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SCRAMBLING TO DEFINE BANKRUPTCY JURISDICTION: THE CHIEF JUSTICE, THE JUDICIAL CONFERENCE, AND THE LEGISLATIVE PROCESS

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In the Bankruptcy Code of 1978, Congress expanded the jurisdiction of the bankruptcy courts. Several years later, however, the Supreme Court struck down the jurisdictional provisions of the Code as unconstitutional. After a protracted struggle and a questionable stop gap Emergency Rule adopted by the Judicial Conference, Congress attempted to resolve the confusion by amending the Code in 1984.

In this Article, Professor Countryman traces bankruptcy jurisdiction from the 1898 law to the 1984 amendments. The Article examines the troubled process that produced the 1984 amendments and notes particularly the irregular role played by the Chief Justice of the United States and the United States Judicial Conference. In his conclusion, Professor Countryman raises serious questions about the implications of the 1984 amendments, as well as the legislative process through which those amendments became law.

In the arcane world of federal bankruptcy law, nothing is more arcane than the jurisdiction of the bankruptcy court. That was true under the old Bankruptcy Act of 1898,[1] as frequently amended, and was even more true when that Act was replaced by the new Bankruptcy Code of 1978, effective October 1, 1979.[2] The situation became still worse in 1982, when the Supreme Court found at least some part of the 1978 effort unconstitutional.[3] The Ninety-eighth Congress responded to the Court's ruling by amending the Code in 1984.[4] The best that can be said of the 1984 amendments to the new Code is that a hitherto unacceptable situation has now been rendered intolerable by a process that reflects no credit on any branch of the federal government.

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[1] Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1979), *reprinted in* 1 app. COLLIER ON BANKRUPTCY 1 (15th ed. 1984).

[2] Bankruptcy Code of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (current version at 11 U.S.C. §§ 101–151326 (1982)).

[3] *See* Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1981).

[4] Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 333 (to be codified at scattered sections of 11 U.S.C. and 28 U.S.C.).

I. THE BANKRUPTCY ACT OF 1898

To understand how we got where we are, it is necessary to understand where we were. Before the new Bankruptcy Code became effective in 1979, the old Bankruptcy Act authorized the district courts to appoint bankruptcy "referees" to six-year terms.[5] The "referees" were so denominated, not because they wore striped shirts and blew whistles, but because a wide variety of cases under the old Act were referred to them.[6] The referees in bankruptcy were removable by the district courts for incompetence, misconduct, or neglect of duty.[7] Their compensation was fixed and could be increased but not reduced by the Judicial Conference of the United States; it was payable from a fund provided by a share of the filing fee and additional levies paid by the bankrupt estates.[8]

Most obviously, the referees were not Article III judges. Rules of Bankruptcy Procedure, promulgated by the Supreme Court in 1973, redesignated the referees as "bankruptcy judges."[9] This change persuaded some of their appointing district courts to remove previous restrictions and to permit them to wear robes, but did not everywhere eliminate a variety of prohibitions against bankruptcy judges using the elevators, parking lots, and dining rooms reserved for Article III judges.[10]

The old Act conferred the bankruptcy jurisdiction on "courts of bankruptcy," defining "court" to mean "the judge or the referee of the court of bankruptcy," and "courts of bankruptcy" to "include" the district courts.[11] But the Act gave the referees jurisdiction, subject to review by a district judge, to perform all duties conferred on "courts of bankruptcy" as distinguished from those conferred on "judges," which were to be performed only by district judges.[12] Under the convoluted, bifurcated

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[5] Bankruptcy Act of 1898, § 34 (repealed 1979), *reprinted in* 1 app. COLLIER ON BANKRUPTCY, *supra* note 1, at 37–38.

[6] *See id.* §§ 2, 38 (repealed 1979), *reprinted in* 1 app. COLLIER ON BANKRUPTCY, *supra* note 1, at 6–10, 41–42.

[7] *Id.* § 34 (repealed 1979), *reprinted in* 1 app. COLLIER ON BANKRUPTCY, *supra* note 1, at 37–38.

[8] *Id.* § 40 (repealed 1979), *reprinted in* 1 app. COLLIER ON BANKRUPTCY, *supra* note 1, at 43–47.

[9] Fed. R. Bankr. 901(7), 411 U.S. 995, 1092 (1973).

[10] Wall St. J., Sept. 25, 1984, at 1, col. 4.

[11] Bankruptcy Act of 1898, § 1(9), (10) (repealed 1979), *reprinted in* 1 app. COLLIER ON BANKRUPTCY, *supra* note 1, at 2.

[12] *Id.* §§ 1(20), 38 (repealed 1979), *reprinted in* 1 app. COLLIER ON BANKRUPTCY, *supra* note 1, at 3, 41–42.

scheme of the old Act, the jurisdiction of the bankruptcy court was customarily referred to as "summary jurisdiction."

This "summary jurisdiction" of the bankruptcy court extended to three areas. First, the bankruptcy court had jurisdiction over administrative proceedings in the bankruptcy case proper. This category included such matters as ruling on (1) the petitions initiating the bankruptcy cases; (2) the allowance of claims; (3) the setting apart of exemptions; (4) the granting of discharges; and (5) the confirmation of debt adjustment plans under Chapters XI, XII, and XIII.[13]

Second, as the bankruptcy trustee moved to collect and to liquidate property of the estate and to set aside prepetition transfers by the debtor in the exercise of the trustee's avoiding powers, the bankruptcy court's jurisdiction expanded to include the disposition of controversies over property in its possession. Property was viewed as in the possession of the court if (1) it was in the possession of the debtor when the petition was filed;[14] (2) it was an intangible, such as membership of the debtor in a board of trade, that "'was as much in his custody and possession as such a species of property is capable of'";[15] (3) it was in the possession of a third party, such as an agent of the debtor, when the petition was filed, provided that the third party asserted no adverse claim of right to possession against the debtor;[16] or (4) it was, upon the filing of the petition, in the possession of a third party who was asserting an adverse claim of right so obviously frivolous as to make the claim "merely colorable."[17] In the last category of cases, in order to determine whether it had jurisdiction, the court could begin a preliminary inquiry to determine the substantiality of the adverse claim. If the claim was found to be "merely colorable," the bankruptcy court could proceed

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[13] *See* Katchen v. Landy, 382 U.S. 323, 327 (1966) (summary jurisdiction of bankruptcy court affirmed as to allowance of claims); Taylor v. Voss, 271 U.S. 176, 181 (1926) (summary jurisdiction extends to "questions between the bankrupt and his creditors"); U.S. Fidelity Co. v. Bray, 225 U.S. 205, 217 (1912) (jurisdiction of bankruptcy court includes "all matters of administration, such as the allowance, rejection and reconsideration of claims, the reduction of the estates to money and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the trustees and others who are employed to assist them").

[14] Thompson v. Magnolia Petroleum Co., 309 U.S. 478, 481 (1940).

[15] Chicago Bd. of Trade v. Johnson, 264 U.S. 1, 13 (1924) (quoting O'Dell v. Boyden, 150 F. 731, 737 (6th Cir. 1906)).

[16] Babbitt v. Dutcher, 216 U.S. 102, 113 (1910); Mueller v. Nugent, 184 U.S. 1, 17–18 (1902).

[17] Harrison v. Chamberlin, 271 U.S. 191, 194 (1926).

to dispose of the controversy on the merits. If the claim was found to be real and substantial, however, the court was required to decline to determine the merits and to dismiss the summary proceeding.[18] In that event, the trustee, if he chose to pursue the matter, was obliged to bring a "plenary action" in a state court or a federal district court of appropriate jurisdiction.[19]

Third, the old Act provided in section 23b that other actions by the trustee should be brought only in courts where the bankrupt could have brought the actions in the absence of bankruptcy, "unless by consent of the defendant."[20] While it is hornbook law that subject matter jurisdiction cannot be conferred on federal courts by the consent of the parties,[21] the ancient cases establishing this proposition,[22] as well as more recent formulations of it,[23] were all applying it to federal Article III courts. But when the Supreme Court sustained the application of the jurisdiction-by-consent provision, so that a referee in bankruptcy could entertain a trustee's action to recover preferences voidable under old section 60, the Court did not speak of non-Article III courts or of "jurisdiction."[24] Rather, it could "perceive no reason why the privilege of claiming the benefit of the procedure in a plenary suit . . . may not be waived by consent, as any other procedural privilege of the suitor may be waived, and a more summary procedure substituted."[25] Later, in holding in *Schumacher v. Beeler*[26] that consent of the defen-

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[18] *Id.*

[19] *Id.*

[20] Bankruptcy Act of 1898, § 23b (repealed 1979), *reprinted in* 1 app. COLLIER ON BANKRUPTCY, *supra* note 1, at 33. This provision made an exception for provisions in old §§ 60b, 67e, 70e(3) of the 1898 Act, that "where plenary proceedings are necessary" to avoid prepetition preferential transfers, fraudulent conveyances, judicial and statutory liens, and other transfers voidable by the trustee as successor to creditors, "any state court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction." *Id.* But MacDonald v. Plymouth Trust Co., 286 U.S. 263, 266–67 (1932), read "courts of bankruptcy" under old § 60b to be confined to federal district courts because it applied to a situation where the defendant was "entitled to claim the benefits of the procedure in a plenary suit, [which is] not available in the summary method of procedure . . . employed by the referee."

[21] *See* C. WRIGHT, LAW OF FEDERAL COURTS § 7, at 23 (4th ed. 1983); *see also* 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3522 (2d ed. 1984).

[22] *See* People's Bank v. Calhoun, 102 U.S. 256, 260–61 (1880); Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 402 (1856); Jackson v. Ashton, 33 U.S. (8 Pet.) 148, 149 (1834).

[23] *See* Insurance Corp. v. Compagnie Des Bauxites, 456 U.S. 694, 702 (1982); California v. LaRue, 409 U.S. 109, 112 n.3 (1972); Neirbo v. Bethlehem Corp., 308 U.S. 165, 167 (1939); Mitchell v. Maurer, 293 U.S. 237, 244 (1934).

[24] *See* MacDonald v. Plymouth Trust Co., 286 U.S. 263, 266–67 (1932).

[25] *Id.* at 267.

[26] 293 U.S. 367, 371 (1934).

dant would also confer jurisdiction on an Article III district court to entertain the trustee's action to invalidate under state law an execution lien on property in the possession of a levying sheriff, the Court treated section 23b as conferring jurisdiction conditioned on the consent of the defendant. The Court found such a jurisdictional grant permissible because it believed that Congress, in the exercise of the bankruptcy power,[27] could have permitted all suits "by trustees in bankruptcy in the federal courts against adverse claimants, regardless of diversity of citizenship."[28] Thus, the consent requirement was merely a limitation on a broader jurisdiction that could have been granted.

Amendments to the Bankruptcy Act in 1938 expressly made section 23b inapplicable in Chapter X reorganization cases.[29] In *Williams v. Austrian*[30] the Court rejected the earlier treatment of section 23b as a jurisdictional grant and pronounced it only a limitation on a grant of jurisdiction in old section 2a(7) to "[c]ause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto . . . ."[31] With the limitation inapplicable under Chapter X, the Court held that an Article III district court in New York could, over the objection of the defendants, entertain a state law action for looting corporate assets against officers of a corporate debtor in reorganization in a Virginia federal district court. Like an equity receivership court, all federal district courts under section 2a(7) had "dependent jurisdiction, regardless of diversity or other independent grounds for federal jurisdiction, to hear plenary suits related to the estate of the debtor . . . ."[32] After a 1952 amendment to section 2a(7) providing that an adverse party not objecting to summary jurisdiction within the time allowed for filing an answer "shall be deemed to have consented to such jurisdiction,"[33] jurisdiction by consent

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[27] "The Congress shall have the Power . . . [t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4.

[28] *Schumacher*, 293 U.S. at 371.

[29] The Chandler Act, Pub. L. No. 75-696, 52 Stat. 840, 883 (1938) (repealed 1979), *reprinted in* 1 app. COLLIER ON BANKRUPTCY, *supra* note 1, at 147 (as § 102 of the Bankruptcy Act of 1898).

[30] 331 U.S 642 (1947).

[31] Bankruptcy Act of 1898, § 2a(7) (repealed 1979), *reprinted in* 1 app. COLLIER ON BANKRUPTCY, *supra* note 1, at 7.

[32] *Williams*, 331 U.S. at 655–56; *see also* Schumacher v. Beeler, 293 U.S. 367, 374 (1934).

[33] Amendments to the Bankruptcy Act, Pub. L. No. 82-456, § 2(b), 66 Stat. 420, 420–21 (1952) (repealed 1979), *reprinted in* 1 app. COLLIER ON BANKRUPTCY, *supra* note 1, at 7 (as § 2a(7) of the Bankruptcy Act of 1898).

was sometimes irreverently referred to as "jurisdiction by ambush."

That was the status of bankruptcy court jurisdiction when the new Bankruptcy Code was enacted, save for a wide-ranging dispute among the Justices in a case that did not involve the bankruptcy courts at all. In *National Mutual Insurance Co. v. Tidewater Transfer Co.*,[34] the Court held on different grounds, none of which commanded a majority, that Congress could authorize Article III district courts sitting outside the District of Columbia to adjudicate disputes between citizens of the District of Columbia and citizens of the states. Three Justices invoked *Schumacher* and *Austrian* for the proposition that Congress, in the exercise of its Article I bankruptcy power, could confer jurisdiction on Article III courts to entertain "nondiversity suits involving only state law questions."[35] Four other Justices viewed these cases as holding that the bankruptcy jurisdiction conferred on district courts was a part of the federal question jurisdiction,[36] and the remaining two did not address the question of bankruptcy jurisdiction.[37]

Under pre-1978 law, the party in possession who challenged the summary jurisdiction could put the trustee to his proof on the merits of the defendant's asserted right to possession. Then, unless the trustee could persuade the court that the asserted right was "merely colorable," the action would have to be brought anew in another court. The additional time and expense involved in such a second effort would preclude a poorly funded trustee from pursuing the matter in many cases. Thus the defendant might prevail merely by persuading the bankruptcy court that his claim of right was not completely ridiculous, and the estate would be out the cost of the failed summary proceeding.

Moreover, the nebulous character of jurisdictional tests based on "possession" and whether a claim was "merely colorable" also increased uncertainty and invited litigation. One meticulous tabulator in 1940 found that since 1898 the number of published opinions on the issue of the bankruptcy court's summary juris-

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[34] 337 U.S. 582 (1949).

[35] *Id.* at 596 (Jackson, J., joined by Black and Burton, JJ., announcing the opinion of the Court).

[36] *Id.* at 612–13 (Rutledge, J., with whom Murphy, J., joined, concurring); *id.* at 652 n.3 (Frankfurter, J., with whom Reed, J., joined, dissenting).

[37] *Id.* at 626 (Vinson, J., with whom Douglas, J., joined, dissenting).

diction exceeded one for every volume of the Federal Reporter and the Federal Supplement.[38]

II. THE BANKRUPTCY CODE OF 1978

The federal commission that produced the first draft of what became the new Bankruptcy Code recommended that the jurisdictional problems under the old Act be eliminated by giving the bankruptcy courts jurisdiction over "all controversies that arise out of a [bankruptcy] case" without regard to possession of property or the consent of the defendant.[39] The commission further recommended that the bankruptcy court be established as a court independent of the district court. It also recommended that bankruptcy judges be appointed by the President with the advice and consent of the Senate for fifteen-year terms, with salary subject to adjustment, and with the bankruptcy judges removable by a commission of three judges for incapacity, misconduct, or neglect of duty.[40]

Essentially, Congress adopted the recommendation on bankruptcy jurisdiction. The House Judiciary Committee, however, concluded that the bankruptcy courts should be Article III courts. On policy grounds, the Committee contended that the enhanced status would attract better-qualified judges.[41] It also concluded, after consultation with a number of mostly academic experts,[42] that there was "substantial doubt" whether a non-Article III court would be constitutional.[43]

The House Committee's proposal to make bankruptcy judges Article III judges with the same salaries as district judges and

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[38] *See* Note, *Scope of the Summary Jurisdiction of the Bankruptcy Court*, 40 COLUM. L. REV. 489, 490 n.2 (1940).

[39] REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 137, Part II, 93d Cong., 1st Sess. 30 (1973).

[40] *Id.* at 15–16. One Commission member, District Judge Edward Weinfeld, was willing to extend the terms of the judges to twelve years, but wanted to retain the "referee system" with the bankruptcy judges appointed by the district courts. REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 137, Part I, 93d Cong., 1st Sess. 299, 301 (1973).

[41] H.R. REP. NO. 595, 95th Cong. 1st Sess. 22 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5963, 5983.

[42] *See Bankruptcy Law Revision: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 63–87 (1976) (correspondence with Charles Alan Wright, Herbert Weschler, Terrance Sandalow, David L. Shapiro, Paul J. Mishkin, Jo Desha Lucas, Thomas G. Krattenmayer, Erwin N. Griswold, and Bruce M. Clagett).

[43] H.R. REP. NO. 595, *supra* note 41, at 33, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 5994.

to add a bankruptcy judge from each circuit to the Judicial Conference was first embodied in a bill introduced on January 4, 1977.[44] The Judicial Conference, made up entirely of Article III judges,[45] promptly adopted a resolution opposing the proposal and authorized the Chief Justice to appoint an ad hoc committee to implement that resolution.[46] The Chief Justice appointed to that committee, among others, Circuit Judge Ruggero Aldisert, District Judge Edward Weinfeld, Chairman of the Conference's Committee on Administration of the Bankruptcy System, and District Judge Robert DeMascio, who was to succeed Judge Weinfeld as Chairman of the Conference's Bankruptcy Committee.[47]

Senator Dennis DeConcini (D-Ariz.) later introduced a somewhat different bill in the Senate, under which bankruptcy judges would be appointed by the Judicial Council of each circuit "to serve in each district court" for twelve-year terms and would be removable by the Judicial Council for incompetence, misconduct, neglect of duty, or physical or mental disability.[48] The judges' salaries of $48,500 would be subject to adjustment.[49] Thereafter the Judicial Conference's ad hoc committee appeared at Senate hearings to endorse the Senate bill,[50] while opposing the House bill's addition of bankruptcy judges to the Judicial Conference as "totally unwieldy."[51] The ad hoc committee reported that there was "unanimity in [the] committee and unan-

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[44] H.R. 6, 95th Cong., 1st Sess., 123 CONG. REC. 125 (1977).

[45] At this time, the Judicial Conference consisted of the Chief Justice, the chief judge of each federal judicial circuit, a district judge from each circuit, and the chief judges of the Court of Claims and of the Court of Customs and Patent Appeals. All of these judges are, or were, Article III judges. *See* Glidden Co. v. Zdanok, 370 U.S. 530 (1962). In 1982, when the Federal Courts Improvement Act, Pub. L. No. 97-164, 96 Stat. 25 (1982), combined the appellate jurisdiction of the Court of Claims and the Court of Customs and Patent Appeals in a new Court of Appeals for the Federal Circuit and created a new Article I United States Claims Court with the trial jurisdiction formerly held by the Court of Claims, the latter two judges were dropped from the Judicial Conference. *See* 28 U.S.C. § 331 (1982).

[46] JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF PROCEEDINGS 23–24 (Mar. 1977).

[47] *Id.*

[48] S. 2266, 95th Cong., 1st Sess. § 201 (1977).

[49] *Id.*

[50] *See Bankruptcy Reform Act of 1978: Hearings Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary on S.2266 and H.R. 8200*, 95th Cong., 1st Sess. 411 (1977) (statement of Judge Wesley E. Brown, Chairman of the Judicial Conference Ad Hoc Comm. on Bankruptcy Legislation, accompanied by Judge James Lawrence King, Judge Ruggero J. Aldisert, Judge Robert E. DeMascio, Judge Thomas J. MacBride, Judge Raymond J. Pettine, Judge Morey L. Sear, Judge Gordon Thompson, Jr., and Judge Edward Weinfeld).

[51] *Id.* at 420 (statement of Judge Ruggero J. Aldisert).

imity in the Judicial Conference of the United States that Article III status was not necessary [for the bankruptcy courts] to assume [the] expanded jurisdiction."[52]

District Judge Wesley Brown, chairman of the ad hoc committee, also appeared in House hearings and revealed the ad hoc committee's own draft of a statute for the bankruptcy court system.[53] This draft was a virtual copy of the Senate bill, except that the bankruptcy judges were again designated "referees in bankruptcy."[54] The ad hoc committee focused its objections to the House bill on the creation of "specialized" judges and on the additional expense involved, ignoring the facts that the specialized judges and most of the expense would be present whether or not the bankruptcy judges were Article III judges.[55] Former District Judge Simon Rifkind opposed the increase in the number of Article III judges, however, on the ground that it "would dilute the significance, and prestige, of district judgeships."[56] Similarly, Attorney General Griffin Bell, himself a former circuit judge, opposed a system of Article III bankruptcy courts on the ground that such action "would almost certainly operate to diminish the prestige and influence of our district courts."[57] Judge Weinfeld had volunteered to "meet head on" the "suggestion that the opposition of the judges is sort of an ego trip on the part of the judges; that they're holding on to their power—a jealousy of their power."[58] But when the Rifkind and Bell statements were read to him, Weinfeld said, "I don't disagree with those statements at all."[59]

As passed by the House on February 1, 1978,[60] the House bill provided that bankruptcy courts were Article III courts with exclusive jurisdiction over bankruptcy cases proper, and exclusive, but not original, jurisdiction over "all civil proceedings arising under" the Bankruptcy Code "or arising under or related

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[52] *Id.* at 413.

[53] *Bankruptcy Court Revision: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary on H.R. 8200*, 95th Cong., 1st Sess. 118 (1977) (statement of Judge Wesley E. Brown, Chairman, Judicial Conference Ad Hoc Comm. on Bankruptcy Legislation).

[54] *Id.* at 116.

[55] *Id.* at 113.

[56] *Id.* at 9–10 (statement of Simon Rifkind, Past President, American College of Trial Lawyers).

[57] *Id.* at 218 (statement of Griffin Bell, U.S. Att'y Gen.).

[58] *Id.* at 140–41 (statement of Judge Edward Weinfeld, Chairman of the Comm. on the Admin. of the Bankruptcy System, Judicial Conference of the United States).

[59] *Id.* at 153.

[60] 124 CONG. REC. 1804 (1978).

to cases under" the Bankruptcy Code.[61] One bankruptcy judge from each circuit was added to the Judicial Conference.[62] The Senate bill's court provisions passed the Senate with relatively few changes.[63] Under the version that passed the Senate, however, the bankruptcy judges were appointed by the circuit courts of appeals and made "adjuncts" of the district courts.[64]

In an agreed compromise measure, which passed the House on September 28, 1978,[65] the bankruptcy judges lost Article III status. They were to be appointed as "adjuncts" of the circuit courts by the President with the advice and consent of the Senate for fourteen-year terms.[66] They were to receive a salary of $50,000, subject to adjustment,[67] and they were subject to removal by the circuit judicial council.[68] The expanded jurisdiction was conferred on the courts of appeal, but the bankruptcy courts were directed to exercise "all" of that jurisdiction.[69] Three bankruptcy judges were added to the Judicial Conference.[70]

A few days after the House action, Chief Justice Warren Burger reportedly called Senator Strom Thurmond (R-S.C.), ranking minority member of the Senate Judiciary Committee, and Senator Malcolm Wallop (R-Wyo.), a minority sponsor of the bill, to delay a vote in the Senate because of his dissatisfaction with the new bankruptcy court provisions.[71] The Chief Justice was particularly unhappy with those provisions calling for presidential appointment, making the bankruptcy courts "adjuncts" of the circuit courts of appeals rather than the lower-level district courts, and adding bankruptcy judges to the Judicial Conference.[72] The Supreme Court's public information officer reportedly confirmed the Chief Justice's call to Thurmond. He explained this "unusual action" by saying that the Chief Justice was acting in his role as Chairman of the Judicial Con-

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[61] H.R. 8200, §§ 201(a), 243(a), 95th Cong., 1st Sess., 124 CONG. REC. 1783, 1786–87 (1978).
[62] *Id.* § 208, 124 CONG. REC. 1784.
[63] *See* 124 CONG. REC. 28,257–84 (1978).
[64] *Id.* at 28,261 (statement of Sen. Thurmond (R-S.C.)).
[65] H.R. 8200, 95th Cong., 1st Sess., 124 CONG. REC. 32,350–33,420 (1978).
[66] *Id.* § 201(a), 124 CONG. REC. 32,381.
[67] *Id.*, 124 CONG. REC. 32,382.
[68] *Id.*
[69] *Id.* § 241(a), 124 CONG. REC. 32,385.
[70] *Id.* § 208, 124 CONG. REC. 32,382.
[71] Wash. Post, Oct. 3, 1978, at C11, col. 5; Wall St. J., Oct. 2, 1978, at 5, col. 1.
[72] Wash. Post, Oct. 3, 1978, at C11, col. 5; Wall St. J., Oct. 2, 1978, at 5, col. 1.

ference, "which by law is authorized to tell Congress what it thinks of bills affecting the court system."[73]

That is a rather free-handed interpretation of the statute creating the Judicial Conference, which provides that "[t]he Chief Justice shall submit to Congress an annual report of the proceedings of the Judicial Conference and its recommendations for legislation."[74] It is particularly unusual when read in connection with a section of the federal Criminal Code forbidding the use of any federally appropriated funds, unless expressly authorized by Congress, to pay for any "telephone, letter . . . or other device" intended to influence the vote of any member of Congress, unless on the request of such member.[75]

The press also reported that Senator DeConcini had said that there would be no further negotiations between Congress and the Chief Justice, because DeConcini considered dealing with the third branch of government to be a violation of the doctrine of separation of powers.[76] A few days later, however, Senator DeConcini was reported as saying that the Chief Justice had called him on September 28 and "yelled at me that I was irresponsible" and that the Chief Justice was "going to go to the president and get him to veto this."[77]

The Chief Justice's efforts were apparently not entirely without effect. An amended compromise measure passed the Senate on October 5,[78] after Senator DeConcini thanked "the Chief Justice . . . for his support throughout the Congress of the numerous items of legislation" that had come before the Senate Subcommittee on Improvements in Judicial Machinery.[79] The bill made the bankruptcy courts "adjuncts" of the district courts rather than the courts of appeals.[80] The expanded bankruptcy jurisdiction was vested in the district courts, but "all" of it was to be exercised by the bankruptcy courts.[81] In appointing bank-

[73] Wall St. J., Oct. 2, 1978, at 5, col. 1.

[74] 28 U.S.C. § 331 (1982).

[75] 18 U.S.C. § 1913 (1982).

[76] Wash. Post, Oct. 3, 1978, at C11, col. 5.

[77] Wash. Post, Oct. 7, 1978, at C1, col. 1.

[78] H.R. 8200, 95th Cong., 2d Sess., 124 CONG. REC. 33,990–34,019 (1978).

[79] 124 CONG. REC. 33,990 (1978) (statement of Sen. DeConcini).

[80] *Id.* at 33,991 (1978) (Senate amendments to H.R. 8200); *id.* at 34,019 (statement of Sen. Thurmond).

[81] H.R. 8200, § 241(a), 124 CONG. REC. 32,385 (1978). H.R. 8200 enacted 28 U.S.C. § 1471 to provide in part:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts, other than the district courts, the district courts shall

ruptcy judges the President was to "give due consideration to the recommended nominee or nominees of the Judicial Council of the Circuit,"[82] and two bankruptcy judges were added to the Judicial Conference.[83] The House accepted the Senate amendments[84] and, despite a reported letter from the Chief Justice to the President urging veto,[85] President Carter signed the bill on November 6, 1978.[86]

As enacted, certain sections of the new law, including the section defining the expanded bankruptcy jurisdiction, were not to take effect until April 1, 1984.[87] The terms of each incumbent bankruptcy judge were extended to March 31, 1984, or to "when his successor takes office."[88] During a "transition period" defined to run from October 1, 1979, when the new Bankruptcy Code took effect, until March 31, 1984, these incumbents were to serve as "bankruptcy judges" on the old "courts of bankruptcy," which were continued through March 31, 1984.[89] And, somewhat inartfully, the law also provided that the new jurisdictional section, which was not to take effect until April 1, 1984, "shall apply" to the continued courts.[90]

III. THE *Northern Pipeline* DECISION

Incumbent bankruptcy judges were acting under this interim scheme when the Supreme Court decided the *Northern Pipeline* case in June 1982.[91] Debtor, Northern Pipeline, had filed a vol-

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have original but not exclusive jurisdiciton of all civil proceedings arising under title 11 or arising in or related to cases under title 11.

(c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.

Id.

[82] 124 CONG. REC. 33,991 (1978) (Senate amendments to H.R. 8200).

[83] *Id.*

[84] 124 CONG. REC. 34,143–45 (1978).

[85] N.Y. Times, Nov. 19, 1978, at 39, col. 1.

[86] 14 WEEKLY COMP. PRES. DOC. 2005 (Nov. 10, 1978).

[87] Section 201(a) of the new law, establishing the new bankruptcy court system in new §§ 151–160 of 28 U.S.C.; § 208, amending § 331 of the Judicial Code to add two bankruptcy judges to the Judicial Conference; and § 241(a), enacting new § 1471 of 28 U.S.C., *see supra* note 81, conferring the expanded bankruptcy jurisdiction on the district courts, but directing that it all be exercised by the bankruptcy courts, were not to take effect until April 1, 1984. Bankruptcy Code of 1978, Pub. L. No. 95-598, § 402(b), 92 Stat. 2549, 2682.

[88] *Id.* § 404(b), 92 Stat. 2683.

[89] *Id.* § 404(a), 92 Stat. 2683.

[90] *Id.* § 405(b), 92 Stat. 2685.

[91] Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

untary petition for reorganization under new Chapter 11 of the Bankruptcy Code. As in most Chapter 11 cases, no trustee had been appointed, in which event the Code provided that the debtor should constitute a "debtor in possession"[92] with all of the powers, functions, and duties of a trustee.[93] Those included the function of representing the estate with the capacity to sue and to be sued[94] and the power to operate the debtor's business, unless the court ordered otherwise.[95]

Northern Pipeline asserted a prepetition cause of action for breach of contract against Marathon Pipe Line, which became property of the estate when the Chapter 11 case was commenced by the filing of the petition.[96] Northern Pipeline filed an action in the bankruptcy court against Marathon for breach of contract. Marathon moved to dismiss that action on the ground that the new jurisdictional provision conferred Article III judicial power on non-Article III courts in violation of the separation of powers doctrine. A majority of the Court sustained Marathon's contention, with the Chief Justice among the three dissenters.

The *Northern Pipeline* opinion was one of Justice William Brennan's most ambitious excursions of such kind[97] since *Baker v. Carr*,[98] in which he undertook to chart the seas of the political question doctrine. While he undertook to do a similar charting job for Article I and Article III courts, he unfortunately wrote for only a plurality of four this time, with two other justices concurring on much narrower grounds.[99] The holding of six justices in *Northern Pipeline* is fairly well encapsulated in a footnote to the plurality opinion:

> [A]t the least, the new bankruptcy judges cannot constitu-

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[92] 11 U.S.C. § 1101 (1982).

[93] *Id.* § 1107.

[94] *Id.* § 323.

[95] *Id.* § 1108.

[96] Under 11 U.S.C. § 301 (1982), a voluntary case is commenced by the filing of a petition by the debtor. And under 11 U.S.C. § 541(a)(1) (1982), with some inapplicable exceptions, property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case."

[97] Fay v. Noia, 372 U.S. 391 (1963), is another example of Justice Brennan charting the seas of the law—in that case, the law of the federal writ of habeas corpus.

[98] 369 U.S. 186 (1962). Even after *Baker v. Carr*, Professor Tribe wrote that the "[p]olitical question doctrine is in a state of some confusion." L. TRIBE, AMERICAN CONSTITUTIONAL LAW 71 (1978).

[99] *Northern Pipeline*, 458 U.S. 50. The plurality was made up of Justices Brennan, Marshall, Blackmun, and Stevens. The concurring Justices were Rehnquist and O'Connor. *Id.* at 89. Chief Justice Burger wrote a dissenting opinion. *Id.* at 92. Justice White also wrote a dissenting opinion, which was joined by the Chief Justice and Justice Powell. *Id.*

> tionally be vested with jurisdiction to decide this state-law contract claim against Marathon. As part of a comprehensive restructuring of the bankruptcy laws, Congress has vested jurisdiction over this and all matters related to cases under Title 11 in a single non-Art. III court, and has done so pursuant to a single statutory grant of jurisdiction.[100] In these circumstances, we cannot conclude that if Congress were aware that the grant of jurisdiction could not constitutionally encompass this and similar claims, it would simply remove the jurisdiction of the bankruptcy court over these matters, leaving the jurisdictional provision and adjudicatory structure intact with respect to other types of claims, and thus subject to Art. III constitutional challenge on a claim-by-claim basis. Indeed, we note that one of the express purposes of the Act was to ensure adjudication of all claims in a single forum and to avoid the delay and expense of jurisdictional disputes. Nor can we assume, as the CHIEF JUSTICE suggests, . . . that Congress' choice would be to have this case "routed to the United States district court of which the bankruptcy court is an adjunct."[101] We think that it is for Congress to determine the proper manner of restructuring the Bankruptcy Act of 1978 to conform to the requirements of Art. III in the way that will best effectuate the legislative purpose.[102]

Justices Rehnquist and O'Connor concurred on the ground that, because "the claims of Northern arise entirely under state law," and "[t]he lawsuit is before the Bankruptcy Court only because the plaintiff [had] previously filed a petition for reorganization in that court,"[103] "Marathon may object to proceeding further with this lawsuit on the grounds that if it is to be resolved by an agency of the United States, it may be resolved only by an agency that exercises '[t]he judicial power of the United States' described by Art. III of the Constitution."[104] They also

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[100] *See supra* note 81.

[101] The first paragraph of the Chief Justice's dissent emphasized that the Court's holding was limited to the narrow ground of Justice Rehnquist's concurring opinion, which did "not suggest that there is something inherently unconstitutional about the new bankruptcy courts." *Northern Pipeline*, 458 U.S. at 92 (Rehnquist, J., concurring). The second and last paragraph stated:

> It will not be necessary for Congress, in order to meet the requirements of the Court's holding, to undertake a radical restructuring of the present system of bankruptcy adjudication. The problems arising from today's judgment can be resolved simply by providing that ancillary common-law actions, such as the one involved in these cases [sic], be routed to the United States district court of which the bankruptcy court is an adjunct.

Id.

[102] *Id.* at 87 n.40 (citations omitted).

[103] *Id.* at 90 (Rehnquist, J., concurring).

[104] *Id.* at 89.

agreed, citing the plurality's footnote, "that this grant of authority is not readily severable from the remaining grant of authority to bankruptcy courts, under [28 U.S.C.] § 1471."[105]

Because much of what Justice Brennan said in his wide-ranging plurality opinion has had an obvious impact on later developments, it is necessary to consider that opinion in somewhat greater detail. Justice Brennan conceded that section 1471(b), giving the district courts original but not exclusive jurisdiction over civil proceedings related to cases under the Bankruptcy Code, when combined with section 1471(c),[106] would include within the bankruptcy court's jurisdiction "causes of action owned by the debtor at the time of the petition for bankruptcy."[107] That statutory grant of jurisdiction, however, could not be squared with the separation of powers doctrine, which requires that Article III federal judicial power be vested in Article III judges.[108]

There were only "three narrow"[109] exceptions to the separation of powers doctrine that permitted the use of "legislative courts."[110] One was for territorial courts established in "certain geographic areas, in which no State operated as sovereign" and for which the Constitution conferred on Congress "the general powers of government."[111] The second exception was for the establishment of military courts-martial, an exception also based on constitutional grants to Congress and the Executive of "extraordinary control over the precise subject at issue."[112] Neither of these exceptions would support what Congress had attempted to do with the bankruptcy courts. To treat Congress's Article I authority to enact bankruptcy laws[113] as an "exceptional grant of power"[114] comparable to its powers over the territories and the military would leave "no limiting principle," and would lead to similar treatment of all Article I powers.[115] Imagine what Congress could do with the commerce power!

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[105] *Id.* at 91–92; *see supra* note 81.
[106] *See supra* note 81.
[107] *Northern Pipeline*, 458 U.S. at 54.
[108] *Id.* at 57–59.
[109] *Id.* at 64.
[110] *Id.* at 73.
[111] *Id.* at 64; *see* U.S. CONST. art. I, § 8, cl. 17; *id.* art. IV, § 3, cl. 2.
[112] *Northern Pipeline*, 458 U.S. at 66; *see* U.S. CONST. art. I, § 8, cls. 14–16; *id.* amend. V.
[113] *See supra* note 27.
[114] *Northern Pipeline*, 458 U.S. at 70.
[115] *Id.* at 73.

The third exception was for adjudications involving "public rights."[116] This exception extended only to matters arising "between the government and others"[117] and "only to matters that historically could have been determined exclusively" by the executive or legislative departments.[118] No such "public rights" were involved in Northern Pipeline's contract action against Marathon. While the "restructuring of debtor-creditor relations, which is at the core of the federal bankruptcy power," might involve "public rights," the "adjudication of state-created private rights, such as the right to recover contract damages that is at issue in this case," did not.[119]

The plurality acknowledged an alternative approach not involving the use of legislative courts, which was to view the bankruptcy court as a mere "adjunct" of the Article III district court.[120] This alternative approach was demonstrated by the venerable case of *Crowell v. Benson*,[121] which upheld the use of an administrative agency to make initial factual determinations pursuant to a federal statute requiring employers to compensate their employees for work-related injuries occurring upon the navigable waters of the United States, and by the more recent case of *United States v. Raddatz*,[122] upholding provisions in the Federal Magistrates Act[123] that permitted district court judges to refer certain pretrial motions to magistrates for initial determination. Those cases established that "when Congress creates a substantive federal right,"[124] administrative agencies and magistrates could be used as "adjuncts" to Article III courts, pro-

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[116] *Id.* at 67.

[117] *Id.* at 69.

[118] *Id.* at 68.

[119] *Id.* at 71. The plurality opinion recognized that, under the decisions in Williams v. Austrian, 331 U.S. 642, 649 (1947), *see supra* text accompanying note 30, and Schumacher v. Beeler, 293 U.S. 367, 373 (1934), *see supra* text accompanying note 26, Northern Pipeline's claim against Marathon could be adjudicated in a federal Article III court "on the basis of its relationship to the petition for reorganization." *Northern Pipeline*, 458 U.S. at 72 n.26.

[120] 458 U.S. at 76–77.

[121] 285 U.S. 22 (1932).

[122] 447 U.S. 667 (1980).

[123] The Federal Magistrates Act of 1979, 28 U.S.C. § 636(b)(1)(B) (1982), states that "a judge may . . . designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement."

[124] *Northern Pipeline*, 458 U.S. at 80.

vided that "'the essential attributes of the judicial power'" were retained by the Article III tribunals.[125]

Congress's grant of bankruptcy jurisdiction, however, did not satisfy the limiting proviso of the "public rights" cases. The statute upheld in *Crowell v. Benson* imposed liability on employers without regard to fault, and it prescribed a fixed, mandatory schedule of compensation.[126] All that was entrusted to the determination of the administrative agency were questions of fact as to whether there was an injury, the nature of the injury, and whether it was work-related and occurred on navigable waters. Moreover, the agency could not enforce its own compensation orders, but had to go to an Article III federal district court which would enforce the order if the court determined it to be in accordance with law and supported by evidence in the record.[127] In *Raddatz*, the magistrate's proposed findings and recommendations were subject to de novo review by the district court, and the magistrates functioned only on reference by the district court. They were also appointed by and subject to removal by the district court,[128] so that the "ultimate decision-making authority respecting all pre-trial motions clearly remained with the district court."[129]

In contrast, many of the proceedings over which Congress gave the bankruptcy courts jurisdiction, including those in *Northern Pipeline*, "involve[d] a right created by *state* law, a right independent of and antecedent to the reorganization petition that conferred jurisdiction upon the Bankruptcy Court."[130] Moreover, the bankruptcy courts were not limited, as the administrative agency in *Crowell v. Benson* was, to "statutorily channeled fact finding functions."[131] Instead, they were to exercise "'*all* of the jurisdiction' conferred by the Act on the district court."[132] In addition, under then existing Bankruptcy Rule 810, their findings of fact were binding on a reviewing district court if not "clearly erroneous,"[133] and they "issue[d]

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[125] *Id.* at 77 (quoting *Crowell*, 285 U.S. at 51).

