 9271 (statement of James V. Bennett). *See id.* at 9410 (Report with Recommendations to the Criminal Justice Section Council from the Committee on Criminal Code Revision, American Bar Association — August, 1977) (make guidelines only advisory until more experience is gathered).

30 *Id.* at 8978 (remarks of Andrew von Hirsch), 9087 (remarks of Nancy Crisman).

31 *Id.* at 8978 (remarks of Andrew von Hirsch), 8981 (statement of Andrew von Hirsch), 9032-33 (letter of Dorothy Parker, June 20, 1977), 9050 (remarks of Alan M. Dershowitz). *But see* Coffee, *supra* note 28.

32 The bill requires the Sentencing Commission to report to Congress the guidelines, which take effect 180 days thereafter if not vetoed or amended by Congress. Proposed 28 U.S.C. § 994(a).

33 As a practical matter, it is not clear whether the sentencing provisions of S. 1437 sur-

II. THE CHALLENGE OF FORMULATING SENTENCING GUIDELINES

A. Introduction to The Guideline Concept

The Senate Report accompanying S. 1437[34] makes clear[35] that the single most important purpose of the Sentencing Commission established by the bill is to "establish sentencing policies and practices for the federal criminal justice system."[36] The Commission is directed by the bill to achieve this end through the promulgation of guidelines and general policy statements[37] which must be considered by a court before imposing any sentence.[38]

S. 1437 contemplates the creation of a form of sentencing guidelines sometimes known as a range-presumptive system.[39] Under a range-presumptive system, each convicted offender is compared against a set of guidelines to determine the appropriate range of punishment. There is an initial presumption that the actual sentence will be between the high and low values of the range; however, if specified conditions are met, the sentence may be higher or lower than the range values.[40]

The parole policy guidelines adopted recently by the U.S. Parole Commission[41] provide one illustration of how a range-presumptive guideline system works. First, a "salient factor score" is developed for each particular offender utilizing a standard score form which quantifies certain offender characteristics believed to relate to recidivism.[42] The salient factor score form used by the Parole Commission is illustrated in Figure I. Second, the offense for

vived on their own merit, or whether they were simply lost in the overall debate surrounding the bill. One authority notes that the political coalition which passed S. 1437 in the Senate was a fragile compromise between liberals and conservatives; questions about the sentencing provisions were substantial, and the provisions may not have been passable without being part of a much broader reform effort. Tonry, *The Sentencing Commission in Sentencing Reform*, 7 HOFSTRA L. REV. 315, 317-22 (1979).

34 S. REP. NO. 605, *supra* note 26.

35 *Id.* at 1160.

36 Proposed 28 U.S.C. § 991(b)(1).

37 Proposed 28 U.S.C. § 994(a).

38 A sentence which deviates from the sentencing guidelines is subject to appellate review, while one that is consistent with the guidelines but inconsistent with the policy statements is not. S. REP. NO. 605, *supra* note 26, at 1165.

39 Tonry, *supra* note 33, at 350.

40 *Id.* at 348.

41 28 C.F.R. §§ 2.20-2.21 (1979).

42 The Senate Report makes quite clear that the Parole Commission guidelines are expected to serve as an inspiration for the sentencing guidelines, if not as an exact model for them. S. REP. NO. 605, *supra* note 26, at 1167 n.14. Accordingly, recent attacks on the parole guidelines are of more than passing interest to anyone who would apply the same

which the offender has been incarcerated is positioned on a scale of severity from "Low" to "Greatest II." Examples of crimes of low severity are property offenses involving property worth less than $2000, small-scale soft drug offenses, and gambling law violations. Examples of crimes placed by the Parole Commission in the Greatest II category include espionage, kidnapping, and murder. Finally, the offense and offender characteristics are compared against a standardized matrix or grid (Figure II) to determine the recommended time the offender should serve in prison before being released on parole. The officials making parole release decisions in particular cases are not rigidly bound by the guidelines; parole authorities may render decisions outside the guidelines where exceptional circumstances so warrant.[43]

FIGURE I

Salient Factor Score Form
United States Parole Commission Guidelines

Item A ..... ____
No prior convictions (adult or juvenile) = 3
1 prior conviction = 2
2 or 3 prior convictions = 1
4 or more prior convictions = 0

Item B ..... ____
No prior commitments (adult or juvenile) = 2
1 or 2 prior commitments = 1
3 or more prior commitments = 0

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technique to the sentencing process. *See* Flaxman, *supra* note 15 (arguing that experience with the federal parole guidelines fails to establish the feasibility of the use of descriptive guidelines to ensure that judicial sentencing decisions are made fairly). Although the parole guidelines have been upheld in numerous district court habeas corpus proceedings, *id.* at 260 n.12, validity of the guidelines has only recently been seriously considered in appellate courts. Geraghty v. United States Parole Comm'n., 579 F.2d 238 (3rd Cir. 1978) (summary judgment against plaintiff improper where plaintiff's claim raises issues of fact as to whether parole guidelines violate Parole Commission and Reorganization Act, 18 U.S.C. §§ 4201-4218 (1976), and prohibition against ex post facto laws), *vacated and remanded,* 445 U.S. —, 48 U.S.L.W. 4296 (March 18, 1980).

43 The Parole Commission is given broad discretion to consider especially mitigating or aggravating factors in deciding whether to make a decision outside the guidelines. 28 C.F.R. § 2.20(c)-(e) (1979). However, where a decision is made to retain a prisoner in custody beyond the recommended guideline period, the prisoner must be informed of the specific factors and information relied upon in making the decision. *Id.* at § 2.13(d). Prisoners may challenge a decision outside the guidelines on the grounds, *inter alia,* that the parole denial is not supported by the facts or reasons as stated, or that the information relied on is erroneous. *Id.* at § 2.25(f).

Item C ..... ———
Age at behavior leading to first commitment (adult or juvenile):
26 or older = 2
18 to 25 = 1
17 or younger = 0

Item D ..... ———
Commitment offense did not involve auto theft or check(s) (forgery/larceny) = 1
Commitment offense involved auto theft or check(s) = 0

Item E ..... ———
Never had parole revoked or been committed for a new offense while on parole, and not a probation violator this time = 1
Has had parole revoked or been committed for a new offense while on parole, or is a probation violator this time = 0

Item F ..... ———
No history of heroin or opiate dependence = 1
Otherwise = 0

Item G ..... ———
Verified employment (or full-time school attendance) for a total of at least 6 months during the last two years in the community = 1
Otherwise = 0

TOTAL SCORE ..... ———

FIGURE II
Guidelines for Decisionmaking (adults)
United States Parole Commission

(Matrix values are customary jail time in months to be served before release)

Offense characteristics — severity of offense behavior	Offender Characteristics — parole prognosis (salient factor score)			
	Very good (11 to 9)	Good (8 to 6)	Fair (5 to 4)	Poor (3 to 0)
Greatest II (note 1)	52+	64+	78+	100+
Greatest I	40-52	52-64	64-78	78-100
Very high	24-36	36-48	48-60	60-72
High	14-20	20-26	26-34	34-44
Moderate	10-14	14-18	18-24	24-32
Low moderate	8	8-12	12-16	16-22
Low	6	6-9	9-12	12-16

Note 1: Specific upper limits are not provided for the Greatest II severity of offense behavior category due to the limited number of cases and extreme variation possible within each category of offender characteristics.

The parole guidelines are designed to provide for a more consistent exercise of discretion in at least three ways. First, quantification of offender characteristics through the salient factor score minimizes the extent to which a decisionmaker can allow highly subjective feelings, such as racial prejudice, to influence the parole decision. By a standard weighing of the importance of each relevant factor,[44] a more nearly uniform perspective in evaluation can be assured. Second, the Parole Commission's listing of a number of offenses according to relative severity for the purpose of offense classification creates a sense of consistency in the parole process. As a consequence, there is a diminished likelihood that one parole official would, for example, classify simple marijuana possession as a more severe offense than embezzlement while another official might do the reverse. Third, given a particular combination of offense severity and offender characteristics, the Parole Commission matrix recommends a fairly narrow range of prison time and thus makes it more likely that similar offenders will indeed serve comparable sentences for similar crimes.

It is important to note that the parole guidelines do not eliminate the ability of parole officials to account for exceptional factors (*e.g.*, extreme violence in committing the offense or exemplary behavior while in prison) in order to adjust the recommended term of incarceration. Nevertheless, the parole guidelines, by standardizing the weight given many offense and offender characteristics, minimize the extent to which the subjective biases of individual parole officials can affect parole decisions.

B. Punishment Theory in the Development of Guidelines

Although S. 1437 provides little explicit guidance on the exact form the sentencing guidelines are to take, the Senate Report explains that the guidelines may be similar in structure to the guidelines now used by the Parole Commission, although they need not be identical.[45] As the Report recognizes, the parole guidelines serve a different purpose and are grounded in a dif-

44 Prior conviction record, for example, is worth 0 to 3 points, while history of heroin addiction (probably an emotion-charged issue for some penal authorities) is worth only 0 to 1 point. *See* Figure I *supra*.

45 S. REP. NO. 605, *supra* note 26, at 1167 n.14.

ferent theoretical base.[46] Parole guidelines are used to determine when it is safe to release a prisoner into society and as such are founded primarily upon prediction of recidivism.[47] The variables used to derive the salient factor score, which in turn determines the offender categories in the parole guideline matrix, are accordingly confined to those factors believed to be most predictive of a return to crime.[48]

By contrast, the purpose and use of sentencing guidelines are nowhere nearly so one-dimensional, largely because there is no single, dominant theory behind our system of criminal punishment. Over the years many reasons for punishing criminal offenders have been proposed. Retribution, deterrence, denunciation, incapacitation, and rehabilitation are commonly listed as justifications for punishment,[49] but no single rationalization has been accepted by all penal theorists.[50]

S. 1437 institutionalizes this theoretical indecision in proposed 18 U.S.C. § 101(b), which states the touchstone for the proposed revision of the federal criminal justice system. That subsection states that:

> The general purpose of this title is to establish justice in the context of a federal system by:. . .
> (b) prescribing appropriate sanctions for engaging in such conduct that will:
> (1) deter such conduct;
> (2) protect the public from persons who engage in such conduct;
> (3) assure just punishment for such conduct;
> (4) promote the correction and rehabilitation of persons who engage in such conduct, recognizing that imprisonment is generally not an appropriate means of promoting correction and rehabilitation.

Thus, proposed 18 U.S.C. § 101(b) adopts an integrative approach to punishment theory by accepting the notion that at least four distinct punishment theories are valid motivations for a criminal justice system.[51] The provisions of the bill establishing the man-

46 *Id.*
47 Coffee, *supra* note 28, at 993.
48 *Id.* at 991-93.
49 FRANKEL, *supra* note 1, at 106.
50 Zalman, *supra* note 3, at 1011.
51 S. REP. No. 605, *supra* note 26, at 892.
It must be noted that proposed 18 U.S.C. § 101(b)(4) of S. 1722, 96th Cong., 1st Sess.

date for the Sentencing Commission echo this integrative philosophy, declaring that:

> The purposes of the United States Sentencing Commission are to:
> (1) establish sentencing policies and practices for the federal criminal justice system that:
> (A) assure the meeting of the purposes of sentencing set forth in [proposed 18 U.S.C. § 101(b)]. . . .[52]

Clearly, the four purposes of sentencing listed in subsection 101(b) cannot always be reconciled,[53] and simultaneous application of the theories will be difficult, if not counterproductive. Rather than providing legislative guidance to the Commission as to how these theories are to be balanced, however, the bill leaves this difficult issue completely for the Commission to resolve. The Senate Report states merely that "[f]or each combination of a category of offense and a category of offender, a sentence or sentencing range is to be recomended [sic] that is consistent with all pertinent provisions of title 18 of the United States Code. [Footnote omitted]."[54] The omitted footnote provides a somewhat curious explanation of the text, stating that

> [i]t is possible in some cases that the sentencing recommendation for a particular type of case will vary as to length or type of sentence because different purposes of sentencing apply to different categories of offenders convicted of basically similar offenses.[55]

The Report thus suggests that offender categories will be created on the basis of Commission determination that certain types of offenders require punishment based on differing principles of sentencing. Theoretically, under this instruction the Commission could decide that the promotion of rehabilitation dictates that one armed robber be sentenced to a short term or to probation, while

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(1979), reads: "The general purpose of this title is to establish justice in the context of a federal system by . . . (b) prescribing appropriate sanctions for engaging in such conduct that will . . . (4) promote the correction and rehabilitation of persons who engage in such conduct." With the deletion of the last clause of the subsection, the drafters effectively concede that imprisonment will be a sanction used for rehabilitative purposes. This change makes S. 1722 a step backward from the promising reforms of S. 1437. *See* notes 1 and 2 *supra* and accompanying text.

52 Proposed 28 U.S.C. § 991(b).

53 Coffee, *supra* note 28, at 997 n.63.

54 S. REP. No. 605, *supra* note 26, at 1166.

55 *Id.*

another armed robber who commits the identical crime be given a long jail term because he possesses offender characteristics indicating that he is less amenable to rehabilitation. While such a result may be acceptable under a rehabilitation-oriented philosophy of corrections, it is absolutely anathema to a philosophy of "just punishment," the third purpose expressed in subsection 101(b), which points toward equality of treatment for perpetrators of similar crimes.[56]

By apparently giving each of the four subsection 101(b) purposes of punishment equal weight, the bill ensures that the Sentencing Commission will face the prospect of possibly irresolvable conflicts of ideology among its members.[57] Rather than risk having a Sentencing Commission paralyzed by dogmatic infighting, the sentencing legislation should at least indicate priorities among the enumerated punishment philosophies.

An example of such a ranking of priorities is provided by a recently enacted Oregon sentencing law, which declares that

> The [sentencing] ranges [for imprisonment] shall be designed to achieve the following objectives:
>
> (a) Punishment which is commensurate with the seriousness of the prisoner's criminal conduct; and
>
> (b) To the extent not inconsistent with paragraph (a) of this subsection:
>
> (A) The deterrence of criminal conduct; and
>
> (B) The protection of the public from further crimes by the defendant.[58]

The Oregon legislature has thus directed that the goal of providing just sentences based primarily on the seriousness of the offense — akin to the third purpose of sanctions in proposed 18 U.S.C. § 101(b) — has priority over deterrence and public protection as the primary purpose of punishment. Congress should make an analogous decision with regard to the purposes expressed in subsection 101(b).[59] If Congress fails to do so, then the Commission itself will face as one of its first tasks the resolution of problems caused by these conflicting sentencing goals.

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56 *See* 124 CONG. REC. S671 (daily ed. Jan. 27, 1978) (statement of Sen. Philip Hart).

57 Tonry, *supra* note 33, at 331-33.

58 1977 OR. LAWS ch. 372, § 2.

59 *See Hearings, supra* note 5, at 8978 (remarks of Andrew von Hirsch). *But see* S. REP. NO. 605, *supra* note 26, at 886, 892 (since differing sentencing purposes may apply to

C. Issues in the Implementation of Guidelines

In addition to the problems resulting from the omission from S. 1437 of a clearer statement of punishment philosophy, several very practical issues face any commission attempting to develop a set of sentencing guidelines. First, the Commission must make several decisions with regard to the structure[60] of the guidelines. Second, some difficult questions exist relative to the selection and manner of employment of the factors used to derive the offense and offender classifications applicable to each case.

With regard to the structure of the guidelines, it must be recognized that the components of the Parole Commission guidelines, which are expected to serve as a paradigm for the sentencing guidelines,[61] are relatively uncomplicated when considered against all the elements which must be included in the sentencing guidelines.[62] The parole guidelines contain only one variable — length of imprisonment — within the matrix. The sentencing guidelines to be promulgated by the Sentencing Commission, by contrast, must combine and balance three distinct forms of punishment, *viz.*, incarceration, probation, and monetary fines.[63] Additionally, the "offense characteristics" developed by the Parole Commission are simply a ranking of types of crimes according to their usual seriousness,[64] while the offense characteristics contemplated by S. 1437 in proposed 28 U.S.C. § 994(c)[65] are expected to reflect the nature and circumstances surrounding each individual offense.[66]

Accordingly, it is unlikely that sentencing guidelines promulgated under S. 1437 or a similar bill will take the form of a

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dissimilar cases, the power to invoke discriminately the subsection 101(b) purposes should be left to judges).

However, even if the subsection 101(b) purposes do apply to unlike cases in different ways, the Commission should not leave to judges the substantial discretion implicit in the ability to sentence according to differing purposes.

60 As used in this context, "structure" refers to the physical or graphic layout of the guideline matrices, grids, or charts.

61 *See* notes 41 to 43 and accompanying text *supra.*

62 The Senate Report notes rather matter-of-factly that the guidelines will be "difficult to develop," but it gives no indication of the enormous complexity of the task. S. REP. NO. 605, *supra* note 26, at 1166-67.

63 Proposed 28 U.S.C. § 994(a)(1).

64 *See* Figure II and text accompanying notes 41-43 *supra.*

65 *See* text accompanying notes 87-88 *infra.*

66 *See* Flaxman, *supra* note 15, at 274.

single matrix grid, such as the parole guidelines, encompassing all sentencing possibilities for every combination of offense and offender characteristics. Although the bill itself and the accompanying Senate Report provide no clarification of this question,[67] the sheer complexity of a single matrix approach makes it much more likely that a number of matrix grids will be developed.[68] One possible solution is to develop a separate matrix for each offense, or for classes of comparable offenses.

Additionally, although development of guidelines perhaps will be the Commission's most critical task, S. 1437 contains few explicit instructions as to how the guidelines are to be constructed. Proposed 28 U.S.C. § 994(b) provides that where a sentence specified by the guidelines includes a term of imprisonment, then for each category of offense including each category of defendant (*i.e.*, for each grid block in the matrix), "the maximum of the range established for such a term shall not exceed the minimum of that range by more than 12 months or 25 percent, whichever is greater."[69] However, aside from classifying all offenses and specifying the maximum periods of imprisonment for each class of offense, the bill says nothing definitive to narrow the *total* possible range of punishments which could be established by the Commission for any offense or offender.[70]

Instead, the Commission is given direction only by general statements of policy scattered throughout S. 1437[71] as well as by language in the Senate Report, which directs that initially the Commission shall

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67 *Cf.* S. REP. NO. 605, *supra* note 26, at 1165-66.

68 *But see* Coffee, *supra* note 28, at 1038-39 (query as to the number of guidelines per offense); *Hearings, supra* note 5, at 9137 (statement of John J. Cleary) (suggestion of regional guidelines).

69 Proposed 28 U.S.C. § 994(b)(1). As reported out of the Senate Judiciary Committee, section 994(b)(1) provided that the maximum not exceed the minimum "by more than 25 percent"; the bill arrived at its final form as a result of an amendment by Senator James Abourezk on the Senate floor. 124 CONG. REC. S202 (daily ed. Jan. 20, 1978).

S. 1722 returns proposed 28 U.S.C. § 994(b) approximately to its earlier state by mandating that "the maximum of the range established for such a term [of imprisonment] shall not exceed the maximum of that range by more than 25 percent." Here, the S. 1722 version probably should be heralded as an advance over S. 1437 because the range within the guidelines for each combination of offender and offense would be narrowed considerably. *See* text accompanying notes 70-79 *infra.*

70 Proposed 18 U.S.C. § 2301(b). *See* text accompanying notes 75-79 *infra.*

71 *See, e.g.*, proposed 18 U.S.C. §§ 101(b), 2001(a); proposed 28 U.S.C. §§ 991(b), 994(f)-(m).

> be guided by the average sentences imposed in such categories of cases prior to the creation of the Commission, and in cases involving sentences to terms of imprisonment, the length of such terms actually served, unless the Commission determines that such a length of term of imprisonment does not adequately reflect a basis for a sentencing range that is consistent with the purposes of sentencing described in subsection 101(b). . .[72]

However, sentencing guidelines based on pre-Commission "average" sentences will be fair and just only if the "average" sentences are just. Since one of the primary justifications for a sentencing commission is that it is needed to correct present sentencing irregularities,[73] it is probable that the Commission will find that current average sentences do not provide a useful basis for the sentencing guidelines.[74]

Figure III represents one hypothetical sentencing matrix for the crime of robbery[75] which the Commission could develop. Five classes each of offense and offender categories are possible in this matrix, ranging from number 1 (least severe) to number 5 (most severe). For simplicity of illustration, the matrix considers imprisonment as the only available form of punishment, but obviously the guidelines could be adjusted to include probation and monetary sanctions.[76] The sentence ranges in Figure III conform to the requirements of S. 1437; the maximum possible sentence is

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72 Proposed 28 U.S.C. § 994(1). This subsection was altered on the Senate floor pursuant to an amendment proposed by Senator Hart. The changes were as follows: (1) "take into consideration" was amended to read "shall be guided by," and (2) "unless the Commission . . . described in subsection 101(b) . . ." was added. 124 CONG. REC. S285-286, 288 (daily ed. Jan. 23, 1978).

73 *See* text accompanying notes 16-26 *supra*.

74 *See* Flaxman, *supra* note 15, at 268-71.

Research is being conducted at present to determine what factors currently affect the harshness of sentences. Forst, Rhodes, and Wellford, *Sentencing and Social Science: Research for the Formation of Federal Sentencing Guidelines*, 7 HOFSTRA L. REV. 355 (1979).

75 Proposed 18 U.S.C. § 1721. Under subsection 1721(b), robbery is a Class C felony carrying a maximum authorized imprisonment term of ten years. *Id.* at § 2301(b)(3).

76 Use of probation and/or early release would enable the Commission to have a large variance in sanctions for each offense, provided the Commission can justify the disparity of sanctions so as to meet the requirements of proposed 28 U.S.C. § 991(b)(1)(B), which provides:

> (b) The purposes of the United States Sentencing Commission are to:
> (1) establish sentencing policies and practices for the federal criminal justice system that . . .
> (B) provide certainty and fairness in meeting the purposes of sentencing,

75 months of imprisonment, which is well within the 120 month statutory maximum for the crime established by the bill.[77] Except for grid-block 5×5, each block has a twelve month range; block 5×5 has a fifteen month range in which the maximum, seventy-five months, is twenty-five percent greater than the minimum, sixty months. Thus, the sentencing range for each grid-block conforms to the requirements of proposed 28 U.S.C. § 994(b)(1).[78]

Figure III illustrates that the range of punishments provided in a sentencing guideline can be within the statutory specifications of S. 1437 and still be unacceptably broad. Even with only five categories each of offenses and offenders, the most severe possible sentence, 75 months, is more than six times as long as the least severe possible sentence, 12 months. Figure III considers only incarceration as a possible punishment; if probation and fines were included as sanctions, the disparity in punishment would be even greater. In addition, the amount of discretion given to a judge for sentencing offenders within a given grid-block is too great. Offenders placed within the same grid-block should merit quite similar punishments; but in grid-block 2×2, for example, some offenders may be sentenced to a fifty percent longer sentence than other block 2×2 offenders.

FIGURE III

Example 1: Possible Sentencing Guideline Matrix For Robbery
(Matrix values are range of imprisonment in months.)

	5	48-60	50-62	52-65	54-66	60-75
	4	38-50	40-52	42-54	48-60	54-66
Offense	3	28-40	30-42	36-48	42-54	52-65
Categories	2	18-30	24-36	30-42	40-52	50-62
	1	12-24	18-30	28-40	38-50	48-60
		1	2	3	4	5
				Offender Categories		

avoiding unwarranted sentence disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices.

77 Proposed 18 U.S.C. § 2310(b)(3).

78 *See* text accompanying note 69 *supra*.

Thus, Figure III illustrates two problems of which the Commission should be aware when promulgating guidelines. First, even with only a few categories of offenses and offenders, it is possible to establish a total sentencing range that may be excessively broad. Second, the range within any one grid-block of the matrix might be too large. Figure IV is an illustration of one possible correction of the difficulties demonstrated in Figure III. In Figure IV, the total sentencing range has been reduced by more than half to twenty-four months. The range within each grid-block is also reduced; the largest range is six months. Figure IV thus illustrates an equilibrium between the declared goals of fair and certain punishment and the desire for sentencing flexibility to meet the needs of individual cases.[79] The difficult task of the Sentencing Commission is to strike this balance for the total scale of offenses included in the federal criminal justice system.

FIGURE IV

Example 2: Possible Sentencing Guideline Matrix for Robbery
(Matrix values are range of imprisonment in months.)

	5	27-33	28-34	31-36	33-37	35-40
	4	23-28	26-31	27-33	30-35	33-37
Offense	3	21-26	22-27	25-30	27-33	31-36
Categories	2	18-22	20-25	22-27	26-31	28-34
	1	16-20	18-22	21-26	23-28	27-33
		1	2	3	4	5
				Offender Categories		

The second major issue which the Commission must face in devising the guidelines is the determination of what factors it will utilize in establishing categories of offenses and of offenders. The proposed legislation directs that in establishing categories of offenses the Commission must review:

(1) the grade of the offense;
(2) the circumstances under which the offense was committed which mitigate or aggravate the seriousness of the offense;
(3) the nature and degree of the harm caused by the offense, including whether it involved property, irreplaceable property, a person, a number of persons, or a breach of public trust;
(4) the community view of the gravity of the offense;
(5) the public concern generated by the offense;

79 Proposed 28 U.S.C. § 991(b)(1)(B). Figure IV also meets the statutory requirements of S. 1722. *See* note 69 *supra.*

(6) the deterrent effect a particular sentence may have on the commission of the offense by others; and
(7) the current incidence of the offense in the community and in the nation as a whole.[80]

Similarly, in establishing categories of offenders the Commission must evaluate the relevance of an offender's:

(1) age;
(2) education;
(3) vocational skills;
(4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;
(5) physical condition, including drug dependence;
(6) previous employment record;
(7) family ties and responsibilities;
(8) community ties;
(9) role in the offense;
(10) criminal history; and
(11) degree of dependence upon criminal activity for a livelihood.[81]

As indicated below,[82] serious questions exist regarding the propriety of using some of these factors in establishing sentencing guidelines; thus, it is critical to understand the manner in which the categorization factors are to be considered by the Commission. Just what does "consideration" of a factor entail? Must all of these factors, especially those relevant to the offender characterization, be accounted for in the guidelines? Are these factors appropriate for use in sentencing guidelines? May the Commission consider factors not listed? Should the Commission be given discretion as to which factors it should employ in implementation of guidelines?

One question, whether the Commission is constrained to consider only those factors listed in the bill, can quickly be answered in the negative. Proposed subsections 994(c) and 994(d) provide that the Commission, in establishing categories of offenses and offenders, "shall consider but not limit its consideration" to the enumerated factors. According to the Senate Report, "Some *examples* of factors the Commission should take into account in set-

80 Proposed 28 U.S.C. § 994(c).
81 Proposed 28 U.S.C. § 994(d).
82 *See* text accompanying notes 86-104 *infra.*

ting up these categories are set out in subsections (c) and (d)" (emphasis supplied).[83] The Report states categorically that, "These subsections do not list all the appropriate factors. . . ."[84] Clearly, the Commission in its promulgation of guidelines has authority to consider factors other than those mentioned in the bill.