[126] *See* Longshoremen's and Harbor Workers' Compensation Act, ch. 509, 44 Stat. 1424 (1927) (codified as amended at 33 U.S.C. §§ 901–945, 947–950 (1982)).

[127] *See id.* § 21(c), 44 Stat. 1436–37 (codified at 33 U.S.C. § 921(d) (1982)).

[128] *Raddatz*, 447 U.S. at 685; *see* 28 U.S.C. § 631(i) (1982).

[129] *Northern Pipeline*, 458 U.S. at 79 (citing *Raddatz*, 447 U.S. at 682).

[130] *Id.* at 84 (emphasis in original).

[131] *Id.* at 85.

[132] *Id.* (emphasis in original) (quoting 28 U.S.C. § 1471(c)); *see supra* note 81.

[133] Fed. R. Bankr. 810, 411 U.S. 1090 (1973). Section 405(d) of the 1978 Act, Pub. L. No. 95-598, 92 Stat. 2549, 2685, provided that the existing bankruptcy rules should

final judgments, which [were] binding and enforceable even in the absence of an appeal."[134] Hence, Congress had "impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the Art. III district court, and [had] vested those attributes in a non-Art. III adjunct."[135]

One other aspect of *Northern Pipeline* has had an effect on later developments. The concurring opinion of Justice Rehnquist, in which Justice O'Connor joined, found unconstitutional as much of the bankruptcy jurisdictional grant as enabled the bankruptcy court "to entertain and decide Northern's lawsuit over Marathon's objection."[136] The Chief Justice's dissenting opinion emphasized that the holding was therefore limited to cases that stated a traditional common law action and that must be heard by an Article III court, "absent the consent of the litigants."[137] And the dissenting opinion of Justice White, in which the Chief Justice and Justice Powell joined, argued that the plurality opinion should have been limited to a holding that the claim against Marathon would have to be heard by Article III judges or by state courts, "unless the defendant consents to suit before the bankruptcy judge."[138] It is possible to conclude, therefore, that at least five Justices would see no constitutional objection to Congress giving the bankruptcy courts power to adjudicate Northern Pipeline's state law claim against Marathon with the consent of the defendant.

A majority of the Court was able to agree on two other matters in *Northern Pipeline*: their holding should not be "applied retroactively to the effective date of the [new Bankruptcy] Act,"[139] and their judgment should be stayed for more than three months, until October 4, 1982, to "afford Congress an opportunity to reconstitute the bankruptcy courts or to adopt other valid meth-

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continue to apply "to the extent not inconsistent with [Public Law 95-598] until such rules are repealed or superseded by" new rules promulgated by the Supreme Court pursuant to 28 U.S.C. § 2075 (1982). *See infra* note 147.

[134] *Northern Pipeline*, 458 U.S. at 85–86.

[135] *Id.* at 87.

[136] *Id.* at 91 (Rehnquist, J., concurring).

[137] *Id.* at 92 (Burger, C.J., dissenting).

[138] *Id.* at 95 (White, J., dissenting).

[139] *Id.* at 87; *id* at 92 (Rehnquist, J., concurring). The Court applied three considerations derived from Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), in its decision against retroactivity. These were, first, whether the holding "decid[ed] an issue of first impression whose resolution was not clearly foreshadowed" by earlier cases, *id.* at 106; second, "whether retrospective operation will further or retard [the] operation" of the holding in question, *id.* at 107; and third, whether retroactive application "could produce substantial inequitable results," *id.*

ods of adjudication, without impairing the interim administration of the bankruptcy laws."[140] As October 4 arrived without congressional action, the Court, on motion of the Solicitor General, again stayed its judgment "to and including December 24,"[141] but on December 23 it denied an application for a further stay.[142]

IV. THE EMERGENCY RULE

Congress did not act to resolve the jurisdictional controversy for more than two years after the *Northern Pipeline* decision.[143] In September 1982, however, the Judicial Conference stepped into the breach by adopting a resolution requiring the Director of the Administrative Office of United States Courts to "provide each circuit with a proposed rule,"[144] which was to take effect in the absence of congressional action. The resolution was intended "to permit the bankruptcy system to continue without disruption in reliance on jurisdictional grants remaining in the law as limited by" the *Northern Pipeline* decision.[145] This resolution was a remarkable position for the Judicial Conference, a group of Article III judges, to take. For one thing, its assumption that there were "jurisdictional grants remaining" after the *Northern Pipeline* decision ignored a holding of a majority of the Court that the "single statutory grant of jurisdiction" in bankruptcy was nonseverable.[146] Second, it assumed that allocation of this remaining jurisdiction between district courts and bankruptcy courts was a proper function of court rules, although the Supreme Court has never so regarded even its own rulemaking function.[147] Third, except for authority given the Judicial

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[140] *Northern Pipeline*, 458 U.S. at 88; *see id.* at 92 (Rehnquist, J., concurring).

[141] Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 459 U.S. 813 (1982).

[142] Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 459 U.S. 1094 (1982).

[143] *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 333, 336.

[144] JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF PROCEEDINGS 91 (Sept. 1982).

[145] *Id.*

[146] *Northern Pipeline*, 458 U.S. at 87 n.40, 87–88; *id.* at 91–92 (Rehnquist, J., concurring).

[147] 28 U.S.C. § 2072 (1982) authorizes the Supreme Court to prescribe general rules of practice and procedure for federal district courts. The rules are to be reported to Congress not later than May 1 of the year that they are to take effect; they are not to

Conference to prescribe rules for handling complaints against individual federal judges, the Judicial Conference is given no bankruptcy rulemaking authority,[148] and the Administrative Office is given no authority to make rules affecting bankruptcy above the administrative level.[149]

Director William E. Foley nonetheless prepared and dispatched to all circuit, district, and bankruptcy court judges an

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take effect earlier than 90 days thereafter. FED. R. CIV. P. 82 provides that "[t]hese rules shall not be construed to extend or limit the jurisdiction of the . . . district courts." 28 U.S.C. § 2075 (1982) similarly authorizes the Supreme Court to prescribe rules of practice and procedure in bankruptcy cases. Like its predecessor, FED. R. BANKR. 9030 distinguishes carefully between rulemaking authority and the expansion of jurisdiction: "These rules shall not be construed to extend or limit the jurisdiction of the bankruptcy courts or the venue of any matters therein." *See also* United States v. Sherwood, 312 U.S. 584, 589–90 (1941) ("An authority conferred upon a court to make rules of procedure for the exercise of its jurisdiction is not an authority to enlarge that jurisdiction.").

[148] The Judicial Conference is directed to "make a comprehensive survey of the condition of business in the courts of the United States and prepare plans for assignment of judges to or from circuits or districts where necessary." 28 U.S.C. § 331 (1982). It is to "submit suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business." *Id.* Apart from its authority to prescribe rules for handling complaints against judges, the Conference's only authority with respect to rules is to "carry on a continuous study of the operation and effect of" the rules of practice and procedure prescribed by the Supreme Court and to make recommendations for changes and additions to them to the Supreme Court. *Id.*

This last provision was added to § 331 in 1958. Act of July 11, 1958, Pub. L. 85-513, 72 Stat. 356 (codified at 28 U.S.C. § 331 (1982)). Prior to that time, the Supreme Court had appointed its own Advisory Committee to draft rules of civil and criminal procedure for promulgation by the Court and submission to Congress with the rules becoming effective if Congress did not act within 90 days. After the 1958 amendment to § 331, the Judicial Conference established its Advisory Committee for each body of rules and its Standing Committee for all rules; the members of all of the committees are appointed by the Chief Justice. After an Advisory Committee has completed its drafting job, proposed new rules are forwarded to the Standing Committee for its approval and then to the Judicial Conference for its approval before being submitted to the Supreme Court. *See* 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1004–1007 (1969). This change in the process has been criticized. *See* Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673 (1975).

[149] The Administrative Office is supervised by a Director who is appointed and subject to removal by the Supreme Court. *See* 28 U.S.C. § 601 (1982). He is "the administrative officer of the courts, and under the supervision and direction of the Judicial Conference." *Id.* § 604(a).

The Director is the person in charge of such matters as payments of compensation and expenses of judges and judicial officers, auditing the accounts of courts, establishing a program of interpreters for judicial proceedings, and preparing statistical reports of judicial business. *Id.* With respect to bankruptcy courts, he is specifically instructed only to prepare statistical reports of business transacted by such courts. *Id.* § 604(a)(13). He is also authorized to promulgate such rules "as may be necessary to carry out the Director's functions," specifically to promulgate rules approved by the Conference in order "to assist him in the performance of [his] duties" with respect to magistrates, and to perform "such other duties as may be assigned to him by the Supreme Court or the Judicial Conference." *Id.* § 604(a)(14), (e), (f).

Emergency Rule.[150] An accompanying memorandum of September 27, 1982, explained that "[t]he Administrative Office concludes that [*Northern Pipeline*] did not invalidate" section 1471(a) and (b) of the Judicial Code, which vested the bankruptcy jurisdiction in the district courts.[151] The unstated assumption was that *Northern Pipeline* had only invalidated section 1471(c), which directed the bankruptcy courts to exercise "all" of that jurisdiction.[152] Accordingly, the Emergency Rule was "an interim measure by which district courts may delegate many of their bankruptcy powers to bankruptcy judges."[153] The authority for this measure was said to be found in section 105 of the Bankruptcy Code,[154] which then authorized bankruptcy courts, not district courts, to issue any order necessary or appropriate to carry out the provisions of the Bankruptcy Code.[155] It was also said to be found in then Bankruptcy Rule 927, which authorized district courts to promulgate bankruptcy rules of "practice and procedure . . . not inconsistent with" those promulgated by the Supreme Court.[156]

In a later memorandum of December 3, 1982, Director Foley submitted to the same courts a revised version of the rule and a "Sample Order" by which the Judicial Council of each circuit, "acting pursuant to . . . 28 U.S.C. § 332(d),"[157] was to direct the district courts in the circuit to adopt the rule.[158]

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[150] The rule is attached to Memorandum from William E. Foley, Director, Administrative Office of the United States Courts, to the judges of the U.S. Courts of Appeal, District Courts, Bankruptcy Courts, and the clerks of the Bankruptcy Courts (Sept. 27, 1982) (on file at HARV. J. ON LEGIS.) [memorandum hereinafter cited as September 27 Foley Memorandum].

[151] *Id.* at 2. The original memorandum erroneously referred to 11 U.S.C. § 1471(a) and (b).

[152] *See supra* note 81. Perhaps, if the assumption had been stated, it would have been necessary to explain why § 1471(c) was not a fairly clear indication that Congress did not intend that the district courts themselves should exercise any of that jurisdiction.

[153] *See* September 27 Foley Memorandum, *supra* note 150, at 2.

[154] *Id.*

[155] *See* Bankruptcy Code of 1978, Pub. L. No. 95-598, § 105, 92 Stat. 2549, 2555 (codified at 11 U.S.C. § 105 (1982)).

[156] Fed. R. Bankr. 927, 411 U.S. 1103 (1973).

[157] 28 U.S.C. § 332(d)(1) (1982) provides that each Judicial Council "shall make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit."

[158] The revised Emergency Rule and Sample Order are attached to Memorandum from William E. Foley, Director, Administrative Office of the United States Courts, to the judges of the U.S. Courts of Appeals, District Courts, and Bankruptcy Courts, and to the clerks of the U.S. District Courts and Bankruptcy Courts (Dec. 3, 1982) (on file at HARV. J. ON LEGIS.) [memorandum hereinafter cited as December 3 Foley Memorandum; rule hereinafter cited as Revised Emergency Rule]. The rule is reprinted in 1 COLLIER ON BANKRUPTCY, *supra* note 1, ¶ 3, at 2–6.

The Emergency Rule was, by its own terms, effective only until Congress acted or until March 31, 1984, whichever occurred first.[159] It provided for reference of all civil proceedings covered by section 1471(a) and (b) to the bankruptcy courts, although (1) the reference could be withdrawn in whole or in part by the district court and (2) the bankruptcy judges were forbidden to conduct jury trials.[160]

But the rule then undertook to separate "related proceedings," defined in the rule as "those civil proceedings that, in the absence of a petition in bankruptcy, could have been brought in a district court or a state court,"[161] from all other cases and proceedings. It also undertook to treat the two groups differently. In "related proceedings," the bankruptcy court could not "enter a judgment or dispositive order" unless the parties consented, but, like a special master, was to "submit findings, conclusions, and a proposed judgment or order to the district judge."[162] All such proposed judgments and orders were to be reviewed by the district court.[163] In other cases and proceedings, the orders and judgments of bankruptcy judges were made effective upon entry unless stayed by the bankruptcy judge or a district judge.[164] The district judge was to review such orders and judgments only if an appeal was taken or if the bankruptcy judge "certifie[d] that circumstances require[d] that the order or judgment be approved by a district judge."[165]

In an apparent effort to show that the final decisionmaking authority remained with the district court,[166] the rule also provided that, in reviewing orders or judgments of either type, the

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[159] Revised Emergency Rule § (a), *reprinted in* 1 COLLIER ON BANKRUPTCY, *supra* note 1, ¶ 3, at 2.

[160] Revised Emergency Rule §§ (c)(1)–(2), (d)(1)(D), *reprinted in* 1 COLLIER ON BANKRUPTCY, *supra* note 1, ¶ 3, at 3–4. The bankruptcy judges were also forbidden to enjoin other courts, to punish criminal contempt not committed in their presence or warranting a punishment of imprisonment, or to conduct an appeal from another bankruptcy judge. *Id.* § (d)(1)(A)–(C). These prohibitions, however, were already contained in Pub. L. No. 95-598, §§ 241(a), 405(a), 92 Stat. 2549, 2668, 2685.

[161] Revised Emergency Rule § (d)(3)(A), *reprinted in* 1 COLLIER ON BANKRUPTCY, *supra* note 1, ¶ 3, at 4. The rule also provided that "[r]elated proceedings include, but are not limited to, claims brought by the estate against parties who have not filed claims against the estate." *Id.*

[162] *Id.* § (d)(3)(B).

[163] *Id.* § (e)(2)(a)(iii), *reprinted in* 1 COLLIER ON BANKRUPTCY, *supra* note 1, ¶ 3, at 5.

[164] *Id.* § (e)(2)(a)(i)–(ii).

[165] *Id.*

[166] *See supra*, text accompanying note 129.

district court could hold a hearing and "receive such evidence as is appropriate"[167] and "need give no deference to the findings of the bankruptcy judge."[168] Apparently, then Bankruptcy Rule 810, prescribing the "clearly erroneous" standard for review of bankruptcy courts' findings,[169] was to be disposed of by a provision in the Emergency Rule that the Bankruptcy Rules promulgated by the Supreme Court should continue in effect to the extent not inconsistent with *Northern Pipeline*.[170] But the new "no deference" standard was difficult to reconcile with a recital in the Emergency Rule of the "exceptional circumstances" justifying the rule, one of which was "the specialized expertise necessary to the determination of bankruptcy matters."[171] It may be even more difficult to reconcile with the rubber-stamp mentality suggested by a statement made in the Foley memorandum of September 27, and repeated in his memorandum of December 3, that "[w]here the bankruptcy judge certifies that circumstances require, an order or judgment entered by a bankruptcy judge will be *confirmed* by a district judge even if no objection is filed."[172]

All circuit councils and, with minor local variations, district courts followed directions. Thus, after Christmas Eve, 1982, there was in place, as a matter of form at least, a rule allocating bankruptcy jurisdiction between bankruptcy and district court judges. And all of this was accomplished with no participation by the Supreme Court, except as the Chief Justice might be thought to have had some hand in it.

In an effort to keep their cases moving, counsel did not, in most instances, challenge the allocation of jurisdiction to the bankruptcy courts by the Emergency Rule. They relied instead on the ancient doctrine that federal courts, while courts of limited jurisdiction, have jurisdiction to decide whether they have subject matter jurisdiction. According to this doctrine, absent a

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[167] Revised Emergency Rule § (e)(2)(B), *reprinted in* 1 COLLIER ON BANKRUPTCY, *supra* note 1, ¶ 3, at 5.

[168] *Id.*

[169] Fed. R. Bankr. 810, 411 U.S. 1090 (1973).

[170] Revised Emergency Rule § (g), *reprinted in* 1 COLLIER ON BANKRUPTCY, *supra* note 1, ¶ 3, at 6.

[171] *Id.* § (a), *reprinted in* 1 COLLIER ON BANKRUPTCY, *supra* note 1, ¶ 3, at 2–3.

[172] December 3 Foley Memorandum, *supra* note 158, at 2 (emphasis added); September 27 Foley Memorandum, *supra* note 150, at 3 (emphasis added).

direct attack, those judgments are res judicata on the jurisdictional issue and not subject to collateral attack.[173]

The Supreme Court applied that doctrine twice to reject collateral attacks on bankruptcy court orders. In the first case, the Court sustained confirmation of a reorganization plan under old section 77b, the predecessor to old Chapter X, that provided for the discharge of guarantors of the corporate debtors' bonds, although the bankruptcy court had no jurisdiction to discharge the guarantors' liabilities.[174] The second case upheld confirmation of a municipal debt adjustment plan under a predecessor to old Chapter IX which the Supreme Court had later held unconstitutional in another case.[175] Because of the nature of the bankruptcy proceedings involved in those cases, the plan-confirming orders in both cases were originally entered by Article III district courts. Even if this same jurisdictional doctrine applies to non-Article III courts, however, does it apply to such a court that has no other jurisdiction whatsoever? That would be the situation of the bankruptcy courts after December 24, 1982, if the promulgators of the Emergency Rule were wrong on any one of their four assumptions: (1) that bankruptcy jurisdiction remained in the district courts after *Northern Pipeline*; (2) that the promulgators of the rules had rulemaking authority; (3) that jurisdiction could be allocated by rule; or (4) that the Emergency Rule's allocation of jurisdiction was valid under *Northern Pipeline*.

Those who have challenged the validity of the Emergency Rule have met with little success beyond the bankruptcy court level. The Supreme Court has three times denied petitions for original writs of mandamus or prohibition attacking the rule.[176] Each of the eight courts of appeals that have considered the question have held the rule valid.[177] In so doing, none of them

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[173] *See* M'Cormick v. Sullivant, 23 U.S. (10 Wheat.) 192 (1825) (federal district court's unappealed decree on the merits is res judicata on diversity jurisdiction).

[174] Stoll v. Gottlieb, 305 U.S. 165, 177 (1938) (determination of subject matter jurisdiction was res judicata in a later action on a bond guaranty whether the power to deal with guarantors' liability "was strictly or quasi-jurisdictional").

[175] Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371 (1940).

[176] *See In re* International Harvester Co., 103 S. Ct. 1804 (1983) (the author was on the petition in this case); *In re* Doan, 103 S. Ct. 1534 (1983); *In re* Keene Corp., 103 S. Ct. 1237 (1983).

[177] *See In re* Landmark Capital Co. 742 F.2d 1166 (9th Cir. 1984); *In re* Stewart, 12 BANKR. CT. DEC. (CRR) 308 (7th Cir. 1984); *In re* Pine Assocs., Inc., 733 F.2d 208 (2d Cir. 1984); *In re* Davis, 730 F.2d 176 (5th Cir. 1984); Lindquist v. Metropolitan Bank Bloomington, 730 F.2d 1204 (8th Cir. 1984); Oklahoma Health Serv. Fed. Credit Union, v. Webb, 726 F.2d 624 (10th Cir. 1984); *In re* Kaiser, 722 F.2d 1574 (2d Cir. 1983); Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd., 709 F.2d 190 (3d Cir.), *cert. denied*,

considered the third assumption listed in the preceeding paragraph, and only some of them clearly addressed the second.[178] In disposing of the first issue, most of them relied also on the fact that, until replaced on April 1, 1984, by a new section 1334 dealing solely with appeals from bankruptcy courts to district courts,[179] old section 1334 of the Judicial Code continued to provide that the district courts "shall have original jurisdiction, exclusive of the courts of the States, of all matters and proceedings in bankruptcy."[180] But if that provision dealt with more than jurisdiction over the bankruptcy case proper, it was inconsistent with the later-enacted § 1471(b) of the Judicial Code[181] that all these cases assumed was still in effect.

The first district judge to uphold the rule was Judge DeMascio, Chairman of the Judicial Conference's Bankruptcy Committee.[182] Of three district judges who held the rule invalid at least in part, one[183] was, in effect, overruled two months later,[184] another[185] was reversed on appeal,[186] and the decisions of the third[187] were appealed, but the appellate court concluded that the 1984 statutory amendments had rendered the question of the rule's validity moot.[188]

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104 S. Ct. 349 (1983); White Motor Corp. v. Citibank, N.A., 704 F.2d 254 (6th Cir. 1983); *In re* Hansen, 702 F.2d 728 (8th Cir.), *cert. denied*, 103 S. Ct. 3539 (1983); *In re* Braniff Airways, Inc., 27 Bankr. 231 (N.D. Tex.), *aff'd* 700 F.2d 214 (5th Cir.), *cert. denied*, 103 S. Ct. 2122 (1983); *In re* Northland Point Partners, 26 Bankr. 860, 1019 (E.D. Mich.), *aff'd by unreported order* (6th Cir.), *cert. denied*, 104 S. Ct. 151 (1983). *But see* Rhodes v. Stewart, 705 F.2d 159 (6th Cir.), *cert. denied*, 104 S. Ct. 427 (1983) (Court, in dicta, states that a plurality of the Supreme Court had held that bankruptcy court jurisdiction was unconstitutional in toto.).

[178] For cases addressing the notion that the promulgators of the rules had rulemaking authority, see *In re* Davis, 730 F.2d 176, 182–83 (5th Cir. 1984); Oklahoma Health Services v. Webb, 726 F.2d 624, 625–26 (10th Cir. 1984); Coastal Steel Corp. v. Tilghman Wheelabrator, Ltd., 709 F.2d 190, 199 (3d Cir.), *cert. denied*, 104 S. Ct. 349 (1983); White Motor Corp. v. Citibank, N.A., 704 F.2d 254, 261–64 (6th Cir. 1983); *In re* Braniff Airways, 27 Bankr. 231, 235 (N.D. Tex.), *aff'd* 700 F.2d 214 (5th Cir.), *cert. denied*, 103 S. Ct. 2122 (1983); *In re* Northland Point Partners, 26 Bankr. 860, 861, 1022 (E.D. Mich.), *aff'd by unreported order* (6th Cir.), *cert. denied*, 104 S. Ct. 151 (1983).

[179] Bankruptcy Code of 1978, Pub. L. No. 95-598, §§ 238(a), 402(b), 92 Stat. 2549, 2667, 2682 (to be codified at 28 U.S.C. § 1334) (effective April 1, 1984). As indicated below, § 1334 was again amended in 1984. *See infra* note 259 and accompanying text.

[180] 28 U.S.C. § 1334 (1982) (amended 1984).

[181] *See supra* note 81.

[182] *See In re* Northland Point Partners, 26 Bankr. 860, 1019 (E.D. Mich.), *aff'd by unreported order* (6th Cir.), *cert. denied*, 104 S. Ct. 151 (1983).

[183] *In re* Matlock Trailer Corp., 27 Bankr. 318 (M.D. Tenn. 1983).

[184] White Motor Corp. v. Citibank, N.A., 704 F.2d 254 (6th Cir. 1983).

[185] Pine Assocs. v. Aetna Casualty & Surety Co., 36 Bankr. 878 (D.Conn. 1983).

[186] *In re* Pine Assocs., Inc., 733 F.2d 208 (2d Cir. 1984).

[187] *In re* South Portland Shipyard and Marine Ry. Corp., 32 Bankr. 1012 (D. Me. 1983); *In re* Romeo J. Roy, Inc., 32 Bankr. 1008 (D. Me. 1983).

[188] *In re* Romeo J. Roy, Inc. 740 F.2d 111 (1st Cir. 1984) (consolidated appeal of the two cases).

The provision in the Emergency Rule permitting bankruptcy courts to entertain and to dispose of "related proceedings" with the consent of the parties was doubtlessly inspired not only by the practice under the former Bankruptcy Act,[189] but also by a 1979 amendment to the Federal Magistrates Act.[190] The amendment authorized magistrates, with the consent of the parties, to conduct civil trials and to enter final judgments subject to review by the courts of appeals or, with the parties' consent, by the district courts.[191] A panel of the Ninth Circuit cast a cloud on this device in 1983 by holding, on authority of *Northern Pipeline*, that non-Article III magistrates, although established as "adjuncts" of the district courts, could not be given this power in a patent infringement case.[192] The court reasoned that more than a waivable due process right to an Article III judge was involved under the separation of powers doctrine: "the Constitution establishes a framework of government that cannot be altered by statute nor waived by litigant consent."[193] But on en banc rehearing, the Ninth Circuit overturned the panel's decision by an 8-3 vote.[194] While the en banc ruling relied on the parties' consent as a voluntary waiver of the litigants' "personal rights" to trial before an Article III court, it did not rely on that consent as disposing of the question whether the procedure "compromises the essential independence of the judiciary."[195] Rather, it concluded that there had not been an impermissible transfer of Article III judicial power to magistrates within the meaning of *Northern Pipeline*. The transfer was proper because (1) the subject matter (patents) was exclusively one of federal law; (2) Article III district judges had appointed and could remove the magistrates and retained the power to withdraw any matter from them; and (3) the magistrates' decisions, though they were not subject to de novo review, were reviewed by Article III judges.[196] Five other courts of appeals have, by sim-

[189] *See supra* notes 20–33 and accompanying text.

[190] Act of Oct. 10, 1979, Pub. L. No. 96-82, § 2, 93 Stat. 643, 643–44 (codified at 28 U.S.C. § 636(c) (1982)).

[191] *Id.*

[192] Pacemaker Diagnostic Clinic of America, Inc. v. Instromedix, Inc., 712 F.2d 1305, 1310 (9th Cir. 1983), *rev'd en banc*, 725 F.2d 537 (9th Cir.), *on remand*, 735 F.2d 1371 (9th Cir.), *cert. denied*, 105 S. Ct. 100 (1984).

[193] *Id.*

[194] Pacemaker Diagnostic Clinic of America, Inc., v. Instromedix, Inc., 725 F.2d 537 (9th Cir. 1984) (en banc), *on remand*, 735 F.2d 1371 (9th Cir.), *cert. denied*, 105 S. Ct. 100 (1984).

[195] *Id.* at 541.

[196] *Id.* at 541–46.

ilar reasoning, reached the same conclusion about the consent provision of the Magistrates Act.[197]

Meanwhile, in late April 1983, the Supreme Court submitted to Congress proposed new Bankruptcy Rules, which, Congress not having acted in the ninety-day interim, took effect August 1, 1983.[198] The Advisory Committee that wrote these rules[199] had virtually completed its work before the *Northern Pipeline* decision and took no account of either that decision or of the Emergency Rule.[200] For example, while the Emergency Rule provides that district courts need give "no deference" to the findings of the bankruptcy judge,[201] new Bankruptcy Rule 8013[202] preserves the "clearly erroneous" standard of review. And, while the Emergency Rule provides that bankruptcy judges shall not conduct jury trials,[203] new rule 9015[204] provides a procedure for conducting jury trials in the bankruptcy court that is more comprehensive than the former rules.[205]

This problem apparently inspired Administrator Foley (he may have had other inspiration) to dispatch another memorandum on August 3, 1983, to all judges of the courts of appeals, district courts, and bankruptcy courts.[206] This memorandum ad-

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[197] Geras v. Lafayette Display Fixtures, Inc., 742 F.2d 1037 (7th Cir. 1984); Puryear v. Ede's, Ltd., 731 F.2d 1153 (5th Cir. 1984); Collins v. Foreman, 729 F.2d 108 (2d Cir.), *cert. denied*, 105 S. Ct. 218 (1984); Goldstein v. Kelleher, 728 F.2d 32 (1st Cir.), *cert. denied*, 105 S. Ct. 172 (1984); Wharton-Thomas v. United States, 721 F.2d 922 (3d Cir. 1983). The Ninth Circuit upheld another provision of the Magistrates Act authorizing magistrates to try criminal misdemeanor cases with the consent of the defendant. United States v. Byers, 730 F.2d 568 (9th Cir. 1984).

[198] 103 S. Ct. [No. 14] (May 15, 1983) (prefatory material). On August 30, 1983, Congress made a minor amendment, effective August 1, 1983, to FED. R. BANKR. 2002(f), dealing with the giving of notice in bankruptcy cases. Act of August 30, 1983, Pub. L. No. 98-91, 1983 U.S. CODE CONG. & AD. NEWS (97 Stat.) 607.

[199] *See supra* note 148.

[200] But in his letter transmitting the rules to the Standing Committee, the Chairman of the Advisory Committee stated that the rules "were drafted to accommodate any future amendments by Congress to the jurisdiction of the bankruptcy courts necessitated by *Northern Pipeline* . . . ." Letter from the Honorable Ruggero J. Aldisert to the Honorable Edward T. Gignoux (Aug. 9, 1982), *reprinted in* 1 app. COLLIER ON BANKRUPTCY, *supra* note 1, at 1217.

[201] Revised Emergency Rule § (e)(2)(B), *reprinted in* 1 COLLIER ON BANKRUPTCY, *supra* note 1, ¶ 3, at 5.

[202] FED. R. BANKR. 8013.

[203] Revised Emergency Rule § (d)(1)(D), *reprinted in* 1 COLLIER ON BANKRUPTCY, *supra* note 1, ¶ 3, at 3–4.

[204] FED. R. BANKR. 9015.

[205] *See* Fed. R. Bankr. 115(b), 409(c), 411 U.S. 1011–12, 1053–54 (1973).

[206] Memorandum from William E. Foley, Director, Administrative Office of the United States Courts, to the judges of the U.S. Courts of Appeals, District Courts, Bankruptcy Courts, Magistrates, Circuit Executives, District Court Executives, and clerks of courts and divisional offices (Aug. 3, 1983), *reprinted in* 1 COLLIER ON BANKRUPTCY, *supra* note 1, at ¶ 2.05 [hereinafter cited as August 3 Foley Memorandum].

vised them that, in instances of conflict, the Emergency Rule should prevail over the Supreme Court's new rules, because the Emergency Rule "implements jurisdictional provisions that remain extant, while the Bankruptcy Rules govern procedure within the limits of that jurisdiction and do not affect substantive rights such as jurisdiction."[207] Without reference to the Foley memorandum, however, Judge Aldisert, Chairman of the Advisory Committee that wrote the new Rules and a member of the Judicial Conference's ad hoc committee to oppose Article III status for bankruptcy judges, wrote for his circuit and held that the "clearly erroneous" standard of new Rule 8013 had replaced the "no deference" standard of the Emergency Rule.[208] The basis for this holding was that "a statute[209] vests the exclusive power for promulgating rules of bankruptcy in the Supreme Court and Congress . . . and not in United States district courts" and that "any local rule governing *procedure* as distinguished from *jurisdiction*, in bankruptcy must yield to the Bankruptcy Rules duly promulgated under the Supreme Court's statutory authority."[210] Also without reference to the Foley memorandum, several bankruptcy judges have held that new Rule 9015 overrides the Emergency Rule and authorizes them to conduct jury trials.[211]

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[207] *Id.* at 3.

[208] *See In re* Morrissey, 717 F.2d 100, 104, 105 (3d Cir. 1983).

[209] 28 U.S.C. § 2075 (1982); *see supra* note 147.

[210] *In re* Morrissey, 717 F.2d 100, 104–05 (3d Cir. 1983) (emphasis in original). *Morrissey* involved review of a bankruptcy judge's denial of a bankruptcy trustee's application to assume an executory contract. In a case arising under the old Bankruptcy Act, where an air conditioner installer filed a claim against the debtor for the price of its services, and the bankruptcy court had ruled against the debtor on the merits of an asserted compulsory counterclaim for breach of the installment contract, the court held former Bankruptcy Rule 810, imposing the "clearly erroneous" standard on a reviewing district court, unconstitutional. 1616 Reminc Ltd. Partnership v. Atchison & Keller, 704 F.2d 1313 (4th Cir. 1983). But Judge Aldisert pointed out that in *Atchison* "the bankruptcy judge exercised jurisdiction under a traditional state common law action." *Morrissey*, 717 F.2d at 104 n.7. *See also In re* K & L Ltd., 741 F.2d 1023 (7th Cir. 1984).

[211] *See In re* Paula Saker & Co., 37 Bankr. 802 (Bankr. S.D.N.Y. 1984) (bankruptcy trustee's action to recover preferential transfers); *In re* Martin Baker Well Drilling, Inc., 36 Bankr. 154, 156 (Bankr. D. Me. 1984) (actions asserted by debtor in possession including preferential and fraudulent transfers, conversion, interference with contractual relationships, and defamation); *In re* O.P.M. Leasing Servs., Inc., 35 Bankr. 854 (Bankr. S.D.N.Y. 1983) (jury trial of bankruptcy trustee's action to avoid fraudulent conveyances denied only because no timely demand was filed); *In re* River Transp. Co., 35 Bankr. 556 (Bankr. M.D. Tenn. 1983) (state law contract action against debtors removed to bankruptcy court and debtor in possession asserted counterclaims in tort and to recover preferential transfers). But another bankruptcy court's ruling that it could conduct a jury trial on the dischargeability of a debt was reversed in *In re* Proehl, 36 Bankr. 86 (W.D. Va. 1984). The district court held that "a bankruptcy judge may not preside over a jury trial" notwithstanding post-*Northern Pipeline* Rule 9015, as the rule

V. CONGRESSIONAL ACTION

During this time Congress approached the problem with nothing like the near unanimity exhibited by the Article III judges. After the district court decision in *Northern Pipeline*, which had also held the bankruptcy jurisdictional grant unconstitutional,[212] and two months before the Supreme Court decision in *Northern Pipeline*, Chairman Peter Rodino (D-N.J.) of the House Judiciary Committee introduced a bill to make bankruptcy judges Article III judges.[213] During hearings that were held on this bill, a spokesman for the Justice Department testified that there were three possible solutions to the problem created by the Supreme Court's decision in *Northern Pipeline*.[214] The first was a return to the pre-1978 referee system. The second possibility was the creation of "Article I bankruptcy courts with limited original jurisdiction but with powers to act as adjuncts of the district court in other matters."[215] Finally, "[i]f it [was] thought to be important to retain all of the procedural reforms of the 1978 Act, . . . the easiest and safest course [was] to grant Article III status to the bankruptcy judges."[216] Thereafter, the House Committee reported out a revised bill,[217] which retained the proposal that bankruptcy judges be made Article III judges. At its September 1982 meeting, the Judicial Conference opposed the House Committee's bill and proposed instead that bankruptcy judges should remain Article I judges and exercise "all" of the bankruptcy jurisdiction.[218] But under the Conference's plan, a district court could recall a case on its own motion or on that of a party and could refer the case to a magistrate for trial and disposition on the consent of the parties.[219] In early September 1982, the Judicial Conference submitted its proposal to Con-

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conflicted with the Supreme Court's jurisdictional decision in *Northern Pipeline*. *Id.* at 88.

[212] Marathon Pipe Line Co. v. Northern Pipeline Co., 12 Bankr. 946 (D. Minn.), *aff'd*, 458 U.S. 50 (1981).

[213] H.R. 6109, 97th Cong., 2d Sess., 128 CONG. REC. H1501 (daily ed. Apr. 20, 1982).

[214] *Bankruptcy Court Act of 1982: Hearings Before Subcommittee on Monopolies and Commercial Law of House Judiciary Committee on H.R. 6109*, 97th Cong., 2d Sess. 10 (1982) (statement of Jonathan C. Rose, Ass't. Att'y Gen., Office of Legal Policy). (The author, along with several others, submitted a written statement in support of H.R. 6109. *Id.* at 56.)

[215] *Id.* at 10.

[216] *Id.*

[217] H.R. REP. No. 807, 97th Cong., 2d Sess. (1982) (accompanying H.R. 6978).

[218] JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF PROCEEDINGS (Sept. 1982).

[219] *Id.*

gress.[220] The Administrative Office's Legislative Affairs Officer sent a copy of the proposal to all circuit courts, district courts, bankruptcy courts, and magistrates, assuring them that "[i]f you wish to express your views to Congress, I do not believe you should be deterred from doing so by apprehension that propriety precludes your comments."[221]

Although the Conference's proposal was introduced in the House by Representative Robert Kastenmeier (D-Wis.) in September 1982,[222] no further action was taken in the Ninety-seventh Congress on this problem. In early 1983, the Senate and the House held further hearings on the matter, during which spokesmen for the Justice Department expressed the Department's doubts that the Emergency Rule then in effect would "be found consistent with the requirements of the *Northern Pipeline* decision,"[223] although the Department did not intend to challenge the validity of the rule "as a litigant."[224] The spokesmen reported that the Department could not recommend "any Article I solution that is either workable as a practical matter or sufficiently free of Constitutional doubt."[225] They endorsed a revised Judicial Conference proposal under which bankruptcy judges would disappear entirely, a bankruptcy administrator would be appointed for each district to handle administrative matters, and contested matters would be decided by 115 additional district judges or, with the consent of the parties, by magistrates.[226]

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[220] JUDICIAL CONFERENCE OF THE UNITED STATES, NORTHERN PIPELINE CONSTRUCTION CO. V. MARATHON PIPE LINE CO. AND PROPOSALS FOR REMEDIAL CONGRESSIONAL ACTION (1982). The report was transmitted to the House of Prepresentatives by William E. Foley. Letter from William E. Foley, Director, Administrative Office of the United States Courts, to Thomas P. O'Neill, Speaker of the House (Sept. 10, 1982) (on file at HARV. J. ON LEGIS.).

[221] Memorandum from William Weller, Administrative Office Legislative Affairs Officer, to all Circuit, District, and Bankruptcy Judges, Magistrates, and Circuit Executives (Sept. 9, 1982) (on file at the HARV. J. ON LEGIS.).

[222] H.R. 7132, 97th Cong., 2d Sess., 128 CONG. REC. H7173 (daily ed. Sept. 16, 1982).

[223] *Bankruptcy Court Act of 1983: Hearings Before Subcommittee on Monopolies and Commercial Law of House Judiciary Committee on H.R. 3*, 98th Cong., 1st Sess. 62 (1983) (statement of Edward C. Schmults, Dep. Att'y. Gen.) [hereinafter cited as *1983 House Hearings*]. (The author, along with several others, submitted a written statement in support of H.R. 3. *Id.* at 163.)

[224] *Hearings Before Subcommittee on Courts of Senate Judiciary Committee on Northern Pipeline Co. v. Marathon Pipeline Co. Decision*, 98th Cong., 1st Sess. 19 (1983) (statement of Jonathon C. Rose, Ass't Att'y Gen., Office of Legal Policy) [hereinafter cited as *1983 Senate Hearings*].

[225] *1983 House Hearings*, *supra* note 223, at 63 (statement of Edward C. Schmults); *see also 1983 Senate Hearings*, *supra* note 224, at 21–22 (statement of Jonathan C. Rose).

[226] *1983 House Hearings*, *supra* note 223, at 63–64 (statement of Edward C. Schmults); *1983 Senate Hearings*, *supra* note 224, at 23–24 (statement of Jonathan C. Rose).

Additionally, District Judge Spencer Williams appeared at the Senate Hearings as President of the "newly formed" Federal Judges Association, a group of 280 circuit and district court judges.[227] The Association "urgently" sought "disapproval of any solution that would authorize more than one Article III court," and Judge Williams rejected as "unwarranted and unfair" any suggestion that opposition to Article III bankruptcy courts was attributable to "the egocentricity of existing Article III judges."[228] Although Judge Williams reported that his organization "voted unanimously" to support the "position" of the Judicial Conference, when he was asked if he had "seen . . . and studied" the Judicial Conference proposal, he replied that he had not.[229]

Following these hearings, the House Judiciary Committee again reported out a bill that would have created 227 Article III bankruptcy judgeships.[230] But Representative Kastenmeier, dissenting from the committee report, reintroduced the Judicial Conference bill,[231] which he had introduced in the earlier session.[232] Kastenmeier subsequently introduced a similar bill sponsored by himself and Representative Thomas Kindness (R-Ohio).[233] Shortly thereafter, Kastenmeier issued a "Dear Colleague" letter, presumably circulated only to Democratic colleagues, in which he urged them not to "act to give President Reagan power to appoint 227 life tenure judges."[234]

On the Senate side, Senator Robert Dole (R-Kan.), who had been collecting proposals for changes in substantive bankruptcy law[235] as Chairman of the Senate subcommittee with jurisdiction over bankruptcy legislation, introduced another bill for that purpose.[236] Senator Strom Thurmond introduced a bill that would retain the bankruptcy courts as Article I courts.[237] Both of these bills passed the Senate in April 1983.[238] But with Chairman

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[227] *1983 Senate Hearings*, *supra* note 224, at 30–42 (statement of Jonathan C. Rose).

[228] *1983 Senate Hearings*, *supra* note 224, at 30, 41 (statement of Judge Spencer M. Williams). There were, as of June 30, 1983, 140 circuit and 490 district court judges. ANNUAL REPORT OF DIRECTOR OF ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 3 (1983).

[229] *Id.* at 30, 31.

[230] H.R. REP. No. 9, 98th Cong., 1st Sess. (1983) (accompanying H.R. 3).

[231] H.R. 1401, 98th Cong., 1st Sess., 129 CONG. REC. H512 (daily ed. Feb. 10, 1983).

[232] *See supra* note 222 and accompanying text.

[233] H.R. 3257, 98th Cong., 1st Sess., 129 CONG. REC. H3787 (daily ed. June 8, 1983).

[234] Letter from Robert Kastenmeier to his colleagues in the House of Representatives (March 3, 1983) (on file at HARV. J. ON LEGIS.).

[235] *See* S. REP. No. 446, 97th Cong., 2d Sess. (1982) (accompanying S. 2000).

[236] S. 445, 98th Cong., 1st Sess., 129 CONG. REC. S972 (daily ed. Feb. 3, 1983).

[237] S. 1013, 98th Cong., 1st Sess., 129 CONG. REC. S4259 (daily ed. Apr. 7, 1983).

[238] 129 CONG. REC. S5364, S5388 (daily ed. Apr. 27, 1983).

Rodino and a majority of the House Judiciary Committee insisting that there should be no action on substantive amendments to the Bankruptcy Code until the court problem had been settled, there was no action in the House in that year.

Subsequently, in February 1984, the Supreme Court held that a collective bargaining contract was an "executory contract," which could be rejected with the approval of the bankruptcy court.[239] It also prescribed some standards for the bankruptcy court to apply in approving or disapproving rejection,[240] and held that the National Labor Relations Board could not base an unfair labor practice charge on an employer's unilateral modification or rejection of a collective bargaining contract, without awaiting bankruptcy court approval.[241] Instead, any claim based on such an action must be processed in the bankruptcy court.[242] The day that the Court's decision was announced, Representative Rodino introduced a bill to amend the Bankruptcy Code to impose a stricter standard for rejection of labor contracts and to forbid unilateral modification or rejection by the employer prior to court approval of rejection.[243] He later introduced a bill that combined his proposal for Article III bankruptcy judges with his substantive proposal for labor contracts, as well as two other substantive amendments already contained in pending Senate bills.[244]

The latter bill passed the House in March, but only after its provisions for Article III bankruptcy courts had been replaced by the Kastenmeier-Kindness bill's provisions for non-Article III bankruptcy courts.[245] After the addition of many substantive amendments, the bill passed the Senate in June.[246] Finally, on June 29, both Houses agreed on a conference committee report[247] reconciling their differences, and the bill was sent to the President for his signature.[248]

Before this compromise was reached, some stop-gap amendments had been necessary. The 1978 Act had provided for a four-and-one-half year transition period expiring March 31,

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[239] NLRB v. Bildisco & Bildisco, 104 S. Ct. 1188, 1194 (1984).
[240] *Id.* at 1196–97.
[241] *Id.* at 1197.
[242] *Id.*
[243] H.R. 4908, 98th Cong., 2d Sess., 130 CONG. REC. H809 (daily ed. Feb. 22, 1984).
[244] H.R. 5174, 98th Cong., 2d Sess., 130 CONG. REC. H1727 (daily ed. Mar. 19, 1984).
[245] 130 CONG. REC. H1853 (daily ed. March 21, 1984).
[246] 130 CONG. REC. S7625 (daily ed. June 19, 1984).
[247] H.R. REP. No. 882, 98th Cong., 2d Sess. (1984).
[248] 130 CONG. REC. S8900, H7500 (daily ed. June 29, 1984).

1984, during which incumbent bankruptcy judges were to continue to function as courts of bankruptcy pending the appointment of new judges.[249] As it became apparent that the deadline would expire before the nature of the new bankruptcy courts could be resolved, Congress from time to time enacted brief extensions of the March 31 deadline, the last of which expired June 27, 1984.[250] Because the Emergency Rule by its own terms also expired March 31, 1984, this action by Congress presumably sent the district courts scrambling to make similar extensions of the expiration date of the Emergency Rule.

Although Congress allowed the June 27 deadline to expire without further action, section 106(a) of the bill, approved by both Houses on June 29, provided that the term of a bankruptcy judge "who [was] serving on the date of enactment of this Act" was extended to and would expire either four years after the date that the judge was last appointed to office or on October 1, 1986, whichever was later.[251] In apparent recognition of the fact that no bankruptcy judges had been serving since June 27, and therefore none would be serving when the President signed the bill, section 121(e) provided that the term of office of any bankruptcy judge serving on June 27 was extended and should expire at the end of the day the President signed the bill.[252] Section 122(c) put on the finishing touches by providing that section 121(e) should take effect June 27, 1984.[253]

VI. THE BANKRUPTCY AMENDMENTS AND FEDERAL JUDGESHIP ACT OF 1984

The bill took effect as the Bankruptcy Amendments and Federal Judgeship Act of 1984[254] upon the President's signature on

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[249] *See supra* text accompanying note 89.

[250] Bankruptcy Act; Extension, Pub. L. No. 98-325, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 268; Bankruptcy Act, Extension, Pub. L. No. 98-299, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 214; Bankruptcy Act, Extension, Pub. L. No. 98-271, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 163; Bankruptcy Act, Extension, Pub. L. No. 98-249, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 116.

[251] H.R. 5174, 98th Cong., 2d Sess., § 106(a), 130 CONG. REC. H7471, H7474 (daily ed. June 29, 1984).

[252] *Id.* § 121(e), 130 CONG. REC. H7475.

[253] *Id.* § 122(c).

[254] Pub. L. No. 98-353, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 333 (to be codified at scattered sections of 11 U.S.C. and 28 U.S.C.). The unwieldly title is due

July 10, 1984. In a statement announcing the signing of the bill, President Reagan objected to the "provisions in the bill seeking to continue in office all existing bankruptcy judges,"—provisions which, he had been advised by the Department of Justice and the Administrative Office of the United States Courts, were "inconsistent with the appointments clause of the Constitution."[255] He nonetheless signed the bill "after having received assurances from the Administrative Office that bankruptcy cases may be handled in the courts without reliance on [these] invalid provisions," but he urged Congress "immediately to repeal the unconstitutional provisions in order to eliminate any confusion that might remain with respect to the operation of the bankruptcy system."[256]

The 1984 Act authorizes 232 bankruptcy judges as "units" of the district courts, to be appointed by the circuit courts of appeal for fourteen-year terms and to serve "as judicial officers of the United States district court established under Article III of the Constitution," with salaries subject to adjustment.[257] The judges are subject to removal by the Judicial Council of the Circuit "only for incompetence, misconduct, neglect of duty, or physical or mental disability."[258]

The entire bankruptcy jurisdiction is again conferred on the

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to the law's creation of 24 additional Article III circuit and 61 additional Article III district judgeships, but with provisions that no more than 11 circuit court positions and 29 district court positions should be filled prior to January 21, 1985. *Id.* §§ 201(a), 202, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 346–50 (portions to be codified at 28 U.S.C. §§ 44(a), 133).

[255] White House Press Release, 20 WEEKLY COMP. PRES. DOC. 1010, 1011 (July 10, 1984). U.S. CONST. art. II, § 2, cl. 2, provides that the President "shall nominate and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

[256] White House Press Release, *supra* note 255, at 1011. The President also objected to the provisions in the bill prohibiting the appointment of any more than 40 of the newly-authorized Article III circuit and district court judges before January 21, 1985. *Id. See supra* note 254. But because he did not believe that, "[a]s a practical matter," he could appoint more than 40 new judges before that date, he concluded that "the purported restrictions of my appointments authority will have no actual effect" and his signing of the bill "should in no way be considered as a precedent for future congressional limitations on the constitutional appointments authority of the President." White House Press Release, *supra* note 255, at 1011.

[257] Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 104, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 333, 336–39 (to be codified at 28 U.S.C. §§ 151–53).

[258] *Id.*, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 338 (to be codified at 28 U.S.C. § 152(e)).

district courts by language identical to that employed in section 1471(a) and (b) of the Judicial Code of 1978,[259] but there is no provision similar to old section 1471(c) directing the bankruptcy court to exercise "all" of that jurisdiction. Instead, new section 157 of the Judicial Code authorizes each district court to provide that "any or all cases" or "proceedings" within that jurisdiction shall be referred to the bankruptcy judges.[260]

The balance of new section 157 is similar to the Emergency Rule, although there is some change in terminology, and the emphasis is placed on when the bankruptcy judge can act as a judge rather than on when he acts only as a special master. That section provides that bankruptcy judges may hear and determine all matters and enter orders and judgments subject to review on appeal in the bankruptcy case proper and in "all core proceedings."[261] These "core proceedings" are defined as including, but not limited to:

> (A) matters concerning the administration of the estate;
> (B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interest [sic] for the purposes of confirming a plan under chapter 11 or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;[262]
> (C) counterclaims by the estate against persons filing claims against the estate;
> (D) orders in respect to obtaining credit;
> (E) orders to turn over property of the estate;

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[259] *Compare id.* § 101, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 333 (to be codified at 28 U.S.C. § 1334) *with* 28 U.S.C. § 1471 (1982) (quoted *supra* note 81).

[260] Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 104, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 333, 340 (to be codified at 28 U.S.C. § 157(a)).

[261] *Id.* (to be codified at 28 U.S.C. § 157(b)(1)). The "core proceedings" terminology, new to bankruptcy jurisprudence, is apparently borrowed from Justice Brennan's plurality opinion in *Northern Pipeline*. *See supra* text accompanying note 119.

[262] Section 157(b)(5) provides: "The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending." *Id.*, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 341 (to be codified at 28 U.S.C. § 157(b)(5)). New § 1411(a) also preserves "any right to trial by jury that an individual has under applicable nonbankruptcy law with regard to a personal injury or wrongful death tort claim." *Id.* § 102, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 334 (to be codified at 28 U.S.C. § 1411(a)). But § 1411(a) does not apply to cases pending on July 10, 1984. *Id.* § 122(b), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 346.

> (F) proceedings to determine, avoid, or recover preferences;[263]
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> (G) motions to terminate, annul or modify the automatic stay;
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> (H) proceedings to determine, avoid, or recover fraudulent conveyances;[264]
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> (I) determinations as to the dischargeability of particular debts;
>
> (J) objections to discharges;
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> (K) determinations of the validity, extent, or priority of liens;[265]
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> (L) confirmations of plans;
>
> (M) orders approving the use or lease of property, including the use of cash collateral;
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> (N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and
>
> (O) other proceedings affecting the liquidation of the assets of the estate[266] or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.[267]

Immediately after this definition is the following provision:

> The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding . . . or is a proceeding that is otherwise related to a case under [the Bankruptcy Code]. A determination that a proceeding is not a core proceeding shall not

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[263] Under 11 U.S.C. § 547, the trustee or debtor in possession can recover preferential transfers as defined in that section of the Bankruptcy Code. 11 U.S.C. § 547 (1982). Alternatively, under 11 U.S.C. § 544(b), the trustee or debtor in possession can avoid any transfer of the debtor's property that is voidable under state preference law by a creditor holding an allowable unsecured claim. *Id.* § 544(b).

[264] Under 11 U.S.C. § 548, the trustee or debtor in possession can recover fraudulent conveyances as defined by that section of the Bankruptcy Code. *Id.* § 548 Alternatively, under 11 U.S.C. § 544(b), the trustee or debtor in possession can recover any fraudulent conveyance that is voidable under state fraudulent conveyance law by a creditor holding an allowable unsecured claim. *Id.* § 544(b).

[265] The extent and priority of liens in bankruptcy is generally determined by nonbankruptcy (usually state) law. *See* Butner v. United States, 440 U.S. 48 (1979). *But see* 11 U.S.C. §552 (1982). The validity of liens may be determined under one of several provisions of the Bankruptcy Code authorizing the trustee or debtor in possession to invalidate prepetition transfers, some of which, *e.g.*, 11 U.S.C. §§ 545, 547, 548 (1982), prescribe their own standards for invalidation and others of which, *e.g.*, *id.* § 544, incorporate nonbankruptcy (usually state) invalidation standards. *See also id.* § 558.

[266] This provision could, but probably will not, be read to embrace what the debtor in possession was seeking to do in the *Northern Pipeline* case: liquidate and collect the estate's claim for prepetition breach of contract.

[267] Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 104, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 333, 340 (to be codified at 28 U.S.C. § 157(b)(2)).

> be made solely on the basis that its resolution may be affected by State law.[268]

A proceeding that is not a "core proceeding" but is "otherwise related to a case" under the Code, may be heard by a bankruptcy judge.[269] In such a proceeding, the judge "shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected."[270] There is one exception to this general proposition: the district court, with the consent of all the parties, may refer "a proceeding related to the case" under the Code to a bankruptcy judge to hear, to decide, and to "enter appropriate orders and judgments, subject to review" on appeal.[271]

Finally, the district court may withdraw, in whole or in part, any case or proceeding referred to a bankruptcy judge "on its own motion or on timely motion of any party, for cause shown."[272] The district court must withdraw a proceeding, on timely motion of a party, if the court determines that its resolution requires consideration of both the Bankruptcy Code "and other laws of the United States regulating organizations or activities affecting interstate commerce."[273]

On June 29, 1984, the day both Houses of Congress approved the new scheme, Director Foley issued another memorandum to all chief judges of the courts of appeal and of the district courts.[274] He advised them that, in view of the June 27 expiration of the last extension of the transition period under the 1978 legislation, the Executive Committee of the Judicial Conference had adopted a resolution exercising the Conference's authority to fix the number of federal magistrates.[275] The resolution authorized the same number of additional magistrates as there had

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[268] *Id.* (to be codified at 28 U.S.C. § 157(b)(3)).

[269] *Id.*, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 341 (to be codified at 28 U.S.C. § 157(c)(1)).

[270] *Id.*

[271] *Id.* (to be codified at 28 U.S.C. § 157(c)(2)).

[272] *Id.* (to be codified at 28 U.S.C. § 157(d)).

[273] *Id.*

[274] Memorandum from William E. Foley, Director, Administrative Office of the United States Courts, to the chief judges of the U.S. Courts of Appeals and District Courts, Circuit Executives, and District Court Executives (June 29, 1984) (on file at HARV. J. ON LEGIS.) [hereinafter cited as June 29 Foley Memorandum].

[275] *Id.* at 1–2; *see* 28 U.S.C. § 631(a) (1982).

been bankruptcy judges on June 27 and made those who were bankruptcy judges on June 27 eligible to apply for these new magistrate positions. In addition, because it would take some time to make the new appointments, Foley authorized each district court clerk to appoint a like number of "consultants."[276] Foley found authority for this action in the clerk's authority to appoint, with court approval, deputy clerks, clerical assistants, and employees,[277] and in the general authority given to the Administrative Office to hire "experts or consultants" on a temporary basis.[278] The consultants were to advise on bankruptcy matters for a period not to exceed thirty days. Former bankruptcy judges were also eligible for these appointments.[279]

On July 11, the day after the President signed the bill, Foley dispatched another memorandum[280] to judges of the courts of appeal and the district courts and to "former bankruptcy judges," advising them that "there is a very real possibility" that Congress's attempt to resurrect the expired terms of bankruptcy judges would be held unconstitutional in the light of *Buckley v. Valeo*.[281] In *Buckley*, the Supreme Court invalidated the congressional appointment of members to the Federal Election Commission on the ground that Commission members "exercising significant authority pursuant to laws of the United States" were "officers of the United States" within the meaning of the Appointments Clause, and that that Clause did not "include Congress or its officers among those in whom the appointment power may be vested."[282] While recognizing "that only a duly authorized court can finally decide" the constitutional question, Foley asserted that he could not "ignore the inherent risk of the invalidation of judicial actions taken by bankruptcy judges" nor "ignore my responsibility as 'paymaster' of the Federal judiciary."[283] He therefore announced that he would "not approve payment of salary to any former bankruptcy judge" and suggested that magistrates continue to handle bankruptcy cases and

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[276] June 29 Foley Memorandum, *supra* note 274, at 2, 4.

[277] *Id.* at 4; *see* 28 U.S.C. § 751(b) (1982).

[278] June 29 Foley Memorandum, *supra* note 274, at 4; *see* 5 U.S.C. § 3109 (1982).

[279] June 29 Foley Memorandum, *supra* note 274, at 4.

[280] Memorandum from William E. Foley, Director, Administrative Office of the United States Courts, to the judges of the U.S. Courts of Appeals and U.S. District Courts, and former bankruptcy judges (July 11, 1984) (on file at HARV. J. ON LEGIS.) [hereinafter cited as July 11 Foley Memorandum].

[281] 424 U.S. 1 (1976).

[282] *Id.* at 126, 128–29.

[283] July 11 Foley Memorandum, *supra* note 280, at 1.

proceedings "under the June 28 interim procedures" until the courts of appeals could make new appointments of bankruptcy judges.[284]

On July 12, in immediate reaction to Foley's July 11 memorandum, House Judiciary Committee Chairman Rodino wrote to the Chief Justice questioning the propriety of the Administrative Office, whose statutory functions were "purely clerical, and which operated under the supervision of the Judicial Conference," issuing an "advisory constitutional opinion regarding a matter that will come before the federal judiciary for decision."[285] Rodino suggested that "[i]t may be necessary to hold hearings on this matter," and asked for the Chief Justice's assurance that "all documents concerning the decision leading to the Administrative Office's memoranda [would] be preserved."[286] According to reports from "legislative and judicial aides who had read it," the Chief Justice replied on the same day in a letter that supported Foley's position.[287]

On July 20, a number of bankruptcy judges brought an action against Foley in the District of Columbia for declaratory judgment that the judges had retained their status as bankruptcy judges and to compel Foley to pay them their salaries.[288] On the same day, Foley announced that he had decided "that my previous decision concerning payment of salaries should be rescinded."[289]

The Appointments Power issue has been raised in a number of pending bankruptcy cases. In at least one case, a district court has held on alternate grounds that the sitting bankruptcy judges have remained validly in office.[290] First, the court determined that because the 1978 legislation continued each incumbent bankruptcy judge in office until March 31 (later extended

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[284] *Id.* at 1–2.

[285] Letter from Peter W. Rodino to Chief Justice Warren E. Burger (July 12, 1984) (on file at HARV. J. ON LEGIS.).

[286] *Id.*

[287] N.Y. Times, July 14, 1984, p. 35, col. 1. The contents of the Chief Justice's letter have not been released.

[288] Lundin v. Foley, No. 84-2237, (D. D.C. filed July 20, 1984).

[289] Memorandum from William E. Foley, Director, Administrative Office of the United States Courts, to all judges of the United States (July 20, 1984) (on file at HARV. J. ON LEGIS.).

[290] *In re* Benny, No. C-84-120 Misc. RHS, slip op. (N.D. Cal. Nov. 29, 1984). The Department of Justice intervened in the case to support those attacking the constitutionality of the congressional effort to continue the bankruptcy judges in office, while the Senate and "the Speaker and Bipartisan Leadership Group of the House of Representatives" intervened to defend the constitutionality of their efforts. *Id.* at 2.

to June 27), 1984, "or when his successor takes office,"[291] the "terms of office of bankruptcy judges did not end on June 27, 1984, . . . but continued at least until July 10, 1984," when the 1984 legislation took effect.[292] Hence, the court did not need to reach the constitutional question. Second, even if the terms of incumbents were viewed as having expired before July 10, those seeking to raise the Appointments Power question did not challenge the 1978 extension of bankruptcy judges' terms until March 31, 1984, or the four extensions of bankruptcy judges' terms from March 31 to June 27, 1984; they only challenged the attempt in section 122(c) of the 1984 legislation to extend the judges' terms retroactively from June 27 to July 10, 1984.[293] The court held, however, that this retroactive feature was not an attempt by Congress to select the appointees, as in *Buckley v. Valeo*,[294] but was simply a permissible redefinition of the duties of bankruptcy judges who were validly appointed by the district courts and whose new duties were "germane" to the ones for which they were originally appointed.[295] Such action, particularly when taken in "conjunction" with the President's action of signing the 1984 legislation into law, was within the bounds of permissible retroactivity.[296]

With a statute replacing the Emergency Rule in the allocation of bankruptcy jurisdiction between bankruptcy and district courts, three of the four issues raised by the Emergency Rule[297] have disappeared. There remains, however, the considerable question whether the statutory allocation meets constitutional requirements under the separation of powers doctrine. Because the 1984 statute carries this feature over from the Emergency Rule, there also remains the question of whether the parties can, by their consent, confer on the bankruptcy courts subject matter jurisdiction that the courts could not otherwise exercise because of either statutory or constitutional limitations.

Constitutional questions apart, the 1984 legislation dealing with the bankruptcy courts must establish a record for inept performance by Congress.

First, most of the additions made to the Judicial Code by the

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[291] *See supra* note 88 and accompanying text.
[292] *In re* Benny, No. C-84-120 Misc. RHS, slip op. at 8 (N.D. Cal. Nov. 29, 1984).
[293] *Id.* at 18; *see supra* note 253 and accompanying text.
[294] *See supra* note 281 and accompanying text.
[295] *In re* Benny, No. C-84-120 Misc. RHS, slip op. at 17 (N.D. Cal. Nov. 29, 1984).
[296] *Id.* at 29–30.
[297] *See supra* text at p. 24.

1978 Act to accommodate the new court structure and bankruptcy jurisdiction were, by section 402(b) of the 1978 Act, not to be effective until April 1, 1984.[298] By the series of 1984 extensions[299] that effective date ultimately became June 28, 1984. Section 113 of the 1984 Act amends section 402(b) of the 1978 Act by replacing the phrase "shall take effect on June 28, 1984" with "shall not be effective."[300] But section 121(a) of the 1984 Act also amends section 402(b) of the 1978 Act by replacing "June 28, 1984" with "the date of enactment" of the 1984 Act (July 10, 1984).[301] Confusion is compounded by the fact that section 402(b) of the 1978 Act applied to Judical Code sections dealing with bankruptcy courts, bankruptcy judges, bankruptcy jurisdiction, venue, appeals, and jury trials,[302]all of which have been replaced by other sections of the 1984 Act.[303] Yet section 402(b) also applied to other Judicial Code sections that concern bankruptcy courts' jurisdiction in equity and admiralty, their powers to deal with contempts and to issue writs of habeas corpus, and the addition of bankruptcy judges to the Judicial Conference,[304] none of which have been replaced.

Second, section 404(a) and (b) of the 1978 Act provided for the continuation until March 31, 1984, of the bankrutpcy courts created under the old Bankrutpcy Act and staffed by the existing bankruptcy judges.[305] The 1984 series of extensions moved that date up to June 27, 1984.[306] Section 114 of the 1984 Act repeals section 404 of the 1978 Act, but at the same time section 121(b) of the 1984 Act replaces "June 27, 1984" in section 404(a) and (b) of the 1978 Act with "the day before the date of enactment of" the 1984 Act (July 9, 1984).[307]

Third, other transition provisions of the 1978 Act are simultaneously repealed by section 114 of the 1984 Act, and amended by section 121(c) and (d) of the same act.[308]

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[298] *See supra* note 87.

[299] *See supra* note 250.

[300] The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 113, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 333, 343.

[301] *Id.* § 121(a), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 345.

[302] *See* Bankruptcy Code of 1978, Pub. L. No. 95-598, § 402(b), 92 Stat. 2549, 2682.

[303] *See* The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, §§ 101–104, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 333, 333–41 (to be codified at scattered sections of 28 U.S.C.).

[304] *See* Bankruptcy Code of 1978, Pub. L. No. 95-598, § 402(b), 92 Stat. 2549, 2682.

[305] *Id.* § 404(a)–(b), 92 Stat. 2683.

[306] *See supra* note 250 and accompanying text.

[307] The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, §§ 104, 121(b), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 333, 343, 345.

[308] *Id.* §§ 114, 121(c)–(d), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 343, 346.

Such technical errors in the 1984 Act are not confined to provisions dealing with court structure and jurisdiction. While this is not the place to debate the merits of the many substantive changes made in the Bankruptcy Code, those changes also abound with technical errors. For instance, two substantive subsections have been amended so as to reduce them to gibberish.[309] Also, the 1984 amendments inserted a new fifth priority for farmers with claims against bankrupt grain storage elevators and for fishermen with claims against bankrupt fish storage or processing facilities, relegating certain consumer claims from fifth to sixth priority and downgrading certain tax claims from sixth to seventh priority.[310] But, due to a failure to make conforming amendments elsewhere, farmers' and fishermen's priorities rather than consumers' priorities now come ahead of tax lien claims;[311] and consumer priority claims rather than tax priority claims must now be paid in cash over a six year period in reorganization cases.[312]

VII. CONCLUSION

For the year ending June 30, 1983, the number of bankruptcy cases filed exceeded all civil and criminal cases filed in the federal district courts.[313] And this has been typically true as bankruptcy case filings have increased from some 194,000 in

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[309] 11 U.S.C. § 365(c)(1)(2) was amended by § 362(2) of the 1984 law, Pub. L. No. 98-353, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 333, 361–63, and 11 U.S.C. § 549(b) was amended by § 464(a) of the 1984 Act, Pub. L. No. 98-353, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 379. Although the latter amendment was enacted as an amendment to § 549(a), it deletes language that was only in § 549(b) and not in § 549(a) and inserts a word ahead of another word that is only in § 549(b) and not in § 549(a).

[310] *See* The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 350, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 333, 358–59 (to be codified at 11 U.S.C. § 507(a)).

[311] *See* 11 U.S.C. § 724(b)(2) (1982). Had anyone thought about it, probably all three would have been put ahead of tax liens.

[312] *See* 11 U.S.C. § 1129(1)(9)(C) (1982). Perhaps the courts will be able to overcome a third failure to make a conforming amendment. A debt "for a tax . . . of the kind . . . specified in section . . . 507(a)(6)" is excepted from the bankruptcy discharge by 11 U.S.C. § 523(a)(1)(A) (1982), although tax claims are now specified in § 507(a)(7) rather than § 507(a)(6). *See* The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 350(2), 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 333, 358 (amending 11 U.S.C. § 507(a)(6) to be codified at 11 U.S.C. § 507(a)(7)).

[313] A total of 347,734 bankruptcy cases were filed, and a total of 171,623 adversary proceedings were filed in pending bankruptcy cases. ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 418, 428 (1983). Civil cases filed in the District Courts totaled 241,842, and criminal cases totaled 35,872. *Id.* at 4, 7.

1970 to a high of more than 374,500 in 1983.[314] To carry such a caseload, we need a better system than that given us by the 1984 congressional action.

As was obvious from the moment of the 1984 enactment, there is at the very least a serious constitutional question as to whether we now have any bankruptcy judges at all. If the ultimate decision is that we do not, then the courts of appeal may be able to accelerate somewhat their staffing of the bankruptcy courts with new non-Article III judges. But what will be the status of all orders entered in bankruptcy courts, and of all orders entered in bankruptcy cases by district courts on the proposed findings and conclusions of bankruptcy judges, in the interim? Will the ancient and little-explored notion of de facto judges whose orders are not subject to collateral attack[315] be resuscitated and extended to this situation?

Beyond the question of the validity of judicial appointments, there is another substantial constitutional question that will remain no matter how the appointments matter is resolved. Will the congressional attempt to define the permissible jurisdiction of non-Article III bankruptcy courts[316] survive further challenges under the doctrine of separation of powers? Because there is a severability provision in the 1984 legislation,[317] answers to this question may come on an application-by-application, case-by-case basis over a period of years.

It is not the purpose of this Article to attempt to answer these large constitutional questions, but merely to submit that a "solution" to one constitutional problem that leaves these other constitutional problems remaining is an intolerable solution.

Many of the 1984 defects are doubtlessly due to the fact that too many special interest cooks were stirring the broth, each concerned with adding its own ingredient but without much knowledge of or interest in the impact on the overall end product. Nothing more is to be expected of lobbyists for the consumer credit industry or other private interests. But it is most

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[314] *Id.* at 4, 7, 11–12; ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, BANKRUPTCY STATISTICAL TABLES, TWELVE MONTH PERIODS ENDED JUNE 30, 1970–1979: UNITED STATES DISTRICT COURTS iii (1982).

[315] *See* Glidden Co. v. Zdanok, 370 U.S. 530, 535–36 (1962) (opinion of Harlan, J., joined by Brennan and Stewart, JJ.); McDowell v. United States, 159 U.S. 596, 601–02 (1895); Ball v. United States, 140 U.S. 115, 128–29 (1891); *Ex Parte* Ward, 173 U.S. 452, 454–56 (1890).

[316] *See supra* notes 259–273 and accompanying text.

[317] The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 551, 1984 U.S. CODE CONG. & AD. NEWS (98 Stat.) 333, 391.

disturbing that the special interest lobbyists in this case included the Chief Justice of the United States and the Judicial Conference of the United States. It is also most disturbing that the one ingredient essential to them in any solution was that bankruptcy judges not be given Article III status. It seems appropriate, therefore, to conclude by suggesting some questions for consideration for many of our Article III judges as they reflect on their roles as part of our government.

First, does the separation of powers doctrine function only to protect the judicial branch from intrusion by the executive and legislative branches and to protect the executive and legislative branches from intrusions by each other, or does it function also to protect the executive and legislative branches from intrusions by the judiciary? As the Chief Justice wrote for a unanimous Court in *United States v. Will*: "A paramount—indeed an indispensible—ingredient of the concept of power delegated to coequal branches is that each branch must recognize and respect the limits on its own authority and the boundaries of authority delegated to the other branches."[318] If that concept covers judicial intrusions, was it not violated by Article III judges in their interference with the legislative process and in their promulgation of the Emergency Rule to fill the legislative gap resulting from the Supreme Court's decision that the 1978 congressional grant of bankruptcy jurisdiction was unconstitutional?[319]

Second, are the further tenure and compensation protections in Article III[320] designed to give Article III judges protection not only from other branches but also from other Article III judges within the judicial branch? When the Supreme Court denied an alternative writ of prohibition or mandamus to a district judge who had been denied new case assignments by his circuit Judicial Council, Justices Douglas and Black, dissenting, read Article III to mean that an Article III judge "is independent of every other judge."[321] And the Chief Justice wrote for the Court to say that "[t]here can, of course, be no disagreement among us as to the imperative need for total and absolute independence

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[318] 449 U.S. 200, 228 (1980) (Blackmun, J., not participating).

[319] Because the Director of the Administrative Office is to operate "under the supervision and direction of the Judicial Conference," *see supra* note 149, his activities in this entire episode seem attributable to the Judicial Conference, or perhaps to its Chairman, the Chief Justice.

[320] U.S. CONST. art. III, § 1.

[321] Chandler v. Judicial Council, 398 U.S. 74, 136 (1970) (Douglas, J., joined by Black, J., dissenting).

of judges in deciding cases or in any phase of the decisional function."[322] The Emergency Rule was adopted by the district courts at the direction of the circuit judges in their capacities as members of the Judicial Councils, who were in turn acting at the direction of the Chief Justice and many circuit and district judges in their capacities as members of the Judicial Conference. Is it reassuringly apparent that, of the many Article III circuit and district judges who have ruled on the validity of the Emergency Rule, it was the "total and absolute independence" of those judges that led all but three of them[323] to find no question about the validity of that Rule?

[322] *Id.* at 84.

[323] *See supra* notes 177–188 and accompanying text.

ARTICLE

REGULATING THE INTERCEPTION AND DISCLOSURE OF WIRE, RADIO, AND ORAL COMMUNICATIONS: A CASE STUDY OF FEDERAL STATUTORY ANTIQUATION

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In enacting statutes to meet contemporary problems, Congress often cannot anticipate rapid changes that later make those statutory provisions obsolete. Statutory antiquation has occurred most recently in the telecommunications industry, where technological and market structure changes have produced conduits that may no longer fall within federal statutory definitions.

In this Article, Mr. Fein discusses the problem of statutory antiquation by focusing on the application of wiretapping statutes to the interception of cordless telephone conversations. Mr. Fein propounds the view that obsolete statutes improperly empower the judiciary with substantial policymaking discretion. He suggests that, in order to avoid the need for frequent legislative amendment of the statutes governing the interception and divulgence of communications, Congress should authorize the Department of Justice to expound through rulemaking the particularized application of broad standards prescribed by Congress. In conclusion, Mr. Fein proposes general strategies that Congress could utilize to recapture policymaking authority.

Technological advances and the resulting changes in market structures have caused the antiquation of many federal statutes. This phenomenon has been manifested in the areas of banking,[1]

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[1] The issue of whether electronic customer banking communications terminals constitute bank "branches" under the McFadden Act § 7, 12 U.S.C. § 36(f) (1982), has generated several lawsuits. *See* Independent Bankers Ass'n of Am. v. Smith, 534 F.2d 921 (D.C. Cir.), *cert. denied sub nom.* Bloom v. Independent Bankers Ass'n of Am., 429 U.S. 862 (1976); Illinois *ex rel.* Lignoul v. Continental Ill. Nat'l Bank & Trust Co. of Chicago, 536 F.2d 176 (7th Cir.), *cert. denied*, 429 U.S. 871 (1976); Missouri *ex rel.* Kostman v. First Nat'l Bank in St. Louis, 405 F. Supp. 733 (E.D. Mo. 1975), *aff'd*, 538 F.2d 219 (8th Cir.), *cert. denied*, 429 U.S. 941 (1976). In American Bankers Ass'n v. Connell, 686 F.2d 953 (D.C. Cir. 1979) (per curiam), the court discussed the development of fund transfers that represent use of a device or technique which was not authorized by relevant statutes: "This court is convinced that the methods of transfer authorized by the agency regulations have outpaced the methods and technology of fund transfer authorized by the existing statutes." *Id.* at 954. The *Connell* court said that it was not empowered to make policy judgments and set aside the regulations authorizing such

patent,[2] copyright,[3] health,[4] environmental, [5] and telecommunications law.[6] The proliferation of outdated statutes is problematic for several reasons. Such statutes fail to provide the judiciary with adequate legal standards to guide the adjudication of disputes. Judicial decisions that are based on the interpretation of antiquated statutes are thus likely to produce widely divergent results. As a consequence, predictability in the law, evenhanded justice, and private and public planning are undermined.

Obsolete statutes also empower an unelected federal judiciary with substantial policymaking discretion under the guise of statutory interpretation.[7] When antiquated statutes remain unamended by Congress for protracted periods of time, ambiguity weakens application of the law to contemporary problems. In resolving these statutory ambiguities, judges will, of necessity,

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transfers as being violative of the statute with the expectation that Congress would review the situation. Congress enacted legislation in the wake of the *Connell* decision to dispel the legal confusion. *See* Thrift Institution Restructuring Act, Pub. L. No. 97-320, § 312, 96 Stat. 1469, 1496–97 (1982) (codified at 12 U.S.C. § 1464(b)(1)–(2) (1982)).

[2] *See, e.g.*, Diamond v. Diehr, 450 U.S. 175 (1981) (examining the patentability of a computer controlled rubber molding process); Diamond v. Chakrabarty, 447 U.S. 303 (1980) (examining the patentability of live, human-made micro-organisms); Parker v. Flook, 437 U.S. 584 (1978) (denying the patentability of a "Method for Updating Alarm Limits" designed to identify abnormal conditions during catalytic conversion processes; the only novel feature of the process was a mathematical formula).

[3] *See, e.g.*, Sony Corp. of Am. v. Universal City Studios, Inc., 104 S. Ct. 774 (1984) (addressing the application of the Copyright Act, 17 U.S.C. §§ 101–810 (1982), to sale of home video cassette recorders); Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968) (addressing the application of the Copyright Act to cable television interception of broadcast signals).

[4] The Food and Drug Administration (and, in all likelihood, eventually the courts) will soon confront the applicability of the Medical Devices Act of 1976, 15 U.S.C. § 55 (and amendments at 21 U.S.C. §§ 321, 331, 334, 351, 352, 358, 360, 360c–360k, 374, 379, 379a, 381) to computer software used by doctors to diagnose and treat patients. *See* Schrage, *FDA Looks at Medical Diagnostic Software*, Wash. Post, Aug. 19, 1984, at G1, col. 3.

[5] A White House task force, a congressional subcommittee, the Environmental Protection Agency, the National Institute of Health, and the courts are currently studying the question of regulating the environmental aspects of recombinant DNA technology. A vexing legal question is whether the products of DNA technology are subject to regulation under the Toxic Substances Control Act, 15 U.S.C. §§ 2601–2629 (1976). *See* Henderson, *Who Should Monitor the "New Substances"?*, Wash. Post, Aug. 19, 1984, at G1, col. 5.

[6] National Ass'n of Broadcasters v. FCC, 740 F.2d 1190 (D.C. Cir. 1984) (examining the applicability of title III of the Communications Act of 1934, 47 U.S.C. §§ 301–399b (1982), to direct broadcast satellite operations).

[7] *Cf.* Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring), where Justice Rehnquist said that one purpose of the non-delegation doctrine was to "[ensure] to the extent consistent with orderly governmental administration that important choices of social policy are made by the Congress, the branch of our Government most responsive to the popular will."

exercise authority over the policymaking that Article I of the Constitution entrusts to elected representatives.[8]

Congress, however, has been inefficient in amending statutes and thus has left unresolved intricate legal questions engendered by technological or marketplace changes. Often significant lapses of time occur between the passage of legislation and its amendment.[9] Congress's agenda is generally dominated by budget, taxation, foreign policy, and national security issues.[10] The preoccupation of Congress with these subjects impedes the amendment of statutes of seemingly modest importance. A handful of opponents of any legislative change can often obstruct statutory amendments through delaying tactics.[11] Even if

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[8] *But see* American Bankers Ass'n v. Connell, 686 F.2d 953 (D.C. Cir. 1979), where the court noted that the novel methods of transferring funds authorized by the pertinent agency regulations had outpaced the existing statutes. Of this predicament the court stated: "We are neither empowered to rewrite the language of statutes which may be antiquated in dealing with the most recent technological advances, nor are we empowered to make a policy judgment as to whether the utilization of these new methods of fund transfer is in the overall public interest." *Id.* at 954.

[9] The Patent Act of 1793, ch. 11, 1 Stat. 318 (codified as amended at 35 U.S.C. §§ 1–293 and 15 U.S.C. § 1071 (1982)), authored by Thomas Jefferson, was amended in 1870, *see* An Act to Revise, Consolidate and Amend the Statutes Relating to Patents and Copyright, ch. 230, 16 Stat. 198 (1870), and was not substantially altered again until 1952. *See* Patent Acts, Pub. L. No. 82-593, 66 Stat. 792 (1952). The Copyright Act of 1909, ch. 302, 35 Stat. 1075 (codified as amended at 17 U.S.C. §§ 101–215 (1982)), was left largely unrevised until 1976, *see* Copyright Act Amendments of 1976, Pub. L. No. 94-553, 90 Stat. 2541. The Clean Water Act, ch. 758, 62 Stat. 1155 (1948) (codified as amended at 33 U.S.C. §§ 1251–1376 (1982)), went substantially unchanged from 1948 to 1972. *See* Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816. The Clean Air Act, ch. 360, 69 Stat. 322 (1955) (codified as amended at 42 U.S.C. §§ 7401–7642 (1982)) went from 1955 to 1967 without significant alteration. *See* Air Quality Act of 1967, Pub. L. No. 90-148, 81 Stat. 485. Finally, while the Communications Act of 1934, ch. 652, 48 Stat. 1064, has been frequently amended, many of its major provisions governing broadcasting and telecommunications common carriers have been in place since 1934, with some dating back to 1927. *See, e.g.*, Radio Act of 1927, ch. 169, 44 Stat. 1162; Act of June 19, 1934, ch. 652, 48 Stat. 1064; Communications Act Amendments of 1978, Pub. L. No. 95-234, 92 Stat. 33; Public Broadcasting Amendments Act of 1981, Pub. L. No. 97-35, §§ 1221–1234, 95 Stat. 357, 725–36; Cable Communications Policy Act of 1984, Pub. L. No. 98-549.