On the other hand, the bill is not so clear as to whether utilization of the enumerated categorization factors is mandatory. The Senate Report explains:

> These subsections do not list all the appropriate factors, nor require the Commission to adopt categories based on the listed factors. Neither is the Commission required to consider these factors in determining the sentencing range to be provided. Its only obligation is to consider what effect, if any, these factors should have on a sentence when establishing categories of offenses and offenders and the recommended sentence for a particular offense committed by a particular category of offender. After consideration, the Commission may conclude that the factor is not pertinent to establishing such categories. Further, the Commission is free to consider other factors beyond those listed.[85]

In short, the Commission must consider each factor listed in proposed subsections 994(c) and 994(d), may consider any other factor it so desires, and then may reject for use in the guidelines any factor it has considered and found to be irrelevant or inappropriate. The amount of consideration each factor will receive is entirely up to the Commission;[86] consideration could range from summary rejection of a factor to extensive empirical analysis resulting in heavy reliance upon that factor in the guidelines.

The factors to be considered in establishing offense categories under proposed 28 U.S.C. § 994(c) focus on conventional concepts regarding the seriousness of an offense.[87] As such, these factors are relatively uncontroversial; in the Senate subcommittee hearings on the bill, they apparently did not generate much comment regarding the propriety of their use.[88] On the other hand, a

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83 S. REP. No. 605, *supra* note 26, at 1166.

84 *Id.* at 1166 n.11.

85 *Id.*

86 Congress, of course, retains the ultimate power to overrule the Commission and to reject or modify any guidelines promulgated by the Commission. Proposed 28 U.S.C. § 994(n).

87. *See* text at note 80 *supra.*

88 *See generally Hearings, supra* note 5, at 8575-9895. *But see id.* at 9083 (statement of

number of authorities in the corrections field have argued that the offense rather than the offender should be punished,[89] and accordingly they have questioned the propriety of explicit consideration of individual offender characteristics. To some experts, the use of such factors in determining criminal sanctions results in punishing individuals based on their race and socioeconomic status.[90] Indeed, a number of the factors listed in proposed 28 U.S.C. § 994(d) are closely correlated to status, and therefore their use would appear to institutionalize the sort of subjective judicial bias[91] that the guidelines are intended to prevent.

For example, five of the factors listed — defendant's education, vocational skills, previous employment record, family ties and responsibilities, and community ties — should not be considered by judges in sentencing offenders. Even if these factors have relevance in predicting recidivism for the purpose of determining eligibility for parole, it is patently unfair to give two offenders different initial sentences merely because of their different socioeconomic backgrounds.[92] This position was partially espoused by Senator Edward Kennedy during floor debate on S. 1437, when he said:

> I just want to indicate that these factors should relate only to probation. The purpose of my statement is to inform the Commission to that effect. . . .
>
> I would say, in my position as floor manager, that these factors should never be taken into consideration in sentencing one to a term of imprisonment. . . .
>
> Of course, the relevancy of these factors in the area of probation is obvious.
>
> I would hope that it would be clear in the record what our intentions are — not to have these five factors be considered in setting guidelines for prisons.[93]

Nancy Crisman) (criticizing some of the offense factors as unrelated to severity of the offense).

89 *See* VON HIRSCH, *supra* note 1; TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, *supra* note 1, at 32-33.

90 Coffee, *supra* note 28, at 1000-33.

91 Tiffany, Avichai & Peters, *A Statistical Analysis of Sentencing in Federal Courts: Defendant Convicted After Trial, 1967-1968,* 4 J. LEGAL STUD. 369, 379-88 (1975).

92 18 U.S.C. § 101(b) clearly states that sanctions are to be prescribed "for engaging in . . . conduct. . . ." In other words, the sentencing provisions of S. 1437 were drafted with the intention of punishing the offense, not the offender. *See* note 89 *supra* and accompanying text.

93 124 CONG. REC. S701 (daily ed. Jan. 27, 1978).

Similarly, use of age as an explicit classification factor should be done with caution. It has been determined that the younger a person is when committing his first offense, the more likely that he will become a repeat offender.[94] Some corrections officials therefore might argue that fulfilling the second subsection 101(b) purpose of protecting the public from offenders dictates that younger offenders be sentenced to longer terms than older offenders. However, by incarcerating the young offender, the government effectively deprives him of any opportunity to mend errant ways and thus makes achievement of rehabilitation, the fourth subsection 101(b) purpose, much more difficult. The poisoning effect of a long term in prison could in turn make reform of the young felon even more unlikely.[95] Additionally, the legislative history of S. 1437 demonstrates that sentencing younger offenders to relatively longer terms would be contrary to congressional intent. Prior to amendment on the Senate floor, proposed 28 U.S.C. § 994(i) directed the Commission to provide sanctions other than imprisonment for those under age twenty-six convicted of non-serious offenses,[96] thus indicating the drafters' intent to give *lighter* sentences to youthful offenders in some instances.

As a status classification similar to and highly correlated to age, physical condition is a factor which must also be employed carefully. While good physical condition might indicate sheer ability to commit crime *(e.g.,* can run fast in escape, or can easily overpower victims), it tells little about the propensity or desire to engage in criminal activity.[97] Indeed, some studies have found that undernourishment, disease, and poor health are found disproportionately among criminals.[98] The bottom line is that the connection between crime and physical condition is neither clear nor

94 E. SUTHERLAND & D. CRESSEY, CRIMINOLOGY 125 (1970).

95 *E.g., id.* at 354.

96 As reported to the Senate, proposed 28 U.S.C. § 994(i) read, "The Commission shall insure that the guidelines reflect the appropriateness of imposing a sentence other than imprisonment in cases in which the defendant is a first offender under twenty-six years of age who has not been convicted of a crime of violence or an otherwise serious offense." The section was amended because the Senate decided to encourage sentencing alternatives to imprisonment for *all* first-time offenders committing non-violent, non-serious crimes and because the line drawn at age twenty-six was completely arbitrary. 124 CONG. REC. S289 (daily ed. Jan. 23, 1978). The amendment is therefore not a reversal of the original intent to give light sentences to youthful offenders but rather an extension of that treatment.

97 SUTHERLAND & CRESSEY, *supra* note 94, at 121, 125-26.

98 *Id.* at 121.

necessary. Consequently, if physical condition is considered at all it should be only with the humanitarian purpose of not placing offenders in a prison environment which they are too frail to endure.

Role in the offense should not even be considered a factor for categorization of offenders. Role in the offense deals with the offense itself, not with the characteristics of the offender. As such, this factor should be accounted for in the categorization of offenses, if at all. Otherwise, there will be a double counting, since the degree of involvement will most certainly be considered in assessing the conduct on the offense scale. Furthermore, if the substantive criminal code provides for separate offenses and sentences for accomplices and for those aiding and abetting, then there is no need for any consideration of the role in the offense as a separate factor.

A fourth factor, mental and emotional condition, must be divided into two classes of states of the psyche. To the extent that the offender's mental and emotional condition is associated with his state of mind in commission of the offense, that condition relates to his culpability. Therefore, mental and emotional condition should be an offense, not an offender, categorization factor. If the mental and emotional condition reflects instability which is insufficient to preclude a finding of insanity, that condition should not be used by the judge to mitigate the sentence imposed. The state of empirical knowledge is inadequate to determine whether severity of sentence can be correlated to mental stability in a manner rationally serving the subsection 101(b) purposes of sanctions, particularly the assurance of a just punishment.[99] In the interest of fairness, mental instability accordingly should not be considered a factor until empirical research confirms its beneficial use as a factor in the sentencing process. Moreover, the necessarily subjective, non-professional assessment — even with expert assistance — by the judge of the offender's mental condition does not further the goal of an objective and unbiased sentencing system.

Implicit in the use of the remaining two offender factors, criminal history and degree of dependence upon criminal activity for a livelihood, is an economic discrimination against those seemingly forced to turn to crime.[100] Also, the latter factor borders on

99 *See id.* at 151-70.

100 VON HIRSCH, *supra* note 1, at 148. *See* Alschuler, *Sentencing Reform and Prosecu-*

status discrimination, although dependence on criminal activity is arguably a status grounded in conduct which the public may legitimately wish to discourage.

Narrowing consideration of past criminal activity to prior convictions or prior imprisonment might result in a more objective evaluation of these factors and would minimize the status implications inherent in use of the factors. However, the price paid for such a limitation on the evaluation of prior criminal conduct is the loss of much relevant information. The economics and procedural pitfalls of the criminal justice system today force the winnowing of many possible convictions and incarcerations, but in the process much valuable information remains available in the form of arrests, dropped charges, and the like.[101] The Senate Report accordingly indicates that "criminal history" in subsection 994(d) includes "prior criminal activity not resulting in convictions"[102] but does not indicate where the line should be drawn.

There is evidence that the Senate Judiciary Committee intended past criminal activity to be the dominant offender categorization factor. In explicating proposed 28 U.S.C. § 991(b)(1)(B), the Senate Report states that

> the policies and practices [of the Commission] are required to provide certainty and fairness in meeting the purposes of sentencing. In doing so, the policies and practices are required to avoid unwarranted disparities among the sentences for defendants with similar records who have been convicted of similar conduct. *This requirement establishes two factors — the prior records of offenders and the criminal conduct for which they are to be sentenced — as the principal determinants* of whether two offenders' cases are so similar that a difference between their sentences should be considered a disparity and therefore avoided unless it is warranted by other factors (emphasis supplied).[103]

In other words, the offender's criminal history is the foremost offender categorization factor, notwithstanding the lack of any language in the bill in corroboration of the Senate Report's position. However, the Report continues,

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torial Power: A Critique of Recent Proposals for "Fixed" and Presumptive Sentencing, 126 U. PA. L. REV. 550, 559 (1978).

101 *See id.* at 559 n.29, 563-66.

102 S. REP. NO. 605, *supra* note 26, at 1166 n.11.

103 *Id.* at 1161.

> The key word in discussing unwarranted sentence disparities is "unwarranted." The Committee does not mean to suggest that sentencing policies and practices should eliminate justifiable differences between the sentences of persons convicted of similar offenses who have similar records. The Commission is, in fact, required to consider a number of factors in promulgating sentencing guidelines to determine what impact on the guidelines, if any, would be warranted by differences among defendants in those factors. [footnote omitted][104]

The balance of the Report's explanation thus vitiates the efficacy of the first part as a mandate to the Commission to place primary — let alone exclusive — emphasis on the offender's criminal history in categorizing offenders.

Conclusion

There is no doubt that the present federal sentencing system is in dire need of revision. Central to reform efforts must be the drastic reduction of judicial discretion. The sentencing sections of S. 1437 are a noble attempt to correct the evil of discretion; unfortunately, the provisions of the bill fall somewhat short of its lofty — yet attainable — goals.

Nevertheless, the sentencing provisions of S. 1437 are not far from the mark. A few alterations could strengthen the Sentencing Commission's mandate and ensure that the aspirations expressed in the bill of providing "certainty and fairness in meeting the purposes of sentencing"[105] are more than mere rhetoric. First, Congress should indicate the relative priorities of the punishment philosophies expressed in proposed 18 U.S.C. § 101(b). The failure to state relative priorities may make easier the passage of a sentencing reform bill by avoiding antagonizing proponents of a particular philosophy,[106] but the bill's silence on this issue risks entangling the Commission in conflicts of ideology. Here, also, the notion of accountability is relevant; Congress should make the policy decisions regarding punishment theory which will serve as the foundation for the federal criminal justice system.[107]

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104 *Id.*
105 Proposed 28 U.S.C. § 991(b)(1)(B).
106 *See* Tonry, *supra* note 33, at 316-17.
107 *See* Flaxman, *supra* note 15, at 279.

A second major failing of the bill is the inclusion of a number of inappropriate factors in the list which the Commission must consider under proposed 28 U.S.C. §§ 994(c) and (d). The multiplicity of factors requires that an inordinate amount of information be gathered for a sentencing hearing; creation of a voluminous file on each offender could distract the judge from consideration of crucial factors and thus neglects equality of treatment for the sake of excessive individualization.[108] More importantly, many of the proposed subsection 994(d) offender categorization factors are highly status correlated; use of socioeconomic factors in sentencing decisions seems to be of marginal additional benefit[109] while at the same time being of questionable fairness. The Commission should treat like cases alike by directing judges to concentrate on a few crucial factors and to avoid becoming submerged in a quagmire of irrelevant and prejudicial offender data.[110] The ability of judges to sentence outside the guidelines in extraordinary cases[111] should provide sufficient flexibility to allow for the truly exceptional offender whose situation merits special treatment.

It is difficult for Congress to accommodate all interests and viewpoints in the enactment of any law, especially one relating to an issue as emotional as crime. Consequently, passage of a major criminal reform bill is undeniably a difficult task. Even with its flaws, however, S. 1437 is an important effort toward rationalizing federal sentencing practices. The bill is one for which the Senate is to be applauded; at the very least, it heralds the imminent arrival of much needed reform.

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108 Coffee, *supra* note 28, at 987.

109 *Id.* at 1011-33.

110 *Id.* at 987. *But see* Alschuler, *supra* note 100, at 560-61 (danger of specifying factors in advance).

In anticipation of the eventual creation of a federal sentencing commission, the Department of Justice has contracted with the Institution of Law and Social Research to conduct research on factors affecting the harshness of sentencing. Forst, Rhodes, and Wellford, *supra* note 74, at 367-69. In particular, the study will focus on determining what factors are most predictive of recidivism. *Id.* at 368-69.

111 Proposed 18 U.S.C. § 2003.

NOTE

TEAMSTERS, TRUCKERS, AND THE ICC: A POLITICAL AND ECONOMIC ANALYSIS OF MOTOR CARRIER DEREGULATION

JAMES F. HAYDEN*

In the wake of airline deregulation, Congress has recently seen fit to propose a variety of measures to deregulate the trucking industry. Labor and management, however, have objected to such moves, making it difficult to form a strong constituency behind such legislative endeavors.

In this Note, Mr. Hayden argues that trucking deregulation is nonetheless desirable. To obtain these benefits, he develops a framework to assist in analyzing various approaches to carrier decontrol. Conceding that rate bureaus dampen competition, Mr. Hayden focuses instead on rate classification and entry restrictions as the major reason behind enforced rate uniformity. While commending various internal measures taken by the ICC, Mr. Hayden concludes that changes in the Interstate Commerce Act are necessary to obtain the full benefits of liberalized entry and rate standards.

Recent deregulation of the airline industry has fueled a similar movement towards decontrol in the trucking industry. In the last few years, a substantial body of literature critical of motor carrier regulation has developed,[1] much as it did against the Civil Aeronautics Board's control of air transportation. In contrast with airline decontrol, however, transforming academic criticism of trucking into legislative action has proven difficult. While the airline industry took a divided stance toward dismantling the CAB, both labor and management in the trucking industry are strongly opposed to deregulation.

Forming a constituency to press for trucking deregulation has been particularly difficult since benefits of decontrol would be diffuse though substantial, and proponents lack any dramatic examples of benefits that could galvanize groups into political action. Instead of the dramatic decrease in ticket prices and the

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1 *See, e.g.*, REGULATION OF ENTRY AND PRICING IN TRUCK TRANSPORTATION (MacAvoy & Snow eds. 1977) [hereinafter cited as MacAvoy & Snow]; J. MEYER, M. PECK, J. STENASON, & C. ZWICK, THE ECONOMICS OF COMPETITION IN THE TRANSPORTATION INDUSTRIES (1959) [hereinafter cited as MEYER, ET AL.]; T.G. MOORE, FREIGHT TRANSPORTATION REGULATION (1972).

disappearance of excess capacity that followed airline deregulation, trucking decontrol would cause small decreases in the transportation cost component of many products.[2] Moreover, transitional problems could be significant, unless the deregulation process is carefully crafted.[3]

The complexity of the economic arguments pertaining to Interstate Commerce Commission (ICC) controls and divergent assessments of the political strength of deregulation's opponents have led to proposals to deregulate that vary considerably in their timing and comprehensiveness.

This Note will attempt to develop a framework for evaluating the various approaches to motor carrier decontrol. First, it will examine the structure of ICC control and explore the rationale behind regulation. Second, it will describe the economic inefficiencies and increased costs that have resulted and which provide the impetus for reform. And finally, it will compare the deregulation plans that have been put forward in terms of their potential effectiveness and political acceptability.

I. The Structure of Trucking Regulation

A. *The Scope of Regulation*

Congress extended ICC jurisdiction to the trucking industry with the passage of the Motor Carrier Act of 1935 (1935 Act).[4] The 1935 Act with later amendments established a system of regulation that only partially encompassed the trucking industry, leaving some major types of trucking and some large geographical areas outside of the ICC's jurisdiction. Private carriers, defined as companies which haul their own goods incidental to their primary business, are exempt from ICC regulation.[5] Also exempt are haulers of agricultural commodities[6] and all freight operations within "commercial zones," made up of cities and a set area

2 Samuelson, *The Truckers and the Feds — A Tangled Relationship,* 11 Nat'l J. 4, 4-5 (1979) [hereinafter cited as Samuelson].

3 *See* text accompanying notes 92 to 101 *infra.*

4 Motor Carrier Act of 1935, ch. 498 § 206a, 49 Stat. 543 (codified with amendments in scattered sections of 49 U.S.C.A. §§ 1010-11916 (1979 Supp.).

5 49 U.S.C.A. § 10524 (1979 Supp.).

6 49 U.S.C.A. § 10526(a) (4-6) (1979 Supp.).

surrounding them.[7] As a result of these exceptions, approximately 60 percent of inter-city freight is handled by unregulated trucking operations.[8]

B. *Powers*

The 1935 Act and subsequent legislation gave the ICC control over the rates, entry, mergers and expansions of trucking firms, as well as the power to approve agreements among motor carriers that would otherwise be subject to antitrust laws.[9] In the 1940's, a clash developed between the ICC and the Antitrust Division of the Justice Department over the legality of rate-bureau activities in trucking and railroading. The Congress sided with the ICC and passed the Reed-Bulwinkle Act, granting collective action an anti-trust exemption in rail and motor carriage.[10]

1. Entry & Merger

For all common carriers, certificates of convenience and necessity have been granted by the ICC, either through de novo application or as "grandfather rights" given to all firms "in bona fide operation" prior to June 1935.[11] These certificates specify the routes a carrier may serve and the commodities that can be carried. Mergers of trucking companies are exempt from antitrust laws, but must be approved by the ICC.[12] ICC approval is also required for sale, expansion, or transfer of operating rights contained in certificates of convenience and necessity.[13]

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7 49 U.S.C.A. § 10526(b)(1) (1979 Supp.).

8 Snow, *The Problem of Motor Carrier Regulation and the Ford Administration's Proposal for Reform,* in MacAvoy & Snow, *supra* note 1, at 6.

9 49 U.S.C.A. § 10708 (1979 Supp.) (rate-setting powers); 49 U.S.C.A. §§ 10921-10923 (1979 Supp.) (entry and expansion control); 49 U.S.C.A. § 10706(b) (1979 Supp.) (anti-trust immunity).

10 The Reed-Bulwinkle Act, ch. 491, 62 Stat. 472 (1948) (codified as amended at 49 U.S.C.A. § 10706(b)-(h) (1979 Supp.)). The history of the confrontation between the two agencies is set forth in the statute's legislative history. H.R. REP. NO. 1100, 80th Cong., 1st Sess., *reprinted in* [1948] U.S. CODE CONG. SERV. 1844, 1846-47. For a description of the origins of the industry's participation in the regulation of trucking during the era of industrial self-regulation under the National Industrial Recovery Act, *see* W. K. JONES, REGULATED INDUSTRIES 484-99 (2d ed. 1967) [hereinafter cited as JONES.]

11 49 U.S.C.A. § 10921-10933 (1979 Supp.). A description of the process of granting grandfather rights is provided in JONES, *supra* note 10, at 505-07.

12 49 U.S.C.A. § 11343 (1979 Supp.).

13 49 U.S.C.A. §§ 10926, 10922-3 (1979 Supp.).

A restrictive policy toward entry requests and a liberal policy regarding merger applications by the ICC have reduced the number of regulated motor carriers from 27,000 in 1940[14] to 16,874 in 1977.[15]

2. Rates

The ICC has considerable power over rate setting in trucking. The rates of motor carriers must be published and adhered to, and may be changed only upon 30 days notice.[16] Furthermore, all rate changes must be filed with, and approved by, the ICC[17] and the ICC can establish minimum, maximum, or actual rates if it finds the proposed rates to be unreasonable or discriminatory.[18]

Rates become effective 30 days after they are filed with the ICC, unless the Commission votes to investigate and suspend.[19] A rate may be suspended for up to seven months pending an investigation through a public hearing[20] and the proponent of the rate change bears the burden of proving it reasonable, non-discriminatory, and compensatory.[21]

Rates are rarely reviewed at the instigation of the ICC, however. Instead, the process is typically activated by protests of an "interested party," usually a shipper or a competing carrier.[22] Although the ICC has broad powers over trucking rates, its role has usually been one of passive oversight. Not only is the investigation of rates usually triggered by private parties, but the coordination and publication of rate changes, and the development of a rate classification system, have been left to private collective action.[23]

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14 J. JOHNSON, TRUCKING MERGERS 55 (1973).

15 92 ICC ANN. REP. 132 (1978). The number of regulated carriers has risen from a historical low of 15,100 in 1970, 84 ICC ANN. REP. 127 (1970). This recent upturn results from changes in ICC entry policies noted at text accompanying notes 120 to 129 *infra.*

16 49 U.S.C.A. § 10762 (1979 Supp.).

17 *Id.*

18 49 U.S.C.A. § 10704 (1979 Supp.).

19 49 U.S.C.A. § 10708 (1979 Supp.).

20 49 U.S.C.A. § 10708(b) (1979 Supp.).

21 49 U.S.C.A. § 10708(c) (1979 Supp.) (requires proponent of rate change to prove it reasonable); 49 U.S.C.A. § 10741 (1979 Supp.) (prohibits discrimination in rate setting).

22 49 U.S.C.A. § 10708(a)(1) (1979 Supp.). Only 5 percent of the more than 360,000 rate schedules filed annually with the Commission are protested. U.S. Interstate Commerce Commission, A Look at the ICC 13 (1973) (ICC pamphlet).

23 *See generally* C. TAFF, COMMERCIAL MOTOR TRANSPORTATION (5th ed. 1975).

This collective action takes place in regional rate bureaus to which virtually all less-than-truckload (LTL) freight carriers belong.[24] Rate change proposals can be filed with the bureaus by shippers, consignees or common carriers, among others, and are voted on by Standing Rate Committees made up of bureau employees.[25] If an appeal is taken from that decision, the rate proposal is voted on by the General Committee, composed of carrier representatives.[26]

If a rate change is approved by the bureau and the ICC, it becomes the only lawful rate member-carriers can charge, subject to one important exception. The Reed-Bulwinkle Act's antitrust immunity for combinations among trucking companies is available only so long as the right of carriers to take independent action is "free and unrestrained."[27] As a consequence, member-carriers can "flag-out," or not join a collectively determined rate change. If a carrier wishes to take independent rate action, notice is given to other carriers, who may decide to be included in or excluded from the independently proposed rate. The independently set rate must, of course, still pass ICC scrutiny unless the carrier is merely remaining at the old rate level while other carriers move to a new rate.

3. Rate Classification

After passage of the 1935 Act, the motor carrier rate bureaus adopted the simple expedient of following the rail freight classification system in order to meet the necessity of filing rates covering the transportation of thousands of commodities between thousands of geographical locations.[28] The National Motor Freight Classification System, administered by the National Classification Board, divides commodities into twenty-three different categories by their cost and demand characteristics.[29] These categories, or

24 *Id.* at 374.
25 *Id.* at 378.
26 *Id.*
27 49 U.S.C.A. § 10706(c)(2)(c) (1979 Supp.).
28 TAFF, *supra* note 23, at 331.
29 The discussion in the text that follows is largely derived from TAFF, *supra* note 23, at 330-349. The New England carriers have developed their own freight classification system, based primarily on density. *Id.* at 338-40. A listing of the fifteen characteristics of freight that are generally used for classification purposes is set out in New York, New Haven & Hartford R.R. v. United States, 221 F. Supp. 370, 373 (D. Conn. 1963), *aff'd*, 379 U.S. 343 (1964).

classes, are then assigned rates which are percentages of the Class I rates.

Nearly all of the freight handled by common carriers moves under one of these class rates.[30] Though changes in specific rates (through moving a commodity from one class rate to another, or establishing a rate only for that commodity) are the most numerous, general rate level changes which maintain the relationship among class rates have the greatest impact on the revenues earned by motor carriers.[31] The 1978 general rate increases added approximately $731 million to the revenues of the motor carriers represented by the eleven largest regional rate bureaus.[32]

II. The Rationale for Trucking Regulation

A. *The Justification for the 1935 Act*

Defenders of continued ICC oversight of the trucking industry base much of their argument on the ground that decontrol would mean a return to the chaotic conditions of the 1930's.[33] A close look at the initial reasons for trucking regulation, however, reveals little to support arguments for maintaining controls. The Motor Carrier Act of 1935 aimed to end "excessive competition," a catch-all phrase used to describe the variety of economic conditions facing the Depression-era transportation industries.[34]

The emergence of the trucking industry in the 1920's had upset a carefully calibrated regulatory relationship between railroads and shippers that developed after passage of the Interstate Commerce

30 Staff of Senate Comm. on Commerce, 95th Cong., 2d Sess., The Impact on Small Communities of Motor Carriage Regulatory Revision 28 (Comm. Print 1978). About 70 percent of all regulated freight moves under class rates, but this figure includes TL, as well as LTL freight. *Id.* at 31. The ICC has attempted to minimize the amount of LTL traffic that does not move under class rates. Motor Carriers Rates, New York City Area — New England, 62 M.C.C. 427, 10 Fed. Carr. Cas. ¶ 33,006 (1954). *See also* text accompanying note 112 *infra*.

31 1979 Fed. Carr. Rep. (CCH) (Index-Lists-Guides) ¶ 184.17 (description of the different methods of altering rates).

32 *Oversight of Freight Rate Competition in the Motor Carrier Industry: Hearings Before the Subcomm. on Anti-trust and Monopoly of the Senate Judiciary Comm.*, 95th Cong., 1st & 2d Sess. 854 (1978) (statement of A. Daniel O'Neal, Chairman of the ICC) [hereinafter cited as *Kennedy Hearings*].

33 *See id.* at 1513 (prepared statement of the American Trucking Associations, Inc.).

34 J. Eastman, Report of the Federal Coordinator of Transportation, H.R. Rep. No. 89, 74th Cong., 1st Sess. 113-28 (1934).

Act in 1887.[35] While it was not clear whether trucking regulation was to supplant competition in the transportation industries or merely ease the transitional shock caused by the rapid growth of motor carriage, the Act seemed to have three major aims, all loosely subsumed under the goal of ending excessive competition: protection of the railroads, stabilization of rates charged to shippers and protection of larger, established trucking firms.[36]

The railroads were most hurt, since trucks had diverted their most profitable higher revenue traffic, forcing significant rail rate reductions.[37] Not surprisingly, the railroads acted as the strongest proponents of trucking regulation, pushing for both state and federal controls in the 1920's.[38]

Regulation of trucking proved ineffective in halting the shift of traffic away from railroads, however. In 1976, trucks generated three times the revenues railroads produced.[39] As there is now little competition between the railroads and motor carriers in the LTL sector, ICC control of trucking is no longer seen by railroads as a cure for their financial problems. Instead, reduced ICC rail regulation, especially in ratesetting, is pursued as a better solution.[40]

It was not until the Depression that other groups, most notably shippers and larger trucking concerns, saw regulation of trucking to be in their interest.[41] Many shippers opposed regulation on the grounds that it was too comprehensive although some supported motor carrier controls as a means of equalizing a very important cost variable among competitors.[42] Other shippers utilizing regulated rail carriers worried about the advantage available to their

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35 Ch. 104, 24 Stat. 379 (1887) (codified in scattered sections of 49 U.S.C.A. (1979 Supp.)).

36 *See* JONES, *supra* note 10, at 487-96.

37 *Id.* at 487-90.

38 D. GARNEL, THE RISE OF TEAMSTER POWER IN THE WEST 19-20 (1972).

39 U.S. DEP'T OF TRANSPORTATION, A PROSPECTUS FOR CHANGE IN THE FREIGHT RAILROAD INDUSTRY 12 (1978). In 1976, inter-city trucking generated $56 billion, while railroads accounted for $18.6 billion. *Id.*

40 Some legislative moves have already been taken towards rail decontrol. *See* The Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 30 (1976). Railroad support of further deregulation was noted in *Plan to Cut U.S. Regulation of Railroads Slated to be Announced by Carter Today,* Wall St. J., March 23, 1979, at 3, col. 2.

41 *See* JONES, *supra* note 10, at 490-96.

42 *Id.* at 494-96.

competitors who could utilize cheaper trucking services.[43] By granting the ICC rate-setting power, the 1935 Act effectively established the rate stability that some shippers desired, but at a steep cost. As a consequence, many shippers' organizations are now pushing for trucking deregulation.[44]

Larger motor carriers began to favor regulation when the growing pool of unemployed labor and the over-supply of used trucks led to a substantial influx of owner-operators willing to haul freight at very low rates. The influx of these operators bid away the traffic of larger motor carriers operating under Teamster negotiated contracts that put them at a real labor cost disadvantage.[45]

The Motor Carrier Act proved most successful in protecting established carriers from competition that would have resulted from the continued entry of new firms. Since the Act went into effect, profits of trucking concerns have been high and revenues have climbed steadily.[46] In light of these events, it is thus far from clear that regulation, if ever necessary, is required today for the financial well-being of the trucking industry. Though the American Trucking Association, Inc.[47] claims that chaotic conditions like those of the 1930's will result if deregulation occurs, economists maintain that the structure of the trucking industry makes it especially unlikely to experience destructive competition.[48]

Destructive competition generally occurs when an industry has capacity in excess of demand, with rigidities that retard the removal of capital or labor.[49] This can happen in either of two situations. First, in industries with high fixed costs and stagnating

43 *Id.*

44 *See Kennedy Hearings, supra* note 32, at 1145-58, 1166-68, 1183-93.

45 *See* JONES, *supra* note 10, at 492-93. In the 1930's, in contrast to its present-day stance, the American Trucking Associations, Inc., was only reluctantly in favor of regulation. When passage of the 1935 Act became inevitable, the ATA acquiesced and worked to ameliorate the harshness of some provisions toward the industry. *Id.*; GARNEL, *supra* note 38, at 29.

46 92 ICC ANN. REP. 45 (1978); *see also* Ex Parte No. MC-121, Policy statement on Motor Carrier Regulation, 43 Fed. Reg. 60296, 60298 (1979).

47 *See Kennedy Hearings, supra* note 32, at 1513.

48 2 A. KAHN, ECONOMICS OF REGULATION 180-85 (1971) [hereinafter cited as KAHN].

49 F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 199 (1970).

demand, producers often find it preferable to continue operation and cover at least their relatively small variable costs rather than shut down and have their investments wiped out completely.[50] Producers therefore cut prices hoping to fill productive capacity by wresting sales away from competitors. Competitors usually respond, prices spiral downward and losses mount. Because fixed trucking costs are so low, however — only 10 percent of total cost[51] — this first type of destructive competition is particularly unlikely to occur in trucking. Costs are only incurred when trucking services are actually provided and these costs, varying with output, set a floor below which prices cannot be cut without causing a greater loss with each additional sale.

The second type of destructive competition occurs when the industry's labor force is unwilling or unable to acquire other employment so that the burden of price competition is transmitted directly to wage rates.[52] The rate wars in trucking in the 1930's resulted from such labor immobility. In the Depression, a large pool of unemployed labor, willing to work for almost any level of compensation, drove trucking labor costs, and therefore the variable costs, lower and lower.[53]

However, trucking no longer seems susceptible to "chaotic conditions" stemming from labor immobility. Although two-thirds of variable cost in trucking is made up of labor cost,[54] a decrease in unemployment and the organization of truck drivers by the International Brotherhood of Teamsters have insured that price cuts cannot easily be translated into wage cuts. That regulation is not essential to ending chaotic conditions is demonstrated by the stability of the large and unregulated agricultural sector of the industry.[55] In short, it is difficult to make a case for trucking regulation by resorting to the original rationale for passage of the 1935 Act.

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50 *Id.*

51 U.S. INTERSTATE COMMERCE COMMISSION, STATEMENT NO. I-54, EXPLANATIONS OF THE DEVELOPMENT OF MOTOR CARRIER COSTS WITH STATEMENT AS TO THEIR MEANING AND SIGNIFICANCE 71-99 (1954).

52 KAHN, *supra* note 48, at 180.

53 *Id.* at 181-82.

54 ICC, STATEMENT No. I-54, *supra* note 51.

55 *See, e.g.*, Miklius & Casavant, *Stability of Motor Carriers Under the Agricultural Exemption*, in MacAvoy and Snow, *supra* note 1, at 271-301.

B. *The Justifications for Continued Regulation*

In addition to the original justifications, supporters of continued motor carrier regulation now put forward a number of other rationales, roughly falling into four categories: concentration, service, chaos and safety. First, proponents of continued controls assert that ICC oversight is needed to check monopoly practices such as price discrimination, high levels of concentration, and monopoly pricing. But neither the history of motor common carriage, nor the experiences of both foreign countries and the American unregulated sector suggests the existence of monopoly power, held in check only by the ICC.[56] Such power is possible only when the barriers to entry in an industry are so high as to prevent new competition. But low start-up costs in trucking would foreclose such anti-competitive industry behavior.[57]

Second, defenders of motor carrier controls warn that deregulation will end service to small communities and small shippers which are now the beneficiaries of rate cross-subsidization built into the system.[58] To the extent that carriers would curtail service to these shippers, it would result from an end to the cross-subsidy for otherwise unprofitable services, not as a direct result of deregulation. And if service declines resulted, the subsidy could be continued on a more explicit basis by means of direct payments. This was indeed the solution employed in airline deregulation.[59]

The third argument put forward predicts chaotic market conditions will result from deregulation. If carriers are no longer required to file rates, shippers will be unable to compare intelligently what truckers charge, leading to rampant price discrimination.[60] Alternatively, large shippers could use the ignorance of small car-

56 *See generally* MacAvoy & Snow, *supra* note 1; T.G. MOORE, TRUCKING REGULATION: LESSONS FROM EUROPE (1975).

57 MEYER ET AL., *supra* note 1, at 86.

58 Bureau of Economics, U.S. Interstate Commerce Commission, *A Cost and Benefit Evaluation of Surface Transport Regulation,* in MacAvoy & Snow, *supra* note 1, at 47, 79-84; Davis & Sherwood, *Transportation Regulation, Another Dimension,* 42 ICC PRAC. J. 164 (1975).

59 The Airline Deregulation Act of 1978, Pub. L. No. 95-504, § 33, 92 Stat. 1705, 1732-40 (1978). Indeed, it has been argued the ICC's attempted cross-subsidization is ineffective, given the evidence that carriers are able to avoid handling low profit shipments despite the common carrier obligation imposed by law. *Kennedy Hearings, supra* note 32, at 881, 885 (prepared statement of A. Daniel O'Neal, ICC Chairman). Consequently, deregulation might actually increase service to small shippers and small communities.

60 *Deregulated Air Freight Rates Soar,* Transport Topics, March 5, 1979, at 7, col. 1.

riers to bluff rates downward to unprofitable levels. But again, the experience of unregulated trucking undermines the force of this objection. Rate publication services have sprung up in exempt sectors, quickly and efficiently disseminating rate information among shippers and carriers, and preventing the emergence of disorderly markets.[61]

Finally, and most credibly, opponents of decontrol argue that stiffer competition among carriers will lead to more frequent violation of safety rules, thus causing an increase in accident rates. Unregulated carriers do violate safety rules more frequently than do their regulated counterparts, but evidence on accident rates appears inconclusive.[62] At any rate, economic regulation presents only an indirect means of controlling highway safety. Increased enforcement of safety rules offers a more rational method of reducing accidents.

III. The Economic Costs of Trucking Regulation

A. *Profit Inflation*

Critics of motor carrier regulation also argue that the entry and rate policies of the ICC have caused inflated profits, inefficiencies and excessive wage payments.[63] Estimates of the added annual cost to consumers run from $2 to $5 billion.[64]

The best estimates of this inflation in trucking profits resulting from ICC protection are based on the values attached to operating

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61 *Kennedy Hearings, supra* note 32, at 39-41 (testimony of Joseph Herzig, President, General Rate Service).

62 Samuelson, *supra* note 2, at 7-8.

63 *See* text accompanying note 1 *supra.*

64 *Trucking — A Dramatic Example,* 11 Nat'l J. 1259, 1259 (1979) (Carter Administration estimating cost of regulation at $5 billion annually); press release from the Office of Senator Edward M. Kennedy (Jan. 22, 1979, 1 p.m. version) (Senator Kennedy estimating cost of regulation at $2 billion annually). Most concern over the cartelizing effect of ICC regulation has focused on the LTL sector of the industry, for several reasons. First, this sector is the least competitive with other modes of transport, such as railroads. Consolidated Freightways, Inc., 1977 Fact Book and Ten Year Financial Review 4, 12, *in Kennedy Hearings, supra* note 32, at 341, 349. Second, the means for joint price setting exists in the LTL sector in the form of rate bureaus, which play a less important role in the truck load sector. Snow, *The Problem of Motor Carrier Regulation and the Ford Administration's Proposal for Reform,* in MacAvoy & Snow, *supra* note 1, at 5. And finally, rates have risen faster in the LTL rather than the truckload sector in recent years. *Kennedy Hearings, supra* note 32, at 1025-1029 (exchange of letters between Senator Kennedy and Frank E. Fitzsimmons, President of the International Brotherhood of Teamsters).

rights, for which there exists an active market. These certificates command prices equal to approximately 15 to 20 percent of the annual revenues generated by their authorized traffic.[65] The total value of such rights are estimated at between $3 and $4 billion in an industry that produced revenues of $26 billion in 1978.[66] Economists maintain that certificate value represents the present value of the future stream of monopoly profits available to the certificate holders.[67]

Class I common carriers of general freight, a category made up of the larger carriers who handle most of the LTL traffic, had a pre-tax rate of return to equity averaging 19.4 percent from 1964 to 1973.[68] The average for that same period for all manufacturing firms was 15.8 percent.[69] Furthermore, in recent years, the difference has increased. In 1976, carriers enjoyed a 23.7 percent rate of return, while the rate for all manufacturing was closer to 14 percent.[70]

B. *Inefficiencies*

Accusations of ICC-induced inefficiencies, usually in the form of excess and empty mileage, focus on restrictions placed on operating rights. Carriers are limited in the number of points they can serve, and freight bound for a point beyond a carrier's authority has to be interlined — transferred to another carrier

65 American Trucking Associations, Inc., Accounting for Motor Carrier Operating Rights (brief and petition before the Financial Accounting Standards Board, 1974), *cited in* Moore, *The Beneficiaries of Trucking Regulation*, 21 J. L. & ECON. 327, 340-42 (1978).

66 Mosher, *Trucking Deregulation — An Idea Whose Time Has Almost Gone?*, 11 NAT'L J. 817, 818 (1979) [hereinafter cited as Mosher].

67 Moore, *supra* note 65. Snow & Sobotka, *Certificate Values*, in MacAvoy & Snow, *supra* note 1, at 153-56.

68 *See* ECONOMIC REPORT OF THE PRESIDENT 261 (1976); U.S. INTERSTATE COMMERCE COMMISSION, TRANSPORT STATISTICS IN THE UNITED STATES, PART 7 (annual editions 1964-73). The trucking profit figures are calculated only for Class I common carriers of general freight engaged in inter-city services. Until 1974, this included carriers earning more than $1 million a year. These carriers generated the vast bulk of revenues among inter-city general freight common carriers. *See Kennedy Hearings, supra* note 32, at 79 (statement of A. Daniel O'Neal, ICC Chairman). For the very largest trucking companies, the returns to equity exceed the average by even more. *Id.* at 754. Trucking profits are somewhat overstated, however, since the ICC by statute must exclude intangibles when computing equity. 49 U.S.C.A. § 10701(d) (1979 Supp.). The largest portion of intangibles is made up of the value of operating rights. Samuelson, *supra* note 2, at 7.

69 *Id.*

70 *Id.; see also* Ex Parte No. MC-121, Policy statement on Motor Carrier Regulation, 43 Fed. Reg. 60296, 60298 (1979).

having authority to serve the freight's ultimate destination. Interlining increases the number of times that freight is handled, making damage more likely, and increasing the time goods are in transit.[71] Restrictions on the types of commodities a carrier can haul often cause empty backhauls when the flow of commodities a carrier is authorized to haul is unbalanced between points a carrier can serve. These limitations partly explain why regulated carriers operated empty trucks on between 19 and 28 percent of trips.[72] Some excess capacity would exist without regulatory restrictions, since freight flows are often unbalanced between two points. But economists nonetheless estimate that empty mileage caused by ICC restrictions inflates the cost of motor carriage by six percent to 15 percent.[73]

To avoid these problems, carriers often merge with, or acquire the operating rights of, other trucking companies with complementary traffic flows, or with which they regularly interline.[74] Frequently, a merger designed to combine two routes, creating authority to serve points A and B, produces an indirect route through point C. The ICC, however, requires that such a "gateway" continue to be used after the two routes — A to C and C to B — have been tacked together, even if no traffic is destined for point C.[75] The Commission has justified this gateway requirement by pointing out that allowing each carrier to offer direct services between every two points in its system would be tantamount to significant amounts of new entry on virtually all routes.[76] As in the case of certificate restrictions, fear of new entry is the reason behind rules resulting in unnecessary circuiting and empty mileage.

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71 J. JOHNSON, TRUCKING MERGERS 60 (1973).

72 Snow, *The Problem of Motor Carrier Regulation and the Ford Administration's Proposal for Reform,* in MacAvoy & Snow, *supra* note 1, at 25-27. Unlike regulated airlines, in trucking excess capacity is not mainly a result of service competition that replaces rate competition. Evidence of this is that unregulated carriers have greater excess capacity, due to ICC backhaul restrictions, than do regulated carriers. *Id.* Service competition in motor carriage is in the number of points a carrier serves directly, without the delays and costs of inter-lining. CONSOLIDATED FREIGHTWAYS, INC., *supra* note 64, at 5.

73 Jones, *On Removing Operating and Backhaul Restrictions,* in MacAvoy & Snow, *supra* note 1, at 215.

74 *See* JOHNSON, *supra* note 14.

75 Ex Parte 55 (Sub 8) Petition for the Elimination of Gateways by Rulemaking, 119 M.C.C. 530, 1974 Fed. Carr. Cas. ¶ 36,726 (gateways partially eliminated for irregular route common carriers only).

76 *Id.* at 543, 1974 Fed. Carr. Cas. at ¶ 36,726.04.

C. *Wage Inflation*

The ICC's past policy of cost-plus ratemaking coupled with strict limitations on new entry has allowed the Teamsters Union to negotiate and enforce an industry-wide inflation of wages, to the benefit of both employer and employee. Wages, accounting for about two-thirds of trucking costs, are set uniformly in the National Master Freight Agreement for the unionized carriers, which includes from 75 to 90 percent of the regulated LTL common carriers.[77] Since any wage increase is applied equally to the vast majority of competing carriers, employers have less reason to resist union wage demands than do those employers in industries with significant numbers of non-union competitors.

At the same time that employer resistance to wage demands has been weakened by the industry-wide organization of employees,[78] the ICC's cost-plus ratemaking policy, followed for over 30 years, has had the perverse effect of making wage increases profitable for employers.[79] To determine maximum rate levels during general rate increase request hearings, the ICC would ascertain total costs of operation and set rates allowing a seven percent profit margin. In effect, each additional dollar paid in wages meant an additional seven cents in profits.

The Teamsters Union's collective bargaining policies have been

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77 Moore provides various estimates of unionization levels in trucking, ranging from 62 to 73 percent. Moore, *supra* note 65. When estimates of unionization are provided for only regulated common carriers, especially when limited to general freight carriers, the estimates run higher. The McClellan committee hearings produce estimates of 90 percent unionization levels in this sector of trucking. *Investigation of Improper Activities in the Labor or Management Field: Hearings Before the Select Comm. on Improper Activities in the Labor or Management Field,* 86th Cong., 1st Sess. 15610 (1959). Other sources support a unionization figure of around 90 percent. H. LEVINSON, C. REHMUS, J. GOLDBERG, & M. KAHN, COLLECTIVE BARGAINING AND TECHNOLOGICAL CHANGE IN AMERICAN TRANSPORTATION 19 (1971) (Figures for 1946).

78 Whenever profits and rates are tied to some measure like wages, a powerful incentive to inflate that measure is created. *See, e.g.,* Averch & Johnson, *Behavior of the Firm Under Regulatory Constraint,* 52 AMER. ECON. REV. 1052 (1962). Near-full unionization means that a setback at the bargaining table is compensated for by the regulators.

79 Levine & Wang, *Motor Carrier Financing and Earnings Regulation,* 42 ICC PRAC. J. 29, 31 (1974); TAFF, *supra* note 23, at 191-94. Although the operating ratio is still considered in evaluation of general rate increase requests, the ICC now relies primarily on the rate of return to equity. Southern Motor Carriers Rate Conference — General Rate Increase, 1978 FED. CARR. REP. (CCH) (Cases) ¶ 36,875. For a discussion of the evolution of the ICC's approach to evaluating the revenue needs of motor carriers in maximum rate level proceedings, *see Kennedy Hearings, supra* note 32, at 892-97 (prepared statement of A. Daniel O'Neal, ICC Chairman).

developed with a clear recognition of the impact ICC rate regulation has had on the employers' ability to pass on the cost of wage increases. When James R. Hoffa, then President of the Union, was asked during national contract negotiations in 1962 whether he thought his wage demands would lead to a strike, he replied, "Only if we need to convince the ICC to grant a rate increase."[80]

Thomas G. Moore estimates that between $1 and $1.3 billion of the Teamster wage bill paid by regulated trucking firms resulted directly from this rate-wage inflation in 1972.[81] And statistics do in fact reveal that wages of Teamsters in the regulated sector exceed wages paid to employees of unregulated trucking firms by 37 to 55 percent.[82]

IV. Evaluation of Approaches to Trucking Deregulation

In the past several years, a variety of approaches to trucking deregulation have been put foward, each differing greatly in the timing and comprehensiveness of decontrol.[83] These differences give the plans markedly dissimilar tradeoffs between the inducement of greater price competition and the introduction of serious transitional problems. Evaluating the alternative approaches is further complicated by unified industry opposition.[84]

The proposed methods of deregulation fall into five categories: first, complete and immediate deregulation; second, a repeal of trucking's antitrust immunity granted by the Reed-Bulwinkle Act; third, eliminating ICC rate control; fourth, loosening ICC entry restrictions; and finally, a legislative consolidation and modest expansion of the regulatory reforms already accomplished by the ICC.

A. *Immediate and Complete Deregulation*

Unified industry opposition from management and labor makes it unlikely that Congress will initially pass a bill deregulating truck-

80 R. James & E. James, Hoffa and the Teamsters 98 (1965).

81 Moore, *supra* note 65, at 332-41.

82 *Id.*

83 *See, e.g.*, Motor Carrier Reform Act of 1975, H. R. 10909, S. 292a, *reprinted in* H. R. Doc. No. 94-307, 94th Cong., 1st Sess. (1975) (Ford Administration bill); Motor Carrier Rate Making Reform Act of 1979, S. 710, 96th Cong., 1st Sess., 125 Cong. Rec. S3077 (daily ed. March 21, 1979) (Kennedy bill); Trucking Competition and Safety Act of 1979, S. 1400, 96th Cong. 1st Sess. (1979) (Carter Administration bill).

84 Mosher, *supra* note 66.

ing as comprehensively as the Airline Deregulation Act of 1978 did for airlines.[85] Airline industry opposition to decontrol subsided when carriers discovered that demand for air travel is price sensitive.[86] The CAB allowed carriers to cut rates, and to the surprise of those who opposed deregulation, passenger traffic and profits jumped dramatically. But demand for trucking is not considered price sensitive. Thus, the trucking industry appears to have comparatively little to gain from rate reduction.[87]

At the same time, both the Teamsters and trucking management have much to lose if trucking controls are abandoned. The entry of non-union carriers following deregulation would erode both the high level of Teamster wages and the virtually complete unionization of drivers and helpers in the industry. New entry and unrestrained rate competition would certainly reduce trucking profit margins. In addition, lifting ICC controls would immediately reduce to zero the value of operating rights held by trucking companies, presently valued at between $3 and $4 billion.[88]

Not unexpectedly, therefore, Teamsters and truckers have mobilized an extensive and thus far effective effort to halt moves legislatively to decontrol the motor freight industry. Senator Kennedy's proposed Motor Carrier Ratemaking Reform Act of 1979 ran into heavy industry lobbying.[89] As a result, Kennedy's Judiciary Committee lost a rare Senate jurisdictional battle over the bill, and full Senate consideration, if any, has been delayed probably until some time late this year.[90] President Carter's promised push towards deregulation was also slowed last spring by fear that such a move would anger the Teamsters Union into ignoring the administration's wage and price guidelines during contract negotiations.[91]

Legislative removal of ICC controls faces a tough political battle

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85 Pub. L. No. 95-504, 92 Stat. 1705 (1978).

86 Samuelson, *supra* note 2, at 4.

87 *Id.* at 4-5. Savings resulting from deregulation will come mainly from reduced profit margins, lower inefficiencies and competitive restraint on labor costs.

88 Mosher, *supra* note 84, at 818.

89 Holsendolph, *Senators Clashing on Truck Bill,* N.Y. Times, Jan. 25, 1979, at D1, col. 1.

90 125 CONG. REC. S3075-7 (daily ed. March 21, 1979) (remarks of Senators Kennedy and Cannon).

91 Mosher, *supra* note 66, at 817.

not only because of the opposition of the Teamsters and the truckers, but also because of the wariness of legislators who realize that unless the deregulation process is carefully crafted, the transition to an unregulated industry could be a traumatic one.[92] A sudden and complete removal of entry restrictions is likely to result in the chaotic conditions of which the industry association has warned.[93] While the mortality rate of trucking firms in the unregulated sector is low,[94] a phasing out of entry barriers may be necessary to avoid causing existing motor carriers to founder in the transition from regulation to competition.

Transitional problems could stem from several sources. Bank credit has been extended to many trucking firms based on the value of operating rights which would disappear with deregulation.[95] More importantly, with high rates of unionization in the LTL sector, competition from the unrestrained entry of non-union firms charging lower rates would endanger existing carriers paying union wages.[96] This occurred on a smaller scale when the commercial zone exemption around major cities was expanded.[97] The short haul sector of the industry affected by the change is less heavily unionized than the long haul inter-city segment. Nevertheless, the influx of non-union firms forced some unionized short-haul firms out of business.[98] Others survived only after obtaining labor cost lowering concessions from the Teamsters Union.[99]

The potential consequences of these problems should not be

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92 *Id.* at 819.

93 *Kennedy Hearings, supra* note 32, at 1513 (prepared statement of the American Trucking Associations).

94 *See* note 55 *supra.*

95 When commercial zones were expanded by the ICC, effectively allowing new entry into a large, previously regulated area, certificate values fell sharply for carriers previously protected by ICC entry regulation. Baker & Greene, *Commercial Zones and Terminal Areas,* 10 TRANSP. L. J. 171, 194 (1978) [hereinafter cited as Baker & Greene].

96 *See* text accompanying notes 77-82 *supra.*

97 The unregulated, typically non-union carriers that have expanded into the newly enlarged, unregulated commercial zones often pay wages amounting to only 60 percent of the wages paid by the unionized, regulated, short-haul carriers with whom they now compete. Baker & Greene, *supra* note 95, at 195.

98 *Id.* The great disparity between union and non-union wages has led to a shrinking of the unionized sector of regulated trucking, mainly in the TL sector, and some bending of LTL union contract requirements for carriers facing significant non-union competition. Samuelson, *supra* note 2, at 46.

99 *Id.*

minimized. When trucking in Australia was suddenly and completely deregulated by court order, a chaotic period resulted, marked by a high number of failing firms.[100] Only after several years did an orderly competitive situation emerge, with rates at substantially lower levels.[101] Clearly some period of time is required for an orderly adjustment by the Teamsters to deregulation, either through organization of new firms or, more likely, through downward adjustment of wages.

B. *Repeal of the Reed-Bulwinkle Act*

Recently introduced legislation, most notably Senator Edward Kennedy's proposed Motor Carrier Ratemaking Reform Act, lays the blame for a lack of price competition in trucking's LTL sector on rate bureaus.[102] Kennedy stated that motor carrier bureau rate setting amounted to "[l]egalized price-fixing in the trucking industry [which] has cost shippers and consumers billions of dollars in higher prices over the last 30 years. Estimates run as high as $2 billion a year."[103] He characterized repeal of the Reed-Bulwinkle Act as "the clearest, most anti-inflationary step towards a more competitive industry."[104]

Rate bureaus do perform cartelizing functions in the trucking industry that dampen price competition. First, the prices charged by all carriers are comparable because of the standardized use by rate bureaus of the National Motor Freight Classification System. Consequently, rate changes cannot be obscured from competitors in a blizzard of tariff filings drawn up in a variety of different formats. Second, rate bureaus give public notice of any rate changes proposed either collectively or independently. Economist John Meyer, points out the anti-competitive effect of this function:

> In a small numbers market the rationale for price cuts lies largely in the expectation that either the rivals won't notice or respond for some time to the price change or the hope, often un-

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100 Joy, *Unregulated Road Haulage: Australian Experience,* 16 OXFORD ECON. PAPERS 275 (1964); Kolsen, *Structure and Price Determination in the New South Wales Road Haulage Industry,* 32 ECON. REC. 291 (1956).

101 *Id.*

102 S. 710, 96th Cong., 1st Sess., 125 CONG. REC. S3077 (daily ed. March 21, 1979).

103 Press release from the office of Senator Edward M. Kennedy (Jan. 22, 1979, 1 p.m. version).

104 *Id.*

> founded, that the rivals will not match the cut. The rate bureau, by providing a forum for the discussion of rates, provides advance notification and thereby removes any time lag or uncertainty as to the rival's response.[105]

The rate bureau's role is not so pivotal as it appears, however, and bureau elimination, without other changes in ICC regulation, will not necessarily induce a significant amount of price competition in the industry. Passage of the Reed-Bulwinkle Act was accomplished with the realization that rate bureaus had potentially monopolizing powers. The Act thus required agreements among carriers to allow any member carrier "the free and unrestrained right to take independent action either before or after any determination arrived at through such procedure."[106] In addition, membership in rate bureaus is voluntary. As a consequence, rate bureaus lack the power to enforce any price agreements. The lack of price competition in trucking is thus rooted elsewhere and could be largely unaffected by repealing Reed-Bulwinkle.