[10] For example, the *U.S. Code Congressional and Administrative News* each year provides a list of "Major Bills Enacted" in that year's session of Congress. For 1963, of 35 major bills listed, 18 (51%) dealt with nondefense-related appropriations and authorizations, 1 (3%) dealt with taxation, and 6 (17%) pertained to defense and defense authorizations. 1963 U.S. CODE CONG. & AD. NEWS 1882–83. Ten years later, the corresponding figures were 29 (66%), 1 (2%), and 2 (5%). 1973 U.S. CODE CONG. & AD. NEWS 3639–41. By 1983, the corresponding figures were 24 (52%), 2 (4%), and 3 (7%). 1983 U.S. CODE CONG. & AD. NEWS 101–03. Accordingly, for at least the past twenty years, nearly three-quarters of the legislation passed has pertained to these three issues. All other subjects in the aggregate consumed only a quarter of Congress's attention.

[11] The more significant delaying tactics include the following: adding amendments and calling for individual votes on them at the subcommittee and committee levels and on the floor of the House or Senate; assigning bills to "friendly" committees that will ensure a legislative burial; filibustering in the Senate; and persuading the chairman of the

there exists significant agreement on the need for legislative amendments, Congress may lack the technical expertise necessary to draft explicit, coherent, and particularized language that will solve the legal problems that require legislative action.[12] Finally, Congress may abstain from amending statutes simply to avoid controversy that might seem politically threatening.[13]

This Article seeks to illuminate the general problem of sta-

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committee to which a bill is assigned to refuse to schedule hearings on the bill or to schedule markup sessions, thereby requiring the submission of a discharge petition on which the full chamber must vote. A discharge petition is a procedure available in the House of Representatives whereby a petition, if signed by a majority of that chamber's members, will cause a bill to be ejected from the committee to which it has been assigned and brought to the floor for consideration.

Additional delaying tactics can include the addition of nongermane amendments that, if adopted by one chamber, are certain to cause difficulty when the bill reaches conference; failure by members to attend subcommittee or committee meetings and markup sessions to ensure that there is not a quorum present, thereby preventing action; placement by the House Rules Committee of rules on a bill's consideration that will have the result of retarding the bill's progress; agreement to table a bill; and introduction of procedural motions such as motions to recommit a bill even after it has been through a conference committee and is ready for passage.

[12] Significant legislation may be enacted with overwhelming approval to address a perceived problem but fail to employ explicit language in directing an agency to administer the statutory scheme. For example, the Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended in scattered sections of 5 U.S.C., 15 U.S.C., 18 U.S.C., 29 U.S.C., 42 U.S.C., 49 U.S.C. app. (1982)), passed the Senate 83–3 and the House 309–60, 116 CONG. REC. 44,064 (1970), but contains several significant ambiguities. *See, e.g.*, Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 615 (1980) (application of "reasonably necessary or appropriate" standard contained in the Occupational Safety and Health Act of 1970 to regulations concerning benzene concentration). Similarly, although the Federal Water Pollution Control Act Amendments of 1972 passed the Senate by a lopsided 74-0 and the House by 366-11 (and the vote to override the veto was 247-23 in the House and 52-12 in the Senate), 118 CONG. REC. 37,054 (1972), it left many issues to be decided by the courts. *See* Train v. Public Interest Research Group, Inc., 426 U.S. 1 (1976) (whether the definition of "pollutant" under the Federal Water Pollution Control Act included all radioactive materials); Train v. City of New York, 420 U.S. 35 (1975) (whether the Administrator was permitted to follow a presidential letter that mandated the allocation of fewer funds than were authorized by statute). Furthermore, despite the margin of their passage (73-0 in the Senate and 374-1 in the House), 116 CONG. REC. 44,641 (1970), the Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676, left unresolved some very basic questions. *See, e.g.*, Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 104 S.Ct. 2778, 2790–93 (1984) (examining whether a "bubble concept"—whereby a state adopted a plantwide definition of a "stationary source" of pollution under the Clean Air Act—was permitted under the Act, given that Congress had not explicitly defined what it envisioned as a "stationary source" either in the Act or in the legislative history).

[13] Sony Corp. of Am. v. Universal City Studios, Inc., 104 S. Ct. 774 (1984), was briefed and argued before the Supreme Court with an anticipated decision in 1983. The Court, however, tacitly invited Congress to resolve the controlling legal question by carrying over the case for reargument the next term. Sony Corp. of Am. v. Universal City Studios, Inc., 103 S. Ct. 3568 (1983). Congress failed to act, and the Court was forced to resolve the difficult question of the applicability of the Copyright Act, 17 U.S.C. §§ 101–810 (1982), to the taping of television programs on home video cassette recorders.

tutory antiquation by exploring the application of federal laws to one specific problem: the interception and disclosure by law enforcement officials of wire, radio, or oral communications. The introduction of cordless telephones will be used as an example of technological change, and its effects on wiretapping statutes will be discussed in detail. This Article concludes that to obviate the need for repetitive legislative amendments regarding the interception or divulgence of communications, Congress should empower the Department of Justice, whose officials are accountable to a popularly elected President,[14] to expound, through rulemaking, the particularized application of broad standards which Congress can prescribe by statute. This Article further suggests general strategies that Congress might pursue to recapture from the judiciary the policymaking authority that it has lost because of statutory antiquation.

I. Case Law Background

In 1928, the Supreme Court confronted the question of whether the Fourth Amendment limited police authority to intercept telephone communications by wiretapping. In *Olmstead v. United States*, a sharply divided Court held that telephone wiretaps installed without physically invading the premises of the target were constitutionally irreproachable.[15] Writing for the majority, Chief Justice Taft observed that the Fourth Amendment protects only against government searches or seizures of persons, houses, places, or effects.[16] Oral communications, Taft insisted, were thus wholly outside the protective ambit of the Amendment and could be overheard or recorded without a warrant or adherence to constitutional standards of reasonableness.[17]

Taft further maintained that the overhearing of a telephone communication involved no Fourth Amendment seizure, at least where no physical entry was made into a protected area to install a wiretap,[18] because only the sense of hearing was employed by

[14] The Constitution provides for the election of the President by presidential electors who conceivably could defy the will of the electorate. U.S. Const. art. II, § 1, cl. 1–4; *id.*, amend. XII. No President, however, has ever been elected because of a faithless presidential elector.

[15] 277 U.S. 438 (1928).

[16] *Id.* at 464.

[17] *Id.* at 464–66.

[18] *Id.* at 466.

law enforcement officers to effectuate the seizure.[19] Accordingly, the Court held that law enforcement officials were unconstrained by the Fourth Amendment in utilizing telephone wiretaps to obtain evidence of crime when no entry into the premises of private parties was involved.[20]

When *Olmstead* was decided, no federal statute regulated interceptions or disclosures of wire, radio, or oral communications. Congress acted in 1934, however, to fasten strict limits on such practices by passing section 605 of the Communications Act of 1934, which generally made criminal the intercepting and divulgence of any communication by any person unless authorized by the sender.[21]

In *Nardone v. United States* (*Nardone I*), the Court held that section 605 prohibited federal officers from intercepting conversations by wiretapping and divulging the contents in a federal criminal prosecution.[22] The Court rejected the contention that federal law enforcement personnel were not "persons" within the prohibitive ambit of section 605.[23] Two years thereafter, in *Nardone v. United States* (*Nardone II*), the Court further held that the evidentiary fruits of a section 605 infraction perpetrated by federal officers must be suppressed in federal criminal trials.[24] Moreover, in *Weiss v. United States*, the Court concluded that section 605 protects against interception and divulgence of both intrastate and interstate communications.[25]

The Supreme Court delivered a blow to the deterrent effect of section 605, however, in *Schwartz v. Texas*.[26] There it held that conversations intercepted by state officials in contravention of section 605 were admissible in state criminal prosecutions, although divulgence of the contents of the interception was a federal crime.[27] The loophole created in *Schwartz* was partially repaired in *Benanti v. United States*, which held that federal courts in federal prosecutions must suppress evidence seized and divulged in violation of section 605 by state officials.[28]

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[19] *Id.* at 464.
[20] *Id.*
[21] Communications Act of 1934, Pub. L. No. 73-416, § 605, 48 Stat. 1064, 1103–04 (codified as amended at 47 U.S.C. § 605 (1982)) (to be recodified at 47 U.S.C. § 705(a)).
[22] 302 U.S. 379 (1937).
[23] *Id.* at 381–84.
[24] 308 U.S. 338 (1939).
[25] 308 U.S. 321 (1939).
[26] 344 U.S. 199 (1952).
[27] *Id.* at 201.
[28] 355 U.S. 96 (1957).

The Supreme Court considered the legality of electronic eavesdropping, as opposed to wiretapping, in *Goldman v. United States*[29] and *Silverman v. United States*.[30] In *Goldman*, the Court upheld against Fourth Amendment attack the use of a "detectaphone"[31] to overhear conversations held in an office adjoining the one occupied by the investigating officials.[32] The utilization of the detectaphone avoided any trespass on the property of the targets.[33] In *Silverman*, the Court condemned under the Fourth Amendment the investigative use of an electronic listening device, which had been pushed through a wall, that entailed an apparent trespass on the premises of the targets.[34] Both *Goldman* and *Silverman* tacitly discredited the idea urged in *Olmstead* that conversations were excluded from any Fourth Amendment protection.[35] Despite a contrary protestation by the Court in *Silverman*,[36] that decision seemed reconcilable with *Goldman* only if the presence or absence of a physical invasion of private property interests was the Court's constitutional touchstone for protecting private communications from unreasonable police interceptions. That touchstone, however, was ill-suited to safeguarding the privacy values threatened by wiretapping or electronic eavesdropping.

The Supreme Court announced a wholesale reformulation of Fourth Amendment doctrine governing interceptions and disclosures of conversations in a pair of 1967 cases. In *Berger v. New York*, the Court held unconstitutional a state statute empowering police officers to investigate crime through use of electronic eavesdropping.[37] The statute authorized magistrates to issue

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[29] 316 U.S. 129 (1942).

[30] 365 U.S. 505 (1961).

[31] A detectaphone is a listening device which, when placed against a partitioning wall, picks up sound waves in the adjoining room and amplifies them for someone listening in the first room. *See Goldman*, 316 U.S. at 131.

[32] *Id.* at 135.

[33] *Id.* at 134–35.

[34] 365 U.S. at 511–12.

[35] The *Goldman* Court refused to distinguish or to overrule *Olmstead*, which had been decided prior to the passage of the original § 605, and ruled only that the protection of wire communications contained in the original § 605 applied only to the message during the course of its transmission by wire and not to the utterance of a message by the speaker. *Goldman*, 316 U.S. at 133–36. The *Silverman* Court distinguished *Olmstead* because there was a physical trespass in the former. It did not discuss the general proposition of the protection of conversations. *Silverman*, 365 U.S. at 510–11.

[36] The Court stated, "[b]ut decision here does not turn upon the technicality of a trespass upon a party wall as a matter of local law. It is based upon the reality of an actual intrusion into a constitutionally protected area." *Silverman*, 365 U.S. at 512.

[37] 388 U.S. 41 (1967).

sixty-day eavesdropping orders based on affidavits averring that the eavesdropping was reasonably likely to unearth evidence of crime and describing particularly the persons to be overheard or recorded.[38]

Writing for the Court, Justice Clark declared that the statute contained several Fourth Amendment infirmities. It failed to require particularization of the crime under investigation or the type of conversations targeted for interception.[39] In addition, the statute impermissibly allowed courts to grant blanket two-month authority (and two-month extensions) to eavesdrop electronically upon a *single* showing of probable cause.[40] Furthermore, eavesdropping was permitted even after interception of the conversation sought.[41] Finally, clandestine entry into private premises to install eavesdropping equipment was permitted without any showing of exigent circumstances;[42] and the investigating officials were not required to report to a magistrate the contents of seized conversations, thus endowing the officials with unfettered discretion as to the use of conversations of innocent as well as guilty parties.[43] In sum, the statutory scheme for eavesdropping lacked adequate judicial supervision or protective procedures that safeguarded against law enforcement overreaching.[44]

In *Katz v. United States*, the Court found a Fourth Amendment infirmity in the warrantless use of electronic listening equipment by federal officials to overhear communications made from a public telephone booth.[45] Writing for the Court, Justice Stewart declared that private communications are constitutionally protected from government seizure irrespective of whether any property interests are concomitantly invaded in executing the law enforcement gambit.[46] The constitutional protection yields, Stewart explained, only if either an appropriate warrant is issued by a neutral magistrate or exigent circumstances justify the seizure.[47] Because neither of these conditions existed in

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[38] Act of Apr. 12, 1958, ch. 676, 1958 N.Y. Laws 1513.
[39] *Berger*, 388 U.S. at 55–59.
[40] *Id.* at 59.
[41] *Id.* at 59–60.
[42] *Id.* at 60.
[43] *Id.*
[44] *Id.* at 58.
[45] 389 U.S. 347 (1967).
[46] *Id.* at 353.
[47] *Id.* at 356–58.

Katz, the electronic listening by federal officials violated the Fourth Amendment.[48]

In a concurring opinion, Justice Harlan distilled from the case law a two-fold test that must be satisfied to trigger Fourth Amendment protection of the confidentiality of communications.[49] First, an individual must exhibit a subjective expectation of privacy regarding his communication;[50] second, that expectation must be one that society is prepared to recognize as reasonable.[51] This two-fold test has been adopted by the Court in subsequent Fourth Amendment search and seizure cases.[52]

II. STATUTORY RESPONSE

Congress feared that the *Berger* and *Katz* decisions might destroy the effectiveness of wiretapping or electronic surveillance as vehicles to fight organized crime or to enforce important federal criminal statutes.[53] Apprehensions were also voiced that existing law might be insufficient to protect the privacy of oral or wire communications.[54] To address these two concerns, Congress enacted title III of the Omnibus Crime Control and Safe Streets Act of 1968 (the Omnibus Crime Control Act)[55] and concurrently amended section 605 of the Communications Act.[56] These sections purport to establish a comprehensive scheme to regulate the wiretapping and use of electronic surveillance by

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[48] *Id.*

[49] *Id.* at 360 (Harlan, J., concurring).

[50] *Id.* at 361 (Harlan, J., concurring).

[51] *Id.*

[52] *See, e.g.*, Smith v. Maryland, 444 U.S. 736, 740 (1979); Rakas v. Illinois, 439 U.S. 128, 143 (1978).

[53] S. REP. NO. 1097, 90th Cong., 2d Sess. 66–71, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS 2112, 2153–58.

[54] *Id.* at 67, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS at 2154.

[55] Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, §§ 801–804, 82 Stat. 197, 211–25 (codified as amended at 18 U.S.C. §§ 2510–2520 and 47 U.S.C. § 605 (1982)). For a discussion of pertinent legislative history, see S. REP. NO. 1097, *supra* note 53, at 88–108, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS at 2177–97. Throughout this Article, the term "title III" is used to refer to only chapter 119 of title 18. Section 605, while amended by title III, *see infra* note 56, and subsequently recodified by the Cable Communications Policy Act of 1984, *see infra* note 95, will be discussed separately to avoid confusion.

[56] Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 803, 82 Stat. 197, 223 (codified as amended at 47 U.S.C. § 605 (1982)) (to be recodified at 47 U.S.C. § 705(a)). *See* S. REP. NO. 1097, *supra* note 53, at 107–08, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS at 2196–97.

law enforcement officials to intercept or divulge the contents of conversations.[57]

Title III and the amendment to section 605 were not enacted as remedial statutes to curtail abuses of wiretapping or electronic surveillance by law enforcement officers. To the contrary, Congress affirmatively found an absence of any abuse.[58] The overarching purpose of title III was to establish standards and procedures for the investigative use of wiretapping or electronic eavesdropping consistent with the Fourth Amendment norms explicated in *Berger* and *Katz*.[59] Title III also sought to curtail wiretapping or electronic eavesdropping by private parties to enhance privacy protections.[60]

A. *Title III of the Omnibus Crime Control and Safe Streets Act of 1968*

With the Omnibus Crime Control Act, Congress prescribed the conditions under which conversations might be lawfully intercepted and disclosed. Section 2511 of title 18 of the United States Code generally prohibits the interceptions of wire or oral communications through the use of any electronic, mechanical, or other device, or the disclosures of the contents of such intercepted communications.[61] A violation is punishable by a $10,000 fine or five years imprisonment.[62] In addition, the statute grants a civil damages remedy against the wrongdoer to any person whose wire or oral communication is unlawfully intercepted or disclosed.[63] In such a civil action, liquidated damages computed at the rate of $100 for each day of violation, punitive damages, and a reasonable attorney's fee are recoverable.[64] Good faith reliance on a court order or legislative authorization, however, is an affirmative defense to any civil or criminal action.[65] If disclosure of an intercepted oral or wire communication would violate title III, then the contents of the communications

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[57] S. REP. NO. 1097, *supra* note 53, at 66, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS at 2153.
[58] *Id.* at 72–73, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS at 2159–60.
[59] *Id.* at 66, 75, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS at 2153, 2163.
[60] *Id.* at 66–69, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS at 2153–56.
[61] 18 U.S.C. § 2511 (1982).
[62] *Id.* § 2511(1).
[63] *Id.* § 2520.
[64] *Id.*
[65] *Id.*

and any derivative evidence must be excluded in any proceeding before any branch of government at either the federal, state, or local level.[66]

Title III carves out several exceptions to the general denunciation of interceptions of wire or oral communications contained in section 2511. The exceptions relevant to this analysis relate to domestic law enforcement.[67] A law enforcement officer is authorized to intercept an oral or wire communication if he is a party to the communication or if one of the parties has consented to the interception.[68] More significantly, however, the Attorney General is empowered to seek a court order authorizing interceptions and disclosures of oral or wire communications.[69] Court authorizations may be sought to investigate a cluster of serious federal crimes, including murder, kidnapping, bribery, robbery, extortion, racketeering, narcotics offenses, and counterfeiting.[70] Lawfully intercepted communications may be disclosed to other law enforcement officers or through testimony in any federal, state, or local proceeding.[71]

An application for a court order that would authorize an interception must contain comprehensive information,[72] including:

> (1) A detailed statement of facts and circumstances revealing the offense under investigation, the location of the proposed interception, the type of communications sought to be intercepted, and the persons, if known, committing the offense and who are the targets of the interception;[73]
> (2) An explanation of why other investigative procedures would not or did not unearth the evidence of crime sought by the interception;[74] and
> (3) The expected duration of the interception.[75]

The court may approve the application upon a four-fold finding that there exists probable cause to believe (1) that an individual

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[66] *Id.* § 2515.
[67] *Id.* §§ 2511(2)(c), 2516.
[68] *Id.* § 2511(2)(c).
[69] *Id.* § 2516.
[70] *Id.* § 2516(1).
[71] *Id.* § 2517.
[72] *Id.* § 2518(1).
[73] *Id.* § 2518(1)(b).
[74] *Id.* § 2518(1)(c).
[75] *Id.* § 2518(1)(d).

is committing, has committed, or is about to commit a specified serious offense;[76] (2) that the contemplated interception will yield evidence of the offense;[77] (3) that ordinary investigative procedures would be either unproductive or too dangerous in seeking such evidence;[78] and (4) that the facilities or place involving the oral or wire communications to be intercepted are being used in furtherance of crime or are leased to, listed in the name of, or commonly used by the suspect.[79]

The court order may authorize an interception for a maximum of thirty days,[80] but extensions can be granted if appropriate findings are made.[81] Interceptions must be executed so as to minimize the overhearing of conversations irrelevant to the crime under investigation.[82]

Statutory definitions of "wire communication,"[83] "oral communication,"[84] "intercept,"[85] "electronic, mechanical, or other device,"[86] and "communications common carrier"[87] are provided to facilitate interpretation of title III. These definitions are pivotal in ascertaining the scope of title III and its pertinence to radio communications.[88]

B. *Section 705(a) of the Communications Act*

As discussed above, the initial version of section 605 of the 1934 Communications Act made criminal the interception and divulgence, by law enforcement officers, of virtually all private wire or radio communications.[89] In addition, section 605 initially prohibited persons associated with the wire or radio transmission of an interstate or foreign communication from divulging

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[76] *Id.* § 2518(3)(a).
[77] *Id.* § 2518(3)(b).
[78] *Id.* § 2518(3)(c).
[79] *Id.* § 2518(3)(d).
[80] *Id.* § 2518(5).
[81] *Id.* These findings are the same as those required for the initial warrant. *See supra* notes 76–79 and accompanying text.
[82] 18 U.S.C. § 2518(5) (1982).
[83] *Id.* § 2510(1).
[84] *Id.* § 2510(2).
[85] *Id.* § 2510(4).
[86] *Id.* § 2510(5).
[87] *Id.* § 2510(10).
[88] *See infra* notes 138–62 and accompanying text.
[89] Communications Act of 1934, Pub. L. No. 73-416, § 605, 48 Stat. 1064, 1103–04 (codified as amended at 47 U.S.C. § 605 (1982)) (to be recodified at 47 U.S.C. § 705(a)); *see supra* notes 21–28 and accompanying text.

the contents of the communication except through authorized channels of transmission or in response to a court-authorized subpoena or other exercise of lawful authority.[90] Moreover, unauthorized interception of any interstate or foreign wire or radio communication was prohibited when it was coupled with use, by the wrongdoer, of the intercepted communication to advantage himself or another.[91] A corresponding prohibition applied to persons who knowingly exploited an illegal interception of an interstate or foreign radio or wire communication to benefit themselves or others.[92] The statute exempted from the section 605 prohibitions the receiving or divulging of radio communications transmitted either for the use of the general public, or relating to ships in distress.[93]

Title III of the Omnibus Crime Control Act significantly amended section 605.[94] The amended version, now section 705(a), provides that "[n]o person not being authorized by the sender shall intercept any radio communication and divulge . . . such intercepted communication to any person."[95] The Senate report accompanying the bill explains that law enforcement officers are not "persons" for purposes of this section.[96] Section

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[90] Former § 605 read, in pertinent part:

> [N]o person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority . . . .

Communications Act of 1934, Pub. L. No. 73-416, § 605, 48 Stat. 1064, 1103–04 (codified as amended at 47 U.S.C. § 605 (1982)) (to be recodified at 47 U.S.C. § 705(a)).

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 803, 82 Stat. 197, 223 (amending 47 U.S.C. § 605); S. REP. No. 1097, *supra* note 53, at 107, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS at 2196.

[95] Communications Act of 1934, § 705(a), 47 U.S.C. § 605 (1982) (to be recodified at 47 U.S.C. § 705(a)). Although the provision retained its designation in the Communications Act as § 605 after the 1968 amendments, Congress redesignated the provision as § 705(a) in 1984. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, §§ 5–6. To avoid confusion, this Article will refer to the amended provision as § 705(a), even though the provision was not so designated for most of the time period discussed in the Article.

[96] S. REP. No. 1097, *supra* note 53, at 108, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS at 2197.

705(a) thus reversed *Nardone I* which had held that law enforcement officials were "persons" under the former section 605.[97]

While section 705(a) retained the general prohibition against the divulgence of interstate or foreign wire or radio communications outside regular channels of transmission by persons associated with such transmissions, it created an exception for divulging information in accordance with title III.[98] The other prohibitions contained in section 605 remained unaltered in the 1968 amendments, except that their scope was limited to interstate or foreign *radio* communications; the prohibitions' former application to *wire* communications was deleted.[99]

In contrast to title III, section 705(a) of the Communications Act explicitly addresses privacy protections to be afforded to radio communications.[100] That section was enacted as a component of title III. Canons of statutory construction[101] thus teach that section 705(a) should supercede title III in providing the legal norms to govern interception or divulgence of radio communications if there is any inconsistency between the two statutory schemes.

The sparse legislative history behind the amendment of section 605 makes an ascertainment of its purpose problematic. The most plausible deduction, however, is that Congress intended to expand the authority of police to intercept and to divulge radio communications by overturning the *Nardone I* interpretation of the initial version of section 605.[102]

Section 705(a) generally denounces all unauthorized interceptions and divulgences of radio communications, except when executed by law enforcement officers.[103] A "radio communica-

[97] 302 U.S. 379 (1937); *see supra* notes 22–23 and accompanying text.

[98] Section 705(a) states, in pertinent part, "Except as authorized by chapter 119, title 18, United States Code [title III], no person receiving, assisting in receiving, transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof . . . ." Communications Act of 1934, § 705(a), 47 U.S.C. § 605 (1982) (to be recodified at 47 U.S.C. § 705(a)).

[99] *Compare* Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 803, 82 Stat. 197, 223 (amending 47 U.S.C. § 605), *with* Communications Act of 1934, Pub. L. No. 73-416, § 605, 48 Stat. 1064, 1103–04 (codified as amended at 47 U.S.C. § 605 (1982)) (to be recodified at 47 U.S.C. § 705(a)).

[100] *See generally* Communications Act of 1934, § 705(a), 47 U.S.C. § 605 (1982) (to be recodified at 47 U.S.C. § 705(a)).

[101] *See* Busic v. United States, 446 U.S. 398, 406 (1980).

[102] *See supra* notes 22–23 & 97 and accompanying text.

[103] S. REP. NO. 1097, *supra* note 53, at 107–08, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS at 2197. When Congress redesignated § 605 to become § 705(a) in 1984, it also provided a limited exception for the interception of certain satellite cable programming to the blanket prohibitions established in § 605. Cable Communications Policy

tion" is specifically defined as "the transmission by radio of writing, signs, pictures, and sounds of all kinds . . . ."[104] In some circumstances, as will be discussed subsequently,[105] radio communications involving cordless phone sets, microwave, or satellites would arguably constitute either wire or oral communications facially subject to title III norms. But because Congress directly delineated privacy rules to govern radio communications in amending section 605, the latter statute should displace title III as providing the authoritative norms to govern their interception and divulgence by law enforcement officials. This conclusion is reinforced by a statement in the Senate report accompanying the bill, which employs the terms "wire or oral communications," in contradistinction to "radio," in describing a demarcation between title III and section 705(a).[106]

Section 705(a) places no limits on the authority of police to intercept and to divulge any radio communication. The Fourth Amendment, as expounded in *Berger* and *Katz*, however, does curtail such practices if the radio communications are made with legitimate expectations of privacy. If a radio communication fails to meet that privacy standard, then it would not even be facially governed by title III because no "oral communication" could by definition be involved.[107]

The best harmonization of section 705(a) and title III regarding radio communications yields the following rule: police may in-

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Act of 1984, Pub. L. No. 98-549, § 5 (to be codified at 47 U.S.C. § 705(b)). Otherwise, the legislative history of the Cable Communications Policy Act of 1984 indicates that in recodifying § 605, "there [was] no intention to pass judgment on any particular case that was, or was not decided under section 605 . . ." and there was an intention "that the amendment preserve [the existing] broad protections [against the unauthorized interception of radio communications]; that all acts which presently constitute a violation of present section 605 shall continue to be unlawful under that section as amended and redesignated by [the 1984 Act]." 130 CONG. REC. H12,237 (daily ed. Oct. 11, 1984) (statement of Rep. Wirth (D-Colo.)). Subsections 705(c) and 705(d), which were added by the 1984 Act, further define the limited exception provided in § 705(b) and delineate the penalties for violations of § 705(a). Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 5.

[104] 47 U.S.C. § 153(b) (1982). "Section [705(a)] not only prohibits unauthorized interception of traditional radio communications, but also communications transmitted by means of new technologies. For example, . . . section [705(a)] provides protection against the unauthorized reception of subscription television (STV), multipoint distribution services (MDS), and satellite communications." 130 CONG. REC. H12,237 (daily ed. Oct. 11, 1984) (statement of Rep. Wirth).

[105] *See infra* notes 163–64 & 178–90 and accompanying text.

[106] S. REP. No. 1097, *supra* note 53, at 107–08, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS at 2196–97.

[107] The definition of oral communications under title III limits the scope of this term to oral communications protected by the Fourth Amendment. 18 U.S.C. § 2510(2) (1982); *see infra* note 155 and accompanying text.

tercept or divulge such communications without restriction, unless the person making the communication holds a legitimate expectation of privacy regarding that communication. In the latter situation, the Fourth Amendment requires police to obtain an appropriate warrant in order to seize the communication and to employ the resulting evidence in a criminal prosecution, although section 705(a) imposes no such warrant requirement.

In sum, it seems clear that Congress intended section 705(a), as opposed to title III, to govern the legality of the interception or divulgence of radio communications by law enforcement officers or persons not involved in the regular transmission of communications.[108] As to persons involved in the regular transmission of communications, section 705(a) provides the prohibiting rules for both *wire* and *radio* communications, but creates a wholesale exception from the prohibitions for interceptions or divulgences authorized by title III.[109]

Under an alternative interpretation of these statutes, the interception and divulgence of radio communications by law enforcement officials would be governed by title III if the radio communications satisfied the legitimate expectations of privacy test incorporated in the title III definition of "oral communications."[110] This reconciliation of title III and amended section 705(a) yields the following rules. The section 705(a) blanket prohibition against the interception or divulgence of radio communications would apply to persons, excluding law enforcement officers, not involved in the regular transmission of communications. Except as authorized by title III, the section 705(a) prohibition against the divulgence of both wire and radio communications would apply to persons involved in the regular transmission of communications. Title III and the statutory warrant requirement contained therein would govern the interception and divulgence of oral communications, including radio communications, by law enforcement officials.

This reading of the statutes avoids any inconsistency between

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[108] *See* S. REP. NO. 1097, *supra* note 53, at 107–08, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS at 2196–97.

[109] Communications Act of 1934, § 705(a), 47 U.S.C. § 605 (1982) (to be recodified at 47 U.S.C. § 705(a)).

[110] The Ninth Circuit, in a discussion of the 1968 amendment to the initial version of § 605 and the accompanying legislative history, noted that "It is obvious that the legislature wanted law enforcement personnel to be governed exclusively by Chapter 119 of title 18 [*i.e.*, title III]." United States v. Hall, 488 F.2d 193, 196 (9th Cir. 1973).

title III and section 705(a) by concluding that Congress intended to strike the balance between law enforcement and privacy protections in title III and intended title III exclusively to prescribe the conditions under which law enforcement officers may intercept wire and oral communications, with radio communications facially subject to title III as oral communications.[111] Thus, it was necessary in enacting title III to exclude law enforcement officers from the blanket prohibition against the interception of radio communications contained in section 705(a).[112] Under this harmonization of section 705(a) and title III, radio communications that meet the legitimate expectation of privacy test would receive protection as oral communications under title III and law enforcement interceptions of such communications would be subject to the specific statutory warrant requirements of that title.

Under either interpretation of the relationship between title III and section 705(a), changes in technology and market structures have disrupted the statutory scheme governing the interception of communications by law enforcement officers. Moreover, when Congress enacted title III and amended the initial version of section 605, it could not have foreseen the ramifications that such changes would have upon the application of the statutes.

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[111] Radio communications would have to meet the legitimate expectation of privacy test contained in the title III definition of oral communications. 18 U.S.C. § 2510(2) (1982). Additional support for the argument that radio communications may be oral communications within title III is found in that title's prohibition against the use of any device "to intercept oral communications when . . . such device transmits communications by radio, or interferes with the transmission of such communication." *Id.* § 2511(1)(b)(ii). The prohibitions in § 2511(1)(b) were intended to provide an alternative constitutional basis (under the commerce clause), in addition to the broad prohibitions in § 2511(1)(a) to prohibit the interception of oral communications. *See* S. REP. NO. 1097, *supra* note 53, at 92, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS at 2180–81.

Moreover, title III contains an exception to its prohibitions against the interception of any wire or oral transmissions by an employee of the Federal Communications Commission (FCC), in the normal course of his employment, of "a wire communication, or oral communication transmitted by radio." 18 U.S.C. § 2511(2)(b) (1982). In order to give any effect to this exception for FCC interceptions of oral communications transmitted by radio, radio communications must be capable of being oral communications within title III.

[112] So interpreted, this prohibition provides additional protection to radio communications against interception by private individuals (that is, non-law enforcement officers and persons not involved in the regular transmission of communications). Alternatively, as discussed earlier, this prohibition may be interpreted to expand the authority of law enforcement officers to intercept and divulge radio communications. *See supra* note 102 and accompanying text.

III. Structure of the Contemporary Communications Industry

A. *Technological Advances: The Example of Cordless Telephones*

A cordless telephone is a two-way low power communication system without the restrictions on freedom of movement inherent in the connecting handset cord of the standard telephone. Cordless phones are designed to transmit and to receive radio signals simultaneously. The design thus allows continuous conversation between both parties involved in communicating through use of a cordless phone. A cordless phone system includes a base station, a low power transmitter and receiver connected to the telephone network, and a portable handset that incorporates a low power transmitter and receiver.

The user of a cordless phone may engage in telephone conversations while located several hundred feet from his base station. The maximum distance is dependent upon several factors, including the architecture of the building that hosts the base station of a cordless phone. Millions of cordless phones have been purchased recently by consumers, and market analysts forecast an explosive growth in cordless phone sales.[113]

Conversations conducted through use of a cordless phone are not secure. They can be easily monitored by third parties, including law enforcement officials. The monitoring is accomplished by employing any type of radio receiver tunable to the frequencies dedicated to the two-way radio communications link between the cordless phone handset and the base station.

In 1984, the Federal Communications Commission (FCC) issued an order requiring the attachment to cordless phones of a label informing the user that the privacy of his communications may not be assured.[114] In proposing the rule, the FCC explained:

> Apparently, most consumers who use [cordless] phones are unaware that unless the manufacturer incorporates a scheme for coding or scrambling the signal at the transmitter and

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[113] Estimates of the number of cordless telephones in use range from eight to ten million. Some 3.2 million cordless phones were sold in 1983 alone. It has also been estimated that cordless phones comprise approximately 21% of all phones being sold. *See Cordless Telephone Owners Face Problems of Privacy*, Wash. Post, Apr. 2, 1984, at A1 col. 1, A8 col. 1.

[114] *See* New Interim Provisions for Cordless Telephones, 49 Fed. Reg. 1512 (1984) (labeling requirement codified at 47 C.F.R. § 15.236 (1984)).

> descrambling it at the receiver, a signal transmitted through space can be received by an unintended listener. A number of consumers are surprised and concerned about this feature of cordless phones.[115]

The FCC rejected a proposal that would require cordless phones to contain either a scrambling device or a beeper device to alert the recipient of a call made from a cordless phone that his conversation may be overheard.[116] On May 23, 1984, the FCC proposed a rule that would require disclosure on retail packages containing cordless phones of any security features built into the radio communications system.[117]

B. *Structure of the Telephone Markets*

Understanding the structure of the telephone industry is critical to the application of title III because of the requirement in title III that a protected "wire" communication involve the employment of wire facilities furnished or operated by a common carrier engaged in the transmission of *interstate* or *foreign* communications.[118] When title III was enacted in 1968, the telephone marketplace it addressed was markedly different from the contemporary structure of the telecommunications industry. At that time, American Telephone and Telegraph Company (AT&T) held a virtual monopoly over all interstate communications by common carrier,[119] and the volume of private communications systems outside the AT&T network was inconsequential.[120] In addition, AT&T owned virtually all the major local telephone companies that offered local phone service.[121] In conjunction with AT&T longlines, the local phone companies provided local wire transmission for the beginning and concluding portions of an interstate phone call.[122] In 1968, approximately 2,000 rural phone companies offered local phone service outside the AT&T

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[115] Order Granting Conditional Waiver, 48 Fed. Reg. 4788, 4791 (1983) (to be codified at 47 C.F.R. pt. 15) (proposed Feb. 3, 1983).

[116] New Interim Provisions for Cordless Telephones, *supra* note 114, 49 Fed. Reg. at 1516.

[117] Addition of New Interim Provisions for Cordless Telephones, 49 Fed. Reg. 23,397 (1984) (proposed June 6, 1984).

[118] 18 U.S.C. § 2510(1) (1982); *see infra* note 138 and accompanying text.

[119] United States v. American Tel. & Tel. Co., 524 F. Supp. 1336, 1352 (D.D.C. 1981).

[120] In 1968, Bell companies carried some 18,400,000 long distance calls daily, whereas independent telephone companies carried less than 4,000,000 per day. TELEPHONE ENGINEER AND MANAGEMENT DIRECTORY 120 (June 1970).

[121] *See* United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 162 (D.D.C. 1982), *aff'd*, 103 S. Ct. 1240 (1983).

[122] *See* MCI Telecommunications Corp. v. FCC, 580 F.2d 590, 592 (D.C. Cir.), *cert. denied*, 439 U.S. 980 (1978).

family[123] and also interconnected with AT&T longlines in the offering of interstate communications. Furthermore, most interstate communications in 1968 involved wire and not radio technology.[124]

Since 1968, the telephone industry has witnessed a vast transformation. The Federal Communications Commission has authorized open entry into the field of interstate communications, and AT&T's market position has eroded.[125] In addition, interstate carriers today rely substantially on radio, either through the use of microwave or domestic satellites, in offering their services.[126] Furthermore, the construction of private communications networks that bypass the use of common carrier facilities is growing.[127] Moreover, a federal district court consent decree entered to resolve an antitrust suit against AT&T divested AT&T of ownership of local phone companies.[128] Thus, at present, most local phone calls in cities that were served by the former AT&T subsidiary operating companies do not involve the services of any integrated common carrier dedicated to offering interstate service.[129] Indeed, under the consent decree,

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[123] PRESIDENT'S TASK FORCE ON COMMUNICATIONS POLICY, *The Domestic Telecommunications Carrier Industry*, in FINAL REPORT ch. 6, at 1 (1968).

[124] In 1968, Bell maintained some 512,250,000 miles of wire but only 16,129,887 miles of microwave radio relay broadband one-way channel transmission facilities. TELEPHONE ENGINEER AND MANAGEMENT DIRECTORY, *supra* note 120, at 106.

[125] *See, e.g.*, MTS and WATS Market Inquiry Report, 81 F.C.C.2d 177 (1980); Establishment of Domestic Communications-Satellite Facilities by Non-Government Entities, 35 F.C.C.2d 844 (1972); International Record Carrier's Scope of Operations in the Continental United States, 76 F.C.C.2d 115 (1980), *aff'd sub nom.* Western Union Tel. Co. v. F.C.C., 665 F.2d 1126 (D.C. Cir. 1981); Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities, 60 F.C.C.2d 261 (1976), *amended on reconsideration*, 62 F.C.C.2d 588 (1977), *aff'd on appeal sub nom.* American Tel. & Tel. Co. v. FCC, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978); Specialized Common Carrier Services, 29 F.C.C.2d 870 (1971), *reconsideration denied*, 31 F.C.C.2d 1106 (1971), *aff'd sub nom.* Washington Utils. & Transp. Comm'n v. FCC, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975).

[126] *See, e.g.*, Satellite Business Systems, 62 F.C.C.2d 997, *reconsideration denied*, 64 F.C.C.2d 872 (1977), *aff'd sub nom.* United States v. FCC, 652 F.2d 72 (D.C. Cir. 1980).

[127] *See, e.g.*, MTS and WATS Market Structure, 93 F.C.C.2d 241 app. F at 2, *modified on reconsideration*, 48 Fed. Reg. 42,984 (1983), *modified on further reconsideration*, 49 Fed. Reg. 7810 (1984), *aff'd sub nom.* National Ass'n. of Regulatory Util. Comm'rs v. FCC, 737 F.2d 1095 (D.C. Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3070 (U.S. July 18, 1984) (No. 84-95).

[128] United States v. American Tel. & Tel., 552 F. Supp. 131, 223 (D.D.C. 1982), *aff'd*, 103 S. Ct. 1240 (1983).