C. *Reducing ICC Rate Regulation*

A close examination of ICC rate policies and the procedures mandated by the 1935 Act clearly indicates that enforcement of adherence to uniform rate levels depends primarily on the ICC protest and suspension mechanism rather than on the functioning of the rate bureaus. The allocation of the burden of proof in rate protest proceedings, the ICC's policy of enforcing adherence to the National Motor Freight Classification System, the statutory 30-day notice period for rate changes, and the agency's presumption in favor of regional average cost data when evaluating individual rates, all contribute to continued rate uniformity in the motor carrier industry.

Any carrier filing rates through independent action can have his rate protested by "any interested party."[107] The burden of proving a protested rate to be reasonable, compensatory, and nondiscriminatory falls on the proponent of the change[108] and this burden is not easily met. In the absence of compelling cost

105 MEYER, ET AL., *supra* note 1, at 209.
106 49 U.S.C.A. § 10706(c)(2)(c) (1979 Supp.).
107 49 U.S.C.A. § 10708(a)(1) (1979 Supp.).
108 *Id.* at §§ 10708(c), 10741.

evidence to the contrary, the ICC will rely primarily on regional average cost figures and the existing rate levels when it evaluates the validity of the protested rates.[109]

A carrier taking independent action thus has to develop and present individualized cost data with sophistication sufficient to overcome the presumption in favor of regional cost data. Legal costs can also be substantial, especially for smaller carriers. Given these burdens, it is not surprising that 80 to 90 percent of all protested and suspended rate filings are withdrawn before a Commission hearing is held.[110]

Even without rate bureaus, this protest and suspension mechanism could be used to inhibit price competition in regulated trucking. Price cuts could still be detected and protested by competing carriers, since rate changes must be made public and filed with the ICC thirty days before taking effect. And protested rates could still be suspended up to seven months.

In short, it is ICC policies toward rate classification, and not rate bureau practices, that result in enforced rate uniformity. Rate comparability would still exist if the ICC continued to require that rates be set in accordance with some uniform rate classification structure. The ICC presently takes an active role in shaping the existing rate structure, and it could administer a freight classification scheme with a set relationship among rates without collective action on the part of carriers.[111] In fact, in the past the ICC has disallowed independently set rates found to be compensatory simply because the rates were so low that they threatened to undermine the freight classification system.[112]

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109 *Kennedy Hearings, supra* note 32, at 21 (prepared statement of John H. Shenefield, Assistant Attorney General, Anti-trust Division, Dept. of Justice).

110 MEYER, ET AL., *supra* note 1, at 214. 90 percent of the suspended rates are protested on the grounds that they are too low. *Kennedy Hearings, supra* note 32, at 712 (opening statement of Senator Kennedy).

111 The ICC is already actively involved in rate restructurings. Ex Parte No. MC-98, New Procedures in Motor Carrier Restructuring Proceedings, 1978 FED. CARR. REP. (CCH) (Cases) ¶ 36,851. Also, after repeal of the Reed-Bulwinkle Act, carriers could still jointly classify freight, though they could not agree on rate relationships among classes of commodities. T. D. Morgan, Multi-firm Agreements In Deregulated Trucking Industry (unpublished memorandum prepared for the National Commission for the Review of the Antitrust Laws and Procedures, Oct. 10, 1978). The latter task would be impossible unless the ICC set rate relationships uniformly for all carriers.

112 Tobacco, LTL, 61 M.C.C. 159 (1952), 9 Fed. Carr. Cas. ¶ 32,637; Billets, Pig Iron, Scrap Iron — Ohio Transport, 54 M.C.C. 659 (1952), 9 Fed. Carr. Cas. ¶ 32,538.

Although rate setting by the ICC causes price rigidity, stripping the ICC of that power would not be advisable unless entry restrictions are also loosened. Maximum rate regulation should be maintained since many routes are served by only a handful of firms, making monopolistic pricing a real possibility.[113] With strict ICC limits on points served and commodities hauled by carriers, competition is fragmented among artificially created sub-markets where, as Meyer has noted, "the number of significant competitors may place a trucking transportation market in the small numbers or oligopolistic category of market structure."[114] A 1979 study for the Senate Judiciary Committee demonstrated that while no firm dominates the trucking industry nationwide, in individual city-pair markets, the largest four carriers on average account for over 60 percent of the traffic.[115] Significant loosening of maximum rate regulation without entry deregulation might simply lead to substantial rate increases in these small numbers markets.

To circumvent the possibility of monopolistic pricing following deregulation, most proposed reforms of motor carrier regulation attempt to establish a rate zone of reasonableness that would retain a significant degree of maximum rate regulation, but allow rate reductions to go relatively unchallenged.[116] Rate changes within a specified percentage range could not be suspended or found unlawful. The proposed Kennedy bill, for example, immunized from legal challenge rate changes of seven percent and less for increases and 20 percent and less for decreases.[117] Given the problems of the small numbers markets, coupled with the problems of a sudden removal of entry barriers, any deregulation proposal must provide a rate zone of reasonableness for the period of transition to a competitive trucking industry.

This zone of reasonableness, however, offers, at best, a transitional device. Assuming less than immediate deregulation, a zone of reasonableness is a necessary move. But such a move, without more, does little to alter the causes of rate inflation in trucking.

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113 Snow, *The Problem of Motor Carrier Regulation and the Ford Administration's Proposal for Reform* in MacAvoy & Snow, *supra* note 1, at 20-23.

114 MEYER, ET AL., *supra* note 1, at 212.

115 Mosher, *Trucking — A Dramatic Example,* 11 NAT'L J. 1259, 1259 (1979).

116 S. 710, 96th Cong., 1st Sess. § 4, 125 CONG. REC. S3077 (daily ed. March 21, 1979); H.R. 10909, S. 292a, *in* H.R. DOC. NO. 94-307, 94th Cong., 1st Sess. § 10 (1975).

117 S. 710, 96th Cong., 1st Sess. § 4, 125 CONG. REC. S3077 (daily ed. March 21, 1979).

D. *Removing Regulatory Barriers to Entry*

The significant rate decreases predicted to follow from deregulation are not likely to occur unless entry restrictions are first loosened. These restrictions cause the inefficiencies, inflated wage payments, and to some extent, higher-than-normal profit levels. Only a removal of entry controls will thus allow carriers to expand their operating authorities to fill empty backhauls and to offer direct service between points served. Entry of non-union or lower wage unionized competitors offers the only means of slowing the rise of the already inflated levels of compensation paid to Teamster members. Eased entry also provides the best check on tendencies towards oligopolistic pricing in the small numbers markets.

As noted above, however, a sudden and complete removal of entry controls could lead to a chaotic transitional period.[118] Thus, neither the Ford nor the Carter Administration bills, which both attempted a total but gradual decontrol of trucking, called for the immediate removal of entry barriers. The Ford bill would have relaxed entry standards considerably, with the Secretary of Transportation reporting to Congress three years after enactment regarding the continued usefulness of any regulatory barrier to entry.[119]

Nonetheless, gradual decontrol of entry is not easily accomplished through resort to a flat numerical goal analogous to the rate zone of reasonableness. Assuming only a partial removal of controls, case-by-case adjudication of entry applications is inevitable, given the variety of criteria which determine permissible new entries. A substantial range of agency discretion will be needed in the application of any legislatively formulated standard.

Some responsibility for loosening entry controls will thus be delegated to the ICC. The search for the proper standards to guide the ICC in loosening entry controls therefore perhaps need go no further than the policies recently adopted or proposed by the ICC itself.

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118 *See* text accompanying notes 92-101 *supra.*

119 H. R. 10909; S. 292a *in* H.R. Doc. No. 94-307, 94th Cong., 1st Sess. § 8 (1975).

E. *Legislative Consolidation and Expansion of ICC Regulatory Reforms*

The best method of phasing in trucking deregulation would be for Congress to reinforce and give legislative impetus to the recent and significant liberalization of entry and rate policies undertaken by the ICC. This strategy would successfully avoid transitional problems caused by deregulation. Furthermore, the experience of CAB deregulation of airlines suggests that agency-initiated decontrol offers a singularly successful way to build political momentum towards complete legislative deregulation.

For over forty years, the ICC has followed a highly restrictive entry policy, utilizing a three-part test developed in *Pan American Bus Lines.*[120] That test required an applicant for entry to prove that the proposed operations served a public need, could not be performed by existing carriers, and would not harm existing carriers by diverting traffic and revenues from them.[121] Denials of entry requests typically contained language like the following: "It has been consistently held that existing carriers should be afforded the opportunity to transport all the traffic they can handle adequately, economically and efficiently in the territory they serve before a new service is authorized."[122]

Three recent ICC decisions have greatly lessened the severity of these restrictions. First, the ICC has reinterpreted the third part of the test to require carriers protesting entry applications to show that entry threatened them with more than "mere revenue loss."[123] As a new minimum, protesting firms would be required to prove the threat of "substantial traffic diversion and material revenue loss" that will "materially jeopardize existing carriers' ability to serve the public."[124] Significantly, even if that burden is met, entry might still be allowed, since the Commission indicated an unprecedented willingness to consider the benefits of heightened

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120 1 M.C.C. 190, 1 Fed. Carr. Cas. ¶ 7,001 (1936).
121 *Id.* at 204, 1 Fed. Carr. Cas. at ¶ 7,001.05.
122 J.H. Rose Truckline, 110 M.C.C. 180, 184-85 (1969).
123 Liberty Trucking Co., 130 M.C.C. 243, 1978 FED. CARR. REP. (CCH) (Cases) ¶ 36,872, *aff'd and clarified,* 131 MCC 573, 1979 FED. CARR. REP. (CCH) (Cases) ¶ 36,894.
124 *Id.* at ¶ 36,872.01-.02.

competition that "may outweigh the potentially substantial harm to protestants."[125]

Consistent with this new receptiveness to competition, the Commission also eliminated the second part of the *Pan American* standard.[126] Noting the maturity of the trucking industry, the ICC concluded that "the test which, in effect, requires an applicant to prove that the service it proposes cannot be performed by existing carriers has outlived its usefulness and will no longer be applied."[127]

A third Commission action sharply reduced the standing of firms to protest entry application to carriers who have the equipment, facilities, and operating rights necessary to serve the traffic the applicant seeks, and who have at some time actually provided the service.[128] The ICC has also lessened or removed many other restrictions on regulated and unregulated carriers, which had significantly contributed to excess and empty mileage.[129]

In the area of rate policies, the ICC has similarly forsaken its practice of uncritically increasing rates to offset trucking industry claims of increased costs. The cost-plus system of rate-setting has been abandoned in favor of a more restrictive target rate-of-return measure.[130] Moreover, the ICC has begun to examine more critically the cost data accompanying rate increase requests.[131] It has also announced that it will no longer merely pass along the full increase in labor costs resulting from Teamster negotiated contracts.[132] Finally, the ICC has adopted a policy of giving positive

125 *Id.*

126 Ex Parte No. MC-121, Policy Statement on Motor Carrier Regulation, *proposed* 43 Fed. Reg. 56,978 (1978), *adopted* 44 Fed. Reg. 60,296 (1979).

127 *Id.* at 56,980.

128 Protest Standards in Motor Carrier Application Proceedings, 43 Fed. Reg. 60,277 (1978).

129 *E.g.*, Ex Parte No. MC-118, Grant of Motor Carrier Operating Authority, 43 Fed. Reg. 55,051 (1978) (private carriers allowed to apply for backhaul authority); Ex Parte No. MC-119, 43 Fed. Reg. 38,756 (1978) (restrictions limiting number of shippers a contract carrier can serve lifted by the ICC). *See generally* 92 ICC ANN. REP. 45-50 (1978) (description of pro-competitive policies adopted by the Commission).

130 Southern Motor Carriers Rate Conference — General Rate Increase, 1978 FED. CARR. REP. (CCH) (Cases) ¶ 36,875. For a discussion of the evolution of the ICC's approach to evaluating the revenue needs of motor carriers in maximum rate level proceedings, *see Kennedy Hearings, supra* note 32, at 892-97 (prepared statement of A. Daniel O'Neal).

131 Southern Motor Carriers Rate Conference — General Rate Increase, 1978 FED. CARR. REP. (CCH) (Cases) at ¶ 36,875.07.

132 Merry, *Teamster Talks With Trucking Firms Will be First Test of Any Pay Guidelines,* Wall St. J., Sept. 20, 1978, at 6, col. 2.

weight in entry proceedings to an applicant's intention to charge lower than prevailing rates for the new service.[133]

Conclusion

Taken together, these Commission actions may introduce a significant increase in competitiveness among regulated motor carriers. Though the potential savings resulting will be smaller than if deregulation were complete, the risks of transitional problems are smaller, and even modest economic benefits may help the movement for full decontrol develop a political head of steam.

Without legislative reinforcement, however, this outcome is not assured. The adoption of pro-competitive policies by the ICC has generated numerous court challenges.[134] Moreover, these policies could be easily reversed if changes in ICC membership lead to a majority less convinced of the benefits of competition. Changes in the Interstate Commerce Act are necessary to insulate recent administrative changes from court reversal or an agency retreat in the wake of new appointments. In addition, legislative impetus towards a further liberalization of entry and rate standards is desirable, since there are indications that the ICC is moving more slowly to ease restrictions in the LTL sector.[135]

Some necessary reforms like a zone of rate reasonableness, or abolition of the 30-day notice period for rate changes, might require amendment of the Interstate Commerce Act.[136] Legislative actions along those lines, coupled with an incorporation into the statute of the ICC's newly developed entry policies, could start the trucking industry towards deregulation with a minimum of transitional friction. Most importantly, the success of the trucking lobby in frustrating recent attempts at more ambitious reforms indicates that a gradual, piecemeal approach stands the best chance of success in the short run. As these modest steps reduce the cost of

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133 Ex Parte MC-116, Consideration of Rates in Operating Rights Application Proceedings, 44 Fed. Reg. 10,064 (1979), 359 I.C.C. 613 (1979).

134 The American Trucking Associations has announced plans to challenge many of the Commission's policy and rules changes in court. *ATA Analyzes Top Trucking Issues Due for Decision By ICC This Year,* Transport Topics, Jan. 8, 1979, at 1, col. 3.

135 *Kennedy Hearings, supra* note 32, at 1424-28 (opening statement of Senator Kennedy).

136 Former Chairman O'Neal proposed such a combination of legislative and administrative decontrol. Karr, *Major Cuts In ICC Control Over Truckers Are Proposed by Commission's Chairman,* Wall St. J., Nov. 7, 1978, at 3, col. 1.

inter-city trucking without resulting in the chaotic conditions predicted, the arguments put forward by the proponents of continued control will lose force and render full deregulation politically more possible.

Postscript

The Cannon-Packwood bill,[137] recently approved by the Senate Commerce Committee, fulfills many of the objectives outlined above. Entitled the "Motor Carrier Reform Act of 1980," it is the most comprehensive attempt at trucking regulatory reform currently under legislative scrutiny. In its statement of congressional findings, the bill sounds a decidedly conservative note, indicating the draftsmen's intent to "reduce the uncertainty felt in the Nation's transportation industry,"[138] and to give "explicit direction"[139] to the ICC via "well-defined parameters"[140] for regulation.

In the bill, the Commission is warned not to "attempt to go beyond the powers vested in it by the Interstate Commerce Act and other legislation."[141] The only specific curtailment of ICC power to increase competition, however, is found in the bill's required case-by-case adjudication of entry applications designed to open entry policy.[142]

Nonetheless, the substance of the bill contradicts the tone of its policy statement. A better description of the purpose of the proposal can be found in the amendment to the National Transportation Policy which calls for reliance, to the maximum extent feasible, on actual and potential competition in the motor carrier industry.[143]

Most importantly, the Cannon-Packwood bill would work significantly to increase competition by greatly easing entry restrictions and by reducing the artificial distinctions between types of

137 S. 2245, 96th Cong., 2d Sess. (1980). The Senate Commerce Committee approved the bill by a 13 to 4 vote on March 11. *Bill to Deregulate Trucking Clears A Senate Panel,* Wall St. J., March 12, 1980, at 2, col. 2.

138 S. 2245, *supra* note 137, § 3.

139 *Id.*

140 *Id.*

141 *Id.*

142 *Id.* § 5. This subsection would be codified at 49 U.S.C. § 10922(b)(2).

143 S. 2245, *supra* note 137, § 4. This subsection would be codified at 49 U.S.C. § 10101(a)(7).

service that presently fragment motor carriers into discrete non-competitive markets.

Not only would the bill incorporate into law the recently loosened ICC entry standards described earlier,[144] but also broaden greatly existing exemptions from regulation. The definition of exempt commodities would expand to include all food products.[145] Contract carriers could no longer be subjected to ICC restrictions on the number of shippers served, nor could they be limited to specific industries or geographical locations.[146] Restrictions on intercorporate hauling would also be prohibited[147] and ICC controls would be lifted from movements of freight by truck incidental to air shipment.[148]

A new exemption is proposed for return movements of owner-operators hauling certain exempt commodities one-way.[149] Also, the bill establishes procedures to curtail restrictions that cause circuitous routes and empty mileage, and prohibit intermediate stops between two cities.[150]

All of these incremental reductions in entry barriers and market segmentation will put downward pressure on trucking rates as more and more firms of all types are able to compete for each other's business. This pressure makes the bill's inclusion of a zone of rate freedom a meaningful step.[151] Rates can be cut either 10 percent a year, or 10 percent below their level on July 1, 1980, without the risk of an ICC proceeding to test their reasonableness.

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144 *See* text accompanying notes 120-29 *supra,* for a description of the changes in entry policy which the bill substantially adopts with some further liberalizations. S. 2245, *supra* note 137, § 5.

145 *Id.* § 7.

146 *Id.* § 10. This adopts another recent ICC reform. *See* Policy Statement Regarding the "Rule of Eight" in Contract Carrier Applications; Ex Parte No. MC-119, 44 Fed. Reg. 2470 (1979); 43 Fed. Reg. 38756 (1978).

147 S. 2245, *supra* note 137, § 9. This would also codify and expand a policy recently proposed by the Commission. *See* Intercorporate Hauling; Proposed Policy Statement; Ex Parte No. MC-122, 44 Fed. Reg. 42838 (1979).

148 S. 2245, *supra* note 137, § 7. This exemption would be codified at 49 U.S.C. § 10526(a)(8), replacing the present exemption which sets geographical limitations on the exemption. *See* Motor Transportation of Property Incidental to Transportation by Aircraft, 131 M.C.C. 87, [1978] FED. CARR. REP. (CCH) (Cases) ¶ 36,878.

149 S. 2245, *supra* note 137, § 8. This exemption would be codified at 49 U.S.C. § 10527. A similar exemption was recently proposed by the ICC. *See* Special Limited Authority; Proposed Procedures; Ex Parte No. MC-131, 45 Fed. Reg. 2871 (1980).

150 S. 2245, *supra* note 137, § 6.

151 *Id.* § 11. The ICC recently asked for comments on a proposed no-suspend zone. No Suspend Zone-Motor Common Carriers of Property; Ex Parte No. MC-137, 45 Fed. Reg. 6974 (1980).

Importantly, the bill keeps maximum rate controls largely intact, allowing rates to rise 10 percent a year (an increment presently insufficient to offset inflation) until after the antitrust immunity for single-line rate setting is abolished on June 1, 1983.[152] Therefore, the allowed rate of increase is pegged to the inflation rate plus 10 percent.

The proposal reverses present practice by enunciating a new rule of ratemaking that allows rate increases based on anticipated future cost increases.[153] The rule limits the cost that truckers can pass on to those incurred by "honest, economical and efficient management."[154] Though this section potentially favors regulated carriers,[155] it might also give the Commission authority to decline to pass through Teamster-negotiated wage increases held to be exorbitant by the ICC.[156] A congressional grant of such authority could thus do much to stiffen industry resistance in collective bargaining to wage increases historically passed on to shippers and ultimately to consumers.[157] Such wage and rate inflating practices can hardly be seen as the result of "economical and efficient management."

The bill also attempts to provide greater trucking services to small communities and the small shipments market. The approach is designed to open entry into those markets by removing the "public convenience and necessity test," leaving only the "fit,

152 *Id.* § 13. If general rate increases are granted, to the extent those increases are over five percent, the 10 percent allowable increase for individual rate hikes is correspondingly reduced. As a consequence, there is an absolute yearly ceiling of 15 percent for rate increases that can be instituted without challenge. This section also codifies some restrictions on rate bureau activities developed by the Commission. *See* Rate Bureau Investigation; Ex Parte No. 297, 349 I.C.C. 811, 1975 Fed. Carr. Cas. ¶ 36,758; Notification of Rate Proposals; Ex Parte No. 297 (Sub 2), [1978] FED. CARR. REP. (CCH) (Cases) ¶ 36853.

153 S. 2245, *supra* note 137, § 12. Presently, the Commission allows rate increases based on cost increases that are "experienced or provable," [1978] FED. CARR. REP. (CCH) (Cases) ¶ 36,875.06.

154 S. 2245, *supra* note 137, § 12.

155 This section seems designed to reduce fears of motor carriers based on the ICC's recent moves away from a cost-plus to a rate-of-return target for profit targets in ratesetting. *See* Southern Motor Carriers Rate Conference — General Rate Increase [1978] FED. CARR. REP. (CCH) (Cases) ¶ 36,875; *Kennedy Hearings, supra* note 32, at 892-97 (prepared statement of A. Daniel O'Neal).

156 The ICC has also refused to grant general rate increases that violate the President's anti-inflation guidelines. *See* Southern Motors Carriers Rate Conference — General Rate Increase, [1978] FED. CARR. REP. (CCH) (Cases) ¶ 36,875. *See* text at note 132 *supra.*

157 *See* text at notes 77-82 *supra.*

158 S. 2245, *supra* note 137, § 5. These provisions would be codified at 49 U.S.C. § 10922(b)(3).

willing, and able" requirement.[158] The proposal thus rejects several promising alternatives, including the direct subsidy method contained in the Airline Deregulation Act.[159] Yet, the bill could not have gone further in removing rate controls in these markets, since the lack of service has been argued to stem not from entry restrictions as much as from the low rates allowed in these segments due to the attempted cross-subsidization of service.[160]

These approaches are not foreclosed, however, if service levels prove inadequate in these markets. Either congressional or administrative action can be taken later if problems occur.

Enactment of the "Motor Carrier Reform Act of 1980" could prove to be a significant step towards trucking deregulation. The codification of many existing administrative reforms and the initiation of other long overdue changes would enhance competitive pressures and lead to lowered freight bills in a manner sufficiently gradual and incremental to avoid debilitating transitional problems. Moreover, despite the scolding tone of the bill's statement of purpose, the Commission is largely left free to continue its reforms.

159 *See* text at note 59 *supra.*

160 *See Kennedy Hearings, supra* note 32 at 881, 885 (statement of A. Daniel O'Neal); THE IMPACT ON SMALL COMMUNITIES OF MOTOR CARRIAGE REGULATORY REVISION, *supra* note 30; New Procedures in Motor Carrier Restructuring Proceedings; Ex Parte No. 98, [1978] FED. CARR. REP. (CCH) (Cases) ¶ 36,851.

NOTE

ZURCHER v. STANFORD DAILY: THE LEGISLATIVE DEBATE

SUSAN K. ERBURU*

It has been almost a decade since police officers obtained a warrant and conducted a search for criminal evidence in the offices of the Stanford Daily, *despite the fact that no members of the* Daily *staff were suspected of any involvement in the criminal activity under investigation. Although the* Daily *challenged the police search as unconstitutional, in 1978 the Supreme Court ruled in* Zurcher v. Stanford Daily *that no constitutional violation had occurred.*

Since the Daily *search in 1971, and particularly in the wake of the Supreme Court's ruling, the use of so-called "third party" search warrants has dramatically increased, including as subjects not only the press, but lawyers, doctors, and even academic researchers. In view of this increase and as a direct response to* Zurcher, *several bills are being considered in Congress to prohibit the use of "third party" warrants in all but exceptional circumstances.*

In this Note, Ms. Erburu critically examines the proposals which have been introduced to determine how much protection they will really provide. Advocating comprehensive, well-drafted statutory protections to meet the serious potential threat to citizen privacy which Zurcher *created, Ms. Erburu sets forth the competing forces that will have to be reconciled in developing workable rules in this area and proposes various guidelines for drafting this legislation.*

Introduction

Few decisions in the modern history of the Supreme Court have engendered as vociferous and uniformly unfavorable a response from advocates of a free press as the 1978 decision in *Zurcher v. Stanford Daily*.[1] In that case, the Court held that the Fourth

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1 436 U.S. 547 (1978). As one commentator noted: "[T]he decision has produced an outpouring of shock and dismay unprecedented in modern journalism. Some say the press overreacted but we reject that assessment. The decision, we feel, it [sic] potentially one of the greatest threats to press freedom in our country's history." Prepared statement of Robert Lewis, Society of Professional Journalists, Sigma Delta Chi, at 1, *to be printed* in *Citizens' Privacy Protection Act of 1978: Hearings on S. 3164 and S. 3222 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary,* 95th Cong., 2d Sess. (1978) [hereinafter cited as *1978 Senate Hearings*]. The subcommittee held hearings on June 22, July 13, August 22 and December 19, 1978, and further hearings are contemplated on the subject of legislative efforts in response to *Zurcher*. Accordingly, the published report of the hearings has not yet been completed.

The author gratefully acknowledges the assistance of Mr. Kevin Faley of the Subcommittee staff for providing mimeographed copies of the prepared statements of each witness

Amendment[2] does not prohibit the issuance of a search warrant merely because the owner of the place to be searched is not a criminal suspect and a subpoena is a practical alternative. Just as they had reacted to *Branzburg v. Hayes,*[3] a decision severely limiting what reporters considered to be their constitutional privilege to withhold the identity of a confidential source, the press and academia characterized *Zurcher* as one of a long string of Supreme Court attacks on the rights of the nation's press.[4]

After *Branzburg* was handed down, press representatives lobbied extensively for the passage of a federal "shield law" to protect the confidentiality of press sources and information from forced disclosure in response to grand jury or government subpoenas.[5] Despite extensive congressional consideration, a federal "shield law" has not been enacted, and many of its supporters now consider it a dead issue.[6]

Press representatives and commentators instead began to focus attention almost exclusively on a newer development, the increasing utilization of "media search warrants," which are perceived as a much more serious threat to press freedoms. Although the search of the *Stanford Daily* offices in 1971 was the first reported instance of a warrant being used to seek evidence from a press organization

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testifying thus far in the hearings. Page references in citations to these hearings correspond to the pagination in these mimeographed statements, copies of which are on file at the offices of the *Harvard Journal on Legislation,* Harvard Law School, Cambridge, Ma. 02138.

2 "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 on 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.

3 408 U.S. 665 (1972). For comments by press spokesmen in the wake of *Branzburg, see Hearings on H.R. 837, H.R. 1084 Before the House Comm. on the Judiciary,* 92nd Cong., 2d Sess. (1972).

4 *But see* Note, *The Supreme Court and the Not-So-Privileged Press,* 13 U. RICH. L. REV. 313 (1979). The editorial wrath of the press was recently diverted from *Zurcher* by the Court's decision in Herbert v. Lando, 441 U.S. 153 (1979), holding that the First Amendment does not prohibit discovery into the state of mind of reporters by public figure plaintiffs in libel actions.

5 For a history of the bills introduced and the hearings held in this effort, *see* Murasky, *Branzburg and Its Aftermath,* 52 TEXAS L. REV. 829, 842 n.6 (1974) [hereinafter cited as *Murasky*].

6 Although federal legislation is unlikely, use of media subpoenas continues and, in fact, has increased dramatically. *See* statement of Jack C. Landau, on behalf of Reporters Committee for the Freedom of the Press, at 4, *to be printed in 1978 Senate Hearings.* There were about a dozen such subpoenas from 1960-1969, but at least five hundred from 1969-1978. *But see* Note, *A Study in Governmental Separation of Powers: Judicial Response to State Shield Laws,* 66 GEO. L. J. 1273, 1276 nn. 18-22 [hereinafter cited as *Georgetown Note*].

not suspected of criminal activity, several of these searches have occurred since that time.[7] Targets have ranged from "underground" radio stations[8] to local bureaus of the Associated Press.[9]

In addition, searches of other "third party" individuals and organizations — that is, those believed to possess evidence of criminal activity but not suspected of any involvement in criminal activities — have occurred with increasing frequency. Many of these individuals are doctors, lawyers, or others whose businesses involve them in confidential relationships similar to those of newsmen and their confidential sources. Accordingly, the ramifications of the *Zurcher* decision, as indicated by Justice Stevens in his dissent,[10] go far beyond the obvious effects on news media activities.

Notwithstanding their failure to obtain passage of a federal "shield law," press representatives have returned to Congress to seek statutory protection against the increasingly frequent use of search warrants against press offices. Within weeks of the *Zurcher* decision, both House[11] and Senate [12] subcommittees held hearings to discuss the possible effects of the Court's ruling. During this period nineteen bills were introduced,[13] but none had been

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7 For a list of those occasions and a brief summary of each event, *see Justice Department Policy Concerning News Media Search Warrants: Hearings Before the Subcomm. on Government Information and Individual Rights of the House Comm. on Government Operations,* 95th Cong., 2d Sess. 221-22 (Appendix 6 — compiled and submitted by the Reporters Comm. for the Freedom of the Press) (1978) [hereinafter cited as *1978 House Hearings*].

8 *See* Note, *Search and Seizure of the Media: A Statutory, Fourth Amendment and First Amendment Analysis,* 28 STAN. L. REV. 957 (1976) [hereinafter cited as *Stanford Note*]. The Note describes an 8-hour search of KPFK-FM, a Los Angeles radio station, in 1974, as well as other searches by California law enforcement officials of the *Berkeley Barb* and KPOO-FM, two San Francisco Bay area "underground media organizations."

9 For a description of events involving a search warrant issued for a tape recording held by an Associated Press reporter in Helena, Montana, on April 9, 1978, *see 1978 House Hearings, supra* note 7, at 56-57.

10 436 U.S. at 577-81.

11 *See* note 7 *supra.* This hearing was held on June 26, 1978.

12 *See* note 1 *supra.*

13 H.R. 12952, 95th Cong., 2d Sess., 124 CONG. REC. H49019 (1978); H.R. 13017, 95th Cong., 2d Sess., 124 CONG. REC. H5128 (1978); H.R. 13113, 95th Cong., 2d Sess., 124 CONG. REC. H5408 (1978); H.R. 13168, 95th Cong., 2d Sess., 124 CONG. REC. H5746 (1978); H.R. 13169, 95th Cong., 2d Sess., 124 CONG. REC. H5746 (1978); H.R. 13227, 95th Cong., 2d Sess., 124 CONG. REC. H5913 (1978); H.R. 13232, 95th Cong., 2d Sess., 124 CONG. REC. H5913 (1978); H.R. 13284, 95th Cong., 2d Sess., 124 CONG. REC. H6081 (1978); H.R.

reported from committee before the 95th Congress came to an end.[14]

While several of these bills were reintroduced in the 96th Congress,[15] it appears that serious consideration will focus on two proposals: (1) S. 855,[16] a Justice Department-sponsored bill which is based on First Amendment notions but attempts to protect more than just traditionally-recognized "press" entities; and (2) S. 115,[17] the "Third Party Privacy Act of 1979" introduced by Senator Mathias, which is much more ambitious in its protective goals and its policy of guaranteeing citizen privacy from warrant searches. During the early hearings, most congressmen appeared to favor the broader, third-party approach represented by S. 115,

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13305, 95th Cong., 2d Sess., 124 CONG. REC. H6188 (1978); H.R. 13319, 95th Cong., 2d Sess., 124 CONG. REC. H6188 (1978); H.R. 13710, 95th Cong., 2d Sess., 124 CONG. REC. H7792 (1978); H.R. 13909, 95th Cong., 2d Sess., 124 CONG. REC. H8968 (1978); H.R. 13918, 95th Cong., 2d Sess., 124 CONG. REC. H8969 (1978); H.R. 13936, 95th Cong., 2d Sess., 124 CONG. REC. H8969 (1978); S. 3162, 95th Cong., 2d Sess., 124 CONG. REC. S8553 (1978); S. 3164, 95th Cong., 2d Sess., 124 CONG. REC. S8553 (1978); S. 3222, 95th Cong., 2d Sess., 124 CONG. REC. S9447 (1978); S. 3225, 95th Cong., 2d Sess., 124 CONG. REC. S9447 (1978); S. 3258, 95th Cong., 2d Sess., 124 CONG. REC. S10052 (1978); S. 3261, 95th Cong., 2d Sess., 124 CONG. REC. S10053 (1978).

14 *Congress Pondering Plans to Protect Press, Others From Surprise Searches,* 37 CONG. Q. WEEKLY REP. 759 (April 21, 1979).

15 H.R. 1437, 96th Cong. 1st Sess., 125 CONG. REC. H255 (daily ed. Jan. 24, 1979) (formerly H.R. 13232 and H.R. 13017); H.R. 1293, 96th Cong., 1st Sess., 125 CONG. REC. H227 (daily ed. Jan. 23, 1979) (formerly H.R. 13918); H.R. 323, 96th Cong., 1st Sess., 125 CONG. REC. H165 (daily ed. Jan. 18, 1979) (formerly H.R. 13169); H.R. 283, 96th Cong., 1st Sess., 125 CONG. REC. H165 (daily ed. Jan. 18, 1979) (formerly H.R. 12952 and H.R. 13284); H.R. 380, 96th Cong., 1st Sess., 125 CONG. REC. H167 (1979) (formerly H.R. 13305); H.R. 3781, 96th Cong., 1st Sess., 125 CONG. REC. H2458 (1979) (formerly H.R. 13909); H.R. 3837, 96th Cong., 1st Sess., 125 CONG. REC. H2533 (1979) (formerly H.R. 13113).

16 S. 855, 96th Cong., 1st Sess., 125 CONG. REC. S3790 (daily ed. April 2, 1979). *See also* H.R. 3486, 96th Cong., 1st Sess., 125 CONG. REC. H2069 (daily ed. April 5, 1979). The most recent hearing on this proposal was held on April 25, 1979, before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary. Assistant Attorney General Philip Heymann testified on behalf of the proposal. His prepared statement, a copy of which was obtained from the Subcommittee office, is hereinafter cited as *1979 House Hearing.* On September 21, 1979, Birch Bayh (D. Ind.) introduced S. 1790, The Privacy Protection Act of 1979, which echoes exactly all the language of S. 855 and H.R. 3486. S. 1790, 96th Cong. 1st Sess., 125 CONG. REC. S13187 (daily ed. Sept. 21, 1979). This bill also includes two additional Titles, one pertaining to "Citizens Privacy Protection" (Title III), the other to "Confidential Information Protection" (Title II). These sections are framed with parallel language to that used in Title I and S. 855. This Note's analysis of S. 855, its guarantees, and particularly the exceptions enumerated will apply equally therefore to S. 1790. *See* text *infra* at Part II.(B.)(1.) and Part II.(C.)

17 S. 115, 96th Cong., 1st Sess., 125 CONG. REC. S421 (daily ed. Jan. 23, 1979).

but it remains unclear which approach Congress will ultimately adopt.[18]

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The purpose of this Note is to assess the conflicting policy goals — providing adequate protection of citizen privacy while permitting effective law enforcement — thus far exposed in the legislative debate over *Zurcher*. After briefly reviewing the Supreme Court decision and the legislative hearings which followed immediately in its wake, this Note concentrates on the fundamental issues which Congress must resolve in drafting workable legislation in this area: the scope of protection to be established, the exceptions for which provision must be made, the sanctions to be imposed in case of violation, and the necessary basis for asserting federal authority over the activities of state law enforcement and judicial officials. In the context of this discussion, the Note critically examines the major pieces of legislation which have been introduced in the 96th Congress to address the issues raised by search warrants served on third parties generally, and on members of the press in particular. In conclusion, the Note suggests constructive proposals as to the necessary components for any federal legislation designed to remedy the problems raised by *Zurcher*.

I. The Constitutional Context

On the afternoon of April 9, 1971, a group of student demonstrators occupied the administrative offices of the Stanford University Hospital.[19] After making futile requests to the demonstrators to leave peacefully, hospital officials called in officers from the Santa Clara County Sheriff's Office to disperse the group. In the course of police efforts at control, several demonstrators assaulted and injured nine officers. The incident took place at one end of a corridor, while almost all observers and photographers were at the other end. The officers were able to

18 *See* 37 Cong. Q. Weekly Rep. 759, 761 (April 2, 1979). *But see* 38 Cong. Q. Weekly Rep. 345 (Feb. 9, 1980). The Senate Subcommittee on the Constitution on January 31 approved S. 1790, *see supra* note 16, for consideration by the full Senate Judiciary Committee. This decision represents an initial decision to go with the First Amendment approach proposed by the Justice Department. S. 1790's "third-party" provisions (Titles II and III) were not approved by the Subcommittee, but were withheld for further hearings by the full committee.

19 This outline of facts is drawn from both the Supreme Court opinion and the opinion of the district court in Stanford Daily v. Zurcher, 353 F. Supp. 124 (N.D. Cal. 1972).

identify only two of their assailants, but they reported that one photographer had witnessed and apparently photographed the assault.

On April 11, the *Stanford Daily,* the student newspaper, published a special Sunday edition which contained reports and photographs of the hospital demonstration. The following day, the Santa Clara district attorney obtained a warrant authorizing an immediate search of the *Daily* offices for negatives, films, and pictures showing the events at the hospital. The warrant contained no allegation that any members of the *Daily* staff were involved in unlawful activity.

Later the same day, four police officers appeared at the *Daily* offices and conducted the search. In the presence of several *Daily* personnel, the police spent about fifteen minutes looking through filing cabinets, desks, unlocked drawers, wastebaskets, and photographic laboratories. Nothing was seized, as the search uncovered only those pictures which had been previously published.

The *Daily* and several staff members filed suit in federal district court seeking declaratory and injunctive relief under 42 U.S.C. § 1983[20] against the police officers who had conducted the search, the chief of police, the district attorney, and one of his deputies who had sought the warrant. On the complaint that the search had violated plaintiffs' rights under the First, Fourth, and Fourteenth Amendments, the district court denied injunctive relief but granted the declaratory relief sought on a motion for summary judgment.

The district court held that use of a search warrant was *per se* unreasonable against a non-suspect possessing evidence unless police presented affidavits to the court establishing probable cause to believe a subpoena *duces tecum* "impracticable."[21] Evidence only that an individual might refuse to comply with a subpoena would not be a sufficient showing of impracticability; instead, the court's standard required a showing of probable cause that in the

20 42 U.S.C. § 1983 (1970) 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 proceeding for redress."

21 *Zurcher,* 353 F. Supp. at 127.

face of a court restraining order, the individual would actually destroy or remove the evidence. Moreover, if the "third party" is a newspaper, an even higher standard would be required; a search warrant could issue only upon a "clear showing" of the same result.[22] In the court view, First Amendment guarantees and the doctrine of "less drastic means"[23] required use of a subpoena in all but a few situations.

On appeal, the Ninth Circuit affirmed, summarily adopting Judge Peckham's opinion and devoting its *per curiam* opinion to collateral issues.[24]

More than seven years after the search of the *Daily* offices took place, the Supreme Court reversed the lower court rulings and held that the search did not violate the constitutional standards governing issuance and execution of search warrants.[25] Justice White, on behalf of the five-Justice majority, held that "third parties deserve no greater Fourth Amendment protections than criminal suspects because the warrant clause[26] itself makes no distinction regarding the persons to be searched, but requires only a demonstration of probable cause that specific evidence of crime would be found in the specified place."[27] According to White, these basic standards for obtaining a valid warrant are the only constitutionally mandated protections, and the district court had no power to impose any additional procedural safeguards.[28]

Comparing the operation of a search warrant to that of a subpoena, Justice White agreed that subpoenas are too unreliable an

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22 *Id.* at 135.

23 *Id.* at 135 n.14. The Supreme Court's majority opinion in *Zurcher* does not mention this aspect of the district court's reasoning, but its assertion that "[i]n the normal course of events, search warrants are more difficult to obtain than subpoena, since the latter do not involve the judiciary and do not require proof of probable cause" demonstrates the majority's unwillingness to accept this argument. 436 U.S. at 562-63.

24 Stanford Daily v. Zurcher, 550 F.2d 464 (9th Cir. 1977).

25 Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist joined Justice White's majority opinion. Justice Brennan did not participate.

26 The Fourth Amendment has two clauses. The "warrant clause" is separated by an "and" from the general first clause prohibiting "unreasonable searches and seizures." It states "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."

27 436 U.S. at 554.

28 *Id.* at 549-50, 554, 561. The Court characterized the district court's construction of the Fourth Amendment at every mention as a "reconstru[al]," a "sweeping revision," and a "remarkable conclusion." *Id.*

investigative tool to carry "the burden of justifying a major revision of the Fourth Amendment."[29] There is no way, White asserted, that police can be sure in the early stages of a criminal inquiry that the persons subpoenaed are non-suspects or that such persons would not destroy the evidence.[30] Accordingly, Justice White concluded that while even properly drawn search warrants might be unreasonable in some circumstances, this fact did not justify a court adopting the *per se* approach represented by the district court's rule.[31]

In response to the *Daily's* arguments for special protection arising from the First Amendment,[32] Justice White held that the search was not an unconstitutional restraint on the *Daily's* publication.[33] Although White found the operation of a state "shield law"[34] "largely irrelevant,"[35] he linked *Branzburg v. Hayes* to *Zurcher* precedentially by restating his doubts of any "chilling effects" on press access to confidential sources.[36] As in *Branzburg,* White also reserved the possibility that "legislative or executive efforts" could be taken "to establish nonconstitutional protections against possible abuses of the search warrant procedure."[37]

Justice Powell's short concurrence took an intermediate position between the majority opinion that "third party" searches require no special procedures[39] and Justice Stewart's dissent that media search warrants are *per se* unreasonable.[40] Developing more fully the notion of "reasonableness," Justice Powell observed that before issuing a media search warrant, the magistrate must "take cognizance of the independent values protected by the First

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29 *Id.* at 561-62.

30 *Id.* at 561. White used the example of a seemingly blameless "third party" who was so related to or so sympathetic with the "culpable" that law enforcement efforts would be substantially hampered by requiring a subpoena to be served.

31 436 U.S. at 559-60.

32 *See id.* at 563-64 for a summary of these arguments.

33 *Id.* at 566-67.

34 California, where the *Stanford Daily* search took place, has such a "shield law." *See* CAL. EVIDENCE CODE § 1070 (West Supp. 1977).

35 436 U.S. at 567.

36 *Id.*

37 *Id. Cf.* Branzburg v. Hayes, *supra* note 3, at 689 & n.28.

38 436 U.S. at 568-70.

39 *Id.* at 553-54.

40 *Id.* at 570-77.

Amendment."[41] However, Justice Powell was unwilling to impose so stringent a standard as the district court; to the contrary, he believed requiring a showing that service of a subpoena would probably result in destruction of the evidence would unduly burden law enforcement efforts.[42]

Justice Stewart, joined by Justice Marshall, dissented on First Amendment grounds only. In their view, the "explicit" protection of the press in the First Amendment justified the subpoena alternative, while similar protection for other nonsuspects was not constitutionally mandated and would be a "matter of abstract policy."[43] Justice Stewart noted three potential disturbances of First Amendment guarantees occasioned by a newsroom search: 1) the physical disruption of a search which could slow or halt dissemination of the news;[44] 2) the opportunity, no matter how specific the description in the warrant of the evidence sought, for the police to "rummage"[45] through every document in the newsroom, exposing to scrutiny "confidential information completely unrelated to the purpose of the investigation"[46] and, 3) the denial of an opportunity for a prior adversary hearing in which the relevance or existence of the desired evidence could be challenged.[47]

In contrast to the other members of the Court, Justice Stevens, in his dissenting opinion, chose to focus more directly on the nature of the evidence sought than the character of the persons holding it.[48] Accordingly, he saw the issues in this case as an "outgrowth"[49] of the Court's decision in *Warden v. Hayden,*[50] which abandoned the long-standing rule that searches for "mere evidence," as opposed to contraband or fruits and instrumentalities of crime, were completely prohibited by the Fourth

41 *Id.* at 570.
42 *Id.* at 568 n.1.
43 *Id.* at 576.
44 *Id.* at 571.
45 *Id.* at 572. The other term used by Justice Stewart to describe the possible form the search would take is "ransack."
46 *Id.* at 573.
47 *Id.* at 576.
48 *Id.* at 577. "The question is what kind of 'probable cause' must be established in order to obtain a warrant to conduct an unannounced search for *documentary evidence in the private files* of a person not suspected of involvement in any criminal activity." (emphasis added).
49 *Id.*
50 387 U.S. 294 (1967).

Amendment. The practical effect of the "mere evidence" rule, Justice Stevens noted, was not only to limit the types of items subject to search and seizure, but also to limit the category and number of persons subject to searches. Without the rule, almost everyone, including those completely innocent of any wrongdoing, could be subject to serious intrusions on privacy, since the number of people holding "mere evidence" potentially relating to some criminal activity is very large. Justice Stevens noted three potential problems: (1) exposure to police of privileged materials that could not be obtained through subpoenas: (2) inspection of other private materials not specified in the warrant, but so closely intermingled with specified materials as to make inspection inevitable; and, (3) unjustified injury to reputation of the persons searched.[51]

As his basis for justifying the reinstatement of the distinction which *Hayden* rejected between contraband, weapons, and stolen property and "mere evidence," Justice Stevens observed that possession of the former gives rise to two inferences — that the custodian is involved in criminal activity and that prior notice will result in concealment or destruction of the evidence — which justify the use of a search instead of some less intrusive method of acquisition. "Mere possession of documentary evidence"[52] does not, without more, give rise to these inferences. As a result, Justice Stevens concluded that there is no justification for an unannounced search, at least in the case of a nonsuspect.

II. A Critique of Current Legislative Proposals

The various bills which have been introduced in the current session, and which are under consideration in Senate and House subcommittees, are largely the result of concern expressed by witnessess during the hearings held immediately following *Zurcher*. Accordingly, before undertaking an analysis of those proposals, it is helpful to take a brief look at the groups represented in those hearings and at the interests they expressed.

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51 436 U.S. at 579-81.

52 *Id.* at 581. While Justice Stevens failed to distinguish between documentary and nondocumentary evidence, most of the problems which he described relate primarily to documentary searches.

A. *The* Zurcher *Hearings*

Not surprisingly, the interest most frequently represented at the hearings was that of the press. With virtually no dissent, press spokesmen asserted that the inevitable effect of the Court's holding would be to "chill" the ability of the media to gather and disseminate news information of significant interest, especially information dealing with governmental corruption or abuse.[53] Even those members of the press generally inclined to support the conservative outlook of the current Supreme Court were highly critical of Justice White's opinion for the majority.[54]

The outcry over *Zurcher* did not come only from journalists, however. Many private organizations, the most vocal of which was the American Civil Liberties Union (ACLU), expressed strong concern that the Court's interpretation of the Fourth Amendment threatened not only the interests of the press, but also opened the door for widespread intrusions on the privacy interests of all citizens.[55] This concern reflected the observation in Justice Stevens' dissenting opinion that "countless law-abiding citizens — doctors, merchants, customers, bystanders — may have documents in their possession that relate to an ongoing criminal investigation. The consequences of subjecting this large category of persons to unannounced police searches are extremely serious."[56] In addition, legislators were made aware of the medical profession's adverse reaction to *Zurcher,* a reaction which has intensified in subsequent months.[57]

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53 Only one major commentator, *New York Times* columnist Anthony Lewis, took a more moderate approach, criticizing other members of the press for being "unjustifiably hysterical at the Stanford Daily decision." Lewis, *Amending the Court,* N.Y. Times, June 26, 1978, at 19, col. 5. *See also* Lewis, *The Court and the Press,* N.Y. Times, June 8, 1978, at 27, col. 11.

54 *See, e.g.,* Kilpatrick, *Take That, Justice White!,* Wash. Star, June 8, 1978, *reprinted in 1978 House Hearings, supra* note 7, at 212.

55 "[T]he *Stanford Daily* decision is but another step — perhaps the most dangerous and far-reaching — in a series of recent Supreme Court decisions weakening the privacy rights of American citizens." Taken By Surprise: The Implications of *Zurcher v. Stanford Daily* for the News Media and the Public: Report of the New York State Assembly Comm. on Codes 35 (1978) (testimony of Norman Dorsen, National Chairman of the ACLU) [hereinafter cited as Taken By Surprise].

56 436 U.S. at 579 (Stevens, J., dissenting). *See, e.g., Intolerable Assault,* Nat'l L.J., Apr. 30, 1979, at 16, col. 1 (condemning the use of search warrants for obtaining evidence in law offices).

57 *See 1978 House Hearings, supra* note 7, at 269-70 (Appendix 15 — letter from Dr.

Representing the other side of the issues, the response of police, prosecutors, and law enforcement officials generally was fairly subdued. This is partly because legislators conducting hearings on post-*Zurcher* proposals did not seek out, or were not very successful in procuring, the views of law enforcement spokesmen other than high Justice Department officials.[58] This subdued response does not suggest, however, that law enforcement personnel do not have strong feelings about placing restrictions on their ability to obtain search warrants in various circumstances. Indeed, a Justice Department survey of United States attorneys conducted shortly after the *Zurcher* decision indicated a strong opposition among those responding[59] to the proposals which would greatly restrict the availability of search warrants in so-called "third par-

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Grossman). Although this does not represent actual testimony, it is the only recorded expression of the views of an "institutional third party" representative (excluding the press) on the implications of *Zurcher v. Stanford Daily*.

Dr. Grossman was involved in a warrant search of all the files in the entire psychiatric outpatient department of the Stanford University Medical School. The warrant was obtained by the same District Attorney named a defendant in the *Stanford Daily's* suit, and the search took place only several weeks after the *Daily* incident. Grossman stressed that the file sought, that of a one-time patient claiming that he was the victim of a homosexual attack, was privileged from subpoena under CAL. EVIDENCE CODE §1014, but all the District Attorney needed was the victim's permission to overcome the bar. The warrant was executed; searching the files continued until the hospital officials expressed their willingness to turn over the one visit's worth of brief notes.

Dr. Grossman expressed concern that any *Zurcher* legislation covers this kind of intrusion, as well as newsroom searches. He illustrated the drawbacks of single-minded concentration on First Amendment interests by pointing out that although claims arising from this incident were included in briefs for *Stanford Daily v. Zurcher* heard by the Ninth Circuit, those facts were not argued before the Supreme Court and psychiatric organizations were not permitted to file an *amicus curiae* brief, so as to narrow the issue to the "press" context.

Jerome B. Falk, the *Daily's* attorney, nonetheless testified before the Senate Subcommittee on this incident and reported the Supreme Court's unwillingness to reconsider its opinion when this "institutional third party" problem was presented in the Petition for Rehearing. *See* statement of Jerome Falk, at 9-13, *to be printed in 1978 Senate Hearings, supra* note 1.

58 In addition to Assistant Attorney General Philip Heymann, congressional hearings have included the testimony of Assistant Attorney General John Keeney; Charles Gravely, Lewis & Clark County Attorney, Montana; Robert Leonard, President, National District Attorneys' Assoc.; and Glen King, Executive Director, International Assoc. of Chiefs of Police. *See 1978 House Hearings, supra* note 7.

59 Taken By Surprise, *supra* note 55, at 198-206. According to the survey, 76 percent of the United States attorneys responded to the questionnaires, an unusually heavy response which indicated "the extent to which the United States attorneys consider this an important issue." *Id.* at 198. Of those responding, 92 percent opposed legislative schemes limiting third party searches, even if those schemes were to contain a destruction exception. *Id.* at 201.

ty"[60] situations. Similar opposition was expressed by state law enforcement officials.[61]

Not all law enforcement officials took such a rigid stance. In spite of the survey results, for example, the Justice Department, under the guidance of Assistant Attorney General Philip Heymann, drafted and submitted to Congress a legislative proposal[62] which would somewhat limit the circumstances in which state and federal officials could obtain search warrants for evidence held by persons engaged in a variety of First Amendment activities. A similar position has been advocated by some state attorneys general and prosecutors at the local level.[63] Even those officials who support restrictions on press searches, however, assert that significant problems would be encountered if the same restrictions on obtaining warrants were applied to third parties generally.[64]

The numerous bills which have been introduced represent a wide spectrum of responses to the various opinions in *Zurcher* and to

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60 The term "third party" is used interchangeably with the term "nonsuspect" throughout this paper. It denotes a person in possession of evidence relevant to a criminal investigation about whom there is no probable cause to suspect involvement in the crime when the search warrant is sought. As used in this context, the term is not to be confused with references to third parties in other Fourth Amendment cases such as Stoner v. California, 376 U.S. 483 (1964) (third party consent to warrantless search of premises occupied by criminal suspect).

61 Connecticut's chief state attorney, Joseph Gormley, issued guidelines in July, 1978, relating to the use of search warrants for evidence held by members of the press. He emphasized, however, that the guidelines "should not be construed to govern or discourage the use of valid search warrants to discover contraband, fruits and instrumentalities of crime or other evidence of crime that may have been purposely or unintentionally left in possession of someone not involved in the criminal activity." N.Y. Times, July 24, 1978, at 14, col. 3. California Attorney General George Deukmejian has expressed a similar willingness to use search warrants when "necessary."

62 H.R. 3486, 96th Cong., 1st Sess., 125 CONG. REC. H2069 (daily ed. Apr. 5, 1979); S. 855, 96th Cong., 1st Sess., 125 CONG. REC. H53790 (daily ed. Apr. 2, 1979). *See also* S. 1790, 96th Cong. 1st Sess., 125 CONG. REC. S. 13187 (daily ed. Sept. 21, 1979) (Titles I and IV). The Justice Department proposal was introduced as part of the Carter Administration "Privacy Package." Throughout the Note, it will be cited to exclusively by its Senate bill designation.