[129] The divested companies are involved in interstate services, both through interconnection with long distance companies and by offering interstate access and other services. In addition, the consent decree authorizes narrow exceptions to the ban on interstate or interexchange service by divested phone companies. Local service, however, is not itself interstate common carriage. *See id.* at 186.

the divested local phone companies are expressly forbidden from offering interexchange phone service.[130]

Major changes have also occurred in the structure of the telephone equipment industry. When title III was enacted in 1968, AT&T enjoyed a virtual monopoly over the sale or leasing of telephone instruments or equipment to subscribers.[131] Subsequently, a wide array of businesses, supported by Federal Communications Commission rulings[132] and the AT&T consent decree,[133] entered the market of selling or leasing telephone instruments or equipment.[134] Many of these purveyors of telephones are not communications common carriers.[135] This fact is significant for purposes of applying title III because that statute carves out an exception to otherwise unlawful interceptions of communications for business-related interceptions executed by use of telephone equipment furnished by a *communications common carrier*.[136] The exception does not appear to apply to interceptions made by use of telephones purchased from non-common carrier entities.

IV. Application of Title III and Section 705(a) to Contemporary Interceptions of Wire, Radio, or Oral Communications

Title III generally forbids warrantless interceptions or disclosures of communications effectuated by wiretapping, electronic

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[130] *Id.* at 227; *see infra* note 146.

[131] *See, e.g.*, Use of the Carterfone Device in Message Toll Telephone Service, 13 F.C.C.2d 420 (1968).

[132] *See, e.g., id.* at 423–27; North Carolina Utils. Comm'n v. FCC, 552 F.2d 1036 (4th Cir.), *cert. denied*, 434 U.S. 874 (1977); North Carolina Utils. Comm'n v. FCC, 537 F.2d 787 (4th Cir.), *cert. denied*, 429 U.S. 1027 (1976).

[133] United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 225 (D.D.C. 1982).

[134] There is no way of accurately calculating the number of different entities that currently sell or lease telephone equipment. A recent edition of a Washington, D.C., area consumer magazine identified 53 Washington area firms that sell residential telephones. *Phones: Where to Buy*, Washington Consumers' Checkbook, Summer 1984, at 11.

[135] The *Washington Consumers' Checkbook* found telephones being sold by discount retail outlets, appliance stores, department stores, drug stores, furniture stores, electronic equipment supply stores, and telephone companies. *Id.* at 14–15. Additionally, telephones are sold by mail order and have even been given away as a premium for subscribing to *Time* magazine. In sum, there are countless sources for telephone equipment, almost none of which fit the statutory definition of a communications common carrier.

[136] 18 U.S.C. §§ 2510(4), (5)(a), 2511(1) (1982); *see infra* notes 142–43 & 253–66 and accompanying text.

surveillance, or otherwise by law enforcement officers.[137] Five significant terms, however, circumscribe the general prohibition. The prohibition applies only to "wire" or "oral" communications; the communication must have been facilitated by an "interstate common carrier"; and there must have been an "interception."

A "wire communication" is defined in title III as:

> any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connections between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications.[138]

Accordingly, a "wire communication" within the ambit of title III must be transmitted, at least in part, by the employment of wire, cable, or other like connection provided by a common carrier in offering interstate or foreign telecommunications service. A "common carrier" is defined by cross-reference[139] to the Communications Act of 1934, as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio . . . ."[140] An "interstate communication," in turn, is defined to exclude wholly intrastate communications.[141] A wire communication thus falls within title III only if the carriage is undertaken by a common carrier engaged in interstate, as opposed to intrastate, transmission.

A common carrier, as the term has been expounded in the case law, includes only entities that offer telecommunications services indiscriminately to all potential patrons.[142] Private telecommunications systems constructed to serve particular businesses are not systems provided as a common carriage service.[143] Thus communications carried by such systems cannot be "wire" communications within the meaning of title III.

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[137] 18 U.S.C. § 2511 (1982).
[138] *Id.* § 2510(1).
[139] *Id.* § 2510(10).
[140] 47 U.S.C. § 153(h) (1982).
[141] *Id.* § 153(e)(3).
[142] National Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630 (D.C. Cir. 1976). In upholding the FCC's classification of a new private mobile communications service as a noncommon carrier, the court explained that the characteristic that differentiates common carriers from noncommon carriers is that the former hold themselves out to serve the public indiscriminately. *Id.*
[143] *Id.* at 642.

Common carriers exclusively devoted to offering intrastate telephone service also operate outside the title III restrictions on the interception or divulgence of wire communications. At present, virtually all local telephone companies offer only intrastate common carrier service largely because of the divestiture decree involving AT&T.[144] Many of these phone companies, however, operate as components of regional holding companies with operating arms that serve more than one state.[145] Additionally, local phone companies interconnect with interstate carriers in the provision of long-distance service.[146] These facts arguably thrust local phone companies into the definition of interstate common carrier under the Communications Act.[147] That definition, however, contemplates the provision of interstate or foreign carriage, whereas the regional holding companies generally are limited by the consent decree to the provision of "intraexchange" and exchange access service.[148]

In enacting title III, Congress failed to anticipate the subsequent revolutionary change in the market structure of the telecommunications industry attributable to the consent decree. As a consequence, Congress may have unwittingly narrowed the type of "wire" communications within the protective ambit of title III to communications carried, at least in part, by interexchange or long-distance common carriers. Only approximately eight percent of all telephone calls are transmitted, at least in part, by such carriers.[149] Furthermore, a burgeoning number of

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[144] United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982).

[145] For instance, "NYNEX," one of the seven regional companies established as a result of the breakup of AT&T, is comprised of New York Telephone and New England Telephone and Telegraph Company. New England Telephone and Telegraph, in turn, operates in Maine, Massachusetts, New Hampshire, Rhode Island, and Vermont.

[146] United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982). Under the terms of the consent decree, AT& T was required, among other things, to divest itself of the portions of its 22 operating companies which supplied local telephone service. Under the decree, the operating companies provide telephone service within an exchange area, and originate and terminate calls from one exchange area to another; the interexchange portion of calls from one exchange area to another are, with narrow exceptions, carried by AT&T and other interexchange carriers. *Id.* at 186.

[147] *See* United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 171–72 (D.D.C. 1982). While the FCC has some regulatory jurisdiction over common carriers engaged in interstate communication only through interconnection, such jurisdiction is not plenary in nature. *See, e.g.*, 47 U.S.C. § 152(b)(2) (1982). No court has decided the questions of whether the regional companies, or their constituent parts, come within the definition of "common carrier" set forth in the Communications Act, *id.* § 153(h), and whether, without regard to the definitional sections, they are merely connecting carriers subject only to parts of title II of the Communications Act. *See id.* § 152(b).

[148] *See supra* notes 129–30 and accompanying text.

[149] *Composite Plant, Telephone and Calling Statistics of Reporting Companies*, TELEPHONE ENGINEER & MANAGEMENT DIRECTORY 580 (July 1983).

communications are made over private transmission systems outside the scope of title III.[150] Moreover, as noted above, the AT&T divestiture decree makes problematic the application of title III rules regarding wire communications to local phone companies that offer intrastate service.[151]

A literal reading of the title III definition of wire communication would provide title III protection to "any communication made . . . in part" through an interstate common carrier.[152] There is no indication, however, that Congress intended the words "in part" to extend protection to the segment of a communication in which the individual has no legitimate expectation of privacy, merely because that communication is carried, at some point, through an interstate common carrier.[153] Moreover,

[150] *See supra* note 127 and accompanying text.

[151] *See supra* notes 144–48 and accompanying text.

[152] 18 U.S.C. § 2510(1) (1982).

[153] The sparse legislative history indicates that Congress might have wanted the definition of "wire communication" to sweep broadly. *See* S. REP. No. 1097, *supra* note 53, at 89, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS at 2178 ("The coverage is intended to be comprehensive."). *Compare* United States v. Hall, 488 F.2d 193 (9th Cir. 1973) (court concluded that part-wire transmission makes the entire conversation a wire communication which requires a search warrant) *with* Kansas v. Howard, 235 Kan. 236, 679 P.2d 197 (1984) (court concluded that the term "wire communication" applies only to that portion of a radio-telephone communication that is actually transmitted by wire and does not apply to the conversation while it is being transmitted between the mobile unit and the base station of a cordless telephone). *See infra* notes 193–237 and accompanying text.

By 1978, interpretive problems with the title III definitions of wire, radio, and oral communications were seemingly apparent to Congress. The Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified at 50 U.S.C. §§ 1801–1811 (1982)) (FISA), imposes restraints on electronic surveillance and wiretapping for national security purposes. In delineating the FISA regulatory scheme, Congress defined "wire communication" to mean "any communication while it is being carried by a wire . . . ." 50 U.S.C. § 1801(l) (1982). The legislative history of the definition unequivocally demonstrates an intent by Congress to foreclose any argument that interceptions of communications transmitted in part by wire and in part by radio would be governed by rules concerning wire communications when the interception occurred during radio transmission. *See* H. REP. No. 1283 (pt. I), 95th Cong., 2d Sess. 66–67 (1978); S. REP. No. 701, 95th Cong., 2d Sess. 35–37, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 3973, 4004–06; S. REP. No. 604 (pt. I), 95th Cong., 1st Sess. 33–34 (1977), *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 3904, 3934–36. The House Report explained the choice to define explicitly "wire communication" in FISA more narrowly than the corresponding definition in title III:

> [The title III definition] has led to anomalous results such as where a woman listening to an ordinary FM radio has intercepted radio-telephone communications and thereby technically violated [title III]. *See United States v. Hall*, 488 F.2d 193 (9th Cir. 1973). Also, ordinary marine band communications, which do not have a reasonable expectation of privacy or require a warrant for law enforcement interception, can be "patched into" telephone systems, becoming a "wire communication" under [title III].
>
> The definition here makes clear that communications are "wire communications" under the bill only while they are carried by a wire furnished or operated by a common carrier.

H. REP. No. 1283 (pt. I), *supra*, at 66.

a wooden application of this definition would excessively inhibit law enforcement officers in the lawful performance of their duties. Such officers would rationally refrain from intercepting a communication that lacks a legitimate expectation of privacy rather than risk exposure to the civil and criminal penalties under title III if subsequently the communication is fortuitously carried by a wire line furnished by an interstate common carrier.[154]

An "oral" communication is defined as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation."[155] By this definition, Congress intended to limit the concept of oral communications to those protected by the Fourth Amendment from warrantless or unreasonable police seizure or disclosure. Thus, extrapolating from Justice Harlan's concurring opinion in *Katz*,[156] oral communications within title III must be uttered with subjective expectations of privacy, and those expectations must have garnered societal acceptance as reasonable. A radio communication could arguably be an oral communication within the meaning of title III if the reasonable expectation of privacy test is satisfied.[157] Alternatively, Congress may have intended that section 705(a) of the Communications Act supercede title III in regulating the interception or divulgence of radio communication by law enforcement officials.[158] In addition, in many situations it is unlikely that radio communications can meet the reasonable expectation of privacy test contained in the definition of oral communications.[159]

The term "intercept" is defined to mean "the aural acquisition

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The 95th Congress thus seemingly acquiesced in the broad title III definition of "wire communication" expounded in *Hall*. The interpretive views of a subsequent Congress, however, are of little or no weight in ascertaining the legislative intent of the enacting Congress. *See, e.g.*, Consumer Product Safety Comm'n. v. GTE Sylvania Inc., 447 U.S. 102, 117–18 (1980).

The FISA also avoided ambiguities in distinguishing between radio and oral communications by addressing both types separately in the definition of electronic surveillance. *See* 50 U.S.C. § 1801(f) (1982); S. REP. No. 604 (pt. I), *supra*, at 32–36, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS at 3934–37.

[154] *See infra* notes 163, 193–206, 210–18 & 222–34 and accompanying text.

[155] 18 U.S.C. § 2510(2) (1982).

[156] 389 U.S. 347, 353 (1967) (Harlan, J., concurring); *see supra* notes 49–52 and accompanying text.

[157] *See supra* notes 110–12 and accompanying text.

[158] *See supra* notes 100–09 and accompanying text.

[159] *See infra* notes 178–80 & 240–42 and accompanying text.

of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device."[160] In turn, "electronic, mechanical, or other device" is defined to exclude, among other things, telephone equipment "used by an investigative or law enforcement officer in the ordinary course of his duties,"[161] or telephone equipment furnished to a subscriber "by a communications common carrier" and being used by the subscriber in the "ordinary course of his business."[162]

These definitional terms are further illuminated by discussing applications of title III to hypothetical communications. Suppose an intrastate cordless telephone conversation is initiated by *X* and made to *Y*, who is not using a cordless phone set. When the words of *X* travel from the cordless handset to the base station by radio, they arguably constitute title III "oral communications" if the reasonable expectation of privacy standard is satisfied. If radio communications, are governed solely by section 705(a) of the Communications Act, however, then they receive no statutory protection, as compared to Fourth Amendment protection, against interception by law enforcement officers acting in the normal course of their duties.

When the words travel intrastate over the wires of a common carrier to reach *Y*, the words are also oral communications, if they meet the legitimate expectation test of title III, and not wire communications, because the carriage is not by an interstate common carrier. Thus, intrastate conversations involving cordless telephones are not protected as wire communications, and the wire segment of such communications are protected as oral communications only if the statements made were uttered with reasonable privacy expectations. The radio segment may be protected as a title III oral communication, or it may be eligible solely for section 705(a) protection and therefore depend on constitutional restrictions as to interception by law enforcement officers. Thus, because of statutory antiquation, the extent of protection afforded to such conversations now depends on a case by case determination of the legitimate expectations of the parties and on judicial interpretation of the relationship between section 705(a) and title III.

An interstate phone conversation involving the use of a cord-

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[160] 18 U.S.C. § 2510(4) (1982).
[161] *Id.* § 2510(5)(a)(ii).
[162] *Id.* § 2510(5)(a)(i).

less phone by *X* in communicating with *Y* raises taxonomical difficulties under title III. When the words of *X* travel by radio from his cordless phone handset to the base station, and from the base station over the wires of an intrastate common carrier to its central switching system for interstate transmission, no wire communication is involved. When the words travel from the local phone company's central switch over the wires of an interstate common carrier to the central switching office of *Y*'s local telephone company, a wire communication occurs. When the words travel from the central switch of *Y*'s local phone company to his handset, no wire communication is involved. But because a portion of the conversation traveling from *X*'s cordless phone to *Y* involved a wire communication, the entire conversation falls facially within the title III definition of wire communication.

On the other hand, as discussed earlier,[163] excessive reliance on the "in part" language of the definition is not justified on policy grounds, because it would detrimentally affect law enforcement and inappropriately expand the title III protections. Moreover, if Congress intended section 705(a) of the Communications Act to govern the interception or divulgence of radio communications, this directive would be eviscerated by having title III govern merely because a radio communication is joined with a wire communication. Thus, the title III definition of wire communication should not be applied so as to encompass all of a communication simply because a part of that communication is carried by a wire line furnished by an interstate common carrier. Rather, the balance struck by Congress between privacy protection and law enforcement in the statutory scheme should determine the extent of protection afforded each distinct type of communication.

Suppose that an interexchange carrier transmits a call from the central switch of *X*'s local phone company through radio, either by microwave or domestic satellites, to the central switch of *Y*'s local phone company. The long distance carrier thus avoids the use of wire in the transmission, and the wire communication provisions of title III of the Omnibus Crime Control Act do not apply. The call from *X* to *Y* in such circumstances is a title III oral communication, but only if the reasonable expectation of privacy test is satisfied. Moreover, if radio com-

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[163] *See supra* notes 153–54 and accompanying text.

munications are regulated solely by section 705(a) of the Communications Act, then the interstate communication during carriage by microwave or satellite may be intercepted, subject to Fourth Amendment restrictions, by law enforcement officers. At present, a majority of interstate telephone calls are carried by microwave or domestic satellite by interexchange carriers.[164]

Telephone conversations involving a cordless phone should thus be trifurcated to determine the governing legal norms regarding interceptions or divulgences by law enforcement authorities. If the conversation is local, then the title III rules, applicable to oral communications seemingly are triggered. If the conversation is carried long distance by radio, or is carried by radio between a cordless phone and its base station, then section 705(a) of the Communications Act or, under the alternative interpretation, the title III oral communication rules govern while the communication travels by radio. If the conversation is interstate, and the interexchange carrier employs terrestrial wire for transmission purposes, then the title III rules for wire communications apply.

The determination of whether oral communications satisfy the reasonable expectation of privacy test of title III is complex. In *Smith v. Maryland*, the Supreme Court formulated a model for assessing such expectation of privacy claims.[165] In that case, without a warrant, police installed a pen register[166] at the central office of a telephone company. Information gleaned from the register was employed in the investigation and conviction of the defendant.[167]

Justice Blackmun, speaking for a 5-3 majority, affirmed the conviction. He denied that evidence derived from warrantless use of the pen register should have been suppressed as the fruits of a Fourth Amendment violation.[168] Blackmun used the reasonable expectation of privacy test, first enunciated by Justice Harlan in his concurring opinion in *Katz*, whereby a person seeking to invoke the protections of the Fourth Amendment

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[164] AT&T estimates that at present 70% of its domestic traffic and 60% of its foreign traffic travel by microwave or earth satellite. *Is It Safe to Use the Phone?*, TIME, Oct. 29, 1984, at 38. There is no reason to believe that a lower proportion of the traffic carried by the five other interstate common carriers is conveyed by means of radio.

[165] 442 U.S. 735, 737 (1979).

[166] A pen register is a device that records, on paper tape, all numbers dialed from the telephone line to which it is attached. *Id.* at 743–46.

[167] *Id.*

[168] *Id.*

must make the two-fold showing that he exhibited a subjective expectation of privacy regarding the information obtained by law enforcement officials and that the subjective expectation was "one that society is prepared to recognize as 'reasonable.'"[169]

Pen registers, Blackmun observed, do not entail the acquisition of the contents of communications, but disclose only the numbers a user dials on the phone.[170] Telephone subscribers in general, Blackmun asserted, lack any subjective expectation of privacy in the numbers they dial for several reasons:

> (1) Subscribers know that phone company switching equipment employed to complete calls require that numbers dialed be conveyed to the company;[171]
> (2) subscribers know that phone companies possess equipment to record permanently numbers they dial for purposes of billing long distance calls, checking billing operations, detecting fraud, preventing violations of law, and identifying persons making annoying or obscene calls;[172] and
> (3) most phone books inform subscribers that the phone company can frequently help in identifying to official authorities the origin of unwelcome and troublesome calls.[173]

The fact that phone numbers are dialed in a home, Blackmun continued, does not create a subjective expectation of privacy that otherwise is clearly lacking.[174]

Blackmun further concluded that society would not recognize as reasonable any subjective expectation that numbers dialed on a phone would remain private. A person has no legitimate expectation of privacy in information he voluntarily turns over to third parties, Blackmun reasoned.[175] Telephone subscribers voluntarily communicate to phone companies the numbers they dial, and thus assume a risk that those numbers may be recorded and disclosed to the police.[176] Whether phone companies record and disclose a large or small fraction of dialed numbers does

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[169] *Id.* at 740.
[170] *Id.* at 741.
[171] *Id.* at 742.
[172] *Id.*
[173] *Id.* at 742–43.
[174] *Id.* at 743.
[175] *Id.* at 743–44.
[176] *Id.* at 744.

not alter the nature of that risk.[177] Accordingly, society would not accept as justified any subjective expectation of privacy in dialed telephone numbers.

The application of the title III statutory or Fourth Amendment reasonable expectation of privacy standard to oral or radio conversations involving the use of cordless phones requires a multidimensional analysis. Assume *X* employs a cordless phone to make an intrastate call to *Y*, who neither uses a cordless phone nor knows that *X* is using the same. *X* would probably lack any reasonable expectation of privacy in the words he utters or hears from *Y* during their transmission between *X*'s cordless phone and its base station. All cordless phones marketed since late 1982 have been labeled to inform the user that his communications are vulnerable to interception through readily available radio equipment.[178] Furthermore, consumer magazines are available to alert cordless phone users that the privacy of their conversations might not be guaranteed if a scrambling scheme has not been incorporated in the system.[179] Moreover, cordless phone users are probably generally aware that unscrambled conversations can be overheard by anyone listening on an ordinary radio receiver tuned to the appropriate frequency.[180] Thus, *X* would probably lack any subjective expectation of privacy regarding communications traveling between his cordless phone and the base station.

Even assuming that *X* did have such an expectation, society would not recognize a subjective expectation of privacy by *X* as reasonable. As the Court explained in *Smith*, one who voluntarily conveys or exposes information to others cannot claim a legitimate expectation that police will not obtain that information.[181] *X*'s use of a cordless phone constitutes a voluntary exposure to third persons of the contents of communications during their transmission to and from the base station. Accord-

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[177] *Id.* at 745.

[178] *See* Order Granting Conditional Waiver, 48 Fed. Reg. 4788, 4791 (1983) (effective Sept. 29, 1982) (current version at 47 C.F.R. § 15.236 (1984)); *see also supra* notes 114–17 and accompanying text.

[179] *See, e.g.*, *Cordless Telephones*, CONSUMER REPORTS, Sept. 1983, at 447, 449.

[180] In *Smith v. Maryland*, 442 U.S. 735 (1979), Justice Blackmun held telephone subscribers to constructive knowledge that the numbers they dialed might be recorded and retained by the phone company because such information was supplied in phone directories. Likewise, cordless phone users should be held to constructive knowledge of the vulnerability of their conversations to interception on the basis of published articles and the labels required on cordless phones.

[181] 442 U.S. 735, 743–44 (1979).

ingly, *X* cannot invoke any legitimate expectation of privacy regarding communications during their radio transmission involving a cordless phone set. Thus, title III of the Omnibus Crime Control Act would be inapplicable to interceptions or divulgences of *X*'s conversations with *Y*, overheard by police, if the seizure occurred while the words were in transit between the base station and the cordless phone handset. Furthermore, if section 705(a) supercedes title III because the communication is by radio, there is no statutory protection because section 705(a) places no statutory limits on the interception or divulgence of radio communications by law enforcement officials.[182] Having failed to establish a legitimate expectation of privacy, *X* is also unable to invoke Fourth Amendment protection.

Y, however, stands in a different posture from *X*. He is unaware that his words are vulnerable to interception because *X* is using a cordless phone set. Such phones are not commonplace, representing only six percent of all installed phones,[183] and *Y* should not be saddled with constructive knowledge that any person with whom he converses by phone may be jeopardizing the privacy of his communications by using a cordless phone set. Thus, *Y* would probably satisfy the subjective expectation of privacy test as delineated in *Smith*. In addition, society would acknowledge that *Y*'s subjective expectation is reasonable. *Y*, unlike *X*, has not engaged in action that represents a voluntary disclosure of communications to a potentially broad array of owners of radio receivers. *Y* thus would be similarly situated to the defendant in *Katz*, who successfully claimed a reasonable expectation of privacy in the words uttered from a public telephone booth.[184] Accordingly, *Y* would satisfy the test for title III oral communications, and any interception during transit of the conversation between *X*'s cordless phone handset and the

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[182] Communications Act of 1934, § 705(a), 47 U.S.C. § 605 (1982) (to be recodified at 47 U.S.C. § 705(a)).

[183] The highest estimate of the number of cordless telephones in use by the end of 1984 is approximately 9,000,000. Sinclair, *Cordless Telephone Owners Face Problems of Privacy*, Wash. Post, Apr. 2, 1984, at A1, col. 4. In 1981, the most recent year for which census statistics are available, there were 158,000,000 telephones in use. BUREAU OF THE CENSUS, U.S. DEP'T OF COMM., STATISTICAL ABSTRACT OF THE UNITED STATES 558 table 944 (1984). Actually, this probably understates the number of telephones currently in use given the widespread availability of telephones generally and of inexpensive telephones specifically. Accordingly, even the figure of six percent of phones being of the cordless variety probably overstates the proportion of such phones in use.

[184] *Katz*, 389 U.S. at 352.

base station of communications uttered by *Y* would have to comply with the title III statutory warrant requirements. Alternatively, *Y* could invoke Fourth Amendment protection of the radio communications with *X* during transit of the conversation between *X*'s cordless phone handset and the base station, even though section 705(a) of the Communications Act does not independently offer that protection.

When an intrastate conversation between *X* and *Y* is in transit on the wires of a local phone company, no title III *wire* communication occurs. This is because the wires are not furnished by an interstate common carrier. A title III *oral* communication would be occurring on the local wires if *X* and *Y* harbored reasonable expectations of privacy during that segment of the transmission. Such reasonable expectations would seem justified under the *Smith* paradigm. Neither *X* nor *Y* subjectively would have reason to believe that their words transmitted by wire could be routinely intercepted by third parties, including law enforcement officials. Specialized equipment and affirmative schemes would be needed to make a wire interception.[185] Neither *X* nor *Y* would be voluntarily disclosing to a large number of third parties the contents of their communications during carriage by wire. Furthermore, under the *Katz* test, society would accept the subjective privacy expectations of *X* and *Y* as reasonable under the circumstances. Thus, title III would apply to official interceptions or divulgences of wire communications even though the wire is furnished by an intrastate common carrier, because the communication would be treated as "oral" under title III.

Next, suppose *X* makes an interstate phone call to *Y* which is transmitted by the interexchange carrier by radio, through microwave or domestic satellite transponders. Assume that neither *X* nor *Y* knows that radio, instead of terrestrial wire, is employed by the interexchange carrier. In this case, both *X* and *Y* probably would have a reasonable expectation of privacy in their conversation during its radio transmission. Although a substantial percentage of long distance calls are transmitted by radio,[186] neither *X* nor *Y* would know that their conversation is

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[185] Unless consensual access to the telephone set used by either *X* or *Y* was obtained, police would need to discover the local trunk wire line employed to transmit the conversation and would have to install a "tap" at the appropriate place to intercept the communication.

[186] *See supra* note 164 and accompanying text.

being carried by radio, and thus could be easily overheard by persons with an appropriate radio receiver. In addition, society probably would respect the subjective privacy expectatons of *X* or *Y* as reasonable, because they have no choice or knowledge as to how their long distance call is being routed.[187] Thus, an interexchange transmission by radio should be treated as an oral communication protected by title III and the Fourth Amendment, with additional protection offered by section 705(a) of the Communications Act. Even if radio communications are governed solely by section 705(a), an interexchange transmission by radio would receive the protection afforded by that section and interceptions by law enforcement officers would have to comply with the judicial interpretations of the Fourth Amendment warrant requirement.

Now suppose that *X* makes an interstate phone call to *Y* on a private telecommunications system that employs microwaves or satellites for transmission. Users of private communications systems ordinarily know whether radio is the mechanism for transmission and whether their conversation can be readily intercepted by third parties possessing an appropriate radio receiver.[188] Thus, neither *X* nor *Y* would seem to possess a subjective expectation of privacy in their radio communications. Moreover, society would probably not accept such an expectation as reasonable because *X* and *Y* have voluntarily chosen to employ a private radio telecommunications system which they know is vulnerable to interception by third parties, including the police. Accordingly, the communications between *X* and *Y* would be outside both Fourth Amendment and statutory protection.

If the private interstate communications system used by *X* and *Y* employs terrestrial wire rather than radio for transmission

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[187] The National Security Agency's deputy director for communications security, Walter G. Deeley, recently stated

> Anyone making a phone call to the West Coast or Boston from the Washington area has no idea how the conversation will be transmitted. It might go via fiber optics, conventional cable, microwave towers or one of the 19 domestic satellites. If [it] is going via satellite you can presume the other guy is listening to it.

Burnham, *500,000 More Spy-Proof Phones Proposed by Top Security Agency*, N.Y. Times, Oct. 7, 1984, § 1, at 40, col. 1.

[188] The users of private telecommunications systems are either purchasers of the private system or are employees of the business purchaser. A purchaser can be expected to have inquired as to how the telecommunications system operates and its vulnerability to interception. Employees of the purchaser can reasonably be charged with at least constructive knowledge of this information.

purposes, then both *X* and *Y* would seem able to meet the legitimate expectation of privacy standard necessary to qualify the conversation as a title III oral communication. No title III wire communication is involved because the wire in such circumstances is not furnished by a common carrier. Wire communications are not easily intercepted by third parties, and equipment for making such interceptions cannot be readily obtained.[189] Neither *X* nor *Y* would thus knowingly be accepting an appreciable risk that the contents of their communications would be exposed to the police or others. *X* and *Y* would thus seem to satisfy the subjective expectation of privacy standard explicated in *Smith*.[190] In addition, under the *Katz* test society most probably would accept such an expectation as reasonable. Society would view *X* and *Y* to be at least as justified as a person who employs a public telephone booth in considering their wire conversation to be private.

V. Case Law Surrounding the Use of Cordless Telephones

The case law that addresses the legality of police interceptions or divulgences of radio communications involving the use of cordless phone sets is in disarray. The reasoning involved in reaching these decisions is demonstrably flawed, and an analysis of the cases reveals a type of erratic judicial response to antiquated statutes that seemingly mocks evenhanded justice.

In *United States v. Hoffa*, a challenge was made to the legality of F.B.I. interceptions of a defendant's mobile telephone calls (transmitted via radio) by means of ordinary commercial-type frequency modulation (FM) radio receivers.[191] The court of appeals summarily dismissed the Fourth Amendment challenge, explaining that the defendant lacked any reasonable expectation of privacy because his mobile phone radio communications

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[189] While many radio communications can be received on commercially available receivers and scanners, specialized equipment for the interception of wire communications is not widely available. Indeed, such items may be seized and are subject to forfeiture. *See* 18 U.S.C. § 2513 (1982). The essential characteristic that determines whether a device is prohibited by this section is whether it was designed to be "primarily useful" for the "surreptitious interception" of private wire or oral communications. S. Rep. No. 1097, *supra* note 53, at 94, *reprinted in* 1968 U.S. Code Cong. & Ad. News at 2183.

[190] 442 U.S. at 744.

[191] 436 F.2d 1243 (7th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971).

"were exposed to everyone in [the] area who possessed an F.M. radio receiver or another automobile telephone tuned into the same channel."[192] Accordingly, the Fourth Amendment offered no protection against the warrantless interceptions by the F.B.I. The court failed, however, to discuss the scope of the statutory protection of the interception of these communications under title III or section 705(a).

A court of appeals in *United States v. Hall* examined the legality of electronic surveillance of radio-telephone conversations under section 705(a), title III, and the Fourth Amendment.[193] In that case, the criminal defendant's conversations over an automobile radio telephone were intercepted without a warrant by law enforcement authorities through the use of an ordinary radio receiver. Some of the radio-initiated phone conversations by the defendants were transmitted solely by radio to a mobile phone. Others travelled both by radio and across regular terrestrial wires of a phone company.[194]

The court reasoned that section 705(a) was not violated by the interception of communications transmitted entirely by radio calls because the statutory proscription placed no restraint on law enforcement officials.[195] Turning to title III, the court concluded that the all-radio communications were not oral communications as defined in title III because the defendants lacked any reasonable expectation of privacy in their confidentiality.[196] Interceptions of the defendants' conversations could be easily made by anyone possessing a radio receiver tuned to the correct frequency. The court rejected the argument that the radio communications were "wire" communications under title III because wires are contained in radio transmitters and receivers.[197] It observed that Congress differentiated between the concepts of wire communications and radio communications in the language of both title III and the Communications Act of 1934.[198]

With regard to the conversations initially carried by radio but subsequently carried by regular terrestrial telephone wire, the *Hall* court confessed confusion over the applicability of title

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[192] *Id.* at 1247.
[193] 488 F.2d 193 (9th Cir. 1973).
[194] *Id.* at 197.
[195] *Id.* at 195–96.
[196] *Id.* at 196–98.
[197] *Id.* at 196.
[198] *Id.* at 196 & n.5.

III.[199] A wire communication under title III, the court observed, includes any communication carried in whole or in part by wire furnished by a common carrier.[200] The Senate report accompanying title III stated that the definition of wire communication was intended to be "comprehensive."[201] Accordingly, the court declared that fidelity to congressional intent required the conclusion "that, when part of a communication is carried to or from a land-line telephone, the entire conversation is a wire communication and a search warrant is required" to legitimize any interception.[202]

The court acknowledged that its conclusion seemed doubly indefensible.[203] Both the all-radio and part-radio/part-wire communications were intercepted by ordinary radio receivers; and the defendants lacked any reasonable expectation of privacy in the conversations. The court's decision, however, treated the part land-line communication as a wire communication under title III, which garners privacy protection without any showing of a legitimate expectation of privacy, despite the absence of any compelling statutory policy to provide that protection.[204] In addition, the court's conclusion unfairly exposed law enforcement officials to civil and criminal penalties under title III[205] for intercepting a radio communication without a warrant, as sanctioned by section 705(a) of the Communications Act,[206] if the communication is subsequently carried by a wire line furnished by a common carrier, a fact that law enforcement officers are unable to ascertain at the time of a radio interception.

Addressing the Fourth Amendment challenge to the legality

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[199] *Id.* at 197–98.

[200] *Id.* at 196–97.

[201] S. REP. NO. 1097, *supra* note 53, at 89, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS at 2178.

[202] 488 F.2d at 197.

[203] "We realize that our classification . . . produces what appears to be an absurd result." *Id.* at 197.

[204] *Id.*

[205] 18 U.S.C. § 2511(1) (1982) provides, among other things, that the willful interception of wire or oral communications, other than as permitted by title III, is punishable by a fine of not more than $10,000, or imprisonment for a term not to exceed five years, or both. Additionally, persons whose wire or oral communications are unlawfully intercepted are entitled to both actual and punitive damages, plus attorney's fees and litigation costs. *See id.* § 2520; *see also supra* notes 61–65 and accompanying text.

[206] Section 705(a) does not provide an independent statutory warrant requirement. Thus, where no legitimate expectation of privacy exists, law enforcement officers do not need to obtain a warrant for the interception of radio communications because the Fourth Amendment test has not been met. Even if title III is applicable to radio communications, it would not provide a statutory warrant requirement because the title III definition of oral communication has similarly not been met.

of the all-radio communications of the defendants, the court maintained that the reasonable expectation of privacy test, which must be met to qualify as a title III oral communication, was identical to the constitutional test necessary to invoke Fourth Amendment protection.[207] Because defendants failed to satisfy the title III privacy test, their Fourth Amendment claim was unavailing.

The *Hall* opinion displays multiple misunderstandings of section 705(a) and title III. The court incorrectly believed that a radio communication might arguably fall within the definition of a title III wire communication because radio receivers and transmitters contain wires.[208] But title III requires that the wires be furnished by an interstate common carrier in order to fall within the definition of wire communication,[209] and the wires in radio receivers or transmitters are not furnished by interstate common carriers.

The court further erred in concluding that part-radio/part-wire communications should be treated as "wire" communications covered by title III, even when the interception is made during the radio portion of the transmission. In amending the initial version of section 605, Congress expressly addressed the interception of radio communications and exempted law enforcement officials from the scope of those prohibitions.[210] In contrast, in title III, Congress at best indirectly addressed the regulation of police interceptions of radio communications insofar as a radio communication might nominally fall within the definition of oral or wire communication depending on the circumstances.[211] A cardinal canon of statutory construction teaches that the more express statute supercedes the less express one if application of the two in a particular case yields any inconsistency.[212]

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[207] United States v. Hall, 488 F.2d 193, 196 (9th Cir. 1973).

[208] *Id.* at 196.

[209] 18 U.S.C. § 2510(1) (1982).

[210] Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 803, 82 Stat. 197, 223 (codified as amended at 47 U.S.C. § 605 (1982)) (to be recodified at 47 U.S.C. § 705(a)). *See* S. REP. NO. 1097, *supra* note 53, at 108, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS at 2197.

[211] Title III provides no explicit definition of "radio communication" whereas § 705(a), when read together with § 3(b) of the Communications Act, 47 U.S.C. § 153(b) (1982), does provide such a definition. To the extent that a radio communication might fall within the title III definitions of "wire" or "oral" communication, the provisions of 18 U.S.C. § 2518 (1982) would govern the procedures required to be followed by law enforcement officers seeking interception. *See supra* notes 72–82 and accompanying text.

[212] Busic v. United States, 446 U.S. 398, 406 (1980).

In the Omnibus Crime Control Act, Congress limited the statutory presumption of protection to wire communications, while protecting oral communications only if the communication satisfies the legitimate expectation of privacy test. Moreover, by amending the initial version of section 605 so that law enforcement officers are not persons for purposes of section 705(a), radio communications are also protected from interception by law enforcement officers only if a legitimate expectation of privacy exists under the Fourth Amendment. As the *Hall* court recognized, there is no reason to afford greater protection to a radio communication equally susceptible to interception by ordinary radio receivers just because it is subsequently transmitted through a wire line by an interstate common carrier.[213] To expose the intercepting officials to title III civil or criminal penalties or to suppress the evidence derived from the interceptions, in the unforeseeable event that the radio communications are subsequently carried by wire lines furnished by a common carrier, would defeat this statutory scheme. The *Hall* decision virtually nullifies the congressional amendment of section 605 because few if any law enforcement officers will seek to intercept radio communications at the risk of a criminal prosecution or intimidating civil damage suits.

The *Hall* court should have concluded that section 705(a) supercedes title III with respect to police interceptions of a communication during its carriage by radio. This result is not only consistent with traditional norms of statutory construction,[214] but also avoids any frontal assault on the twin goals of title III: protecting privacy and furthering law enforcement through the use of wiretapping or electronic eavesdropping.[215] The latter goal is promoted by making title III subservient to section 705(a) with respect to police interceptions of radio communications, while the former goal is preserved by the Fourth Amendment. In any instance where the radio communication interception would invade reasonable expectations of privacy, the Fourth Amendment will ordinarily require a warrant to make the interception lawful, notwithstanding the absence of any warrant requirement in section 705(a).[216] It is worth emphasizing

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[213] United States v. Hall, 488 F.2d 193, 197 (9th Cir. 1973).

[214] *See* Busic v. United States, 446 U.S. 398, 406 (1980).

[215] *See* S. REP. NO. 1097, *supra* note 53, at 66, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS at 2153.

[216] *See* Katz v. United States, 389 U.S. 347 (1967).

that Congress affirmatively found an absence of official abuse of wiretapping or eavesdropping in enacting title III.[217] Thus, title III is not a remedial statute that justifies resolving any statutory ambiguities in favor of expansion.[218]

In contrast to the *Hall* opinion, the ruling in *U.S. v. Clegg*[219] tacitly recognizes the propriety of treating a communication transmitted in part by radio and in part by wire as governed by section 705(a) if the interception is made during radio transmission, and by title III if the interception is made during the wire transmission. In *Clegg*, a criminal defendant challenged the legality of warrantless interceptions of communications made by a telephone company official.[220] The communications seized were transmitted in part by wire and in part by radio. The challenged interceptions were made during the wire portion of the transmission, recorded only the salutations of the caller to obtain his identity, and were initiated to detect suspected fraud on the phone company. The defendant maintained that because a portion of the intercepted conversations traveled by radio, the rules of section 705(a) should govern their legality.[221]

The court of appeals summarily dismissed this argument. It noted that the signals, when intercepted, were moving by wire within the meaning of title III of the Omnibus Crime Control Act.[222] Thus, its provisions provided the pertinent legal norms for assessing the legality of the interceptions. Applying title III, the court found authority for the questioned interceptions and divulgences by phone company officials of the defendant's communications.[223]

In *Kansas v. Howard*, the court considered the legality of warrantless interceptions by a police informant of defendant's

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[217] S. REP. NO. 1097, *supra* note 53, at 72–73, *reprinted in* 1968 U.S. CODE CONG. & AD. NEWS at 2159–60.

[218] It is well established that remedial statutes are to be liberally construed. *See, e.g.*, Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 431 (1939); International Union, UAW v. Marshall, 584 F.2d 390, 396 (D.C. Cir. 1978). Penal statutes are to be strictly construed so that no one can be subjected to a penalty unless a fair warning has been given in words which plainly impose the penalty. *See, e.g.*, United States v. Campos Serrano, 404 U.S. 293, 297 (1971).

[219] 509 F.2d 605 (5th Cir. 1975).

[220] *Id.* at 607–08.

[221] *Id.* at 611.