63 For example, shortly after the *Zurcher* decision was handed down, New Jersey Attorney General John Degran said that he did not plan to take advantage of the ruling, but would respect the policy represented by New Jersey's shield law, which protects the confidentiality of news sources and unpublished information. N.Y. Times, June 9, 1978, at 17, col. 2. *See also 1978 House Hearings, supra* note 7, at 58 (statement of Robert Leonard, President, National District Attorneys' Assoc., supporting use of subpoenas for obtaining evidence from the press).

64 *See* prepared statement of Philip Heymann, at 9-11, *to be printed in 1978 Senate Hearings, supra* note 1.

the concerns expressed during the hearings. With respect to the most fundamental issue — the proper scope of protection to be granted — there is a distinct split of opinion suggested by the bills. Five of the proposals currently under consideration[65] reflect the views of Justice Stewart[66] and would extend statutory protections against search warrants only to press organizations. In contrast, four of the bills[67] call for much broader coverage, granting protection to all innocent "third-parties" thought to possess evidence relevant to an ongoing criminal investigation. In order to consider other features of legislation in this area, such as exceptions and sanctions, it is first necessary to review the respective arguments for press and general third-party protection.

B. *"Press Only" v. "Third-Party" Bills*

The bills which limit protection to members of the press or news media reflect what Justice Stewart referred to as the "self-evident" fact "that police searches of newspaper offices burden the freedom of the press"[68] protected by the First Amendment. Experience with newsmen's shield laws indicates that the viability of that type of legislation depends as a threshold matter on the adequacy of the definition of "the press" within a given bill. Past efforts to develop an acceptable definition in those shield laws indicate how difficult this task can be.[69]

A complete discussion of the development of an appropriate definition is beyond the scope of this Note,[70] but the basic concerns can be sketched briefly. The goal is to create a definition which is precise and simple enough to be easily applied by law enforcement personnel and magistrates without, at the same time, being either underinclusive or overbroad. Underinclusiveness results in the denial of protection to those who justifiably deserve it.[71] On the other hand, overbreadth places too great a restriction

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65 H.R. 283; H.R. 323; H.R. 1293; H.R. 3781; H.R. 368.

66 436 U.S. at 570 (Stewart, J., dissenting).

67 S. 115; H.R. 380; H.R. 1437; H.R. 3837.

68 436 U.S. at 571.

69 *See* Note, *Newsperson's Privilege in California: The Controversy and Resolution,* 29 HAST. L.J. 375 (1977).

70 For such a discussion, *see* V. BLASI, REPORTER'S COMM. ON FREEDOM OF THE PRESS STUDY REPORT — PRESS SUBPOENAS: AN EMPIRICAL AND LEGAL ANALYSIS 261-85 (1972) [hereinafter cited as BLASI].

71 *See* prepared statement of Philip Heymann, *1979 House Hearing, supra* note 16.

on law enforcement officials, which may discourage desirable investigations or, alternatively, encourage widespread evasion of the rules.[72]

Professor Vincent Blasi has suggested that the notion of "dissemination of ideas or information to the public" must be the focus of any protection of "the press," since the primary justification for the special protection is the facilitation of that dissemination process.[73] To convert that notion into a workable standard, he proposed that association with an established medium of communication be a requirement. While other criteria — the nature of the person's activity, the intent of the person, or the amount of time the person devotes to the enterprise — might be used, they all require the magistrate to make difficult and subjective judgments, a problem minimized by the more mechanistic "association" criterion. In determining what constitutes an "established medium of communication," Professor Blasi suggested five necessary elements: "1) periodicity, 2) general availability, 3) continuity as to title and general nature of contents, 4) an editorial staff, 5) an orientation toward the dissemination of topical information concerning persons other than those who write for the publication."[74] For the most part, the "press-only" bills introduced in the wake of *Zurcher* have addressed this complex issue only perfunctorily. Three of the "press only" bills[75] simplified and modified the Blasi standard for items to be protected from seizure by search warrant: "any place or . . . any things in the possession, custody, or control of any person engaged in the gathering or dissemination of news for the print or broadcast media."[76] This language is a blanket prohibition of searches and seizures whenever the person searched is a nonsuspect[77] who would be traditionally viewed as a "newsman," "reporter," or member of the "media." This defini-

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72 *Cf.* Note, *The Right of the Press to Gather Information,* 71 COLUM. L. REV. 838, 850 (1971) ("[i]f a reporter's privilege not to disclose a confidential source could be invoked by anyone who could claim that he planned to disseminate his findings via placards or leaflets, the right of compulsory process of witnesses would be reduced to virtually nothing.")

73 BLASI, *supra* note 71, at 262-63.

74 *Id.* at 277.

75 H.R. 283; H.R. 323; H.R. 3781.

76 H.R. 283 § 2; H.R. 323 § 2; H.R. 3781 § 2.

77 *Id.* This status is maintained unless a showing of probable cause is made to a court that "such person has committed or is committing a criminal offense."

tion would almost certainly exclude those persons who do not gather news or write for an outlet of the "print or broadcast media,"[78] such as pamphleteers, independent producers of documentary films, or academic or free-lance writers doing research on books or articles but without a settled publisher. While law enforcement agents may be less likely to seek criminal evidence from such sources, subpoenas already have been served on some of these people.[79] It is, therefore, conceivable that the search warrant alternative legitimized in *Zurcher* will be used in the future to avoid protracted court battles over the validity of the subpoenas *duces tecum*.[80]

H.R. 368,[81] introduced by Representative Green, provides a somewhat different approach. This bill is divided into two separate titles — one providing a shield for members of the press from subpoenas and the other providing search warrant protection to third parties generally. Although this is not a "press-only" bill in its search warrant title, the definitions set out in the title governing subpoenas provide a useful example of the more detailed approach suggested by Professor Blasi and absent from the other "press-only" bills. Despite the attention to detail, however, several problems with the Green approach indicate that it should be rejected in the context of search warrant protections.

The bill carefully circumscribes the boundaries of the word "media" by separately defining only the terms "magazine," "news," "news agency," "newscaster," "newspaper," "press association," "professional journalist," and "wire service."[82] While these clauses combine to give a technically accurate description of what is traditionally described as "the Establishment press" or the "national news media," they appear to exclude some student and "alternative" or "underground" publications which, because of erratic financial support or a special, unstable audience, might be found not to satisfy the periodicity, regularity,

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78 *Supra* note 76.

79 *See, e.g.*, United States v. Doe, 460 F.2d 328 (1st Cir. 1972) (subpoena of assistant professor of government at Harvard University to testify about interviews conducted concerning release to public of Pentagon Papers).

80 Statement of Anthony Day, chairman of the Freedom of Information Committee, American Society of Newspaper Editors, at 6, *1978 Senate Hearings, supra* note 1.

81 H.R. 368, Titles I & II, 96th Cong. 1st Sess., 125 CONG. REC. H166 (1979).

82 *Id.* at Title I § 101(1)-(8).

or circulation requirements specified in the bill. This omission becomes especially significant when it is remembered that "alternative" or "underground" newspapers were some of the earliest targets of search warrants;[83] indeed, the stated purpose of such groups is often to criticize and probe the political status quo. Thus, it is not unreasonable to suggest that these groups, most likely to fall outside the carefully crafted guidelines suggested by Professor Blasi and H.R. 368, are also most likely to be in need of the protections which the legislation is intended to establish.[84] Accordingly, despite the initial popularity of the view of the press as an organized, homogeneous, critical whole — a view apparently adopted by Justice Stewart[85] — the description has come under increasing criticism[86] and appears to be an inadequate basis on which to build the necessary protections.

1. The Justice Department Proposal

Recognizing that legislation protecting only persons with institutional media connections has serious definitional deficiencies, the Justice Department has introduced a proposal (S. 855) which, its supporters suggest, should be characterized as a "First Amendment bill, not just a press bill."[87] In contrast to the "press-only" bills previously examined, S. 855 is based on a categorization of the property sought rather than of the persons holding it. Two tiers of protection are established, with the second being subject to a greater number of exceptions.[88] The first tier provides for a so-called "no search" rule — no search warrant could issue for "any

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83 Besides the search of the *Stanford Daily* in 1971, police twice searched the offices of the *Berkeley Barb,* an underground newspaper, and the offices of the *Los Angeles Star,* a sexually explicit tabloid, in 1974. *See Stanford Note, supra* note 8, at 957 n.3.

84 It is important to note, however, that there is a legitimate concern that these organizations are most likely to have policies of destroying or concealing valuable criminal evidence upon receipt of subpoenas.

85 "Or of the Press," Address by Mr. Justice Stewart, Yale Law School Sesquicentennial Convocation, Nov. 2, 1974, *reprinted in* 26 HAST. L.J. 631, 634 (1975).

86 *See, e.g.,* N.Y. Times, Dec. 9, 1978, at 24; Lewis, *A Blow for Liberty,* N.Y. Times, Dec. 14, 1978, § A, 31, col. 1, 2; Shaw, *Journalists Fear Impact of Court Rulings, reprinted from* L.A. Times, Jan. 1, 1979, at 6.

87 *See, e.g.,* Lewis, *A Blow for Liberty, supra* note 86. In line with the suggestion, S. 855 has been titled the "First Amendment Privacy Protection Act of 1979." 125 CONG. REC. S3790 (1979). Its companion bill introduced in the House of Representatives is H.R. 3486, *supra* note 16. *See also* S. 1790, *supra* note 16.

88. *See* discussion at pages 174-179 *infra.*

work product materials possessed by a person in connection with a purpose to disseminate a newspaper, book, broadcast or other similar form of public information. . . ."[89] The person possessing the evidence need not have any organizational affiliations; he would only have to be the creator, or have commissioned the creation of the "work product."[90] The second tier of protection would apply when the evidence consisted of "documentary materials, other than work product, possessed by a person in connection" with the purposes set forth above.[91] Neither category of material could be contraband or the fruits or instrumentalities of crime.[92] The Justice Department thus has at least partially revived the distinction among types of evidence existing prior to *Warden v. Hayden*[93] — only documentary "mere evidence" judged to have First Amendment significance would be protected.[94]

By focusing on materials which have always been considered to fall within the protections of the First Amendment, rather than on persons who may be judged members of the established media, the Justice Department proposal avoids many of the definitional inadequacies of the other "press-only" bills. At the same time, however, this First Amendment orientation, which restricts protection to materials intended for public dissemination, is clearly

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89 S. 855 § 2(a), *supra* note 16, at S3791. *See* statement of Philip Heymann, at 2, *to be printed in 1978 Senate Hearings, supra* note 1.

90 *Id. See* S. 855 § 5(b), *supra* note 16. For analysis of this statutory definition, *see* 125 CONG. REC. S3793 (1979). The bill's drafters obviously intend interpreters of the boundaries of the "work product" concept to analogize to "the extensive body of case law concerning attorney 'work product'," with the exception that the "person possessing the materials himself [need not] have created or solicited the creation of the materials if the person has planned to use the materials in connection with a communication to the public."

91 S. 855 § 2(a), § 2(b), § 5(a), *supra* note 16, at S3791. *See* statement of Philip Heymann, at 4, *to be printed in 1978 Senate Hearings, supra* note 1.

92 125 CONG. REC. at S3793-94. For the "rare example of work product" that is also contraband or the fruit or instrumentality of crime, the analysis mentions "a ransom demand sent by a kidnapper to a newspaper for publication or a fraudulent advertisement which was the instrumentality through which a fraud was effected." *See* statement of Philip Heymann, at 2-3, *to be printed in 1978 Senate Hearings, supra* note 1.

93 For a good discussion of that distinction and the change in court interpretation over the centuries, especially with regard to "papers," *see* McKenna, *The Constitutional Protection of Private Papers: The Role of a Hierarchical Fourth Amendment,* 53 IND. L.J. 55, 67-72 (1977-78) (quoted with approval in *Zurcher)* [hereinafter cited as McKenna]. *See also* Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments,* 90 HARV. L. REV. 945, 948-71 (1977) [hereinafter cited as *Constitutionally Protected Privacy Note.*]

94 125 CONG. REC. at S3793; statement of Philip Heymann, at 2-3, 12 *to be printed in 1978 Senate Hearings, supra* note 1.

not broad enough to cover other types of materials affected with equally compelling citizen privacy interests, such as medical records, attorney work product materials, and similar items. For protection this broad in scope, one must look to the various "third-party" bills which have been introduced.

2. "Third-Party" Bills

For several reasons, bills with broader protection may receive greater support among legislators and witnesses than an approach which grants protection only to members of the press. The main objection to this limited approach is two-fold; granting special privileges to the press is both unfair to non-privileged members of society, who may have equally important privacy interests, and potentially harmful to those to whom the protection is granted.[95] In addition, the definitional problems cited above have led many legislators to conclude that a statute designed to protect only members of the press, but at the same time designed to ensure such protection to all members of that group, is practically impossible to formulate. As a result of these objections, several bills reflect a "core principle" which extends protection from search warrants, as a general rule, to all persons with respect to whom there is no reason to suspect involvement in criminal activities at the time the warrant is sought.

Two[96] of the bills currently under consideration place an affirmative duty on law enforcement officials "to attempt to secure . . . evidence only through a subpoena *duces tecum*" when they have probable cause to believe that "evidence of a crime is located on or about the premises in which the person in possession of the evidence has a reasonable expectation of privacy."[97] The general duty would not apply, however, when "there is probable cause to believe the person or persons in possession of the evidence may be involved in the crime under investigation."[98]

The language used in these bills gives law enforcement officers great discretion in framing their affidavits for a search warrant.

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95 *See generally* W. Van Alstyne, *The Hazards to the Press of Claiming a "Preferred Position,"* 28 HAST. L.J. 761 (1976).

96 H.R. 380; H.R. 1437.

97 H.R. 380 § 1; H.R. 1437 § 1.

98 H.R. 380 § 2(1) & (2); H.R. 1437 § 2(1) & (2).

Probable cause that the "person may be involved in the crime under investigation"[99] could arguably be established with a simple showing of some continuous or recent association with the criminal suspect.[100] Moreover, because during the early stages of an investigation there are often no certain suspects, magistrates may be willing to find that someone connected only circumstantially with the crime is sufficiently "involved" to fall within the exception. Thus, the vulnerability to search warrants under this formulation may be practically as broad as that established in the opinion of the Court in *Zurcher*.[101]

Another possible area of vagueness arises from the provision that only premises in which the possessor of the evidence "has a reasonable expectation of privacy" are protected.[102] In recent years, this term has developed a considerable judicial gloss of which magistrates and law enforcement officials who will be interpreting and applying the statute may not be aware.[103] These bills are thus likely to produce a proliferation of litigation seeking clarification of the standard.[104] As with the "shield laws," vagueness of the definition may allow courts to avoid providing any uniform construction.

Recognizing that the varying institutional and intellectual powers and resources of the magistrates leave some magistrates unable "to argue with the local police,"[105] some congressmen suggested "guidelines" to the subcommittee for the use of subpoenas.[106] The mere provision of such guidelines, however, still allows ample opportunity for wide discretion on the part of magistrates and for police pressure.

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99 H.R. 380 § 2(1); H.R. 1437 § 2(1).

100 *See* statement of Sen. John Heinz, at 7-8; statement of John Shattuck, at 10-11; statement of Philip Heymann, at 10, *to be printed in 1978 Senate Hearings, supra* note 1.

101 *Id.*

102 *See* note 98 *supra.*

103 The term originated in Justice Harlan's concurring opinion in Katz v. United States, 389 U.S. 347, 360-62 (1967). For examples of the wide range of cases in which this concept was used to assess the validity of government invasion or inspection of places or things, *see, e.g.,* United States v. White, 401 U.S. 745 (1971) (eavesdropping); United States v. Dionisio, 410 U.S. 1 (1973) (grand jury subpoena for voice exemplars); United States v. Miller, 425 U.S. 435 (1976) (subpoena duces tecum served upon bank for defendant's bank records).

104 Statement of Paul Davis, Vice President, Radio Television News Directors Association, at 10, *to be printed in 1978 Senate Hearings, supra* note 1.

105 Statement of Rep. Quayle, at 3, *to be printed in 1978 Senate Hearings, supra* note 1.

106 *Id.*

A better approach is taken by H.R. 368. As with the other "third-party" bills, it requires a subpoena for the acquisition of evidence in the possession, control, or custody of any person "not reasonably believed to be implicated in the commission of a crime."[107] An exception to the subpoena requirement would be made upon a showing of probable cause that the person "has committed or is committing the crime to which the evidence relates." In contrast to the other bills, H.R. 368 provides an additional safeguard in the procedure for determining whether the exception applies. There must be "evidence presented at a hearing transcribed by a court reporter."[108] Suspicions about the discernment and care with which a magistrate hears search warrant requests thus could be substantially assuaged by this requirement. Furthermore, a record would be preserved for a plaintiff who later sought to challenge the legality of the search warrant or the proceedings in which it was issued.

The other major "third-party" bill is S. 115,[109] which was newly introduced in the 96th Congress by Senator Mathias and is likely to receive the most congressional attention as the debate progresses. S. 115 prohibits the issuance of search warrants for "any matter," rather than the more limited "documentary material" concept, and thus clearly provides for even broader coverage than existed prior to *Warden v. Hayden*. While "contraband" is exempted from the bill's protections, no attempt is made in S. 115 to reinstate the more limited "mere evidence" as opposed to "fruits or instrumentality of crime" distinction. Thus, the proposal is likely to provoke disapproval from law enforcement officials, who will cite situations where the bill's protections might preclude obtaining a murder weapon, or a ransom note or terrorist communique if it is in the hands of a third party. S. 115 appears to require an adversary hearing before a warrant could issue for any of these items. Accordingly, the drafting here seems problematic and worthy of reworking, so that the bill makes clear its apparent goal — the protection of documentary materials in the hands of innocent third parties.

The procedural requirements of S. 115 preclude the use of *ex*

107 H.R. 368 § 203(1) & (2).
108 *Id.*
109 S. 115, *supra* note 17.

parte orders; instead, an "adversary" hearing must be held and a requested search warrant must be denied unless "authorized by law *and* no privilege or legal grounds exist that justify the refusal to produce the matter."[110] While the guarantee of an adversary hearing is clear, the bill provides little help as to the proper standards to be applied and does not adequately address the potential problem of privileged material being seized in an illegal search.

The bill also provides for voluntary disclosure of the desired evidence by expressly permitting waiver of the right to a hearing. Senator Mathias apparently believed that third parties possessing evidence of a life-endangering crime, such as a ransom note or terrorist message, might, in the interest of expediency, consent to waive the adversary hearing and comply with the request.

S. 115 represents an attempt to deal simply with "third- party" privacy protection. Its simplicity avoids the various definitional problems of the "press-only" and Justice Department proposals. However, this simplicity occasionally lapses into sketchiness of drafting. As a result, while this bill definitely deserves consideration, it is still in need of further refinement.

C. *Exceptions*

Once the scope of the bill is established — whether "press-only," First Amendment-oriented, or third-party — it is necessary to determine what circumstances justify suspension of the general prohibition on search warrants. One approach, of course, would be to permit no exceptions. However, the tremendous burden which this approach would place on criminal investigations and the great potential which it would create for destruction of evidence are readily apparent. Even strong advocates of protective legislation in this area recognize the need for some exceptions to a general "no search" or "subpoena only" rule.[111]

The consensus that some exceptions are justifiable, however, does not extend to what exceptions are called for or how rigorous

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110 *Id.* at § 2(b)(2).

111 *See, e.g.*, statement of John Shattuck, at 13, *to be printed in 1978 Senate Hearings, supra* note 1; *but see* Note, *Search Warrants and Journalists' Confidential Information*, 25 AM. U. L. REV. 958 (1976) (may not be necessary for press-only protection) [hereinafter cited as *Journalists' Confidential Information Note*].

the standard of a showing for such exceptions should be. The following discussion examines these issues within the framework of exceptions contained in the Justice Department bill.

As indicated previously, the Justice Department bill, S. 855, contains two levels of protection, distinguished primarily by the differing exceptions to the general rules. The exceptions to the first tier, the "no search" rule, are very limited. First, a warrant would be permitted if the possessor "has committed or is committing the criminal offense for which the materials are sought."[112] In addition, warrants would be proper where "there is reason to believe that the immediate seizure of the materials is necessary to prevent death or serious bodily injury to a human being."[113]

The subpoena-first rule is subject to both of these exceptions, as well as two additional ones. Search warrants would be proper if "there is reason to believe that the giving of notice pursuant to a subpoena *duces tecum* would result in the destruction, alteration, or concealment of the material",[114] or if there is "reason to believe that the delay in an investigation or trial occasioned by further proceedings relating to the subpoena would threaten the interests of justice."[115]

The Justice Department scheme exhibits more regularity and more careful consideration of law enforcement needs than any of the congressionally-introduced proposals. However, while Justice Department spokesmen made convincing arguments before the Senate subcommittee that the exceptions to the basic rules were clear, narrowly defined, and reasonable,[116] it is unrealistic to assume that a magistrate considering a search warrant request will give less than the broadest possible interpretation to each exception to effectuate law enforcement purposes. Magistrates have a

112 S. 855 § 2(a)(1), *supra* note 16.
113 S. 855 § 2(a)(2), *supra* note 16.
114 S. 855 § 2(b)(3), *supra* note 16.
115 S. 855 § 2(b)(4), *supra* note 16.
116 Statement of Philip Heymann, at 7-9, *to be printed in 1978 Senate Hearings, supra* note 1. To illustrate, Heymann mentioned that the "suspect exception" prevents the creation of "artificial evidence sanctuaries for criminals." The "'danger to life' exception" recognizes that "[l]aw enforcement officials must investigate kidnappings, psychotic murderers, and terrorist threats as well as crimes that do not bring life into the balance . . . [and] reflects our fundamental and overriding concern for human safety." To circumscribe the "delay in response to subpoena would threaten the interests of justice" exception, Heymann suggested that only "[t]ime constraints imposed by the Speedy Trial Act, statutes of limitations, or the expiration of grand juries . . ." might legitimate such a claim.

virtual identity of interests with law enforcement,[117] and they generally grant the requests for search warrants presented to them. Accordingly, the text and analysis of the Justice Department proposal must be carefully examined to determine which exceptions to the search warrant requirement contain special potential for misuse.

The "suspect" exception is specifically drafted to prevent search of a person unless he could be arrested[118] for a crime other than a "possession offense."[119] Press representatives have been concerned,[120] however, with the explicit permission granted to search when the offense is "receipt, possession, or communication of information relating to the national defense, classified information, or restricted data . . ."[121] The sections of the United States Code listed in this exception describe the same offenses the Government asserted against the *New York Times* in the Pentagon Papers litigation.[122] A seizure of that document pursuant to a warrant prior to publication might have served just as effectively as an unconstitutional prior restraint, which the Government was denied in *New York Times Co. v. United States.*[123] There would, of course, be the *ex parte* warrant hearing to determine whether possessing the documents really violated the espionage or national defense

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117 This certainly was the judgment of several witnesses before the Senate subcommittee. *See* Statement of Rep. Quayle, at 3, *supra* note 105; statement of Paul Davis, *supra* note 104, at 6-7; statement of Jerry W. Friedheim, Executive Vice President and General Manager, the American Newspaper Publishers Association at 4, *to be printed in 1978 Senate Hearings, supra* note 1.

Professor Weinreb has voiced doubt whether magistrates could responsibly administer any more complicated legal standards than a basic prohibition against a "general search." *See* Weinreb, *Generalities of the Fourth Amendment,* 42 U. CHI. L. REV. 47, 71-72 (1974) [hereinafter cited as *Weinreb*]. While this assessment may not be wholly valid, legislators should recall that the more complicated and numerous exceptions are to the search warrant prohibition, the greater will be the number of erroneously issued search warrants.

118 125 CONG. REC. at S3792.

119 *Id.* S. 855 § 2(a)(1), *supra* note 16.

120 N.Y. Times, April 10, 1979, at A31, col. 2.

121 S. 855 § 2(a)(1), *supra* note 16.

122 The Government did not claim against the *New York Times* violation of every section listed in S. 855 § 2(a)(1) but instead focused on title 18 of the United States Code. However, the Supreme Court's opinion in New York Times Co. v. United States, 403 U.S. 713 (1971), comments on the inapplicability of each of these provisions as a basis for an injunction restraining publication. *See* 403 U.S. at 720 (18 U.S.C. § 793); at 721 (18 U.S.C. §§ 794, 797, 798); at 735-37 (18 U.S.C. §§ 793, 797, 798); at 741 (50 U.S.C. § 783); at 743 n.3 (42 U.S.C. §§ 2274, 2276, 2277).

123 403 U.S. at 714 (per curiam).

laws; yet there is no assurance that important First Amendment ramifications would be adequately considered there.

The second exception in the Justice Department proposal, applicable to both tiers of protection, permits the use of a search warrant if "there is reason to believe that the immediate seizure of the materials is necesssary to prevent the death of or serious bodily injury to a human being."[124] The justification presented for this exception is that when such circumstances exist, additional weight is added to the law enforcement side of the balance.[125]

It might be argued that such an exception is unnecessary, since most persons would probably turn over the evidence sought upon service of the subpoena if the life-threatening nature of the situation were made known to them. Furthermore, inclusion of this exception could be said to provide law enforcement officers with just one more means of evading the protection of the general rule. Finally, adoption of the less stringent standard "reason to believe" might serve to encourage the abuse of this exception.[126]

The justification for the exception, however, would seem to outweigh these criticisms. First, the situations in which these circumstances would apply, even with the less stringent standard of showing, are likely to be relatively rare, such as where the evidence consists of a ransom note or a terrorist communique containing information relative to an imminent bomb threat.[127] At the same time, the justification for obtaining the evidence is very strong, extending beyond normal law enforcement concerns. Therefore, even the slight potential that the person in possession of the evidence might destroy it or refuse to turn it over until a hearing has been held reasonably justifies the use of a search warrant.[128]

The third exception, which serves to distinguish the "no-

124 *Supra* note 113.

125 Prepared statement of Philip Heymann, at 14, *1979 House Hearings, supra* note 16.

126 *See* 125 CONG. REC. at S3792: The analysis of the "reason to believe" standard states that it is "intended to be less stringent than the standard of probable cause . . . See for a similar recent employment of the 'reason to believe' test, the Right to Financial Privacy Act of 1978."

127 As noted previously, this exception may even justify suspension of the special procedures for documentary searches.

128 "These are exigent situations which do not allow extensive investigation prior to the seizure of materials that are reasonably believed to contain information that may relieve the peril by indicating the location of hostages or the identity of the criminals who threaten human life." Prepared statement of Philip Heymann, at 14-15, *1979 House Hearings, supra* note 16.

search" and "subpoena-first" levels of protection in the Justice Department bill, is the "destruction of evidence" provision.[129] While some form of this exception appears in virtually all of the *Zurcher* bills, there is little agreement over the circumstances and standard of showing which should trigger its availability. While the Justice Department bill once again employs the somewhat weak "reason to believe" standard, other bills take a much stronger approach. H.R. 3837, for example, requires a specific finding, "based upon recorded, non-hearsay evidence, that there is a high probability that the objects sought will be concealed, destroyed or altered."[130] Although this latter formulation is clearly intended to provide as much protection to third parties as possible, its extremely burdensome requirements may very well result in law enforcement officials seeking to circumvent its protections entirely by naming friends or associates of the central suspect as suspects themselves, thereby qualifying for the earlier exception requiring only "reason to believe" that destruction will occur.