[222] *Id.*

[223] *Id.* at 612–13. While § 705(a) contains a prohibition against the divulgence of wire communications by persons involved in the regular transmission of communications, this prohibition does not apply to interceptions or disclosures authorized by title III. *See* Communications Act of 1934, § 705(a), 47 U.S.C. § 605 (1982) (to be recodified at 47 U.S.C. § 705(a)); 18 U.S.C. § 2511(2)(a) (1982).

conversations involving the use of cordless phone sets.[224] The interceptions were made through use of an ordinary commercial radio receiver when the conversations were traveling between the cordless handset and the base station. The Kansas Supreme Court held that the interceptions were lawful under title III.[225]

The court reasoned that the purposes of title III are best advanced by treating the radio portion of a bifurcated transmission of a communication as oral, and the wire portion as wire.[226] This interpretation, the court insisted, was necessary to avoid the "absurd" result of the *Hall* decision.[227] Because the defendants lacked any justified expectation of privacy in their conversations during transit between the cordless phone handset and the base station, the communications failed to qualify as oral under title III at the times of interception and thus no warrant requirement was imposed by law.[228]

Although the result is correct, the reasoning of the *Howard* decision is flawed. The Kansas Supreme Court failed to consider the applicability of section 705(a) in lieu of title III to interceptions of communications during transit by radio. As noted earlier, the most faithful exposition of both section 705(a) and title III commands that section 705(a) exclusively govern police interceptions of communications during any period when radio is the mechanism for transmission.[229] Because section 705(a) imposes no restrictions on police, the interceptions of radio communications were irreproachable under pertinent federal statutes. Because the defendants lacked any legitimate expectation of privacy in the intercepted conversations, the Fourth Amendment was not violated by the failure of the police to obtain a warrant before making the interceptions.

The Florida Supreme Court has also refused to follow the reasoning of the *Hall* decision in interpreting a state statute modeled after title III. In *Dorsey v. Florida*, members of a narcotics ring apparently used wires furnished by a phone company to send messages to a paging company for retransmission to various subscribers to the company's paging service.[230] The paging company transmitted the messages by radio to pocket

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[224] 235 Kan. 236, 679 P.2d 197 (1984).
[225] *Id.*, 679 P.2d at 206.
[226] *Id.*, 679 P.2d at 205–06.
[227] *Id.*, 679 P.2d at 204.
[228] *Id.*, 679 P.2d at 206.
[229] *See supra* notes 100–09 and accompanying text.
[230] 402 So. 2d 1178, 1180, 1182–83 (Fla. 1981).

pagers of the intended recipients. Without a warrant, police by means of a radio scanner intercepted the messages during their radio transit.[231] The defendant assailed the legality of the interceptions, arguing that the radio messages qualified as protected wire communications under the Florida statute.[232]

The Florida Supreme Court dismissed the argument. To avoid the "absurd result" of the *Hall* decision, the court explained, "We construe the prohibition of interception of wire communications . . . to apply only to so much of the communication as is actually transmitted by wire and not broadcast in a manner available to the public."[233] A wooden application of the definition of wire communication, the court insisted, would bring within its embrace a message broadcast over a public address system that is aided by certain wires.[234]

The senders of the beeper messages knew that their wire-line messages would be further transmitted by radio by the paging company.[235] They also knew that the radio transmissions were vulnerable to interception by members of the public who possessed ordinary commercial radio receivers.[236] Accordingly, the court concluded that there was no reasonable expectation of privacy in the intercepted radio communications, and thus the communications were unprotected by any constitutional right or by the Florida statute.[237]

The Florida Supreme Court erred in not considering the statutory legality of the radio interceptions under section 705(a) of the Communications Act and under title III. Under section

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[231] *Id.*

[232] *Id.* at 1182–83. The Florida statute defines "wire communication" as:

> "any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception, furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of intrastate, interstate or foreign communications."

FLA. STATE. ANN. § 934.02(1) (West 1973); *see also id.* § 934.03 (West 1973 & Supp. 1984) (prohibitions on interception and disclosure of wire or oral communications); *id.* § 934.07 (West Supp. 1984) (authorization for interception of wire or oral communications).

[233] *Dorsey*, 402 So. 2d at 1183.

[234] *Id.*

[235] *Id.* at 1182–84.

[236] *Id.* at 1184.

[237] *Id.* The Florida statute defines "oral communication" as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public oral communication uttered at a public meeting." FLA. STAT. ANN. § 934.02(2) (West Supp. 1984).

705(a), the interceptions were legal because they were made by law enforcement officers. Because the defendant lacked any reasonable expectation of privacy, the interceptions did not violate the Fourth Amendment and were not protected as title III oral communications. The court also erred in believing that a message broadcast over a public address system might arguably qualify as a wire communication if the communication was aided by certain wires. The wires in a public address system are not furnished by a common carrier and thus fail even facially to bring a message broadcast by the system within the definition of a wire communication under title III or under the Florida statute. The ultimate result reached in *Dorsey*, however, is correct.

A federal appeals court misapprehended the relationship between section 705(a) and title III in *United States v. Rose*.[238] There, an employee of the Federal Communications Commission intercepted a radio transmission on the "ham" radio operator's band. The employee suspected that the radio transmission violated the FCC's regulations. The interception confirmed the employee's suspicion, but he continued monitoring the radio communications for several hours thereafter. The latter monitoring revealed evidence of illegal drug trafficking, which was exploited by the government to convict several defendants.[239]

Affirming the convictions, the court of appeals rejected the claim that the interceptions by the FCC employee violated title III. The seized radio communications, the court explained, were candidates for protection under title III as oral communications only if made with legitimate expectations of privacy.[240] The facts, however, demonstrated that defendants were acutely aware of the vulnerability of their communications to easy interception: they switched frequencies during transmission, failed to identify themselves or the station on which they were operating, and occasionally used code to conceal the contents of their communications.[241] Moreover, it is common knowledge that broadcasts over ham radio frequencies can be overheard by large numbers of individuals who own suitable radio receivers.[242] Because the intercepted communications did not fall

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[238] 669 F.2d 23 (1st Cir.), *cert. denied*, 459 U.S. 828 (1982).
[239] *Id.* at 24–25.
[240] *Id.* at 25.
[241] *Id.* at 25–26.
[242] *Id.* at 26.

within the protective ambit of title III, the *Rose* court did not reach the question of whether the inteception was exempted from the title III prohibitions by section 2511(2)(b), which allows FCC employees to intercept communications in the normal course of their employment.[243]

Discussing the relevance of section 705(a), the court maintained that its prohibitions have no application to interceptions permissible under title III.[244] The court relied heavily on the fact that the first prohibition in section 705(a) is limited by the words "except as authorized by [title III]."[245] The court extrapolated from these prefatory words the extravagant conclusion that any radio communication intercept authorized by title III is outside the coverage of section 705(a).[246]

Arguably, the court of appeals erred in holding that the interception of the radio communications was governed by title III. As explained previously, Congress explicitly addressed the legality of such interceptions in section 705(a), and thus its legal norms supercede those of title III when radio communication intercepts are at issue.[247] The court's opinion eviscerates section 705(a) by limiting its proscriptions to those situations where an interception or divulgence of a radio or other communication violates title III.[248]

The court of appeals misapplied the words "except as authorized by [title III]" to all of section 705(a)'s three prohibitions, even though the words of exception appear only in conjunction with the initial prohibition pertaining to persons directly involved in transmitting a communication.[249] Under the plain meaning rule of statutory construction, the exception clause is limited to the initial prohibition of section 705(a) where, as here, there is no discernible policy reason traceable to congressional intent that would be furthered by a broader application of the clause.[250]

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[243] *Id.* at 27 n.**

[244] *Id.* at 26–27.

[245] *Id.*

[246] *Id.* at 27.

[247] *See supra* notes 100–09 and accompanying text. The *Rose* court, on the other hand, stated, "Nor does the existence of an independent statutory provision regulating the divulgence of the contents of radio communications, [Communications Act of 1934, § 705(a),] 47 U.S.C. § 605, alter our conclusion." 669 F.2d at 26.

[248] United States v. Rose, 669 F.2d 23, 26–27 (1st Cir. 1982).

[249] Communications Act of 1934, § 705(a), 47 U.S.C. § 605 (1982) (to be recodified at 47 U.S.C. § 705(a)).

[250] "[T]he normal rule of construction is that where words of exception are used, they are to be strictly construed to limit the exception." Israel-British Bank (London) Ltd.

The legality of the radio interceptions at issue in *Rose* should have been tested under the second prohibition of section 705(a). That prohibition forbids radio communication intercepts, but exempts interceptions by law enforcement officers acting in the normal course of their duties.[251] The controlling legal question, therefore, was whether the FCC employee was acting in the ordinary course of his duties when he continued to intercept the radio communications after he had obtained sufficient information to prove violations of the FCC regulations that he was officially charged with enforcing. The answer to that question is problematic.[252]

Furthermore, the court decisions that address the question of whether a communication qualifies as a "wire" communication as defined in title III share a common flaw: none even inquires as to whether the wire lines employed in carrying a conversation were furnished by an interstate common carrier, as opposed to an intrastate carrier or on private lines. This omission may reflect a lack of knowledge of the telecommunications industry—a lack of knowledge that is probably due in part to changes in technology and market structures.

VI. Applying a Title III Exemption to a Transformed Market in Phone Equipment

Title III exempts from its prohibitions interceptions of either oral or wire communications accomplished by "any telephone

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v. Federal Deposit Ins. Corp., 536 F.2d 509, 513 (2d Cir.), *cert. denied*, 429 U.S. 978 (1976) (citation omitted). *See also* Andrus v. Glover Constr. Co., 446 U.S. 608, 616–17 (1980). *See generally* 2A C. Sands, Statutes and Statutory Construction, §§ 47.08, 47.09, 47.11 (4th ed. 1973).

[251] This portion of § 705(a) states: "No person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person." Communications Act of 1934, § 705(a), 47 U.S.C. § 605 (1982) (to be recodified at 47 U.S.C. § 705(a)). The Senate report accompanying title III states that, "'Person' does not include a law enforcement officer acting in the normal course of his duties." S. Rep. No. 1097, *supra* note 53, at 108, *reprinted in* 1968 U.S. Code Cong. & Ad. News at 2197.

[252] The court in *Rose* did not address this question. *See* United States v. Rose, 669 F.2d 23, 27 (1st Cir. 1982). In declaring that law enforcement officers were not to be considered "persons" for the purposes of § 705(a), the Senate report also said, "*But see United States v. Sugden* [, 226 F.2d 281 (9th Cir. 1955), *aff'd*, 351 U.S. 916 (1956) (per curiam)]." S. Rep. No. 1097, *supra* note 53, at 108, *reprinted in* 1968 U.S. Code Cong. & Ad. News at 2197. *Sugden*, which arose under the pre-1968 version of § 605, held that interception by FCC personnel of radio communications emanating from a licensed station was only permissible to the extent necessary to enforce the Communications Act. 226 F.2d at 286. Accordingly, it was determined that radio communications mon-

or telegraph instrument, equipment or facility, or any component thereof, (*i*) furnished to the subscriber or user by a communications common carrier in the ordinary course of its business and being used by the subscriber or user in the ordinary course of its business . . . ."[253] One may be entitled to the exemption only if the intercepting telephone equipment is furnished by a "communications common carrier"—a term that embraces only companies offering interstate or foreign communications services.[254] When the exemption was enacted in 1968, AT&T, a communications common carrier, held a virtual monopoly on telephone equipment.[255] Decisions of the Federal Communications Commission subsequent to 1968, however, have opened up the telephone instrument market to countless businesses that are not communications common carriers.[256] Today, telephones can be purchased from an array of retail outlets, or from firms such as IBM or Motorola, none of which qualify as communications common carriers.[257]

In addition, the 1982 federal district court decree divesting AT&T of its local phone subsidiaries permits the latter to market, but not to manufacture, telephone instruments.[258] Local telephone companies under the decree, however, are generally foreclosed from offering interstate or foreign communications services.[259] They are permitted only to provide local lines necessary to complete interstate or foreign calls.[260] Accordingly, divested AT&T phone subsidiaries fall outside the definition of a communications common carrier for title III purposes.[261] Thus, the purchase of telephone instruments from these phone companies would destroy any claim to the title III exemption for business-related interceptions of oral or wire communications. To qualify for the exemption at present, the intercepting tele-

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itored by FCC personnel pertaining to violations of the immigration laws were protected and were subject to suppression. Had this holding been applied in the *Rose* case, it would have made the admissibility of the contents of the intercepted communications questionable because the interceptions occurred after the FCC employee had obtained the evidence needed for FCC enforcement purposes.

[253] 18 U.S.C. §§ 2510(5) (1982); *see id.* §§ 2511, 2510(4).

[254] *See id.* § 2510(10); 47 U.S.C. § 153(h) (1982).

[255] United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 163 (D.D.C. 1982).

[256] Second Computer Inquiry, Final Decision, 77 F.C.C.2d 384, 388–89 (1980).

[257] *See supra* notes 134–35 and accompanying text.

[258] United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 190–93 (D.D.C. 1982).

[259] *Id.* at 188–89.

[260] *Id.* at 226.

[261] *See supra* notes 129–30 & 144–48 and accompanying text.

phone equipment employed must have been purchased or leased from common carriers that offer interstate or foreign communications services. The following are the major contemporary common carriers providing such services: AT&T, Western Union, GTE, MCI, ITT, and SBS.[262]

Telephone equipment employed by businesses can also satisfy the title III exemption for business-related interceptions if the equipment was purchased from AT&T or its subsidiaries before the divestiture decree of the federal district court. At that time, AT&T's communications entities as a unit fell within the title III definition of a communications common carrier because interstate or foreign communications services were offered by the joint efforts of commonly owned phone companies.[263]

The legislative history of the title III exemption for interceptions by telephone instruments employed in the ordinary course of business reveals no policy reason for limiting the scope of this exemption to cases where the intercepting equipment was furnished by a communications common carrier. Canons of statutory construction, however, counsel against voiding actual words of a statute.[264] Such judicial amending of statutes is permitted only to avoid defeating their purposes or to avoid causing absurd results.[265] An interpretation of the title III exemption that ignores the origin of the intercepting telephone instruments in determining its application, however, is probably most faithful to congressional intent.[266] Congress, however, should definitively resolve this issue through statutory amendment in lieu of entrusting such authority to the federal judiciary.

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[262] AT&T and the five "other common carriers" (OCCs) handle virtually all interstate, long-distance calls not involving private systems. There are a host of resellers (*e.g.*, Allnet, U.S. Tel, Telesaver, etc.) who buy transmission capacity in bulk at a discount from these common carriers and resell it.

[263] *See* Economic Implications and Interrelationships Arising From Policies and Practices Relating to Customer Interconnections, Jurisdictional Separations and Rate Structures, 61 F.C.C.2d 766, 794–95 (1976).

[264] "It is a general rule that the courts, in the interpretation of a statute, may not take, strike, or read anything out of a statute, or delete, subtract, or omit anything therefrom. Rather, effect should, if possible, be accorded to every word and phrase." United States v. Bledsoe, 152 F. Supp. 343, 345 (W.D. Wash. 1956), *aff'd*, 245 F.2d 955 (9th Cir. 1957) (per curiam); *see also* Fulps v. City of Springfield, 715 F.2d 1088 (6th Cir. 1983).

[265] United States v. American Trucking Ass'n, Inc., 310 U.S. 534, 543–44 (1940); United States v. Missouri Pac. Ry. Co., 278 U.S. 269, 278 (1929).

[266] The legislative history of title III is silent as to why Congress limited the exception for interception to circumstances where the telephone equipment employed was supplied by a communications common carrier. The silence conveys virtually nothing regarding congressional intent because the legal rulings that opened the equipment market to noncommon carriers were made subsequent to the enactment of title III.

VII. A Proposed Remedy for Title III and Section 705(a) Antiquation

Technological and marketplace changes in the telecommunications industry have antiquated large portions of title III of the Omnibus Crime Control Act and section 705(a) of the Communications Act. Because of these industry changes, the explicit language of those federal statutes probably does not reflect the balance between law enforcement and privacy interests in communications that Congress struck in 1968. Congress, however, has refrained from amending the statutes. As a consequence, the unelected and electorally unaccountable federal judiciary is endowed with extraordinary discretion in the interpretation of title III and section 705(a) and thus might achieve a balance between law enforcement and privacy goals that diverges from the balance intended by Congress.

The Electronic Surveillance Act of 1984, a bill recently introduced by Representative Robert Kastenmeier (D-Wis.) to amend title III demonstrates the ignorance of the antiquated features described in this Article.[267] In introducing this bill, Kastenmeier observed that "technology has outstripped existing law on electronic surveillance, leaving loopholes for wiretappers, public and private. My bill closes those loopholes, restoring the result intended by Congress when it passed the law criminalizing wiretapping, the Omnibus Crime Control and Safe Streets Act of 1968."[268] The bill, however, fails to address the legal confusion attributable to the terms "oral," "radio," or "wire communications," "communications common carrier," or "telephone equipment furnished by a common carrier."

The bill is commendable, however, in addressing title III antiquation due to increasing use of telephone lines to transmit data or video information or to carry human conversation in digital form.[269] Title III, at present, protects only against interceptions or divulgences of aural communications, defined as embracing communications capable of being heard by the human ear.[270] The prospects for passage of Kastenmeier's bill are unknown.

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[267] H.R. 6343, 98th Cong., 2d Sess. (1984).

[268] 130 Cong. Rec. E4107–08 (daily ed. Oct. 1, 1984) (statement of Rep. Kastenmeier).

[269] H.R. 6343, 98th Cong., 2d Sess. § 2(a) (1984) (striking the word "aural" from § 2510(4) of title III).

[270] 18 U.S.C. § 2510(4) (1982); S. Rep. No. 1097, *supra* note 53, at 90, *reprinted in*

Further technological and marketplace alterations can be anticipated in the dynamic field of telecommunications. Such alterations will compound the current interpretative problems in applying title III and section 705(a) to the interception and divulgence of private communications. If Congress persists in failing to amend these statutes to solve the interpretative problems associated with antiquation, the federal judiciary will be endowed with even greater policymaking power over law enforcement and privacy issues.

To prevent this transfer of policymaking authority to judicial tribunals, Congress should delegate authority to the Department of Justice to expound through rulemaking the meaning of critical concepts in title III and section 705(a). The concepts would include oral communication, radio communication, wire communication, communications common carrier, and telephone equipment. The Justice Department would conduct informal rulemaking proceedings under the Administrative Procedure Act in exercising its delegated authority under title III and section 705(a).[271] During the rulemaking proceedings, expert agencies conversant in technological or marketplace developments in the world of communications, such as the Federal Communications Commission and the National Telecommunications Information Agency, would be expected to file comments that would cast light on possible areas of statutory ambiguity. Rulemaking is not foreign to the Justice Department's current responsibilities. The Drug Abuse Prevention and Control Act entrusts extensive rulemaking power to the Attorney General.[272]

The Justice Department should be instructed by Congress to expound the concepts in a fashion that achieves a reasonable balance between law enforcement needs and cherished privacy norms or traditions. The Justice Department's embellishments on the statutory terms would be armed with a presumption of legality. Federal courts would be authorized to nullify the Justice Department's regulatory pronouncements only by finding clear and unequivocal error.[273]

1968 U.S. CODE CONG. & AD. NEWS at 2178; 130 CONG. REC. E4108 (daily ed. Oct. 1, 1984) (Rep. Kastenmeier's introduction of his bill as a remedy to the loophole created by title III's governance of aural communications alone).

[271] *See* Administrative Procedure Act, § 553, 5 U.S.C. § 553 (1982) (delineating procedures for informal rulemaking).

[272] *See* 21 U.S.C. §§ 811(a), 812, 871(b) (1982).

[273] *Cf.* Administrative Procedure Act, § 706(2)(A), 5 U.S.C. § 706(2)(A) (1982) (reviewing court shall set aside agency action, findings, and conclusions when the court

The proposed scheme for keeping title III and section 705(a) abreast of technological or marketplace change is not ideal. It possesses, however, the virtues of curtailing the judicial policymaking that accompanies obsolete statutes and of enhancing clarity and predictability in the administration of the law.[274]

VIII. CONGRESSIONAL RECAPTURING OF POLICYMAKING AUTHORITY

The constitutional scheme makes Congress dominant among the various branches of government in the formulation of public policy. The entrustment of such authority to Congress enables the electorate to exercise a pivotal influence over public policy through the ballot box. This type of ballot box power is the hallmark of an effective democracy.

Antiquation of federal statutes through marketplace changes, technological advances, or other changes threatens to undermine traditional constitutional norms of policymaking by relegating congressional directives to the periphery of legal decisionmaking. To recapture policymaking authority lost by statutory antiquation, Congress should consider a variety of tactics.

In areas where statutory antiquation seems probable, sunset provisions of five, ten, or fifteen years might be attached to pertinent provisions. As the sunset year approached, the threat that a network of regulatory laws might lapse should spur Congress to evaluate meticulously the existing legal regime and to reach definitive policy decisions as to the need for continuance, modification, or clarification.

Special committees might be created in the House or Senate to monitor statutory antiquation. The committees might be endowed wih authority to compel consideration on the floor of either the House or the Senate of any proposed statutes that would amend laws in order to dispel legal ambiguities attributable to antiquation.

An independent commission might be established to report

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finds that they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," unconstitutional, or in excess of statutory jurisdiction).

[274] The advantages that agency rulemaking has over judicial policymaking include greater agency expertise, increased political accountability of administrative personnel appointed by an elected President, and delineation of standards in advance in order to facilitate public and private planning.

annually to Congress on areas of the law in need of revision because of unforeseen technological or marketplace developments. The commission would propose statutory language that would dispel the legal inexactitude created by such changes.

To avoid repetitive legislation, Congress might endow all executive and independent agencies with broad rulemaking authority to address problems arising under the statutes they administer, because of changing technology or altered market structures. Congress would need to provide some coherent policy guidance to the agencies to avoid constitutional condemnation for delegating excessive legislative power.[275] Executive or independent agencies are not directly accountable to the people, as is Congress. Such agencies are more accountable than federal courts, however, because they are managed by persons without life tenure and who ordinarily can be replaced by the electorate through presidential elections. Thus, executive and independent agencies are to be preferred constitutionally to the federal judiciary in the forging of public policy.

While none of these proposals completely restores primary policymaking authority to representative organs of government in areas where technological or marketplace change seems endemic, all are preferable to the status quo. The present system confers policymaking authority by default on the federal judiciary through the judicial exposition of antiquated federal statutes.

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[275] *See* Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1934), *cited with approval in* National Cable Television Ass'n, Inc. v. United States, 415 U.S. 336, 342 (1974); Industrial Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 685–87 (1980) (Rehnquist, J., concurring).

ARTICLE

CRIMES AGAINST THE UNBORN: PROTECTING AND RESPECTING THE POTENTIALITY OF HUMAN LIFE

JEFFREY A. PARNESS*

Although the Supreme Court's decision in Roe v. Wade limits the states' ability to regulate consensual abortions, it recognizes a state interest in the potential life of the unborn and does not limit the states' power to act in situations where a mother's privacy right is not implicated. The states nonetheless provide only limited protection for the unborn under current criminal and civil laws. As Professor Parness illustrates, even in those states with strong public policy and social sentiment in favor of treating the unborn with respect and dignity, the failure to set forth this purpose clearly in a comprehensive statutory scheme leads to inadequate protection.

Professor Parness advocates strengthening criminal, tort, family, and regulatory law in order to vindicate general and individual interests in the existence of the unborn. According to Professor Parness, however, the linchpin of this effort must be the criminal law, because it provides the clearest signal of legislative intent and the strongest deterrence of harmful acts. He argues that initial efforts should focus on the drafting and passage of "Crimes against the Fetus" laws. If greater scientific knowledge of the effects of current acts on future generations helps generate a consensus in favor of protection of the potential life of the unconceived, then the statutory scheme should be expanded to cover "Crimes against the Unborn."

The United States Supreme Court's controversial decision on abortion in *Roe v. Wade*[1] does not preclude governmental conduct extending protection and respect for the unborn. In fact, the decision recognizes and sanctions state action promoting such interests both within and without the abortion context. One possible form of such governmental action is the imposition of criminal sanctions outside the limited consensual abortion setting addressed in *Roe*.

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[1] 410 U.S. 113 (1973).

Two different governmental objectives serve as the catalyst for the imposition of criminal sanctions extending protection and respect for the unborn. The major objective behind extending protection to the unborn is the promotion of an unborn's actual and healthy birth. The chief goal behind extending respect is a recognition of the humanness of the fetus in situations where promotion of the unborn's live birth is either not desired, or desired but impossible.

Extension of protection and respect for the unborn through criminal laws is in line with significant societal interests. Such interests are founded at times on both a general public interest and a particularized individual interest in the unborn human. Notwithstanding these interests, contemporary criminal laws often fail to extend sufficient protection and respect to the unborn. Furthermore, legal rules in the noncriminal context have often inadequately promoted these same interests. Contemporary criminal laws should be redefined so that the necessary protection and respect is extended to the unborn. These laws should include new and expanded crimes by prospective parents, their attending medical counselors, and third parties. Additionally, judges who interpret and apply new and existing criminal laws involving the unborn should respond to these significant social interests in the extension of adequate protection and respect for the unborn.

I. The Legitimacy of Protecting and Respecting the Unborn Through Criminal Law

The state objective of protecting the unborn's potentiality of life embraces two concerns: that the unborn will be born and that the unborn will have the chance to live a whole or unimpaired life after birth. Thus, the state may seek to ensure that future generations of human beings will exist and that they will exist in their fullest potential. Every potential person represents a member of some new generation. The elimination of this potential person caused by the conduct of others depletes at least the quantitative possibilities of any future generation. Furthermore, great resources for the future may lie dormant both in the unconceived unborn and in developing fetuses whose life works may have an impact on society in a positive way if they

are allowed to develop unimpaired. Consequently, whenever a potential person is injured by conduct that triggers disabilities at birth, that unborn person's full contribution to future generations may be lost or depleted qualitatively.

Protecting the unborn's potentiality of life usually comports with a general public interest. This interest often prompts governments to encourage private decisions and actions leading to childbirth[2] and to help those involved in childbegetting and childbearing to eliminate the chances of birth defects.[3] This

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[2] This general public interest is reflected in legislative enactments and administrative regulations that encourage childbirth in order to protect the potential life of fetuses. *See, e.g.*, Hyde Amendment, Pub. L. No. 96-123, § 109, 93 Stat. 926 (1979), *construed in* Harris v. McRae, 448 U.S. 297, 324–25 (1980) (federal government can pursue the legitimate objective of protecting potential life by subsidizing the medical expenses of indigent women who carry their pregnancies to term while not subsidizing the comparable expenses of most indigent women who undergo abortions, and thus government can establish incentives that make childbirth a more attractive alternative than abortion for persons eligible for Medicaid); 3 CONNECTICUT WELFARE DEP'T, PUBLIC ASSISTANCE PROGRAM MANUAL ch. III, § 275 (1975), *construed in* Maher v. Roe, 432 U.S. 464, 478–79 (1977) (state governments can pursue the "'strong and legitimate interest in encouraging normal childbirth, . . . an interest honored over the centuries,'" by subsidizing the medical expenses of indigent women who choose childbirth and by not subsidizing the medical expenses of indigent women who choose to undergo an elective abortion).

Of course, childbirth may be encouraged for reasons other than the protection of the fetus. *See Maher*, 432 U.S. at 478 n.11 ("[A] State may have legitimate demographic concerns about its rate of population growth. Such concerns are basic to the future of the State and in some circumstances could constitute a substantial reason for departure from a position of neutrality between abortion and childbirth.").

Under some circumstances, courts have permitted governmental action that discourages childbirth; however, this action usually occurs in the preconception stage where there is no fetus to protect. The state interest in preventing the birth of mentally ill children by a policy of compulsory sterilization is one example of such a policy. *See* Buck v. Bell, 274 U.S. 200 (1927) (state-ordered sterilization of retarded to prevent the birth of mentally ill upheld). *But see* Skinner v. Oklahoma, 316 U.S. 535 (1942) (invalidating a state statute providing for sterilization of persons convicted of two or more felonies involving moral turpitude). While some Supreme Court opinions have cited *Bell, see, e.g.*, Roe v. Wade, 410 U.S. 113, 154 (1973); Doe v. Bolton, 410 U.S. 179, 215 (1973) (Douglas, J., concurring), the *Skinner* decision indicates that governmental power to intervene at the preconception stage in the decision to reproduce is limited. Indeed, the philosophy in *Skinner*, that the state may not interfere with a person's decision to procreate, is not consistent with the proposition that the state may usurp that decision. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-10, at 923 (1978).

States may also attempt to further a general public interest that is unprotective of the unborn by preventing the conception of children likely to suffer genetically-transmitted birth defects. *See* Criminal Code of 1961, § 11-11, ILL. ANN. STAT. ch. 38, § 11-11 committee comment (Smith-Hurd 1979) (indicating that one purpose of the Illinois criminal incest law is to prevent birth defects). States may also have an interest in avoiding welfare expenditures for some as yet unconceived. *See* Ferster, *Eliminating the Unfit—Is Sterilization the Answer?*, 27 OHIO ST. L.J. 591, 623–24 (1966).

[3] This general public interest is often reflected in enactments that provide financial assistance, information, and counseling to prospective parents desirous of eliminating and preventing birth disabilities for their future offspring. *See, e.g.*, 42 U.S.C. § 701(a)(2) (1976 & Supp. V. 1981) (authorizing appropriations for states to reduce "the incidence

general public interest in potential life protection is also often reflected in state legislative resolutions urging constitutional change to override the *Roe* decision and to afford quantitative protection of potential life.[4] While these resolutions have not prompted changes in *Roe*, the adoption of such resolutions by representative legislative bodies reflects a significant general public interest in support of protecting the unborn's potentiality of life in both the quantitative and qualitative sense.

Beside the general public interest in the protection of potential life, many individuals now living—including but not limited to prospective parents—have particularized interests in securing the actual or healthy births of certain unborn fetuses.[5] Protecting potential life also comports with furthering these particularized individual interests. Finally, an individual's particularized interest in securing the birth of healthy offspring is usually viewed as so important to the populace that governments often help

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of preventable diseases and handicapping conditions among children"); *id.* § 241(a) (1976 & Supp. V. 1981) (mandating that the Secretary of Health and Human Services promote research relating to the prevention of human physical and mental diseases and impairments); CAL. HEALTH & SAFETY CODE § 150(c) (West 1979) (establishing state policy to alleviate or to cure hereditary disorders); *id.* § 309 (West Supp. 1982) (establishing state policy supporting early detection of preventable heritable disorders); MD. PUB. HEALTH CODE ANN. § 13-102 (1982) (formulating state policy to alleviate or cure hereditary disorders). The interest is also often reflected in tort cases in which certain disabilities have been found compensable because of the public policy to afford protection to those injured as a result of prenatal acts. *See, e.g.*, Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 357, 367 N.E.2d 1250, 1255 (1977) (plurality opinion); *id.* at 366, 367 N.E.2d at 1259 (Dooley, J., concurring); Rodriguez v. Patti, 415 Ill. 496, 497, 114 N.E.2d 721, 721 (1953).

[4] *See, e.g.*, H.R.J. Res. 15, 47th Leg., Reg. Sess., 1981 Mont. Laws 1584–85; S.J. Res. 9, 1980 Reg. Sess., 1980 Ala. Acts 395; S. Res. 1073, 1980 Reg. Sess., 1980 Mass. Acts 240; H.R. Con. Res. 9, 64th Leg., 2d Reg. Sess., 1980 W. Va. Acts 725; H.R. Con. Res. 3, 1979 Reg. Sess., 1979 Miss. Laws 1137; S. Con. Res. 4015, 46th Leg. Assembly, Reg. Sess., 1979 N.D. Sess. Laws 1868; H.R. Res. 7, 1978 Reg. Sess., 1978 Ky. Acts 1401; L. Res. 152, 85th Leg., 2d Reg. Sess., 1978 Neb. Laws 1241; H.R. Res. 71, 1978 Sess., 1978 Pa. Laws 1431; H.R.J. Res 28, 42d Leg., Reg. Sess., 1977 Utah Laws 1263; S.J. Res. 32, 78th Gen. Assembly, 1974 Sess., 1974 Ill. Laws 1674; S.J. Res. 26, 58th Leg., Reg. Sess., 1974 Nev. Stat. 2003.

[5] In part, such parental interests are recognized within the federally-protected childbegetting, childbearing, and childrearing rights. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (right to privacy encompasses the right to be "free from unwarranted governmental intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child"); *see also* Stanley v. Illinois, 405 U.S. 645, 651 (1972) (the rights to conceive and raise children have been deemed "essential").

Individuals often have particularized interests in securing the termination of potential life. Wrongful birth suits (in which compensation is sought for negligent sterilization or abortion procedures that do not prevent unwanted birth), voluntary sterilization, and the use of other means of preventing conception are manifestations of these interests. Such interests are also sometimes supported by constitutional doctrine. *See generally Eisenstadt*, 405 U.S. at 453.

promote healthy childbirth in order to assist the individual in achieving his particularized interest.[6]

Because only those living today can prepare the environment for those of tomorrow, state legislators and state judges should strive to protect the potentiality of human life. Concern for potential human life already appears in differing types of state statutes and state judicial opinions recognizing the unborn as deserving of legal protection. For example, an Idaho statute acts prospectively by providing that in the event that states are again permitted to safeguard the lives of unborn infants before the twenty-fifth week of pregnancy, the Idaho laws that permit abortions are repealed.[7] Most relevant state laws, however, relate to present conduct and define the fetus as a person for certain tort, property, and criminal law purposes. Thus, injuries to a fetus are sometimes compensated under tort law;[8] property of a deceased may be passed to a fetus;[9] and attacks on a fetus may fall within criminal law prohibitions.[10] In addition, current laws sometimes protect the human unborn's potentiality of life

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[6] The interest in support of aiding living individuals to secure their childbearing goals is distinct, but often in harmony with, the general public interest favoring protecting potential life. Governments might only fail to assist an individual in securing the birth of healthy offspring where the general public interest in terminating potential life runs counter to the individual's particularized interest in protecting potential life. Involuntary sterilization programs designed to serve the public interest by reducing population growth in cases of overpopulation or by decreasing the numbers of disabled newborns provide a case in point. Of course, where the general public interest in promoting birth runs counter to a particularized individual interest in terminating potential life (for example, where a mother seeks a third trimester abortion in conflict with the state's interest in promoting the health of the fetus), governments might seek to impose upon the individual the goal of securing the birth of offspring. Where governments seek to overturn individual decisions regarding potential life protection, only a compelling state interest will be sufficient if the individual's fundamental rights are implicated. *See* Roe v. Wade, 410 U.S. 113, 154. *Cf.* Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (the right to procreate was regarded by the court as one of the "basic civil rights of man" demanding "strict scrutiny" of classifications which states make in sterilization laws).

[7] *See* IDAHO CODE § 18-613 (1979). *Cf.* Abortion Law of 1975, § 1, ILL. ANN. STAT. ch. 38, § 81-21 (Smith-Hurd 1977) (if *Roe* is ever reversed, former policy of prohibiting all abortions unless necessary for the preservation of the mother's life will be reinstated).

[8] *See, e.g.*, O'Grady v. Brown, 654 S.W.2d 904, 910 (Mo. 1983) (the term "person" as used in the Missouri wrongful death statute includes the human fetus *en ventre sa mere*); Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 367 N.E.2d 1250 (1977) (duty of care found owing to an unborn prior to conception, where preconception acts of the defendant caused disabilities at birth).

[9] *See, e.g.*, UNIFORM PROBATE CODE § 2-108 (1969) ("relatives of a decedent conceived before his death but born thereafter inherit as if they had been born in the lifetime of the decedent"); Industrial Trust Co. v. Wilson, 61 R.I. 169, 185, 200 A. 467, 475 (1938) (unborn entitled to income from a trust from the time of father's death).

[10] *See, e.g.*, CAL. PENAL CODE § 187 (West Supp. 1982) (homicide defined as the unlawful killing of a human being or a fetus); *id.* § 270 (West Supp. 1982) (child abandonment and neglect law includes as a victim a child conceived but not yet born).

indirectly by assisting potential parents in securing the live and healthy birth of the unborn. Examples are provided by the constitutional limits on state activity deterring or prohibiting human procreation and by federal and state efforts to aid prospective parents who seek to avoid physical and mental disabilities for their future offspring.[11]

The state objective of promoting recognition of and respect for the humanness of the fetus derives from the conviction that a certain dignity must be afforded potential life even during the early stages of human development. Respect for the human fetus is promoted in at least two different ways. First, a number of states require that the disposal of fetal remains occur in a "humane" or an otherwise respectful way.[12] Such laws are exemplified by the Louisiana provision that requires that a physician who performs an abortion must "insure [sic] that the remains of the unborn child are disposed of in a manner consistent with the disposal of other human remains."[13] Second, some states uphold the humanity of the fetus by limiting fetal experimentation. Illustrative are statutes generally prohibiting experimental research on a human fetus, except when research is designed to preserve fetal life.[14] Statutory provisions on fetal disposal and fetal experimentation suggest that in contemporary American society, the fetus is sometimes accorded the same dignity as a human being born alive. Similar to the protection afforded potential life, such legislative action may reflect significant sentiment regarding the status of the unborn mandated by general public interest, by the particular desires of certain individuals, or by both.

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[11] *See supra* notes 3 & 5 and accompanying text.

[12] *See, e.g.*, LA. REV. STAT. ANN. § 40:1299.35.14 (West Supp. 1983) (fetal remains are to be disposed in manner consistent with disposal of "other human remains"); N.D. CENT. CODE § 14-02.1-90 (1981) (fetus must be disposed of in humane fashion under regulations established by the state Department of Health); PA. STAT. ANN. tit. 35, § 6605(c) (Purdon 1977) (the state Department of Health shall make regulations for humane disposition). Regulations promulgated pursuant to the North Dakota statute were invalidated in Leigh v. Olson, 497 F. Supp. 1340 (D. N.D. 1980), although the statute was found to be constitutional on its face. *See infra* notes 221–24 and accompanying text.

[13] LA. REV. STAT. ANN. § 40:1299.35.14 (West Supp. 1983).

[14] *See id.* § 40:1299.35.13 (West Supp. 1983); Abortion Law of 1975, § 6.3, ILL. ANN. STAT. ch. 38, § 81-26(3) (Smith-Hurd 1977). *See generally* NATIONAL COMM'N FOR THE PROTECTION OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, U.S. DEP'T. OF HEALTH, EDUCATION & WELFARE, REPORT AND RECOMMENDATIONS: RESEARCH ON THE FETUS 61–62, 67, 74 (1975) [hereinafter cited as RESEARCH ON THE FETUS]; Wilson, *A Report on Legal Issues Involved in Research on the Fetus* in RESEARCH ON THE FETUS 14-1; Capton, *The Law Relating to Experimentation with the Fetus* in RESEARCH ON THE FETUS 13-1.

That states may labor to protect the potentiality of life and to compel respect for prebirth forms of life should not be surprising. The United States Supreme Court put its imprimatur on these governmental objectives in *Roe v. Wade*.[15] In *Roe*, the Supreme Court recognized and approved the state's "important and legitimate interest in protecting the potentiality of human life."[16] While the decision in *Roe* declares that the state may not protect the potential life of the human fetus from the moment of conception, it does so only in the very narrow context of the mother's abortion decision.[17] In this regard, the decision in *Roe* has been grossly misunderstood. Some have read it as a clear and sweeping rejection of the state's ability to protect previable, potential human life.[18] The decision was not so sweeping.

II. Inadequacies of Contemporary Protection and Respect for the Unborn in Criminal Law

A. *Introduction to Contemporary Criminal Law Protecting the Potentiality of Life*

An examination of contemporary American crimes against the unborn seemingly should begin with an inquiry into the manner in which civilized societies have treated the unborn in the criminal law. The inquiry into history is helpful, for it demonstrates that the deficiencies in the contemporary criminal law's protec-

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[15] 410 U.S. 113, 150 (1973).

[16] *Id.* at 162.

[17] *Id.* at 162–65.

[18] Certain judicial decisions have encouraged the misunderstanding. For example, in People v. Smith, 59 Cal. App. 3d 751, 757, 129 Cal. Rptr. 498, 502 (1976), the court reached this erroneous conclusion:

> The underlying rationale of *Wade*, therefore, is that until viability is reached, human life in the legal sense has not come into existence. Implicit in *Wade* is the conclusion that as a matter of constitutional law the destruction of a nonviable fetus is not a taking of human life. It follows then that such destruction cannot constitute murder or other form of homicide, whether committed by a mother, father (as here), or a third person.