A better approach to the "destruction" exception is contained in S. 115. That bill will not require an adversary hearing before issuance of a search warrant where testimony before a judge or magistrate, based on "personal knowledge," establishes "probable cause" to believe that the adversary hearing procedure will result in evidence being "destroyed, altered, or put beyond the jurisdiction of the court."[131] The use of language such as "personal knowledge" and "probable cause" gives law enforcement officials an easier burden of proof in such proceedings. This "destruction of evidence" phraseology is also a good example of how law enforcement policies can be protected while maintaining the balance between effective investigation and protection of individual privacy.

The fourth exception which appears in the Justice Department proposal permits a search warrant to issue for non-work product documentary materials where:

> (4) the materials have not been produced in response to a court order directing compliance with a subpoena *duces tecum,* and

129 *Supra* note 114.
130 H.R. 3837 § 2, *supra* note 15.
131 S. 115 § 3(a) & (b), *supra* note 17.

> (A) all appellate remedies have been exhausted; or
> (B) there is reason to believe that the delay in an investigation or trial occasioned by further proceedings relating to the subpoena would threaten the interests of justice. In the event a search warrant is sought pursuant to this subparagraph, the person possessing the materials shall be afforded adequate opportunity to submit an affidavit setting forth the basis for any contention that the materials sought are not subject to seizure.[132]

Normally, subpoenas may be enforced only through contempt proceedings, and use of search warrants is not permitted for this purpose.

In support of the exception, Justice Department spokesmen point out that it does not permit a search until the trial court orders compliance with the subpoena. Even at this point, the possessor of the materials is granted further protection, either by appellate consideration of the court order, or the opportunity to respond to the government's claim that interests of justice would be threatened if further proceedings were allowed to delay acquisition of the evidence. Thus, a search warrant issued under this exception would not be based on merely an *ex parte* presentation by the government of the facts relevant to probable cause. Furthermore, execution of a search warrant at this point would not create the disruption normally attendant to an unannounced search since the person in possession would have had ample time to segregate the evidence from other confidential material. Therefore, unless the possessor deliberately refuses to cooperate, execution of a warrant at this stage should not substantially intrude on his privacy.

Justice Department officials assert, moreover, that the purpose for requiring special procedures when evidence is sought from members of the protected class is not to give them the ultimate option of preventing the government from obtaining the material. Rather, the protections are granted to insure that the material is obtained in the least intrusive manner possible, consistent with the interests of society in effective law enforcement. If, despite a court order requiring compliance with the subpoena,[133] the possessor

132 S. 855 § 2(b)(4), *supra* note 16.

133 Thus, the possessor would have already had the opportunity to raise any privileges which may apply.

refuses to produce the evidence, the use of a search warrant becomes the least intrusive means for obtaining the materials.[134]

Despite these justifications, the exception is faulty since it permits law enforcement officials to conduct a search which was initially prohibited, and thus creates a loophole large enough to engulf the protection of the general rule. The availability of the exception naturally depends on interpretation by the magistrate or reviewing court of the imprecise standard of what would "threaten the interests of justice." Relevant situations offered by the Justice Department include difficulties in meeting the time constraints of statutes of limitation, of the Speedy Trial Act in federal prosecution,[135] or of the imminent expiration of the grand jury before whom the subpoena was returned.[136] In the final analysis, the utility or potential abuse of this exception will once again be determined by the care with which magistrates apply it.

D. *Remedies and Sanctions*

Regardless of the scope of protection provided by the legislation or the precision with which the exceptions are drawn, effectiveness of the legislation in providing the desired protection will depend largely on how effectively the remedy and sanction provisions are drafted and applied. A detailed discussion of remedies available for violations in the area of search and seizure, however, is beyond the scope of this Note. Accordingly, the purposes of this section are simply to provide the basis for considering issues relevant to a choice of remedy for redress of violations in a criminal prosecution, and to examine how the current legislative proposals make this choice.[137]

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134 The normal sanction — contempt of court — is not certain enough to produce the desired materials in a timely fashion.

135 18 U.S.C. §§ 3161 *et seq.* (West Supp. 1976).

136 Prepared statement of Philip Heymann, at 17, *1979 House Hearings, supra* note 16.

137 In other words, the possible sanctions are examined from the perspective of all members of the protected class, whether they are innocent, involved in the criminal activity but never taken to trial, or ultimately prosecuted. Of course, persons in the last group may still be able to make use of the exclusionary rule with respect to evidence seized during a search conducted in violation of the procedures. *See* United States v. Caceres, — U.S. —, 47 U.S.L.W. 4399 (1979) (evidence seized in violation of constitutional or statutory requirements, but not agency rules, subject to exclusion). Availability of the exclusionary rule, then, unless expressly included in the remedy scheme, depends upon the form in which the procedures are ultimately adopted (*i.e.*, by statute or agency guidelines).

Before analyzing the various sanctions which have been suggested, it is helpful to consider generally the goals which a scheme of sanctions should seek to fulfill. Primarily, an effective enforcement mechanism should be designed to eliminate violations of the specified roles of conduct.[138] Thus, sanctions should serve to deter improper conduct and to educate those involved as to how they can comply with the rules in the future. Both of these results are most likely when application of the sanctions is directly related and proportionate to the gravity of the offense.

The other major goal of an enforcement system should be to compensate the victim of the improper conduct for the intrusion on his privacy. Naturally, nothing can completely compensate for an unjustifiable breach of privacy stemming from an illegal search, but the lack of specifiable damage need not preclude victims from having the opportunity and, more significantly, the incentive to seek some type of redress. Without such action by the victim, the chances of effective deterrence and punishment are greatly diminished.

Several forms of remedies and sanctions have been suggested by legislatures to deal with violations of proposed post-*Zurcher* restrictions. The following discussion considers the three most popular provisions: application of the exclusionary rule, availability of civil sanctions, and application of criminal penalties.

1. The Exclusionary Rule

The traditional method of enforcing constitutional standards in the Fourth Amendment area is suppression at trial of the evidence obtained as a result of the illegal search and seizure.[139] However, well-established rules of standing in this area have rendered such sanctions unavailable to third parties.[140] Moreover, these same rules deny the defendant in a criminal action the right to assert the

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138 As one commentator has noted: "In the Fourth Amendment area, it is better to initially prevent an unreasonable search from occurring than to later decide that the search was unreasonable and attempt some compensatory action." Comment, *The Tort Alternative to the Exclusionary Rule in Search and Seizure,* 63 J. CRIM. L. C. & P. S. 256, 258 (1972) [hereinafter cited as *Tort Alternative*].

139 *See, e.g.,* Weeks v. United States, 232 U.S. 383 (1914); Mapp v. Ohio, 367 U.S. 643 (1961).

140 *See, e.g., The Supreme Court, 1977 Term,* 92 HARV. L. REV. 200, 208 n.54 (1978); *Stanford Note, supra* note 8, at 987-88 & nn.180-182; *Journalists' Confidential Information Note, supra* note 111, at 946-48.

exclusionary rule on behalf of a third party, unless the defendant was on the premises of the third party when the search occurred.[141]

In light of this unavailability, two bills would specifically provide for a statutory exclusionary rule as a part of their proposed enforcement mechanisms. H.R. 368 would render the fruits of any illegal search "inadmissible in any judicial proceeding."[142] This provision indicates the sponsoring congressman's relative confidence in the deterrent effect of the rule. Given the discretion accorded magistrates by proposed exceptions to the search prohibition, an inadmissibility clause, such as that contained in H.R. 368, could potentially restrain the actions of law enforcement agents. They may use a subpoena more often if they believe search warrants will later be found invalid and the evidence excluded.

A broad inadmissibility provision, however, faces possible constitutional challenges on the grounds that it violates a criminal defendant's Fifth, Sixth and Fourteenth Amendment rights,[143] or the principle of separation of powers.[144] If a "third party" in a separate civil action can obtain suppression of illegally obtained evidence that is relevant and admissible, the criminal defendant may have a valid claim that his rights to a fair trial have been fatally prejudiced. Conversely, if the prosecution is hampered by the suppression of evidence illegally obtained from a "third party" source, the statute may be attacked as an unconstitutional legislative encroachment into that sphere of power reserved to the judiciary — the determination of court procedure.

In assessing the validity of these claims, the reaction of state courts to state "shield laws," which exclude evidence under a testimonial privilege rather than on an "exclusionary rule" analogy, is instructive if not completely predictive.[145] Several of

141 Alderman v. United States, 394 U.S. 165 (1969); Brown v. United States, 411 U.S. 223, 229 (1973). *See* sources, *supra* note 149, and White & Greenspan, *Standing to Object to Search and Seizure,* 118 U. PA. L. REV. 333, 333-48 (1970).

142 H.R. 368 § 204.

143 U.S. CONST. amend. V; VI; XIV, § 1.

144 *See* U.S. CONST. art. I, § 1 (vesting legislative power in Congress); U.S. CONST. art. II, § 1 (vesting executive power in President); U.S. CONST. art. III, § 2 (vesting federal courts with judicial power). *See generally Georgetown Note, supra* note 5, at 1277-79.

145 These decisions rested on an explicit or implied *state* constitutional provision establishing the separation of powers. *Zurcher* legislation could be challenged only as an encroachment on the federal separation of powers. This argument, therefore, would not be relevant to the operation of the statute and its effect on the conduct in state criminal proceedings. There the challenge would be that Congress did not have a constitutional basis of power to impose federal standards in an area of traditional state control. *See* U.S. CONST. amend. X.

these courts have invalidated "shield laws" under the state constitution's "separation of powers" principle[146] or its guarantees of due process and fair trial.[147] Furthermore, the Supreme Court has itself expressed doubt in the efficacy or wisdom of the exclusionary rule even though it has deemed the rule constitutionally mandated by the Fourth Amendment.[148] Accordingly, judges may be willing to strike down congressionally-mandated exclusionary provisions if they believe the societal costs are too great in terms of lost convictions.

There are nonetheless times when third-party searches unjustifiably intrude upon confidential relationships, such as that of attorney-client or doctor-patient. To avoid such a result, both the common law and statutes have granted special protection against compelled production by subpoena of documents such as notes or memoranda falling within the scope of the testimonial privilege.[149] A search warrant for the same documentary evidence provides no similar opportunity for the assertion of the privilege before a court. Therefore, to guarantee absolute privacy under those privileges, there must be some mechanism for suppressing that evidence in court proceedings.

H.R. 3837, introduced by Representative Jacobs, provides such a mechanism by allowing the suppression of material illegally seized from persons in privileged relationships. Although it is not so absolute as H.R. 368, the suppression mechanism gives the magistrate the duty of including "appropriate provisions" in the warrant instructions designed to "protect all privileged matters," by "sealing or guarding such objects without examination until

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146 *See, e.g.,* Ammerman v. Hubbard Broadcasting, Inc., 89 N.M. 307, 312, 551 P.2d 1354, 1357 (1976); Farr v. Superior Court, 22 Cal. App. 3d 60, 70, 99 Cal. Rptr. 342, 348 (1971), *cert. denied,* 409 U.S. 1011 (1972); Rosato v. Superior Court, 51 Cal. App. 3d 190, 220-24, 124 Cal. Rptr. 427, 447-50 (1975), *cert. denied,* 427 U.S. 912 (1976) (state district court rested its holding on the rationale of *Farr*).

147 *See, e.g.,* Farr v. Superior Court, 22 Cal. App. 3d at 70, 99 Cal. Rptr. at 348 (citing Sheppard v. Maxwell, 384 U.S. 333 (1965)); In Matter of Farber, 78 N.J. 259, 394 A.2d 330, 336-371 (1978).

148 *But see* United States v. Calandra, 414 U.S. 338, 348 (1974) (exclusionary rule is a "judicially created remedy . . . rather than a personal constitutional right.").

149 Fisher v. United States, 425 U.S. 391, 402-05 (1976). *See Constitutionally Protected Privacy Note, supra* note 93, at 976 & n.191, 978 & nn.210-11 (explanation of *Fisher* holding regarding third parties within a privileged relationship possessing documents that will potentially incriminate client).

such nonsuspect can be heard by the magistrate or judge."[150] Given the limited circumstances in which this bill permits a search, it appears to be directed to situations where, for example, a reporter, lawyer, doctor, or psychologist has publicly announced his willingness to preserve confidentiality in his professional dealings by destroying or making inaccessible any relevant documents once a possible criminal investigation of one of his clients is underway.[151] In the event that the police make the required showing to obtain a search warrant and then seize material that might be protected by a testimonial privilege, H.R. 3738 would give the target the opportunity for a hearing at which he could argue his right to have the evidence suppressed.

In contrast to H.R. 368,[152] suppression is not conditioned upon the conduct of the search. Because the evidence is already in the government's possession, the "third party" does not, as in a motion to quash a subpoena, have the option of refusing to produce in contempt of court. If the hearing dismisses the claims of privilege, the material is simply unsealed.

While representing an honest attempt to protect privileged material even in the event of a seizure, the procedure is bound to be cumbersome. How, for example, is a police officer searching for the documents specified in the warrant — concededly resulting in some "rummaging"[153] — to seal only those documents "without examination?"[154] Compliance seems impossible unless the person searched turns over the documents named in the warrant without permitting a real "search,"[155] or the officer "seals"

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150 H.R. 3837 § 3, *supra* note 15.

151 Although press representatives testifying before the congressional subcommittees have been careful to state that they would not "destroy" evidence as part of a post-*Zurcher* policy, any stronger expression of intent to "conceal" evidence by a witness might satisfy H.R. 3837 § 2. *Compare 1978 House Hearings, supra* note 7, at 7, 10 (testimony of Healy, Boston Globe, Small, CBS News, Boccardi, AP) *with* statement of Anthony Day, at 6 *and* statement of Richard E. Cady, Indianapolis Star Investigative Team, at 5, *to be printed in 1978 Senate Hearings, supra* note 1.

152 H.R. 368 § 204, *supra* note 142.

153 *Supra* note 45.

154 H.R. 3837 § 3, *supra* note 15.

155 Justice Powell in *Zurcher* envisioned this possibility. 436 U.S. at 570 n.2 (Powell, J., concurring). For an example of a "media search" attempt in which such an agreement was made and broken, *see 1978 House Hearings, supra* note 7, at 260 (Appendix 12 — letter from California Deputy Attorney General on search warrant policies in California). *But see id.* at 221-22 (Appendix 6 — description of 15 media search warrants compiled by the Reporters Committee for Freedom of the Press, Legal Defense and Research Fund. The list

or "guards" some likely files or even a whole cabinet, thereby inconveniencing or halting the normal professional functions of the person until a hearing is conducted. Ultimately, magistrates and police may be given some new responsibilities under this bill which they are unwilling or incapable of assuming in the manner envisioned by the bill.

2. Civil Sanctions

Nine of the eleven bills[156] have some provision for sanctions. All provide a civil action for damages. One bill specifies that the action must be filed in a United States district court;[157] the rest allow state court actions. Five bills permit suits for equitable or declaratory relief in addition to those for general damages.[158]

In order for a civil action to be effective, the injured party must have a solvent defendant from whom he can recover the full extent of his damages. Many bills do not seem to recognize this problem; they do not specify whether the civil action is to be brought against the offending officer (judicial, police, or both) or his governmental employer.

If the United States, or the governmental authority that requested, issued, or executed the warrant is to be liable to suit, the effects of sovereign immunity must be addressed in the bill. "Official immunity" is sometimes granted, either absolutely or qualifiedly,[159] to any act performed in the course of an individual's official duties. The two immunities, "sovereign" and "official," are different in nature,[160] but none of the congressionally-introduced bills has adequately accounted for their separate effects in order to guarantee that damages will always be available to an injured party.

The Justice Department proposal, however, has considered these problems. S. 855 permits "a civil cause of action for dam-

gives four examples of instances where television stations agreed to turn over outtakes or aired footage rather than risk a search).

156 S. 855; H.R. 368; S. 115; H.R. 3486; H.R. 283; H.R. 1437; H.R. 323; H.R 380; H.R. 3781.

157 H.R. 3486.

158 S. 115; H.R. 368; H.R. 1437; H.R. 323; H.R. 3781.

159 For a brief history of the problems of suing state and federal officials for violations of constitutional or statutory rights, even after the passage of 42 U.S.C. § 1983, *see* Note, *Damage Remedies Against Municipalities for Constitutional Violations,* 89 HARV. L. REV. 922, 922-24 (1976) [hereinafter cited as *Damage Remedies Note*].

160 *See* THE FEDERALIST NO. 81 at 487-88 (A. Hamilton) (C. Rossiter ed. 1961) for an ex-

ages . . . against the United States, . . . a State which has waived its sovereign immunity under the Constitution to a claim for damages . . ., or . . . any other governmental unit."[161] Similarly, S. 115 extends coverage of the act to federal, state, and local governmental units, as well as persons acting under the color of law.[162] Rather than letting victims of invalid searches risk suits against an insufficiently solvent government officer or employee, these bills guarantee recovery from the public treasury.[163] However, the drafters of S. 855 clearly did not believe they could make all states liable for the damages caused by their law enforcement agents.[164] They therefore provided for a second category of civil action which could by brought against state officers and employees whose government had refused to waive its sovereign immunity from suit in this area.[165] The bill shows further deference toward the states by allowing the officers sued a qualified immunity from money judgments; "reasonable good faith belief" that the search was lawful is a complete defense to any action. The results under this scheme will likely be skewed, especially since any governmental body liable to suit cannot raise the "reasonable good faith belief" defense unless the sole official act at issue was performed by a member of the judiciary.[166] S. 115 takes a broader approach to this problem by authorizing suits against law enforcement agents or magistrates as individuals and waiving any "defense" that would bar personal liability.[167]

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planation of the general principle and how it was believed to apply to each state as well as the federal government. *See also* U.S. CONST. amend. XI.

161 S. 855 § 4(a)(1). For a discussion of the constitutionality of assessing damages against local or municipal government units, *see Damage Remedies Note, supra* note 159, at 931-32 & nn.55-58.

162 S. 115 § 4(c), *supra* note 17.

163 S. 855 § 4(c).

164 125 CONG. REC. at S3793; statement of Philip Heymann, at 5-6, *to be printed in 1978 Senate Hearings, supra* note 1.

165 S. 855 § 4(a)(2).

166 *Id.* at § 4(b). The retention of a qualified immunity for judicial officers represents a legislative decision to retain "the traditional doctrine." 125 CONG. REC. at S3793. With the numerous exceptions to the search warrant prohibition in S. 855, perhaps the drafters did not want to hold magistrates responsible for more than "good faith" efforts at interpreting Congress' intent. This may leave injured parties without relief in many instances in which police properly execute an invalidly issued warrant. Judicial immunity seems more justifiable in a bill with fewer provisions for magistrate discretion, where "good faith" is more easily determinable.

167 S. 115 § 4(c), *supra* note 17.

Eleventh Amendment case law suggests that these contortions would be unnecessary in a "third party" bill basing its state regulatory powers upon the enabling clause of the Fourteenth Amendment. The drafters of S. 855 seem to anticipate a challenge to damage awards paid from state funds based upon the holding in *Edelman v. Jordan.*[168] The Court there barred an award of retroactive benefits due under a jointly-administered federal-state program established under the Social Security Act, holding that participation in a federal program did not constitute a waiver of state sovereign immunity, *absent clear congressional intent* to make the states "a class of defendants" liable to suit.[169] The Supreme Court has since upheld[170] a backpay award assessed against the state treasury when the suit was brought under statutory provisions that met *Edelman*'s "threshold fact of congressional authorization."[171] A violation of Title VII of the Civil Rights Act of 1964 was interpreted in *Fitzpatrick v. Bitzer* to be an instance where "Congress, acting under section 5 of the Fourteenth Amendment, authorized federal courts to award money damages in favor of a private individual against a state government . . . ."[172]

Although Mr. Justice Rehnquist's *Fitzpatrick* opinion reaffirmed the holding of *Parden v. Terminal Ry. Co.*[173] permitting Congress to use the commerce power to waive state sovereign immunity in an FELA action against a state-owned common carrier,[174] he emphasized the special powers of section 5 of the Fourteenth Amendment to so limit state authority.[175] It therefore seems that the drafters of S. 855 should make explicit that their power to waive state sovereign immunity from suits against state law enforcement agencies invalidly searching First Amendment "protected materials" comes from section 5 of the Fourteenth Amendment rather than the commerce clause.

168 415 U.S. 651 (1974).
169 *Id.* at 672.
170 Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).
171 427 U.S. at 452, *quoting* Edelman v. Jordan, 415 U.S. at 672.
172 427 U.S. at 447.
173 *Id.* at 452.
174 Parden v. Terminal Ry. Co., 377 U.S. 184 (1964).
175 427 U.S. at 453: "As ratified by the States after the Civil War, that Amendment quite clearly contemplates limitations on their [the states'] authority. . . . The substantive provisions are by express terms directed at the States. . . . Standing behind the imperatives is Congress' power to 'enforce' them 'by appropriate legislation.' "

The power outlined in *Fitzpatrick* indeed simplifies the administration of sanctions immensely and should be utilized. With an express preemption of preexisting "good faith" defenses, such as that provided by § 4(b) of S. 855, the civil sanctions should coerce state governments to instruct and guide their officials and employees in the proper administration and conduct of "third party" search regulation.[176]

In drafting their proposal, Justice Department officials recognized that "it often will be difficult for a plaintiff to show more than nominal actual damages."[177] Accordingly, to provide the necessary incentive for injured persons, S. 855 sets a floor recovery of $1000 in liquidated damages.[178]

Like all the other bills with civil damage remedies, S. 855 permits the recovery of punitive damages.[179] This bill, however, leaves the amount of the award to the court's discretion; all but one other bill[180] put a ceiling of $10,000 upon "each willful violation of the bills' provisions."[181] With or without a monetary ceiling, this feature may prove very difficult to administer. The drafters have not specified against whom the assessment of willfulness is to be made — is it to be the magistrate who wrongly issued the warrant or the law enforcement agents who wrongly claimed an exception to the warrant prohibition?[182] Given the vague definition of "willfulness," equivalent to "knowing or reckless disregard,"[183] early suits brought under these potential statutes are likely to be lengthy as they give content to definitions such as this one.

A better form of deterrent than the punitive damage provisions is S. 855's allowance of "reasonable attorney's fees and other litigation costs reasonably incurred."[184] Five bills have similar pro-

176 *Cf.* S. 855 § 4(e) (permitting federal "administrative inquiry following a determination of a violation of this Act by an officer or employee of the United States and . . . the imposition of administrative sanctions against such officer or employee if warranted.").

177 125 CONG. REC. at S3793.

178 S. 855 § 4(d).

179 *Id.*

180 S. 115 § 4(d), puts a $1000 ceiling on punitive damages assessable for each violation.

181 *See, e.g.*, H.R. 283 § 3(b).

182 Since magistrates have immunity for "good faith" errors and law enforcement agents do not fall within S. 855's procedures for assessment of actual damages, this question is probably answered by analogy to the common law of punitive damages.

183 *Cf.* St. Amant v. Thompson, 390 U.S. 727 (1968) (definition of "reckless disregard" in libel case brought under the *New York Times v. Sullivan* standard).

184 S. 855 § 4(d).

visions allowing the court discretion to award reasonable attorney's fees to the plaintiff if he prevails, with the United States and the officers committing the violation liable for those awards.[185] A statute must encourage parties to bring suit, even those from whom nothing is seized, whose injury is only the emotional and psychological stress of the intrusion upon expected privacy. Without the publicity given to successful suits, particularly those brought by the press or other institutional "third-parties," officials and agencies may never curb their use of search warrants.

3. Criminal Sanctions

In addition to civil sanctions, three bills contain provisions which would authorize criminal fines against those who violate the search warrant restrictions.[186]

To date, however, most commentators who have addressed the issue of sanctions have shown a marked preference for civil damage remedies over criminal penalties.[187] The lack of support for criminal sanctions stems primarily from the fear that such penalties are, as a practical matter, likely to be ineffective because most courts will be unwilling to impose criminal sanctions on a magistrate, judge, or law enforcement officer who abuses his discretion under the Act.[188]

III. Constitutional Basis of Legislation

For federal legislation to apply to state and local law enforcement officials as well, it must have a constitutional source of power that will sustain judicial scrutiny. Two such sources may apply in this context. First, the Supreme Court has generally been willing to accept nationwide regulatory schemes which can be construed as falling within Congress' powers under the "necessary and proper" clause[189] combined with section 5 of the Fourteenth

185 S. 115; H.R. 368; H.R. 323; H.R. 283; H.R. 3781.

186 H.R. 3781; H.R. 283; H.R. 323.

187 Statement of Paul Davis, *supra* note 104, at 9; statement of Jack C. Landau, *supra* note 4, at 10; statement of Jerry W. Friedheim, *supra* note 117, at 7; statement of Philip Heymann, at 5, *to be printed in 1978 Senate Hearings, supra* note 1.

188 Statement of Paul Davis, *supra* note 104, at 9, *to be printed in 1978 Senate Hearings, supra* note 1.

189 U.S. Const. art. I, § 8, cl. 18. The Supreme Court construed this clause broadly in McCulloch v. Maryland, 17 U.S. 316, 421 (1819) (Marshall, J.):

> Let the end be legitimate, let it be within the scope of the Constitution, and all

Amendment (the enabling clause).[190] Alternatively, if the regulations are designed to prevent the obstruction of interstate commerce, they may be sustained under the "commerce clause" of article I.

Most of the congressionally introduced bills have preambles of purpose citing the First,[191] and Fourteenth Amendments,[192] or phrases associated with their texts,[193] to express the basis of congressional intent. However, since the bills at best represent only early drafts of any statute likely to be passed into law, the formulations in this area are sketchy.[194] In addition, the hearings in the Senate subcommittee have thus far discussed only broadly the potential constitutional bases for the proposed legislation without reaching any decision as to which is preferable.[195]

The Justice Department proposal is the only bill expressly based on the commerce clause power.[196] There, the approach is based on the assertion that the "First Amendment materials" protected by the bill "are fundamental to the work of people who disseminate information in interstate or foreign commerce."[197] This confidence in the broad reach of the commerce clause power[198] should be questioned carefully, however, in view of a recent Supreme Court decision which appears to cut back substantially on Congress' commerce clause power to regulate the conduct of state governmental functions.

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means which are appropriate, which are not prohibited, but consistent with the letter and spirit of the constitution, are constitutional.

190 U.S. CONST. amend. XIV, § 5 was interpreted to be "a positive grant of power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." Courts should uphold such legislation if it meets the standard set out in McCulloch v. Maryland, 17 U.S. 316 (1819). Katzenbach v. Morgan, 384 U.S. 641, 651 (1966). *But see* Oregon v. Mitchell, 400 U.S. 112 (1970), *explained and distinguished in* statement of John Shattuck, *supra* note 111, at 21, *to be printed in 1978 Senate Hearings, supra* note 1.

191 H.R. 1293, *supra* note 15; S. 855, *supra* note 16.

192 H.R. 368, Title II § 201, *supra* note 15.

193 H.R. 283; H.R. 1437; H.R. 323; H.R. 380 ("freedom of the press"); H.R. 3837; H.R. 3781 ("searches and seizures" or "unwarranted intrusions"); *supra* note 15.