See also Larkin v. Cahalan, 389 Mich. 533, 542, 208 N.W.2d 176, 180 (1973) ("By reason of Roe v. Wade, we are compelled to rule that as a matter of federal constitutional law, a fetus is conclusively presumed not to be viable within the first trimester of pregnancy."); Margaret S. v. Edwards, 488 F. Supp. 181, 222 (E.D. La. 1980) (*Roe* "held that 'the word "person," as used in the Fourteenth Amendment, does not include the unborn.' 'Since the fetus is not a person,' neither is it a human being."(citations omitted)). The *Margaret S.* court blithely jumps from the *Roe* holding that the fetus is not a person for Fourteenth Amendment purposes to the holding that the fetus cannot be equated to a human being in any context. *Id.*

tion of the unborn parallels the deficiencies in earlier laws. Both past and present criminal laws can be characterized as being inadequate and shrouded in doubt.

Doubts regarding earlier criminal laws relating to the unborn concern, in part, the extent to which such laws were meant to protect potential life. A review of criminal abortion laws throughout history suggests many such laws were intended only to promote the interests of one or both parents.[19] Such limited intent often was not apparent from the face of the laws. Moreover, earlier laws involving the unborn that clearly were intended to protect potential human life could be read as advancing the general public interest in securing the birth of the unborn, the particularized interests of certain individuals in securing the birth of an unborn, or both. Without an indication as to which interests the laws sought to promote, the proper implementation of protective laws was difficult.

The doubts and inadequacies in the earlier criminal laws serve to explain the deficiencies in contemporary American criminal laws. After quickly reviewing former laws,[20] a mode of analyzing contemporary crimes will be established. Such a mode should seek ways that will help minimize doubts and inadequacies, and that extend to the unborn certain and sufficient protection and respect.

1. The Ancient Sentiment on Consensual Abortion

The practice of artificial abortion is said to be at least 4600 years old.[21] During the age of the Persian Empire, abortifacients had been discovered and were being utilized, although punishment for criminal abortions was severe.[22] During the eras of Greek and Roman preeminence, abortion was practiced much more freely. Both Plato and Aristotle advocated abortion, as well as infanticide, as a method of population control.[23] As a result of this approving attitude toward abortion, the Greek and Roman societies offered little protection to the unborn. In fact,

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[19] *See infra* note 24 and accompanying text.

[20] *See infra* text accompanying notes 28–34.

[21] G. WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 148 (1957).

[22] A. CASTIGLIONI, A HISTORY OF MEDICINE 84 (E. Krumbhaar trans. & ed. 1947). For a detailed review of the earliest abortion laws, see generally Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L.J. 395, 399–422 (1961).

[23] WILLIAMS, *supra* note 21, at 148 (discussing ARISTOTLE, POLITICS, at *1335b 25; PLATO, REPUBLIC, at *461c).

any prosecution that did result in these eras probably was based on the father's right to his offspring.[24] Later, when the Christian churches forcefully opposed both abortion and infanticide based on the sanctity of the life of the unborn and the born, abortions again were more restricted.[25]

Having determined with the help of the church that the sanctity of prebirth life was worthy of protection, society was faced with the question of when life began. Though this question has proven elusive throughout time, there was a "virtually unanimous consensus" in the European Middle Ages on the theory of "mediate" animation of the fetus.[26] Stated simply, the view was that the fetus was ensouled at some point between conception and birth. Although there was consensus on the theory, the exact point of animation was in dispute. Whichever period of time was accepted, all believed that prior to animation, consensual abortion did not constitute homicide.[27]

2. The Common Law on Consensual Abortion

The "mediate" animation theory also provided the foundation for the early common law of England.[28] One of the earliest references to the criminal nature of abortion was made by Henry Bracton, the thirteenth century English jurist. He said in the early thirteenth century that abortion by assaultive blow or by poison constituted homicide if the fetus was formed or quick-

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[24] *See* Feen, *Abortion and Exposure in Ancient Greece*, in ABORTION AND THE STATUS OF THE FETUS, 283, 291 (W. Bondeson, H. Engelhardt, Jr., S. Spicker & D. Winship ed. 1983); Sinclair, *The Legal Basis for the Prohibition on Abortion in Jewish Law*, 15 ISRAEL L. REV. 109, 110 (1980) (father's right found in Book of Exodus).

[25] *See* G. WILLIAMS, *supra* note 21, at 148–49.

[26] Means, *The Law of New York Concerning Abortion and the Status of the Foetus, 1664–1968: A Case of Cessation of Constitutionality*, 14 N.Y.L. FORUM 411, 411–12 (1968) (citing R. HOSER, THE CRIME OF ABORTION IN CANON LAW 55–56 (1942); J. NOONAN, CONTRACEPTION: A HISTORY OF ITS TREATMENT BY THE CATHOLIC THEOLOGIANS AND CANONISTS 90 (1965)).

[27] R. HUSER, THE CRIME OF ABORTION IN CANON LAW 15 (1942).

[28] While the "mediate" animation theory continues to underlie many criminal statutes, currently it vies for legislative recognition with two other theories. As one commentator notes:

> It has come to pass, in our modern pluralistic society, that the mediaeval consensus in favor of mediate animation, in which the English common law was born and bred, has disappeared. Mediate animation survives, and has its advocates, but it is no longer the sole school of thought. It has been joined by two others, immediate animation on the right, and animation at birth on the left, each with ardent advocates of its own.

Means, *supra* note 26, at 416.

ened.[29] This statement, however, later met with a significant degree of resistance.[30]

Even if the point of quickening was the time during gestation at which the fetus was deemed worthy of protection, debates ensued on the manner in which the legal protection should be conferred. The predominant view, unlike that of Bracton, was that abortion or malicious killing of an animated fetus was, at most, a lesser offense than homicide. This view found expression in the writing of Sir Edward Coke, who asserted that the abortion or malicious killing of a quickened child "is a great misprison."[31]

Coke's view was incorporated into the works of later writers. While Blackstone acknowledged that abortion or malicious killing of a fetus was once homicide or manslaughter, though not murder, he found that Sir Edward Coke "doth not look upon this offence in quite so atrocious a light, but merely as a heinous misdemeanor."[32]

The writings of the great common law scholars at best suggest that the killing of a quickened or otherwise animated fetus may have constituted homicide in early common law. The writings therefore imply that the law failed to prescribe any sanction for the killing of an unquickened child. Some contemporary legal scholars, however, doubt that any common law crime of abortion was ever significantly enforced, even where a quickened fetus was involved.[33] These doubts were persuasive enough to compel the United States Supreme Court in *Roe v. Wade* to state that scholarship "makes it now appear doubtful that abortion was ever firmly established as a common law crime, even with respect to the destruction of a quick fetus."[34]

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[29] 2 H. BRACTON, ON THE LAWS AND CUSTOMES OF ENGLAND 341 (S. Thorne ed. 1968), *cited in* Roe v. Wade, 410 U.S. 113, 134 n.23 (1973).

[30] *See infra* notes 31–34 and accompanying text.

[31] E. COKE, INSTITUTES OF THE LAWS OF ENGLAND pt. 3, *50, *cited in* Roe v. Wade, 410 U.S. 113, 135 (1973). Cases occurring in England between Bracton and Coke's writings are reviewed in Winfield, *The Unborn Child*, 8 CAMBRIDGE L.J. 76, 78 (1944). Coke posited that a child who was assaulted or poisoned as a fetus, born alive and then died as a result of the prenatal injury, was murdered. E. COKE, INSTITUTES OF THE LAWS OF ENGLAND, pt. 3, *50. For a history of the "born alive" rule, see Keeler v. Superior Court, 87 Cal. Rptr. 481, 484–86, 470 P.2d 617, 620–22 (1970).

[32] 1 W. BLACKSTONE, COMMENTARIES *129–30.

[33] *See* L. LADER, ABORTION 78–79 (1966); *see also* Note, *The Law and the Unborn Child*, 46 NOTRE DAME LAW. 349, 363 (1971) ("In fact, at common law the abortion of an unborn child prior to quickening was no crime at all if the woman consented; if the woman did not consent to the abortion, the offense was merely an assault and battery.").

[34] 410 U.S. at 136.

3. The Modern, Pre-*Roe* Statutory Law

During the nineteenth century, the recognition of the exiguous protection that the common law provided the unborn, the increasing concern regarding the quality of medical treatment afforded pregnant women, the thought that white, Protestant, middle class people might become a minority, and the desire to discourage illicit sexual conduct led to criminal abortion laws buttressing the interests of the unborn.[35] These concerns manifested themselves in new abortion statutes that resulted in more complete promotion of the unborn's potentiality of life. In 1803, England enacted a new abortion statute, the Miscarriage of Women Act.[36] This Act altered the common law rule. The changes were described as follows:

> In 1803 the first English statute on abortion removed the requirement—originated by Coke, enunciated by Blackstone—that the act come after quickening, although it did preserve a distinction. It condemned the willful, malicious and unlawful use of medical agents (with no reference to surgical) with intent to induce abortion, without regard to whether the attempt was effective, or whether death resulted to the mother. It was made a felony in every case, but punishable by death only if the potion was given after quickening, otherwise ("wilfully and maliciously") only by transportation up to fourteen years, whipping, the pillory, imprisonment, "one or more of the said Punishments."[37]

Parliament amended the Act in 1828,[38] again in 1837,[39] and finally incorporated it into the Offenses Against the Persons Act of

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[35] White, *The Concept of Person, the Law and the Use of the Fetus in Biomedicine*, in ABORTION AND THE STATUS OF THE FETUS, *supra* note 24, at 119, 125–26; *Roe v. Wade*, 410 U.S. 113, 147–52 (1973). Many would argue that concerns over medical treatment afforded pregnant women were dominant. In agreeing with Means' basic insights, see Means, *supra* note 26, at 450–54, one author states:

> [T]he evolution of abortion policy in the United States was inextricably bound up with the history of medicine and medical practice in America, and would remain so through the rest of the nineteenth century. Other considerations would begin to enter in, but the fundamental outlines of abortion policy would continue to be hammered out primarily within the context of medical regulation . . . .

J. MOHR, ABORTION IN AMERICA 31 (1978).

[36] Lord Ellenborough's Act (Miscarriage of Women Act), 1803, 43 Geo. 3, ch. 58, §§ 1–2.

[37] Quay, *supra* note 22, at 431–32. For a critique of the poor draftsmanship, see J. MOHR, *supra* note 35, at 23–24.

[38] Offenses Against the Person Act, 1828, 9 Geo. 4, ch. 31, § 13.

[39] Offenses Against the Person Act, 1837, 7 Will. 4 & 1 Vict., ch. 85, § 6.

1861.[40] For some time, then, the statutory law in England was that the killing of an unborn child, whether quickened or unquickened, constituted a felony.[41] In 1967, however, abortion was legalized in a number of contexts.[42]

The treatment of the unborn in America followed the pattern in England. Until well into the first half of the nineteenth century, American courts adhered to the common law.[43] Then, in response to the growing dissatisfaction with the limited protection, the legislatures of various states began to enact abortion statutes, which changed much of the common law. Connecticut was probably the first American state to enact such abortion legislation. In 1821, it adopted a prohibition against causing the miscarriage of any woman quick with child.[44] Perhaps the most significant progenitor of American anti-abortion legislation was the New York act adopted in 1828.[45] The relevant statutes afforded protection to the unborn by specific anti-abortion laws rather than by general homicide laws, and they punished the destruction of a quickened fetus as a felony and the destruction

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[40] Offenses Against the Person Act, 1861, 24 & 25 Vict., ch. 100. For a discussion of legislative enactments and judicial interpretations bearing upon the Act, see generally Quay, *supra* note 22, at 432–35.

[41] It appears that at least from 1929, a statutory exemption disallowed abortion prosecutions for acts done in good faith for the purpose of preserving the mother's life. Infant Life Act, 1929, 19 & 20 Geo. 5, ch. 34. In 1939, Rex v. Bourne, [1939] 1 K.B. 687, *cited in* Roe v. Wade, 410 U.S. 113, 136–37 (1973), read the exemption to include measures designed to protect mothers' health. On contemporary English abortion law and its roots, see generally G. WILLIAMS, TEXTBOOK OF CRIMINAL LAW, 289–305 (2d ed. 1983).

[42] Abortion Act, 1967, 15 & 16 Eliz. 2, ch. 87. For a discussion of this law, see Roe v. Wade, 410 U.S. 113, 137–38, noting that the new law allowed abortions in order to avoid certain harms to the pregnant woman or any existing children of her family and to avoid births of the seriously handicapped.

[43] One author has written that "[i]n the absence of any legislation whatsoever on the subject of abortion in the United States in 1800, the legal status of the practice was governed by the traditional British common law as interpreted by the local courts of the new American states . . . ." J. MOHR, *supra* note 35, at 3.

Mohr also notes that "[t]he earliest laws that dealt specifically with the legal status of abortion in the United States were inserted into American criminal codebooks between 1821 and 1841." *Id.* at 20.

[44] *See* J. MOHR, *supra* note 35, at 21, *citing* CONN. STAT. tit. 22, §§ 14, 16, at 152, 153 (1821), *repealed by* Act of June 23, 1860, ch. LXXI, 1860 Conn. Public Acts 65. One author has noted that unlike the English Miscarriage of Women Act of 1803, America's first anti-abortion law was not greatly opposed to abortion itself. *See* J. MOHR, *supra* note 35, at 24.

[45] J. MOHR, *supra* note 35, at 26–27, *citing* N.Y. REV. STAT. pt. IV, ch. I, tit. II, §§ 8, 9, at 550; *id.* tit. VI, § 21, at 578 (1828–1835), *repealed by* Act of May 13, 1845, ch. 260, § 6, 1845 N.Y. Laws 285 and Act of March 4, 1846, ch.22, § 1, 1846 N.Y. Laws 19. Illinois passed a law dealing with abortion in the wake of Connecticut's action and before the New York law took effect in 1830. *See* J. MOHR, *supra* note 35, at 25–26, *citing* Act of Jan. 30, 1827, § 46, 1827 Ill. Pub. Laws 131, *repealed by* Act of Feb. 28, 1867, §§ 1–3, 1867 Ill. Pub. Laws 89.

of an unquickened fetus as a misdemeanor.[46] The New York legislation was innovative for America in that it not only protected the unquickened fetus, but it also incorporated the concept of therapeutic abortion.[47] With this latter concept, the state formally recognized the public interest in promoting maternal health via the abortion laws.

A glaring inadequacy of the most protective of these initial statutes relating to the unborn was their failure to deter more fully hostile conduct directed against, or having an impact upon, the unquickened fetus. Gradually, state legislatures abolished the quickening distinction and increased both the degrees of the offenses and the penalties. By the 1960's, most states had promulgated statutes that made consensual abortion a crime, unless necessary to preserve the life of the mother.[48] Looking beyond consensual abortion, however, significant inadequacies in the protection of the unborn still prevailed.

During this pre-*Roe* period, the punishments and scope of the criminal laws often inadequately deterred culpable conduct. For example, under the Texas abortion statute declared unconstitutional in *Roe*, a stranger who intentionally killed the fetus of a pregnant woman without her consent would probably receive "significantly less" penalty than a stranger who slayed a child who was already born.[49] The requirement of "live birth" under homicide laws was the predominant reason why the killing of a fetus was not viewed as equivalent to the more serious crime of homicide.[50] Such a rule of live birth created a gross disparity in the protection of potential life and of continued life.

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[46] *See* J. MOHR, *supra* note 35, at 26–27, *citing* N.Y. REV. STAT. pt. IV, ch. 1, tit. II, §§ 8 & 9, and tit. VI, § 21 (1829). Commentators differ on whether the central aim of these statutes was to promote the potentiality of human life. *See* J. MOHR, *supra* note 35, at 28–31.

[47] *See* J. MOHR, *supra* note 35, at 27, *citing* N.Y. REV. STAT pt. IV, ch. 1, tit. II, § 9 and tit. VI, § 21 (1829). The statutes made an exception where the abortion was "necessary to preserve the life of [the] woman or shall have been advised by two physicians to be necessary for such purpose." *Id.* For an analysis, see J. MOHR, *supra* note 35, at 27.

[48] *See* Roe v. Wade, 410 U.S. 113, 118–19 n.2 (1973). For a compilation of nineteenth and twentieth century statutes through 1961, see Quay, *supra* note 22, at 447–520. For a history of nineteenth century American statutes involving consensual abortions at any time during gestation, see J. MOHR, *supra* note 35.

[49] *Compare* TEX. PENAL CODE ANN. art. 1191 (Vernon 1952) (two–five years imprisonment for criminal abortion if performed with the woman's consent, doubled if no consent), *reprinted in Roe*, 410 U.S. at 118 n.1, *with id.* art. 1257 (death or life imprisonment for murder with malice), *discussed in Roe*, 410 U.S. at 158 n.54.

[50] *See* Evans v. State, 48 Tex. Crim. 589, 89 S.W. 974 (1905). The "born alive" requirement for homicide prosecutions was not unique to Texas and continues to have adherents. *See* People v. Greer, 79 Ill. 2d 103, 402 N.E.2d 203 (1980); State v. Gyles,

A second inadequacy in criminal laws during the pre-*Roe* era, again exemplified by the Texas abortion scheme, was that the pregnant woman could not be prosecuted for self-abortion or for cooperating in an illegal abortion performed by another.[51] Further lack of protection is evidenced by the fact that, in some instances, only intentional conduct was deemed criminal.[52] Consequently, some forms of socially undesirable conduct escaped the confines of criminal activity. For example, grossly negligent conduct causing a miscarriage for a woman desiring to give birth was not considered a crime against the unborn.

The review of criminal statutes at the time of *Roe* reveals that the states' earlier failures to protect fully potential life was not much mitigated by their later bans on consensual abortion. It was in this framework of inadequate protection that the Supreme Court approached the question of the validity of certain consensual abortion laws in 1973. The Court's decision remains as a limitation on the state's ability to protect the unborn both in and outside the consensual abortion context.

4. The *Roe* Decision and Its Aftermath

In 1973, the United States Supreme Court was called upon to resolve the conflict between the state's interest in prohibiting consensual abortions and the privacy interests of pregnant women seeking abortions. At the heart of the decision in *Roe v. Wade* lies the balancing of these conflicting interests. In *Roe*, the Supreme Court was confronted with a Texas statutory scheme that effectively prohibited almost all pregnant women from procuring abortions.[53] The Court described the scheme as criminalizing the procurement of, or the attempt to procure, an

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313 So. 2d 799 (La. 1975). *Cf.* State v. Dickinson, 28 Ohio St. 2d 65, 275 N.E.2d 599 (1971) (an essential element of vehicular homicide is that the "person" killed have been "born alive"). *See generally* R. PERKINS & R. BOYCE, CRIMINAL LAW 49–50 (3d ed. 1982).

[51] *See* Gray v. State, 77 Tex. Crim. 221, 229, 178 S.W. 337, 341 (1915) (cooperation); Moore v. State, 37 Tex. Crim. 552, 561, 40 S.W. 287, 290 (1897) (self-abortion). This inadequacy has been explained by some as dependent upon the view that criminal abortion laws seek to protect a pregnant woman's health rather than to protect potential human life. *See* R. PERKINS & R. BOYCE, *supra* note 50, at 152.

[52] *See, e.g.*, TEX. PENAL CODE ANN. art. 1191 (Vernon 1952) *quoted in Roe*, 410 U.S. at 117 n.1 ("If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine . . . and thereby procure an abortion, he shall be confined in the penitentiary . . . .").

[53] TEX. PENAL CODE ANN. art. 1191–1196 (Vernon 1952) *quoted in Roe*, 410 U.S. at 117–18 n.1.

abortion except for the purpose of saving the life of the mother.[54] The Court noted that such a scheme was in effect in a majority of American states.[55]

The Court determined that the decision to abort implicates a woman's constitutionally protected right to decide about childbearing.[56] In addition, the Court ruled that human fetuses were not "persons" who possessed right to "life" guaranteed by the Fourteenth Amendment.[57] Upon these bases, the Court recognized that the two major interests competing for primacy in the abortion setting were the woman's decisional interest and the state's interest in the fetus's "potentiality of human life."[58] The Court held that the state's interest in the potentiality of a fetus's human life did not become compelling until the fetus's viability.[59] Viability was the crucial point "because the fetus then presumably had the capability of meaningful life outside the mother's womb."[60] The state thus could not prohibit abortions of previable fetuses solely to preserve their potential life.[61]

As the gestation period advanced toward birth, the interest of the state in the potential life of the fetus was held to increase in magnitude. The Court stated:

> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate and even proscribe, abortion except where

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[54] *See Roe*, 410 U.S. at 117–18.

[55] *Id.*

[56] *Id.* at 153 (whether founded in the Fourteenth Amendment's concept of personal liberty or in the Ninth Amendment's reservation of rights to the people, the right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy").

[57] *Id.* at 158.

[58] *Id.* at 163. The interest of the state in the health of the mother was also deemed "important and legitimate," and thus germane to the review of the Texas statutory scheme on abortion. *Id.*

[59] *Id.* at 163.

[60] *Id.*

[61] According to *Roe*, the state may interfere with fundamental rights because fundamental rights are not absolute. However, to do so, it must show a compelling state interest; and it must draft legislation narrowly to further only that interest. *Id.* at 155.

> it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.[62]

The parameters of *Roe* continue to mark the legal contours of state protection of the potentiality of human life inside and outside of the consensual abortion context.[63]

The decision in *Roe* engenders two observations regarding possible crimes against the previable fetus. First, the Court declared in *Roe* only that the fetus was not a person for Fourteenth Amendment purposes. Outside the Fourteenth Amendment context, states can bestow personhood upon the previable fetus within other federal law and state constitutional limits. Thus, even maternal crimes against a previable fetus might be possible when the abortion decision is not implicated. Second, in those settings where the state's interest in potential life is not counterpoised by any individual's constitutionally-protected interest, the state's interest could easily prevail. Consider, for example, state law protection of the previable fetus founded on both the general public interest and the particularized interests of prospective parents in securing the birth of that fetus. In addition, consider both the public's and parents' desire for the unborn child to avoid disabilities at birth. The decision in *Roe* does not preclude the state from protecting previable fetal life when such protection is reasonable and infringes upon no fundamental or other federal or state right, even though such state protection is not mandated by the federal constitution. Thus, the state can forcefully promote within federal law constraints the general and particular interests in protecting the potentiality of human life.

Misapplication of *Roe* in the criminal context is exemplified by the decision in *People v. Smith*.[64] In *Smith*, the state of California appealed the dismissal of a charge of murder of a human fetus. The dismissal was based on the nonviability of the fetus. The reviewing court found that the state's murder law, which expressly proscribed the killing of a human fetus with malice aforethought,[65] did not criminalize the killing of a nonviable fetus. In reaching its decision, the California Court of Appeals relied on *Roe v. Wade*. Specifically, it said:

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[62] *Id.* at 164–65.

[63] The decision was recently reaffirmed in City of Akron v. Akron Center for Reproductive Health, Inc., 103 S. Ct. 2481, 2487 (1983) (reaffirming *Roe* based on the doctrine of *stare decisis*).

[64] 59 Cal. App. 3d 751, 129 Cal. Rptr. 498 (1976).

[65] CAL. PENAL CODE § 187 (West Supp. 1983).

> The underlying rationale of *Wade*, therefore, is that until viability is reached, human life in the legal sense has not come into existence. Implicit in *Wade* is the conclusion that as a matter of constitutional law the destruction of a nonviable fetus is not a taking of human life. It follows that such destruction cannot constitute murder or other form of homicide, whether committed by a mother, a father (as here), or a third person.[66]

The *Smith* court failed to understand that *Roe v. Wade* only applied to Fourteenth Amendment personhood.[67] Furthermore, the court in *Smith* failed to recognize that the *Roe* court left open the difficult question of when life begins.[68] Finally, the *Smith* court failed to comprehend the *Roe* decision's acknowledgment that potential life protection constitutes a legitimate state interest.[69]

Because it dealt with an abortion statute, the opinion in *Roe* was primarily concerned with the potentiality of human life in the quantitative rather than the qualitative sense. This is not to say, however, that the propriety of protecting the unborn's future quality of life may not be gleaned from *Roe* and its progeny. One member of the Court has since suggested that the *Roe* decision served to secure an existence of "quality" for some of the unborn, as it protected certain unborn from impaired lives.[70]

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[66] *Smith*, 59 Cal. App. 3d at 757, 129 Cal. Rptr. at 502. While *Roe* does not bar a state from criminalizing the destruction of a nonviable fetus, the fair warning component of procedural due process requires adequate notice of any such criminalization. *See infra* note 225 and accompanying text. Perhaps the decision in *Smith* could have been founded on the lack of adequate notice, because many lay people familiar with *Roe* might read a state statute protective of a fetus to include only a viable fetus.

[67] This failure is also found in cases involving wrongful death claims. *See, e.g.*, Toth v. Goree, 65 Mich. App. 296, 303–04, 237 N.W.2d 297, 301 (1975) (the court stated that it became "increasingly difficult" to justify allowing the mother the power to terminate her pregnancy before viability while holding a negligent third party liable); Wallace v. Wallace, 120 N.H. 675, 679, 421 A.2d 134, 137 (1980) (the court remarked that it would be inconsistent with *Roe* for a mother to have a constitutional right to destroy a nonviable fetus and, at the same time, for a third person to be subject to liability for negligent acts against the fetus).

[68] *Roe*, 410 U.S. at 159.

[69] *See id.* at 162. At least one state legislator felt that the legislature had already asserted the state's interest in protecting potential life by enacting the Therapeutic Abortion Act, ch. 327, § 1, 1967 Cal. Stat. 1535, which prohibited the abortion of a fetus more than twenty weeks old, so that express inclusion of a viable fetus in the murder statute was not necessary. Comment, *Is the Intentional Killing of an Unborn Child Homicide? California's Law to Punish the Willful Killing of a Fetus*, 2 PAC. L. J. 170, 171–72 (1971) *citing* Press Release from the Office of Assembly Majority Floor Leader W. Craig Biddle, June 15, 1970.

[70] Beal v. Doe, 432 U.S. 438, 462 (1977) (Marshall, J., dissenting) (the effect of precluding abortions would be "to relegate millions of people to lives of poverty and despair").

By implication, it follows that when a woman has decided to carry her pregnancy to full term, the state has a legitimate interest in promoting the quality of life of the unborn child. For the unborn who will not perish by voluntary abortion, the state's promotion of the unborn's quality of life is consistent with the long-standing and well-recognized general pubic interest favoring the avoidance or elimination of handicaps.[71] The protection of the quality of potential life of the unborn is consistent with the Supreme Court decision in *Roe v. Wade* and with significant social sentiment.

While the Supreme Court in *Roe* did not expressly address the state's interest in recognizing and respecting the humanness of the fetus, it did provide a basis for analysis. This state objective derives from the notion that all postconception forms of potential human life should be accorded certain dignity. In *Roe*, the Supreme Court stated tersely that "[w]e need not resolve the difficult question of when life begins."[72] By acknowledging as an option for states the position that human life may for some legal purposes begin at conception,[73] the Supreme Court implicitly sanctioned state laws mandating that some degree of respect be extended to the human fetus as a form of human life. While the legitimate state interest in protecting the potentiality of life must yield at times to the constitutional rights of a prospective mother, the states retain the option of according dignity to the unborn at every stage of development. Although this option cannot be exercised in ways too intrusive upon the privacy right surrounding the abortion decision, seemingly it can be exercised even where the fetus is clearly not a person, and thus his potential life is not implicated.[74] In according dignity to a fetus with no potentiality of life, the state would also promote at times the interests of the living, including the one-time prospective parents and the community at large.

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[71] *See supra* note 3. For a discussion of the indirectness, incoherence, and inadequacy of prevailing laws given the policy favoring the avoidance or elimination of handicaps, see Parness, *The Duty to Prevent Handicaps: Laws Promoting the Prevention of Handicaps to Newborns*, 5 W. NEW ENG. L. REV. 431 (1983).

[72] *Roe*, 410 U.S. at 159.

[73] Consider the references in *Roe* to the tort and property law characterizations of the unborn as persons in certain contexts. *Id.* at 161–62. Although those characterizations involve the so-called "born alive" rule, see *infra* notes 123–24 and accompanying text (rule as applied to homicide statutes), human life for some legal purposes begins before birth without a "born alive" requirement. *See infra* notes 131–32 and accompanying text (homicide laws covering fetuses and unborn children).

[74] One example of such an exercise is the proscription of experimentation with dead fetuses. *See supra* note 14.

Because the *Roe* decision suggested that the state's interest in protecting the potentiality of human life and in recognizing and respecting the humanity of the developing fetus was valid, the state may pursue those interests in the criminal law context. Specifically, the state may protect the potentiality of human life by punishing culpable conduct that harms the fetus and results in either death or disability. Additionally, the state may further its interest in according dignity to the unborn by creating sanctions for disrespectful conduct directed against the unborn. Extending proper respect to the fetus might be deemed particularly important in order to discourage the use of abortion as just another form of birth control.[75]

Though a state may protect the potentiality of human life and promote a certain respect for the human fetus, the Court in *Roe* intimated that many states have not done so. Thus, the Court found that disparate legal treatment is often afforded the born and the unborn,[76] though the state may have a legitimate interest in both of their future lives. Many states protect the "potential life" of the unborn to a lesser degree than they protect the "continued life" of the born.[77] By drafting laws that attempt to ensure the born's chances for a continued and healthy life, the state makes more possible the individual's fulfillment of his full potential, thus assuring continued beneficial contributions to society. In addition, by protecting the "continued life" of the born, the state promotes the interests of the community at large, which also desires the continuing life of that individual.

By comparison, because the decision in *Roe* denies Fourteenth Amendment personhood to the fetus,[78] its use of the term "potential life" can be read to connote only the state's interest in assuring that the unborn of today will be born and live a healthy life tomorrow.[79] The term "potential life" thus does not

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[75] Abortion has, in the past, served as a means of birth control. *See* White, *The Concept of Person, the Law and the Use of the Fetus in Biomedicine*, in ABORTION AND THE STATUS OF THE FETUS, *supra* note 24, at 119, 125 (evidence indicates that abortion was used as a method of birth control in America between 1840 and 1870).

[76] The term "person" "in nearly all instances" in which it appears in the federal constitution was found to have application only postnatally, *Roe*, 410 U.S. at 157, and the court's discussion of state tort law revealed a reluctance by states to afford nonconstitutional legal rights to the unborn, *id.* at 161–162.

[77] For earlier usage of this distinction between potential and continued life, see Parness, *Values and Legal Personhood*, 83 W. VA. L. REV. 487, 492–93 (1981).

[78] *Roe*, 410 U.S. at 158.

[79] *See id.* at 150 (states have a legitimate interest in protecting "potential" life, regardless of whether there is actual life from the point of conception).

include any independent constitutional interest of the unborn to life comparable to whatever life interest may be held by those born alive.[80] The concern for the quantitative and qualitative character of future societies under the "continued life" concept is analogous to, but stronger than, the concern for the quantitative and qualitative character of future societies under the "potential life" concept.

In part, then, the disparate legal treatment afforded the born and the unborn is based upon differing constitutional constraints on governmental action. While the *Roe* decision invalidates state efforts to protect the unborn's "potential life" where these efforts come in conflict with the federal constitutional right of a potential mother, similar individual rights seemingly would be insufficient to overcome the validity of state efforts to protect the born's "continued life." Yet the prevalent disparities in protecting the born's and the unborn's future lives is not founded solely on the differing constitutional constraints. Rather, disparities existed long before these differing constitutional constraints were articulated.

Traditionally, states have opted to afford more protection for the continued life of the born than for the potential life of the unborn. For example, the court in *Roe* indicated that historically the born and unborn were treated differently under tort law.[81] Concededly, there may be reason to treat the born and the unborn differently, in tort law and elsewhere. As noted where the "live birth" requirement remains, potential life does not always lead to life after birth in the absence of unnatural intervention. Nature sometimes intervenes. Differentiation between the born and the unborn might also be needed because the unborn do not suffer as much from acts directed against them as do the living. However, these and other nonconstitutional rationales for differentiating between the born and unborn do not justify many of the differences that continue after *Roe*. Such differences often run contrary to the general public interest and compatible individual particularized interests in affording protection and respect to the unborn.

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[80] The Court in *Roe* recognized the significance of such differing interests when it said: "The appellee and certain *amici* argue that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment. . . . If this suggestion of personhood is established, the appellant's case, of course, collapses for the fetus' right to life would then be guaranteed specifically by the amendment." 410 U.S. at 156–57.

[81] *Id.* at 161–62.

Criminal law provides illustrations of state action where the born and the unborn are unjustifiably treated differently. Criminal laws often do not recognize an unborn as a victim of certain harmful conduct that would constitute a crime against the born.[82] When the harmful conduct against the unborn does not involve a decision to abort or some other decision by the pregnant woman, distinctions between protecting "potential life" and protecting "continued life" are not required by the constitution and do not vindicate any general social sentiment. In such situations, it may be that the unborn, her prospective parents, and all others within the community, excepting the assailant, wish to see that the unborn is born alive and is born healthy.

Laws that extend protection and respect to the unborn can be harmonized not only with *Roe* and with significant social sentiment, but also with the major purposes of the criminal law. One major goal of the criminal law is to deter specific antisocial acts.[83] Accordingly, criminal law utilizes the threat of punishment as a means of promoting proper social conduct. The aims of rehabilitation, education, and retribution are also sometimes served by the criminal law.[84] Statutory provisions that promote the two state objectives of protection and respect can encompass at least the deterrence and educational functions of the criminal law and may be drafted so as not to deny any constitutionally protected right.

The deterrence theory of the criminal law seeks to deter others by making the criminal an example to potential offenders.[85] Statutes that punish culpable conduct that have an impact on the unborn can accomplish this end. Of course, such statutes must provide punishment that looms large in the minds of those who might act negatively toward the unborn. In contrast, criminal sanctions that afford respect for the fetus could perform an educational function. Under the educational theory of criminal punishment, the publicity accompanying the trial, conviction, and sentencing of criminals educates the public concerning the

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[82] *See, e.g.*, People v. Smith, 59 Cal. App. 3d 751, 129 Cal. Rptr. 498 (1976); Hollis v. Commonwealth, 652 S.W.2d 61 (Ky. 1983); People v. Amaro, 448 A.2d 1257 (R.I. 1982).

[83] *See generally* W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 5, at 23 (1972).

[84] *See generally id.* at 22–24.

[85] *See generally id.* at 23 (LaFave and Scott concede that the extent to which deterrence is obtained is often unclear).

proper distinctions between good and bad social behavior.[86] The prevalence of abortion as a means of terminating unwanted pregnancies might be viewed by the state as having desensitized members of society to the dignity and worth of the fetus. By punishing other conduct that demeans the fetus, such as unacceptable disposal of fetal remains, society can communicate its values concerning the dignity of the fetus and can cultivate a respect for the unborn without infringing upon any woman's privacy right.

The use of criminal sanctions to promote protection and respect for the unborn is in harmony with significant social sentiment, the governmental interests found to be legitimate in *Roe v. Wade*, and the traditional purposes of the criminal law. Consequently, one would expect the criminal lawmakers to have made and to have continued an assiduous effort to bestow some measure of protection and respect upon the unborn. Yet a review of both traditional and contemporary criminal laws reveals an unjustified languor regarding such protection and respect. This indifference may arise from state law differences in the treatment of the born and unborn in other legal settings, such as tort and family relations. In recent years, movement toward more parity in these other areas has begun.[87] Outside of the abortion context, states have shown more willingness to protect potential life. The *Roe*-era "traditional rule" in tort law has given way in certain jurisdictions to the extent that even preconception acts can form the basis of liability.[88] In addition, family law standards have been changed in some states so as to protect the unborn—sometimes even independent of any live birth.[89] The

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[86] *Id.* at 23–24.

[87] *See generally* Parness & Pritchard, *To Be or Not to Be: Protecting the Unborn's Potentiality of Life*, 51 U. CIN. L. REV. 257 (1982) (a discussion of instances of extended protection to unborn).

[88] *See, e.g.*, Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 367 N.E.2d. 1250 (1977); McAuley v. Wills, 251 Ga. 3, 303 S.E.2d 258 (1983). *But see* Albala v. City of New York, 54 N.Y.2d. 269, 429 N.E.2d 786, 445 N.Y.S.2d 108 (1981) (cause of action does not lie in favor of child for injuries suffered as a result of preconception tort).

[89] *See, e.g.*, Jefferson v. Griffin-Spalding County Hosp. Auth., 247 Ga. 86, 88, 274 S.E.2d 457, 459 (1981) (custody of unborn child granted the state for purposes of effecting sonogram and caesarian section on pregnant woman in order to sustain the potential life and continued life of the child, notwithstanding parents' religious objections); CAL. PENAL CODE § 270 (West Supp. 1982) (parental duty to provide necessities to unborn child), *enforced in* Kyne v. Kyne, 38 Cal. App. 2d 122, 100 P.2d 806 (1940); Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 424, 201 A.2d 537, 538 (1964) (blood transfusions ordered for woman in third trimester of pregnancy to preserve life of unborn child).

As George Fletcher has written: "For each context of the law, we are apparently

opinion in *Roe* would suggest re-examination of certain other *Roe*-era legal rules beyond the abortion setting in states where the traditional reluctance to accord legal rights to the unborn has begun to crumble. Furthermore, the loud and frequent cries by many states for a constitutional change overriding the decision in *Roe*[90] provides additional evidence that the *Roe* court's account of the strength of state interest in protecting potential life outside the abortion setting needs to be reexamined. It is time for the criminal law to reflect more accurately societal interests regarding necessary protection and respect for the unborn.

5. Contemporary Laws Protecting and Respecting the Unborn: A Mode of Analysis

The foregoing discussion suggests that social sentiment has shifted over time regarding the extent to which potential life should be protected. The analysis suggests that the shift was prompted in part by changes in medical and scientific understanding of the reproductive process. It suggests that sometimes the protection of the unborn went unpromoted or was promoted only by criminal laws whose chief function was to further the particular interests of prospective mothers or fathers. Finally, it suggests that the intensity of general public interest in protecting the unborn has varied.

The decision in *Roe*, of course, established for the first time clear federal constitutional limits within which American social sentiment and resulting criminal statutes could continue to promote protection for the unborn. The *Roe* decision, however, still allows states to protect the potentiality of life of the unborn and to afford respect and dignity to the unborn. There are several ways to do so by means of the criminal law. Laws can include the unborn as victims of specific crimes, or as victims of crimes that may also be committed against those already born. Furthermore, laws can punish crimes against the unborn as severely as comparable crimes against the born. Possible

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willing to settle for a different moment at which the fetus becomes a human being." G. FLETCHER, RETHINKING CRIMINAL LAW 373 (1978).

[90] For a listing of state resolutions urging Congress to overrule Roe v. Wade, see *supra* note 4. For a discussion of congressional attempts to override *Roe*, see Westfall, *Beyond Abortion: The Potential Reach of a Human Life Amendment*, 8 AM. J. OF LAW & MED. 97, 98–102 (1982).

approaches to protecting the unborn's potential life are greatly expanded when the criminal context outside abortion is considered and when recent scientific developments are surveyed.

The following is a more detailed analysis of these possible variations in the protection and respect afforded the unborn by contemporary criminal laws and of the extent to which American states have utilized these means. This undertaking was prompted, in large part, by a firm belief that American states now fail to extend protection and respect to the unborn through criminal law to the extent justified by the states' interest in protecting potential life.[91]

Three elements are considered in analyzing the possible and actual criminal laws regarding the unborn. These elements are the identity of the criminal actor, his state of mind, and the nature of the harm he inflicts. First, crimes are categorized according to the criminal actor. The focus of this analysis is on those actors outside the consensual abortion setting. Contemporary criminal laws regarding such actors are not severely limited by the decision in *Roe*. Distinguishing between classes of actors is essential in light of the *Roe* decision. Under that case, both a pregnant woman and her medical counselors can assert certain fundamental rights in the period before viability that outweigh the state's interest in protecting the potentiality of human life.[92] By contrast, the same or similar fundamental rights cannot be asserted in either the nonconsensual abortion setting or the nonabortion setting. Consequently, states can more vigorously prosecute without concern for infringing upon constitutionally protected rights.