194 *See, e.g.*, the preambles of the bills cited in note 193 *supra.*

195 *See* statement of Paul Davis, *supra* note 110, at 9; statement of Jack C. Landau, *supra* note 4, at 20-23; statement of Jerry Friedheim, *supra* note 117, at 7; statement of John Shattuck, *supra* note 111, at 15-22; statement of Philip Heymann, at 11-12, *to be printed in 1978 Senate Hearings, supra* note 1.

196 S. 855 § 2(a)(b), *supra* note 16.

197 Statement of Philip Heymann, at 11, *to be printed in 1978 Senate Hearings, supra* note 1.

198 *Id.* at 11-12.

National League of Cities v. Usery[199] held that the 1974 Fair Labor Standards Act amendments, extending existing federal minimum wage and maximum hour provisions to state employees, including police, constituted an invalid use of the commerce clause power since they interferred with the states' right to control these government functions.[200]

Were a court to consider S. 855 not just as a protection of interstate public dissemination of information, but as an imposition of federal standards upon the conduct of state and local criminal investigations, it could easily draw an analogy between any *Zurcher* legislation premised upon commerce clause power and the invalid amendments in *National League of Cities.* In that event, of course, the constitutional validity of such legislation would be open to question.

One observer, John Shattuck, legislative director of the American Civil Liberties Union, has specifically considered this analogy and concluded that the earlier Supreme Court decision is distinguishable.[201] The accuracy of his analysis, however, is open to question. To be sure, none of the currently proposed regulatory schemes involves the sort of "fiscal determinations,"[202] which the federal wage and hour provisions invalidated by *National League of Cities* removed from state control. Should the Court decide to expand its general holding that the commerce clause is not to be used directly to displace the states' freedom to structure integral operations in areas of traditional government functions,[203] however, any legislation premised on that clause and establishing national standards for the use of search warrants in "third party" searches must be considered constitutionally suspect.

In support of a commerce clause basis, Mr. Shattuck pointed to the nationwide procedural regulations affecting police use of electronic surveillance in the Omnibus Crime Control and Safe Streets Act of 1968.[204] The legislative history of that act reveals that Con-

199 426 U.S. 833 (1976).
200 *Id.* at 852.
201 Statement of John Shattuck, *supra* note 111, at 16, *to be printed in 1978 Senate Hearings, supra* note 1.
202 *Id.* at 17.
203 426 U.S. at 852.
204 Statement of John Shattuck *supra* note 111, at 16, *to be printed in 1978 Senate Hearings, supra* note 1.

gress intended its regulatory power to be premised on the commerce clause,[205] since interception of wire communications was believed to interfere with "the facilities used to transmit wire communications," and such facilities are definitely "part of the interstate or foreign communications network."[206] This activity seems easily encompassed within enumerated congressional powers under article I, section 8, clause 18. Similarly, the Justice Department may be justified in utilizing commerce clause power to prohibit any search that might interfere with public dissemination of information as long as such dissemination is broad enough to reach an audience in several states.[207] However, such justification would not be available for local dissemination, nor would it apply in the context of the broader "third-party" bills.

Along these lines, the Omnibus Crime Act also regulates interception of oral communications.[208] It is significant that the legislative history of the relevant section indicates that, unlike wire communications, oral communications were not believed to implicate any "interstate or foreign communications network" and, therefore, regulation could not be premised on the commerce clause. Instead, the regulations were expressly designed to protect the "right of privacy . . . arising under certain provisions of the Bill of Rights and the due process clause of the 14th Amendment."[209]

The same could be said for the purpose of most "third-party" bills. Use of the commerce clause to justify a broader bill regulating searches of lawyers' or doctors' offices, where the documents sought would rarely be for public dissemination, would necessarily stretch the meaning and scope of this constitutional grant of power to absurdity. It is nonetheless notable that the *National League of Cities* view of enclaves of state sovereignty was explicitly *not* applied to congressional exercises of authority under

205 [1968] U.S. CODE CONG. & AD. NEWS 2177, 2180.

206 *Id.* at 2180.

207 Courts might not accept use of the commerce clause power to regulate searches of, for example, a high school weekly or a small local newspaper that has no subscribers outside its immediate vicinity. Mr. Heymann's assertion at a press briefing that "even the use of a typewriter manufactured in another state would bring a writer's activities within the realm of the commerce clause . . .," seems to be an unduly broad interpretation. N.Y. Times, December 14, 1978, at A21, col. 6.

208 18 U.S.C. § 2511(a) & (b) (1968).

209 [1968] U.S. CODE CONG. & AD. NEWS 2177, 2180.

the Fourteenth Amendment enabling clause.[210] Taken together, these constitutional interpretations point away from using the commerce clause as the basis of regulatory power in any broad "third-party" legislation. Its basis for constitutional legitimacy must be the "necessary and proper" clause and the Fourteenth Amendment's enabling clause.

Conclusion

As the foregoing text makes clear, each major feature of legislation introduced after *Zurcher* raises potential problems in administration and application and may ultimately face court challenges to its constitutionality. The problems are not insurmountable, however, and it is to be hoped that future discussion will confront rather than evade these issues. The following brief outline provides a summary, in question and answer form, of desirable provisions suggested by the analysis of this Note.

1. What should be protected from the reach of search warrants?

The premises of any person who is not suspected of the crime under investigation but who nonetheless possesses documentary evidence of that crime should not be subject to search by warrant. For purposes of this rule, "documentary evidence" is defined to exclude contraband, fruits, or instrumentalities of crime, in accordance with the case law in this area prior to *Warden v. Hayden.*

2. What exceptions to this general prohibition should be permitted?

A warrant should be permitted to issue upon a showing of probable cause that: (1) the person in possession, control, or custody of the evidence sought has committed or is commiting the crime under investigation; or, (2) the evidence sought is contraband, fruits, or instrumentalities of the crime under investigation. In addition, a warrant should be permitted upon a clear showing that notice in the form of a subpoena *duces tecum* (or other similar compulsory process) would result in the evidence sought being destroyed, altered, concealed, removed, or otherwise rendered unavailable, and that a restraining order would not prevent such a result.

210 426 U.S. at 852 n.17. *Cf.* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

3. To whom should these restrictions apply?

Any person acting under the color of law should be subject to the provisions of the act. Congress' intent in legislating should be to insure protection of the rights of innocent citizens to privacy and freedom from unreasonable searches and seizures, a right guaranteed by the Fourth and Fourteenth Amendments, and to insure the freedom of the press and of speech guaranteed by the First Amendment. Congress derives its power to legislate on the federal level from the United States Constitution, article 1, section 8, clause 18, and can impose the same power on the states under authority granted it by section 5 of the Fourteenth Amendment. State or local laws should be preempted by this act only if their protections are less stringent than those of the act.[211]

4. What remedies should be available and what sanctions should be imposed for violations of this act?

Nothing in the act should affect or prevent the operation of any constitutional, statutory or common law privilege which currently serves to protect evidence from forced disclosure. Thus, evidence seized containing information that would be protected under any existing testimonial privilege should be made inadmissible in any subsequent judicial proceeding.

In addition, victims of searches which violate these statutory protections should be afforded a civil remedy in accordance with the following formulation: "Any person aggrieved by a violation of this Act may commence a civil action in an appropriate United States district court or state court at any time not later than three years after the alleged violation occurred or terminated, or one year after the discovery of such alleged violation whichever is later."[212]

In the event of a violation, the court should have the power to award such relief as may be appropriate, including actual damages, or equitable or declaratory relief. Furthermore, without regard to a finding of actual damages, an injured party should be entitled to recover not less than $1000 in liquidated damages, as well as reasonable attorney's fees.

To avoid the obvious problems raised by holding individual law enforcement or judicial officers liable for these damages, the

211 *Cf.* H.R. 368 § 205(1)(3).
212 *See, e.g.*, H.R. 283 § 3(a).

legislation should focus on the United States, the states, or any other governmental unit from which the officers derive their authority, and hold those governmental entities "liable for violations of this Act by their officers or employees while acting within the scope of or under color of their office or employment."[213] As a general proposition, the responsible governmental entity should not be permitted to assert any rule of law or statute abridging, qualifying, or prohibiting the liability of any officer or governmental employee as a defense to a claim based on this legislation. An exception to this general rule should be included where the violation complained of is that of a judicial officer, provided, however, that such defense is limited to instances where the judicial officer had a "reasonable good faith belief in the lawfulness of his conduct."[214]

213 S. 855 § 4(a)(1).

214 *Id.* This approach gives a magistrate or judicial officer a minimum of discretion in making his determination that an exception to the search warrant prohibition exists. Accordingly, it is intended to be a stricter standard than that contained in S. 855.

BOOK REVIEW

THE SPIRIT OF LIBERALISM. By *Harvey C. Mansfield, Jr.* Cambridge, Mass.: Harvard University Press, 1978. Pp. 130. $13.50.

*Reviewed by Robert Nisbet**

Professor Mansfield writes that he was led to reflect on liberalism in this book after watching "liberals wilt and flounder under the insults and attacks of the New Left."[1] Manifestly, failure was written all over liberal efforts to respond to such attacks — failure of belief and nerve. Says Mansfield:

> I consider the cause of this liberal failure to be in liberalism as it has developed and not in institutions and or events. . . . From having been the aggressive doctrine of vigorous, spirited men, liberalism has become hardly more than a trembling in the presence of illiberalism, which in time degenerates further into a habitual or involuntary tremor even when the threat is removed. Who today is called a liberal for strength and confidence in defense of liberty?[2]

The answer of course is no one. What one is more likely to be called for defense of individual liberty in our contemporary society is either a conservative or a neoconservative. I learned that more than a quarter of a century ago on publication of my *The Quest for Community.*[3] I had spent three years developing what I regarded as a testament to freedom and an analysis of the conditions necessary to the nurturing of freedom. I believed the book to be in every important respect in the tradition of Tocqueville and J. S. Mill (and I still so believe). Alas, however, for my belief and effort, the book was immediately pronounced conservative by both its friendly and unfriendly reviewers. I suppose I could have spent the next quarter of a century arguing impassionedly that I was a true and authentic liberal inasmuch as I believed individual liberty the highest of values in society, but it is only too obvious today that it would have been a wasted twenty-five years. For etymology, historical origins, and two centuries of development notwithstanding, the hard truth is that by the 1930's in this country, liberalism had come to mean something very different from what Locke, Montesquieu, Jefferson, Madison, Tocqueville, Mill, and Spencer had believed it to be.

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1 H. MANSFIELD, THE SPIRIT OF LIBERALISM vii (1978).

2 *Id.*

3 R. NISBET, THE QUEST FOR COMMUNITY (1953).

On the evidence of the last half-century, liberalism means, not individual liberty, but a special form of power: power wielded by intellectuals and politicians in the name of rationalism, in behalf of "the people," for the purpose of legislating, planning, managing, and, when necessary, coercing human lives on a mass scale to achieve, through some kind of regulatory agency, conformity to a chosen end. During the New Deal, one was a liberal if he were favorably disposed toward such agencies as the NRA, or the CCC, and the whole elitist, managerial mentality that came to be synonomous with democratic government. Conservatives and reactionaries were those people who, in the name of economic and other forms of individual liberty, opposed such regulatory agencies and bureaus. Nothing has happened since the New Deal, not in the Fair Deal, the New Frontier, or the Great Society of Lyndon Johnson's dreams, to change by an iota the phenomenon I have just described. At this moment, the test of liberalism in America — I mean of course recognized, accepted liberalism, not some ideal formed of Lockean, Tocquevillian, and Spencerian tissues — is whether one believes ardently in wage and price controls, in EPA, in OSHA, in mandatory busing for fulfillment of centrally-established ethnic quotas in school and business, in environmentalism of the type given clamant expression by the Ralph Naders and Barry Commoners, and in the inspired truth of what is vented each year in ADA resolutions. If one believes in these, he is a full-fledged liberal concerned with humanity and automatically licensed to eat organic foods and to drink Perrier water. But if one regards all of these controls and prohibitions as infringements upon individual right of choice, *i.e.,* freedom, he is a conservative, a mossback, and worse, a pawn of "corporatism."

But as Professor Mansfield points out with eloquent forcefulness, there is more. I have just identified the power element in contemporary liberalism, the passion for bureaucracy that will limit, constrict, and eventually extinguish autonomous individual behavior. Side by side with this power-element, as Professor Mansfield argues, is egalitarianism. Both Tocqueville and Burckhardt saw clearly the ineradicable affinity between centralization of power and egalitarianism. Any centralized government is bound to level, to reduce or obliterate the intermediate authorities and responsibilities; and all that promotes levelling must, through its

erosion and destruction of natural differences in society, lead to an increasing need for central power. Belief in equality — of result, of social condition, not opportunity or equality before the law — is by now an essential requirement to be identified as a modern, realistic, progressive liberal. And, as is abundantly evident, one can do very well for himself economically and socially by doctrinal commitment to full equality for all. Professor Mansfield, commenting on the shift to the Left of "the spectrum of respectable intellectual opinion," notes the large number of those "former zealots of the New Left [who] have settled into bourgeois comfort and well-paid jobs."[4] According to Mansfield, "they are allowed to retain without reproach their pure belief in egalitarianism while benefitting from certain positions now available to them."[5]

Thus, Professor Mansfield has identified now two basic elements of contemporary liberalism: elitist-rationalist uses of power in the name of one or another humanitarian cause, and egalitarianism through national programs of redistribution, entitlement-legislation, and other means, all aimed at homogeneity and standardization of the American people. But there is a third component: preoccupation with the self. Repeat: the *self.* Not the individual personality or character, which was foremost in the old or classical liberalism and which implied individual action, but the self as it has come to be revered in subjectivist, narcissistic circles as a cherished object of, not action or decisionmaking, but of *awareness.* Professor Mansfield is as informed on this vital element of the New Liberalism as he is on the other two:

> Above all, the old New Left has not abandoned the doctrine of self. On the contrary, that doctrine has proved its usefulness in versatility. Whereas a few years ago it was the fashion to project the self outwards by speaking out in protest, thus shocking the bourgeoisie, the erstwhile conscience-mongers have become trend-setters, working with the system and going 'into' this or that. Self-expression can have its moments of introversion, if not of introspection, as well as bursts of demonstration. But such introversion is as far from healthy, liberal self-interest as were the protests designed to outrage liberals. Going 'into' something is not the pursuit of an interest in which a free man takes pride as he makes himself independent; it is absorption in a diversion from the responsible work of supporting oneself and one's family.[6]

I have been citing from Professor Mansfield's Preface, which is

4 MANSFIELD, *supra* note 1, at viii.
5 *Id.*
6 *Id.*

an admirable overview of what follows in some six chapters with the beguiling titles: "Liberal Democracy as a Mixed Regime," "Defending Liberalism," "Disguised Liberalism," "Liberalism in Moderation," "The Right of Revolution," and "Cucumber Liberalism" (concerned with "today's cool cucumber liberalism, which is neither public-spirited nor high-minded but very broad-minded"[7] — to which I add the words "bland, tasteless, and soft when in repose"). I will content myself with a few highlights.

Having identified self-worship as one of the elements of the liberal compound, Professor Mansfield naturally turns to Charles Reich's *The Greening of America.*[8] Although the title may no longer be holy writ in the old New Left, much of its content, particularly that dealing with "Consciousness III," has now become conventional wisdom among liberals. Nowhere is the degeneration of liberal man into liberal self to be seen more resplendently than in this dreadful book. Professor Mansfield unerringly makes his way to the single part of Reich's book that hypnotized the largest number of innocents who clutched the book to their justification-seeking bodies: creativity! Consciousness III was of course Reich's gospel of liberation from conformity, at least in intent. But, writes Professor Mansfield, "Anyone can see the silly conformism in the behavior of those who talk up creativity; for all the forced urgency in their efforts to create, they succeed in nothing more than being 'creative.' "[9] One is reminded of the *Punch* cartoon of many years ago: the elegantly languid young man saying "But Mother! Being a *writer* doesn't mean you write *about* something."

In his chapter on "Disguised Liberalism," Professor Mansfield makes Theodore Lowi's once-heralded *The End of Liberalism*[10] the pièce de résistance. He easily demonstrates that Lowi, far from separating himself from liberalism — that is, ongoing liberalism — only disconnects from the individualism and pluralism of classical liberalism. Lowi, for all his camouflage, is the contemporary liberal incarnate. His concept of "juridical democracy" is the direct intellectual issue of Rousseau's General Will. Just as Rousseau disguised unlimited power in the rhetoric of freedom, so

7 *Id.* at xi.

8 C. REICH, THE GREENING OF AMERICA (1971).

9 MANSFIELD, *supra* note 1, at 54.

10 J. T. LOWI, THE END OF LIBERALISM: IDEOLOGY, POLICY AND THE CRISIS OF PUBLIC AUTHORITY (1969).

does Lowi disguise it in the rhetoric of "juridical democracy." As Professor Mansfield puts it:

> Juridical democracy does not hide either its power or its intention. It is overly moral and it is unafraid of weeping, wailing, and teeth-gnashing among its 'terror-stricken' opponents. But what is the morality of juridical democracy? Lowi, in a book attacking liberals for not raising moral questions, raises none himself and offers no arguments. He only makes moral assertions, from which it appears that moral means equality or democracy.[11]

Precisely. For it is really equality that has taken the place of liberty as the keystone of the New Liberalism. Over and over our liberals, searching for a moral justification for self-worship and for the boundless power they desire to see used by an enlightened guardian class over the populace, come back to equality. They are reluctant — as Rousseau was not! — to dilate upon the amounts of governmental power which will be necessary for the conversion of economy and society into the levelled mass of equal, passive, self-absorbed beings that is the logical consequence of egalitarian doctrines. But liberal deceit or diffidence notwithstanding, they almost always get found out when minds like Professor Mansfield's are at work. In the final essay, *"Cucumber Liberalism,"* Mansfield discusses Rawl's *A Theory of Justice.*[12] Although intended by the author to be a justification, through abstract, natural-rights reasoning, of liberty as the primary good, in fact, the book presents a long and tortuous argument for the supremacy of equality. Says Mansfield:

> Rawls' theory attempts above all to protect the least advantaged in property, but it leaves their protectors unprotected. Indeed, it transforms them. Rawls' theory transforms liberals from an enterprising few, ambitious for profit and discovery, into cucumber liberals actually secure in their stations but pretending to be anxious less they fall into poverty. . . . When liberals look at liberal society from the viewpoint of the least advantaged, they see neither themselves nor the least advantaged but rather a confusion of the two.[13]

There is one question that remains to be answered, one that Professor Mansfield touches upon but does not respond to in any systematic way: how, or by what historical process, did the liberalism of a Mill or Spencer become the liberalism of the Lowi's and the Rawls', the first anchored in individual freedom, the second in power, mass equality, and narcissism? The most useful

11 MANSFIELD, *supra* note 1, at 34.
12 J. RAWLS, A THEORY OF JUSTICE (1971).
13 MANSFIELD, *supra* note 1, at 100-01.

answer I have recently come upon to this question is Michael Freeden's *The New Liberalism.*[14] Freeden confines himself largely to England at the turn of the century and convincingly declares J. A. Hobson and L. T. Hobhouse to be the key figures in the change of referent in liberalism's history. Both, as Freeden points out, began as devout Spencerians, and they never lost their respect for either Spencer or for his emphasis upon freedom. But both men were, as Spencer also was, dedicated social evolutionists, prone to see everything, including ideas as well as social structures, in a process of becoming, of ascent to ever higher and more perfect being. As Freeden points out, Hobson and Hobhouse saw liberalism as an evolutionary process, one that, in their time, was passing from the stage that had been represented by thinkers from Locke to Mill and Spencer and becoming a new or higher liberalism, one anchored in man's social and economic needs rather than in the concept of political and legal individual freedom. The Industrial Revolution, Hobson and Hobhouse believed, had sufficiently transformed the landscape of English society to provide a necessary context for this evolution of liberalism. Man must be legally free, yes, but he must be free first from material want, economic depression, unemployment, illiteracy, and, above all, inequality. By casting the new liberalism in evolutionary terms, it was possible to declare that evolution not only desirable, given the abundance of perceived social problems, but also *necessary:* the result of a process of development as real and as natural as anything in nature. Thus was achieved the pattern of thought within which liberalism could be linked with "progressive" legislation, the "modern," "modernization," and other values which have little if anything to do with freedom but which have become hallowed in intellectual circles during our century.

In America, precisely the same transition or transformation in liberalism was taking place at about the same time. The key figures were Thorstein Veblen, Lester T. Ward, John R. Commons, and Woodrow Wilson, both as professor and President. Ward, Veblen, and Commons managed to argue successfully for a higher, newer, more relevant conception of freedom than that which Locke and the Founding Fathers had set forth. In America as in

14 M. FREEDEN, THE NEW LIBERALISM (1978).

England, this "higher freedom" had little to do with individual rights and autonomy and almost everything to do with social engineering, perfection of elitist administrative power, and egalitarianism. It was Woodrow Wilson who conveyed this new meaning to posterity with his grand and celebrated New Freedom. I therefore wish Professor Mansfield — and a few others — the best of luck with his brilliant and clarifying book, but I am not optimistic. We live in an age in which power and equality are hallowed, and freedom, in the true sense, has already come to seem somewhat antique and expendable.

RECENT PUBLICATIONS

STATE LAND-USE PLANNING AND REGULATION. By *Thomas G. Pelham.* Lexington, MA.: Lexington Books, 1979. Pp. 212, index. $22.95.

With explosive growth in zoning, states have begun to delegate virtually exclusive control over land use to local governments. These governments, not surprisingly, have equated "general welfare" with their parochial interests, and spawned an "entrenched regulatory system composed of thousands of individual local governments, each seeking to maximize its tax base and minimize its social problems, and caring less about what happens to all the others" (p. 2). In *State Land-Use Planning and Regulation: Florida, the Model Code, and Beyond,* Thomas G. Pelham examines the various legislative innovations introduced in the past decade designed to reassert the state's role in land-use planning and regulation. These actions are part of what Pelham calls "the quiet revolution" (p. 2) against local zoning.

Pelham surveys a number of state schemes and evaluates the American Law Institute's Model Land Development Code of 1975 (MLDC) in light of Florida's experience with legislation patterned after the Code. The Florida legislature adopted, with significant modifications, the MLDC's innovative techniques for injecting a state perspective into local land-use decisionmaking: development of regional impact (DRI) and recognition of areas of critical state concern. Both mechanisms single out particular developments for special state attention.

Although the Florida law was initially praised as a significant advance in state land-use planning legislation, Pelham concludes that "[b]ased on the Florida experience, states should not assume that the Model Code's dual state regulatory techniques represent the ultimate in land-use reform" (p. 199). Both approaches are deemed conservative and criticized for leaving the initiative effectively with local governments, failing to provide substantive policy guidelines, leaving too much land outside of the statute, and being of little use in some states.

According to the author, the major weakness of the MLDC and the Florida statute is its failure to link regulation to planning; the

statute neither mandates comprehensive planning nor requires that local regulations comport with the state comprehensive plan. Under an MLDC-type arrangement, as the Florida experience shows, the local governments remain essentially free to control local land use. Consequently, Pelham argues for an alternative model that would require, among other things, that goals be binding on the parties, that a local comprehensive plan be made in accordance with a previously developed state plan, that a binding state review mechanism be created, and, predictably, that more funding and staffing be provided to allow a "continuous and ongoing planning process" (p. 204).

Pelham recognizes that major legal and political hurdles confront any effort to reassert state control in the area of land-use planning. And he notes that "penetrating the traditionally autonomous local regulatory system continues to be a difficult, and perhaps, insoluble, problem" (p. 202). Unfortunately, he offers little new insight on how states might overcome such obstacles.

Nevertheless, the book does offer a useful and interesting look at state legislative attempts to reclaim some of the power over land use given up to local governments. As an afterthought, Pelham ironically notes that by raising concern among local governments and provoking them to action, "the chief legacy of the quiet revolution . . . may be the strengthening of local land-use controls" (p. 205).

Michael O'Malley

THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS. By *Richard Hofstadter.* Chicago: The University of Chicago Press, 1979 (reprint). Pp. 315, index. $5.95.

Seven essays by Richard Hofstadter, former Professor of American History at Columbia University and twice a Pulitzer Prize winner, are brought together in one volume to highlight some of the common threads of the "paranoid style" in American politics. Hofstadter is careful to explain his choice of the descrip-

tion "paranoid" — no other word adequately evokes the qualities of heated exaggeration, suspiciousness, and conspiratorial fantasy. According to Hofstadter, this "style" has been manifest in the politically extreme right whose interpretation of events has had profound political effects. He is quick to point out, however, that this style is not exclusive to America, the right wing, or modern times.

The essays are divided into two parts: conditions that led to the rise of the extreme right of the 1950's and 1960's and the origin of certain problems of the early modern era. The latter section refers to, among other things, Manifest Destiny, the threat of giant business to competition, and long-standing monetary disputes surrounding the international banking issue. Hofstadter contends that the paranoid style stems from widespread and deeply-rooted American ideas and impulses. To illustrate his point, he presents examples from early American writings, including Texas newspaper editorials of 1855 and Massachusetts sermons of 1798 as historical foundations of modern right wing movements.

Several common themes underlie the paranoid response to world events. The single most distinctive factor, according to Hofstadter, is the belief that events are *motivated* by a vast or gigantic conspiracy, rather than by random conspiracies or plots in history. The feeling of persecution is central. Because the extreme conservative sees his political passions as unselfish and patriotic, the feeling of righteousness and moral indignation is intensified. Another characteristic is the impulse to deal with political issues in religious imagery, reducing social issues to Good vs. Evil. By pointing to the antitrust movement and Goldwaterism, Hofstadter traces conservative fear of the decline of entrepreneurial competition and attendant destruction of our national character.

Hofstadter writes in a clear, detached style, and is careful to present an objective, well-researched, and analytic study rather than a forum for his own value judgments. *The Paranoid Style in American Politics* provides welcome insight into the origins of the modern American right.

Carol Thorn

ABORTING AMERICA. By *Bernard Nathanson, M.D.*, with *Richard N. Ostling*. New York: Doubleday and Company, Inc., 1979. Pp. 311. $10.00.

Abortion has become an increasingly controversial issue in the seven years since the Supreme Court's decision in *Roe v. Wade*.[1] That decision marked the high-water mark of a national pro-choice effort, spearheaded by the National Abortion Rights Action League (NARAL), which the author helped to found. Since that decision, however, the Supreme Court has retrenched, announcing, for instance, the *Beal v. Doe*[2] and *Maher v. Roe*[3] decisions which sanction the denial of public funds for non-therapeutic abortions.

The legal controversy over abortion is merely one facet of an extremely complex issue. Other fundamental questions are biological and ethical: Is the fetus a living being? If so, can society justifiably cause its death? In formulating the right of privacy which was the basis for the *Roe v. Wade* decision, Justice Blackmun side-stepped these critical questions.

Aborting America is Dr. Nathanson's attempt to answer those questions. As a gynecologist and obstetrician, he describes new medical developments in the area of pregnancy as a means of coming to terms with moral issues regarding the fetus. His book is a candid account of the politics and policies of abortion. Dr. Nathanson takes issue with the rhetoric of both the pro-choice and Right-to-Life factions, and replies as well to the serious philosophers who have dealt with the ethics of abortion. This is an articulate, presentation of a problematic issue in contemporary society.

Deborah Shulevitz

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1 410 U.S. 113 (1973).
2 432 U.S. 438 (1977).
3 432 U.S. 464 (1977).

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