The second element around which the categories of crimes are organized is the criminal actor's state of mind. A person may act against the unborn either intentionally or unintentionally. Intent need not necessarily connote the specific desire to kill or to injure the unborn.[93] Such a narrow construction would

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[91] This "firm belief" was expressed earlier in Parness & Pritchard, *supra* note 87, at 267–70 (finding relatively few states that have enacted criminal laws protecting the unborn).

[92] *Roe*, 410 U.S. at 126–27 (doctor treating pregnant women could be a party to a suit challenging the validity of criminal abortion laws on privacy grounds under certain circumstances, including harassment or bad faith prosecution by state law enforcement officers); Planned Parenthood v. Danforth, 428 U.S. 52, 62 (1976) (physicians have standing to seek declaratory relief and to enjoin enforcement of abortion legislation).

[93] *See, e.g.*, The Queen v. Saunders & Archer, 75 Eng. Rep. 706 (K.B. 1576) (a husband tried to kill his wife by poisoning her roasted apple; his wife gave part of apple to their infant daughter who died therefrom; the husband was found guilty of murdering

allow a host of culpable actions to escape the full force of the more severe penal sanctions. Rather, intent in criminal law may include actions that the actor knows are likely to cause harm to the unborn. For example, one who intentionally and forcefully assaults a pregnant woman, knowing she is pregnant, may not specifically desire to harm the fetus; yet the requisite criminal intent may be established if an assailant knew or should have known that harm to the fetus would almost certainly result from the assault.[94] Such reprehensible conduct should be prosecuted as an intentional crime against the unborn. Also, under the doctrine of transferred intent,

> if one intends injury to the person of another under circumstances in which such a mental element constitutes mens rea, and in the effort to accomplish this end he inflicts harm upon a person other than the one intended, he is guilty of the same kind of crime as if his aim had been more accurate.[95]

Thus, where the mother's Fourteenth Amendment rights are not involved and the fetus can be considered a person,[96] an intentional assault upon a pregnant woman causing harm to her unborn could be considered an intentional act against the unborn, even if the pregnancy was not known or readily apparent.

The third organizing element for crimes involving harm to the unborn centers on the nature of the harm inflicted. Conduct that results in death to a fetus, and thus in the termination of a potential life, should be distinguished from conduct that results in injury to the fetus causing a disability at birth. Recent scientific and medical advancements increase the possibility of enacting laws protecting the unborn from injuries resulting in birth disabilities. Some recent scientific and medical advances now even permit diagnosis of certain injuries to an unborn prior

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his child). On variations on intent in tort cases, see generally Prosser, *Transferred Intent*, 45 TEX. L. REV. 650 (1967). For the view that some bad intent is needed for any crime, see Perkins, *Criminal Liability Without Fault: A Disquieting Trend*, 68 IOWA L. REV. 1067 (1983).

[94] *See, e.g.*, Act of Aug. 21, 1981, § 1, ILL. ANN. STAT. ch. 38, § 9-1.1 (Smith-Hurd Supp. 1984).

[95] Gladden v. State, 273 Md. 383, 330 A.2d 176, 188 (1974). *See also* O'Connor v. United States, 399 A.2d 21, 24 (D.C. 1979); State v. Hamilton, 89 N.M. 746, 753, 557 P.2d 1095, 1099 (1976). For a general discussion of transferred intent, including a history of its adoption in a majority of jurisdictions, see *Gladden*, 273 Md. at 389–99, 330 A.2d at 180–85; W. LAFAVE AND A. SCOTT, *supra* note 83, § 35, at 252.

[96] *See supra* text accompanying notes 62–68.

to conception and make possible determinations of causal links between preconception acts and disabilities at birth.[97]

The second and third elements, involving the actor's state of mind and the nature of the harm inflicted, allow crimes against the unborn to be organized into four basic categories. They are: 1) varying forms of *intentional* acts causing the *death* of the unborn; 2) *unintentional* acts causing the *death* of the unborn; 3) varying forms of *intentional* acts causing *injury* to the unborn, but not eliminating the chance for live birth; and 4) *unintentional* acts causing *injury* to the unborn, but not eliminating the chance for live birth. The first element, focusing on the actor, suggests three additional groupings, including: 1) acts of a pregnant woman and her medical counselors against the fetus in a consensual abortion setting; 2) other acts of a pregnant woman against her fetus; and 3) acts of third parties against the unborn. This third grouping involves those outside the setting of *Roe v. Wade* and includes strangers to the unborn, prospective fathers, fertile nonpregnant women, and medical counselors to fertile patients not then pregnant. Members of any of the three groupings may be responsible for any of the four basic categories of crimes. The groupings of actors and categories of crimes form a scheme by which analysis can be made of present legislative enactments and judicial decisions regarding crimes against the unborn.

Any detailed analysis of protection and respect afforded the unborn in criminal law must include two other factors. First, an examination of the punishment imposed is necessary. In particular, punishment imposed for conduct causing harm to the unborn should be examined in light of that imposed for similar conduct causing similar harm to the born. The possible rationales for any differences in protection between the unborn and the born should be explored. Second, consideration of the primary and secondary policies behind the various crimes involving harm to the unborn is necessary. Whether a criminal statute penalizing such harm seeks to protect a pregnant woman, her unborn child, or both, often determines the manner in which

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[97] *See* Note, *Current Technology Affecting Supreme Court Abortion Jurisprudence*, 27 N.Y.L. SCH. L. REV. 1221, 1240 (1982) (doctors are now better able to diagnose and to treat the fetus in utero); *see also* Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 353–54, 367 N.E.2d 1250, 1253 (1977) (possibility of harm from transfusions of Rh-negative blood to Rh-positive women is well-established,and thus reasonable foreseeability creates a duty of care even prior to plaintiff's conception).

that statute will be enforced, interpreted, and applied. At times, criminal laws that appear to promote protection for the unborn are not used for that purpose because the recognized legislative design is the protection of the interests of the living. These factors of punishment and purpose, together with the three organizing elements, provide a useful framework for examining contemporary criminal law protection of the unborn.

B. *The Inadequate Protection of the Unborn under Contemporary Criminal Law*

1. Inadequate Protection from Conduct Resulting in Death

Analysis of the present status of crimes extending protection to the unborn should begin with a consideration of the way in which the criminal law treats intentional acts that cause the death of a fetus. As the review of earlier crimes suggests, one form of treatment is the protection of the unborn from acts involving intent to abort. *Roe v. Wade* and its progeny have recently focused national attention on the criminal law's treatment of abortional acts involving a pregnant woman and her medical counselors. Under *Roe* and subsequent cases, states may legislate to protect the potentiality of life only when such legislation does not unduly conflict with the pregnant woman's constitutional right to privacy, or only when it does conflict but nevertheless serves a compelling state interest. The woman's right to terminate first and second trimester pregnancies, implicit in her right to privacy, exempts from criminal sanction both a pregnant woman and her medical counselors when potential life is terminated prior to the third trimester.[98]

While the Supreme Court decided in *Roe* that the state has no compelling interest in the potentiality of life sufficient to legitimate prohibitions of consensual abortions during the first and second trimesters of pregnancy, the Court did permit states to require training and licensing of physicians and clinics involved in first trimester abortions.[99] Such regulations are usually

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[98] *Roe*, 410 U.S. at 163. Because "new embryological data" and "new medical techniques" may soon suggest that independent fetal survival can occur prior to the third trimester, *see id.* at 160–61, the exemption may soon expire before the last trimester. *See* Note, *supra* note 97, at 1221.

[99] *Roe*, 410 U.S. at 163.

designed to protect the pregnant woman's health and welfare.[100] In the second trimester of pregnancy, the state may further regulate abortion procedures to protect maternal health, but patient and physician continue to be relatively free from any criminal liability regarding the termination of a fetus's potential life. During the previability stage, the woman's right to privacy supersedes any state interest in protecting the unborn's potential life because the previable fetus is incapable of leading a meaningful life.[101]

If an abortion technique utilized during the first two trimesters is found to endanger maternal health unduly, a physician usually faces liability for failure to provide proper care for the patient. Yet such failures cannot be used to support prosecutions of crimes against the unborn. An interesting example of a prosecution involving such a failure is *State v. Lewis*.[102] In *Lewis*, a physician undertook an abortion during a woman's second trimester of pregnancy in violation of a requirement that such abortions be performed in a hospital.[103] The attempt to abort the pregnancy failed. The patient became ill and delivered a live baby the next day by a caesarean section performed by another physician in a hospital. The baby died two hours after birth. An applicable act provided: "A person who knowingly or intentionally terminates a human pregnancy with an intention other than to produce a live birth or to remove a dead fetus commits a feticide, a Class C felony. This section does not apply to an abortion performed in compliance with [the legal abortion statutes]."[104] An abortion not performed in compliance with the state's legal abortion law therefore appears to fall within the crime of feticide. The physician in *Lewis*, however, was charged only with violation of the hospital requirement and rightly was not charged with feticide.[105] The feticide charge could not be

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[100] *Id.*

[101] It is only when the fetus is capable of leading a meaningful life outside the womb that the state has a compelling interest in the protection of potential life. *Id.* Prior to viability, the state may have interests other than the protection of potential life that can become compelling. Consider, for example, the state interest in promoting a woman's compliance with a contract to bear a child.

[102] 429 N.E.2d 1110 (Ind. 1981), *cert. denied*, 457 U.S. 1118 (1982).

[103] The requirement was found in IND. CODE § 35-1-58.5-2(b)(2) (Burns 1979), *amended by* Act of Sept. 1, 1984, Pub. L. No. 106, § 4, 1984 IND. ACTS 1048, *codified at* Ind. Code § 35-1-58.5-2(2)(B) (Supp. 1984) (maintaining intact the hospital requirement).

[104] IND. CODE § 35-42-1-6 (Supp. 1981).

[105] *Lewis*, 429 N.E.2d at 1115.

brought, perhaps, because the statute would otherwise constitute an attempt to further the policy of promoting the unborn's potentiality of life, conflicting with the woman's privacy right in the absence of the required compelling state interest.[106] A second reason that feticide probably could not be charged is that the hospital requirement's constitutionality rested on the state's interest in preserving maternal health.[107] Third, there may not have been sufficient notice that the statute could be employed in this way.[108]

Although little or no opportunity to promote the potentiality of life may exist during either the first or second trimester in the consensual abortion context, such an opportunity does exist in the context of most third trimester abortions. In *Roe v. Wade*, the Supreme Court determined that the state's interest in preserving prenatal life was sufficiently compelling in the third trimester to allow a state to prohibit the abortion of a viable fetus, with one exception. The pregnant woman and her medical counselors may pursue the abortion of a viable fetus "when it is necessary to preserve the life or health of the mother."[109] Thus, even where there is a viable fetus, the state interest in preserving the life or health of the mother supersedes any state interest in protecting potential life. So long as a licensed attending physician certifies in good faith the medical necessity of a late abortion for the expectant mother's life or health, and so long as he proceeds with legal medical procedures, a third trimester abortion is legal, and neither the woman nor her counselors can be subject to criminal sanctions.[110]

Outside the maternal health exception, the criminal abortion statutes can operate directly against women and their counselors who undertake late abortions. Several states have capitalized on this capability by prohibiting all postviability abortions, except those vital to the mother's life or health.[111] For example,

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[106] It has been established that a state may not impose criminal liability on medical counselors who fail to employ abortion techniques during the first and second trimesters that increase the chances for fetal survival. Planned Parenthood v. Danforth, 428 U.S. 52, 82–83 (1976).

[107] Gary-Northwest Indiana Women's Services v. Bowen, 496 F. Supp. 894 (N.D. Ind. 1980), *aff'd mem.*, 451 U.S. 934 (1981).

[108] *See infra* note 225.

[109] *Roe*, 410 U.S. at 163–64.

[110] *Id.* at 164–65.

[111] Examples of statutes that prohibit third trimester abortions, except where necessary to preserve the life or health of the mother, include: FLA. STAT. ANN. § 797.03 (West Supp. 1983); Abortion Law of 1975, § 5, ILL. ANN. STAT. ch. 38, § 81-25 (Smith-Hurd 1977); IOWA CODE ANN. § 707.7 (West 1979); LA. REV. STAT. ANN. § 40:1299.35.4

an Illinois law provides: "When the fetus is viable no abortion shall be performed unless medically necessary to preserve the life or health of the mother."[112] While the Illinois statute regarding late abortions focuses on the conduct of a pregnant woman's attending physician and persons assisting in such abortions rather than on the pregnant woman's conduct, other states may exempt females from prosecution by judicial determination. An early decision in Louisiana states:

> There is no doubt that a woman who commits such an act [abortion], or suffers it to be done, is guilty of a great moral wrong; but we do not believe that the Legislature intended to make such women guilty of a criminal offense. One may be guilty of a moral wrong and not be guilty of a crime.[113]

In contrast to Illinois and Louisiana, some states specifically include the expectant mother among the persons criminally liable for certain late abortions. For example, in New York a pregnant woman is guilty of self-abortion in the second degree, a Class B misdemeanor, when she commits or submits to an abortional act upon herself unless such abortional act is justifiable.[114] "Justifiable" acts include those undertaken with a licensed physician within the first two trimesters, and those undertaken with the reasonable belief of the woman and her doctor that a third trimester abortion is necessary.[115] An "abortional act" includes an act committed by the female herself, with the intent to cause a miscarriage.[116] Perhaps because the unjustified death of an unborn child more than twenty-four weeks in gestation is deemed a homicide in New York,[117] unjustified abortional acts by a female in the third trimester constitute a more severely-punished crime, "self-abortion in the first degree," a Class A misdemeanor.[118] With regard to the culpability for self-

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(West Supp. 1983); MO. STAT. ANN. § 188.030 (Vernon 1979); UTAH CODE ANN. § 76-7-302 (1978). *See generally* Wood & Hawkins, *State Regulation of Late Abortion and the Physician's Duty of Care to the Viable Fetus*, 45 Mo. L. Rev. 395, 414–15, 422 (1980) (criticizing states' failure to prohibit third trimester abortions to the extent allowed by the decision in *Roe v. Wade*, but noting that 22 states prohibit certain types of postviability abortions).

[112] Act of Oct. 30, 1979, § 1, ILL. ANN. STAT. ch. 38, § 81-25(2) (Smith-Hurd Supp. 1984).

[113] Simmons v. Victory Indus. Life Ins. Co., 18 La. App. 660, 663, 139 So. 68, 70 (1932).

[114] N.Y. PENAL LAW § 125.50 (McKinney 1975).

[115] *Id.* § 125.05(3) (1975).

[116] *Id.* § 125.05(2) (1975).

[117] *Id.* § 125.00 (1975).

[118] *Id.* § 125.55 (1975).

abortion under these laws, one court stated: "Obviously the Legislature intended that not only the person performing the abortion, but also the person subjecting herself to the abortion would be guilty of a criminal act."[119]

Even where criminal statutes are explicit, or the statutory language is read to include the expectant mother as well as her medical counselors, the actual application of these laws suggests that at least the pregnant woman is free from prosecution in the consensual abortion setting. Cases involving such prosecutions cannot be located. Prosecutors may be reluctant to pursue the conviction of a female for a consensual, but illegal, abortion where a medical counselor or a third person is also criminally liable. Perhaps sufficient deterrence is promoted by prosecuting those other than the woman. There also may be a tendency among physicians not to report third trimester, self-abortion attempts that subsequently require medical treatment. Finally, perhaps the expectant mother is not criminally liable for an intentional act leading to the death of her viable fetus because the legislative intent underlying the criminal abortion and related homicide statutes is to protect the health of the pregnant woman rather than to protect the potentiality of the life of her unborn child. As suggested in *Roe v. Wade*, protecting a pregnant woman's health is a legitimate basis for regulating abortions in the first and second trimesters.[120] Third trimester regulations may be similarly founded because "the risk to the woman from the abortion increases as her pregnancy continues."[121]

While the privacy rights of expectant mothers have been found to disallow state protection of the unborn's potentiality of life through the prohibition of first, second, and some third trimester consensual abortions, the decision in *Roe* permits the states to impose criminal sanctions to deter the conduct of those who are not involved in consensual abortions and who are acting intentionally against the unborn. Unfortunately, many states have not utilized their police powers to protect the potentiality

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[119] Reno v. D'Javid, 85 Misc. 2d 126, 127, 379 N.Y.S.2d 290, 292 (Sup. Ct. 1976) (referring to N.Y. PENAL LAW § 125.05(3) (McKinney 1969), *amended by* Act of July 1, 1970, ch. 127, § 1, 1970 N.Y. Laws 852 (legalizing abortions until the fetus's twenty-fourth week)). The acts under scrutiny in *Reno* took place in June 1970, so the old law was still in effect. *Reno*, 85 Misc. 2d at 127, 379 N.Y.S. 2d. at 292.

[120] *Roe*, 410 U.S at 163.

[121] *Id.* at 150. Consequently, "the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy." *Id.* On the nonprosecution of women for criminal abortion, see R. PERKINS & R. BOYCE, *supra* note 50, at 192–93.

of human life in these settings. The recently decided case of *Hollis v. Commonwealth*[122] illustrates the failure of state legislatures to extend adequate protection. In *Hollis*, the defendant was charged with murder as a result of conduct that caused the death of a fetus. In particular, it was charged that the defendant went to the home of his estranged wife's parents, took his estranged wife from the home out to the barn, told her that he did not want the baby she was carrying, and forced his hand up her vagina causing the death of a twenty-eight to thirty week old fetus.[123] The Kentucky Supreme Court interpreted the relevant state murder statute as incorporating the common law's live birth requirement and thus dismissed the indictment because the fetus was never born alive.[124] The court's reliance on the common law rule would not have been permissible had the legislature protected potential life by expressly including the fetus within the Kentucky murder law.[125]

To avoid results such as that in *Hollis*, some state legislatures have promulgated statutory schemes that offer explicit measures

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[122] 652 S.W.2d 61 (Ky. 1983).

[123] *Id.* at 61.

[124] *Id.* at 62. Of course, a paradox results wherein a homicidal act can be committed against a being not yet human (a fetus), so long as the being is human when it dies. *See* G. FLETCHER, *supra* note 89, at 377.

[125] *Hollis*, 652 S.W.2d at 63. The Kentucky court said:

> Viewed in the context of *Roe*, Kentucky has a "compelling" interest in the life of the fetus when it reaches the stage of viability sufficient to legislate legal sanctions punishing those who destroy it, subject to the limitations that such sanctions shall not apply where the life or health of the mother is involved .... To declare that it has done so by the murder statute, [citation omitted], is totally inconsistent with any rational interpretation of that statute.

Id.

Such a statute, and perhaps such an interpretation, is particularly surprising for Kentucky, because that state's legislature has on three occasions indicated its strong public policy in favor of protecting fetal life. *See* Act of Apr. 14, 1980, ch. 315, 1980 Ky. Acts 1048 (codified at KY. REV. STAT. § 311.715 (1983)) (forbidding the use of public funds to pay for abortions); Act Relating to Abortion, ch. 225, 1980 Ky. Acts 684 (codified at KY. REV. STAT. § 311.800 (1983)) (a strong prohibition against the performance of abortion in public health care facilities); H.R. Res. 7, 1978 Reg. Sess., 1978 Ky. Acts 1401. Compare the approach to statutory interpretation taken in Commonwealth v. Cass, 392 Mass. 799, 467 N.E.2d 1324 (1984) (eliminating the "born alive" rule without specific legislative guidance, but only prospectively).

In *Hollis*, the court went on to note that the legislature intended conduct directed to cause the unlawful abortion of a fetus to be punished under the Kentucky abortion statutes. *See* 652 S.W.2d at 65. Thus, while Kentucky may have had some explicit protection of the unborn, *see id.* at 67 (Wintersheimer, J., dissenting) (arguing that the facts of the *Hollis* case do not fit within the Kentucky abortion statutes), at best it was a more limited protection, a less serious crime. Though Hollis may have been able to be prosecuted for assault on his estranged wife, see *id.* at 65, this would constitute only an indirect—and inadequate—protection of potential life. *See* Parness, *supra* note 71, at 443–44.

of protection to the unborn from the intentional acts of third parties causing the termination of potential life. California, Illinois, and Louisiana provide illustrations of explicit legislative enactments attempting to extend the protection of the criminal law to the unborn.[126] In each of these states, the "born alive" rule had resulted in holdings that conduct resulting in loss of fetal life was outside of the criminal code.[127] Following these decisions, the legislatures attempted to expand the protection of their criminal laws by punishing conduct resulting in fetal death prior to birth.[128] Careful analysis of of these state enactments discloses several differing approaches to this extension of protection to the unborn.[129] It also strongly suggests that these approaches are still not utilized by state legislatures and the interpreting courts to protect fully the potential life of the unborn.

Homicide statutes comprise the first approach. Typically, such statutes define the victims in such general terms as "persons" or "human beings."[130] Yet sometimes explicit protection of the unborn is afforded. California, for example, defines murder as "the unlawful killing of a human being, or a fetus, with malice aforethought."[131] Similarly, in New York, the homicide statute reads: "Homicide means conduct which causes the death of a person or an unborn child with which a female has been pregnant for more than twenty-four weeks . . . ."[132] Louisiana

[126] *See infra* note 128.

[127] *See* Keeler v. Superior Court, 2 Cal. 3d 619, 87 Cal. Rptr. 481, 470 P.2d 617 (1970); People v. Greer, 79 Ill. 2d 103, 402 N.E.2d 203 (1980); State v. Gyles, 313 So. 2d 799 (La. 1975).

[128] CAL. PENAL CODE § 187 (West Supp. 1983) (defining homicide as "the unlawful killing of a human being, or a fetus"); Act of Aug. 21, 1981, § 1, ILL. ANN. STAT. ch. 38, § 9-1.1 (Smith-Hurd Supp. 1984) (establishing crime of feticide imposing criminal liability for killing of fetus); LA. REV. STAT. ANN. § 14.2(7) (West Supp. 1982) (defining person in criminal code as including human being from moment of fertilization). Interestingly, two of these expansions have been interpreted so as to extend only limited protection. *See* People v. Smith, 59 Cal. App. 3d 751, 129 Cal. Rptr. 498 (1976) (previable fetus not protected under new California homicide law); State v. Brown, 378 So. 2d 916 (La. 1979) (homicide does not include feticide, notwithstanding new definition of person). At least one commentator has indicated that the Illinois statute may be similarly narrow. *See* Note, *Feticide in Illinois: Legislative Amelioration of a Common Law Rule*, 4 N. ILL. L. REV. 91 (1984) (criticizing the limited scope of the legislative response via the feticide statute to the *Greer* decision).

[129] *See infra* text accompanying notes 130–69.

[130] *See, e.g.*, IOWA CODE ANN. § 707.1 (West 1979) ("A person who kills another person . . . commits murder."); KAN. STAT. ANN. § 21-3401 (1981) ("Murder is the killing of a human being . . . ."); WASH. REV. CODE § 9A.32.010 (1983) ("Homicide is the killing of a human being . . . .").

[131] CAL. PENAL CODE § 187 (West Supp. 1983).

[132] N.Y. PENAL LAW § 125.00 (McKinney 1975); *see also* UTAH CODE ANN. § 76-5-201 (Supp. 1983) (provides for explicit protection of the unborn).

employs a different approach, generally identifying the fetus as within the term "person" for purposes of the state criminal code.[133] These statutes represent legislative attempts to deter action that threatens the potentiality of fetal life by equating the fetus with the living person for purposes of criminal homicide laws.

While the focus of such explicit homicide statutes appears to be the protection of the unborn, the protection actually proffered is often tenuous. There are instances of narrow judicial readings of statutes expressly designed to protect the unborn.[134] And when the courts fail to protect the unborn under such express statutes, the legislatures often fail to respond. Furthermore, by interpreting broad general terms such as "person" or "human being" as including only those born alive, the scope of nonexplicit state laws is severely diminished.[135]

When the live birth requirement was first established in homicide law, the uncomplicated birth of an existing fetus was viewed by scientists and medical doctors as a perilous feat.[136] Thus, perhaps it was not inappropriate for the law to presume that a hostile act against a fetus was not the conclusive cause of that fetus's eventual failure to survive birth. Today, however, a fetus that has reached twenty weeks of maturity enjoys a high chance of survival and subsequent live birth. Unfortunately, judicial decisions and legislative enactments have not adjusted the law to the technological developments that have significantly increased the probability of complete fetal development and live birth. Rather, the courts and the legislators have clung with dogmatic fervor to the live birth requirement for homicide statutes not expressly protective of the unborn.[137] The result is a

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[133] LA. REV. STAT. ANN. § 14:2(7) (West Supp. 1982).

[134] *See, e.g.*, People v. Smith, 59 Cal. App. 3d 751, 129 Cal. Rptr. 418 (1976); State v. Brown, 378 So. 2d. 916 (La. 1980). For a discussion of these cases, see *supra* note 128.

[135] *See, e.g.*, People v. Greer, 79 Ill. 2d 103, 402 N.E.2d 203 (1980); Hollis v. Commonwealth, 652 S.W.2d 61 (Ky. 1983); People v. Amaro, 448 A.2d 1257 (R.I. 1982).

[136] *See* Comment, *Is Intentional Killing of an Unborn Child Homicide?*, 2 PAC. L.J. 170, 176 (1971) (citing Atkinson, *Life, Birth and Live-Birth*, 20 LAW Q. REV. 134 (1904)). For a history of the incorporation of the English "born alive" rule into American homicide law, see Keeler v. Superior Court, 2 Cal. 3d at 625–29, 470 P.2d at 620–22.

[137] *See generally* R. PERKINS & R. BOYCE, *supra* note 50, at 50 ("[M]ost states still follow the common-law rule that there is no homicide of any grade unless the deceased had been born alive"); *see also* W. LAFAVE & A. SCOTT, *supra* note 83, § 67 at 530–32. Recently, however, two courts have rejected the "born alive" rule, prospectively. *See* Commonwealth v. Cass, 392 Mass. 799, 808, 467 N.E.2d. 1324, 1328 (1984); State v. Horne, No. 22157 (S.C. Aug. 17, 1984) (available on LEXIS, State library, SCar file).

legal system that too often treats differently the actor whose culpable conduct terminates the existence of a nine month old fetus and the actor who causes the death of an infant which had existed independently of the mother for an instant, or for only a brief while.[138]

The Michigan Court of Appeals said of this differentiation:

> This panel agrees that the "born alive" rule is outmoded, archaic and no longer serves a useful purpose. Modern medical practice has advanced to the point that, unlike the situation when the rule was first developed, the vast majority of viable fetuses will, in the absence of some unexpected event, be born alive and healthy.[139]

But even when courts concede the inappropriateness of the "born alive" requirement, they refuse to abandon it without express legislative action. This hesitancy to lay aside the rule is purportedly due to the inability of courts to alter the criminal law.[140] Whatever can be said of the reasoning behind the judicial reluctance to extend protection to the fetus, the differentiation persists as the legislatures remain inactive. While both general public interest and the particularized individual interests suggest that certain homicide laws should promote both potential life and continued life equally, such equality is not often realized.

The diluted protection afforded the unborn by limited judicial constructions of homicide laws is easily illustrated outside the context of the "born alive" rule. Significantly, such limited protection has sometimes come even after legislative alteration of the "born alive" rule and explicit legislative recognition of the fetus as a victim of crime. In California, the "fetus" is protected within the murder statute.[141] This protection came in response to *Keeler v. Superior Court*,[142] in which the court applied the

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[138] Such a distinction can be found by comparing People v. Chavez, 77 Cal. App. 2d 621, 627, 176 P.2d 92, 95 (1947) ("born alive" rule was satisfied by a fetus in the process of being born) with Keeler v. Superior Court, 2 Cal. 3d 619, 637, 87 Cal. Rptr. 481, 492–93, 470 P.2d 625, 629 (1970) (refusing to extend *Chavez* to a case involving an eight or nine month old fetus).

[139] People v. Guthrie, 97 Mich. App. 226, 232, 293 N.W.2d 775, 778 (1980).

[140] *See* Keeler v. Superior Court, 2 Cal. 3d 619, 632–33, 87 Cal. Rptr. 481, 489, 470 P.2d 617, 625 (1970); *In re* Lamphere, 61 Mich. 105, 108, 27 N.W. 882, 883–84 (1886); People v. Guthrie, 97 Mich. App. 226, 232, 293 N.W.2d 775, 778 (1980); People v. Adams, 34 Mich. App. 546, 573, 192 N.W.2d 19, 33 (1971), *aff'd in part*, 389 Mich. 222, 205 N.W.2d 415 (1973). *Compare* Commonwealth v. Cass, 392 Mass. 799, 806, 467 N.E.2d. 1324, 1327 (1984) (because state criminal law is largely common law, court finds itself able to develop common law rules of criminal law).

[141] CAL. PENAL CODE § 187 (West Supp. 1983).

[142] 2 Cal. 3d 619, 87 Cal. Rptr. 481, 470 P.2d 625 (1970).

"born alive" rule. Yet the legislature failed to define "fetus," leaving the term open to judicial construction. In *People v. Smith*,[143] a California court of appeals held that the statute applied only to the intentional killing of a viable fetus. Confronted with the possibility of broadly reading the statute to include the previable fetus, the court elected to limit the scope of fetal protection.[144] Even if such an election is sound given judicial concerns about due process warnings as to what constitutes criminal activity, the decision has yet to be legislatively overruled. The decision of the Louisiana Supreme Court in *State v. Brown*[145] presents perhaps a better instance of unnecessary judicial limitation. In response to a 1975 Louisiana Supreme Court decision indicating that "the killing of a human being" under a Louisiana criminal statute did not encompass the killing of an unborn child,[146] the Louisiana legislature amended the definition of "person" in the criminal code to include "a human being from the moment of fertilization and implantation. . . ."[147] Subsequent to the amendment, the supreme court in *Brown* was called upon to apply the amended definition. Surprisingly, the court ruled that the new definition did not broaden the scope of the homicide statute to include the killing of a fetus.[148] The Louisiana legislature has failed to respond to the inadequacy of the *Brown* decision. *People v. Smith* and *State v. Brown* reveal that state courts often refuse to extend to the unborn the full protection of potential life that homicide statutes seemingly provide and that legislatures fail to override such judicial actions.

Acts specially designed to protect fetuses or pregnant women

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[143] 59 Cal. App. 3d. 751, 129 Cal. Rptr. 498 (1976).

[144] The court's rationale was flawed. *See supra* notes 64–69 and accompanying text. The court did note that the destruction of a nonviable fetus may be punished under the state criminal abortion statute. 59 Cal. App. 3d at 759, 129 Cal. Rptr. at 503–04. *But see supra* note 125 (such use of criminal abortion act questioned). The limitation of homicide laws to viable fetuses is not always the handiwork of courts. *See, e.g.*, R.I. GEN. LAWS § 11-23-5 (1981) (willful killing of an unborn quick child is manslaughter); N.Y. PENAL LAW §§ 125.40–.45 (distinguishing the penalties for killing a previable and viable fetus).

[145] 378 So. 2d 916 (La. 1980).

[146] State v. Gyles, 313 So. 2d 799, 801 (La. 1975).

[147] Act of July 28, 1976, P.A. 256, § 1, 1976 La. Acts 747, (codified at LA. REV. STAT. ANN. § 14:2(7)) (West Supp. 1982).

[148] *Brown*, 378 So. 2d at 918. Critical of the decision is Note, *Feticide Is Still Legal in Louisiana*, 26 LOY. L. REV. 422, 428–30 (1980). This failure is especially surprising given the Louisiana legislature's other actions supporting the protection of potential life. *See* LA. REV. STAT. ANN. § 40:1299.35.0 (West Supp. 1982) (longstanding policy of state is to protect the right to life of the unborn child from conception); H.R. Con. Res. 33, Reg. Sess. 1978, *cited in* 7 FAM. PLAN./POP. REP. 107 (1978) (requesting that the unborn be made persons under the federal constitution).

comprise a second legislative approach to crimes protecting the unborn from the intentional acts of third parties that cause the termination of potential life. Like explicit homicide statutes, these acts typically define the intended victim of the crime either at the point of the hostile act or at the point of the resulting injury to include the fetus. Thus, unlike homicide laws, they are confined to settings involving pregnant women and their fetuses. Iowa law provides one example. One Iowa statute, entitled "Feticide," states: "Any person who intentionally terminates a human pregnancy after the end of the second trimester of the pregnancy where death of the fetus results commits feticide. Feticide is a class 'C' felony."[149] For the purposes of this Act, the fetus is both the sole focus of an intentionally hostile act and the sole recipient of the resulting injury. A second Iowa statute says: "A person who terminates a human pregnancy without the consent of the pregnant person during the commission of a felony or felonious assault is guilty of a class 'B' felony."[150] Under this Act, the fetus does not have to be the object of the violence, but merely the recipient of the resulting injury.[151] A third Iowa statute says: "A person who intentionally terminates a pregnancy without the knowledge and voluntary consent of the pregnant person is guilty of a class 'C' felony."[152] Under this Act, the fetus arguably is both the victim of an intentionally hostile act and of the resulting injury—though perhaps not the sole victim.[153] A fourth Iowa enactment deserves note, but only because of the somewhat unique circumstances to which it applies. The relevant law states: "A person who intentionally kills a viable fetus aborted alive shall be guilty of a class 'B' felony."[154] Under this Act, the fetus is both the sole focus of an intentionally hostile act and the sole recipient of the resulting injury. Finally, there is an Iowa statute, which is wor-

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[149] IOWA CODE ANN. § 707.7 (West 1979). The act is accompanied by the *Roe* life or health exceptions. *Id.*

[150] *Id.* § 707.8(1).

[151] If the sole legal injury deemed emanating from the crime was the intrusion upon the pregnant woman's rights, then the protection of potential human life would be only indirectly promoted by this criminal law.

[152] IOWA CODE ANN. § 707.8(2) (West 1979). This act also includes the *Roe* life or health exceptions. *Id.*

[153] *Cf.* GA. CODE ANN. § 16-5-80 (Supp. 1983) (feticide constitutes the willful killing of a quickened child by an act injuring the mother that would be murder if the mother died).

[154] IOWA CODE ANN. § 707.9 (West 1979). The use of the word "fetus" is somewhat problematic because, under *Roe v. Wade*, one would expect a human being born alive to be subject to continued life, not potential life, protections.

thy of mention, that criminalizes carelessness in the termination of a pregnancy, even where the termination is otherwise legal. The statute declares: "A person who performs or induces a termination of a human pregnancy and who willfully fails to exercise that degree of professional skill, care, and diligence available to preserve the life and health of a viable fetus shall be guilty of a serious misdemeanor."[155] Under this Act, the fetus seems to be the sole focus of an intentionally hostile act—even though the injury to the fetus is no greater than if there had been no carelessness at all.

A special category of enactments designed to protect fetuses or pregnant women are the criminal abortion laws.[156] Such laws differ from the Iowa statutes in that they only apply where there are acts constituting an attempt at an "abortion." Such acts may not include all conduct directed at or causing a pregnancy termination.[157] Criminal abortion laws, therefore, are less inclusive of intentionally hostile acts against the unborn than are pregnancy termination laws.

American criminal abortion laws are both plentiful and varied. An Illinois law declares "no abortion shall be performed except by a physician,"[158] and mandates that abortions only be performed with the informed consent of the woman.[159] Missouri laws also prohibit the performance or inducement of an abortion except by a physician[160] and require informed consent.[161] Similarly, both Illinois[162] and Missouri[163] bar third trimester abortions unless medically necessary for the mother. In Missouri, an abortion is "the intentional destruction of the life of an embryo or fetus in his or her mother's womb or the intentional termination of the pregnancy of a mother with an intention other than to

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[155] IOWA CODE ANN. § 707.10 (West 1979).

[156] *See, e.g.*, CAL. PENAL CODE §§ 274–276 (West Supp. 1984); KY. REV. STAT. §§ 311.750–.780 (1983); N.Y. PENAL LAW §§ 125.40–.60 (McKinney 1975).

[157] For a debate about whether the Kentucky criminal abortion law encompasses third party conduct, compare Hollis v. Commonwealth, 652 S.W.2d 61, 65 (Ky. 1983) (majority argued criminal abortion laws covered third parties) with *id.* at 67 (Wintersheimer, J., dissenting) (when conduct does not result in expulsion of the unborn, it is not criminal abortion).

[158] Act of Oct. 30, 1979, § 1, ILL. ANN. STAT. ch. 38, § 81-23.1(A) (Smith-Hurd Supp. 1984).

[159] Act of Oct. 30, 1979, § 1, ILL. ANN. STAT. ch. 38, § 81-23.2(A) (Smith-Hurd Supp. 1984).

[160] MO. ANN. STAT. § 188.020 (Vernon 1983).

[161] *Id.* § 188.027.

[162] Act of Oct. 30, 1979, § 1, ILL. ANN. STAT. ch. 38, § 81-25(2) (Smith-Hurd Supp. 1984).

[163] MO. ANN. STAT. § 188.030(1) (Vernon 1983).

increase the probability of a live birth or to remove a dead or dying unborn child."[164] While similar in other respects, the Illinois law is extremely restrictive regarding circumstances constituting criminal abortion. In Illinois an abortion means "the use of any instrument, medicine, drug or any other substance or device to terminate the pregnancy of a woman known to be pregnant with intent to cause fetal death."[165] Thus, Smith from the California case of *People v. Smith* apparently could not have been prosecuted for criminal abortion had he acted in Illinois, because he only beat his pregnant wife with his fists for an hour, kicked her in the stomach, shouted that he did not want her fetus to survive, and said "Bleed, baby, bleed."[166] Similarly, Hollis from the Kentucky case of *Hollis v. Commonwealth* apparently could not have been prosecuted for criminal abortion had he acted in Illinois, because he only took his pregnant and estranged wife to a barn where he "told her he did not want a baby, and then forced his hand up her vagina intending to destroy the child and deliver the fetus."[167] Likewise, Keeler from the California case of *Keeler v. Superior Court* apparently could not have been prosecuted for criminal abortion had he acted in Illinois, because he only shoved his knee into the abdomen of his pregnant former wife, and said, "I'm going to stomp it out of you."[168]

The lack of possible prosecutions of Smith, Hollis, and Keeler under Illinois and other criminal abortion laws would not be so shocking if prosecutions could occur under homicide or other laws specifically designed to protect fetuses or pregnant women or both. The "born alive" rule and other restrictive readings of homicide laws, together with the general absence of feticide and other explicit statutes, however, make it likely that in many states, prosecutions of Smith, Hollis, and Keeler could only be based upon criminal statutes protective of all women. Increasing such a likelihood is the fact that possibly relevant criminal provisions are often scattered throughout many parts of a state

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[164] *Id.* § 188.015(1).

[165] Act of Oct. 30, 1979, § 1, ILL. ANN. STAT. ch. 38, § 81-22(6) (Smith-Hurd Supp. 1984). Compare this to the provision in CAL. PENAL CODE § 274 (West Supp. 1984)("Every person who provides, supplies, or administers to any woman, or procures any woman to take any medicine, drug, or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure miscarriage . . . is punishable by imprisonment.").

[166] 59 Cal. App. 3d at 754, 129 Cal. Rptr. at 500.

[167] 652 S.W.2d at 61.

[168] 2 Cal. 3d at 623, 87 Cal. Rptr. at 482, 470 P.2d at 618.

code.[169] To the extent to which the female victims of assailants like Smith, Hollis and Keeler incur less severe injuries than their developing fetuses, prosecutions of less serious offenses result, deterrence is more limited, and the social sentiment favoring protecting the unborn's potentiality of life is not advanced.

Comparable, but perhaps even greater, gaps in criminal law regarding the unborn's potentiality of life exist in the area of unintentional conduct of third parties.[170] Statutes expressly protective of potential life often encompass only conduct undertaken with the intent to cause the termination of potential life or death. Thus, intent to produce fetal death is often a prerequisite for prosecution under criminal abortion,[171] feticide,[172] and homicide[173] statutes. With such prerequisites and in the absence of other laws, a wide range of culpable, but somewhat unintentional third party conduct remains unaddressed.

While unintentional conduct resulting in fetal death and caused by third parties is usually not criminalized, similar conduct resulting in the death of a living person would normally be prosecutable under reckless homicide or vehicular homicide laws.[174] The case of *People v. Amaro*[175] exemplifies the difference. The defendant in *Amaro* was charged with violating the

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[169] It seemingly would be more difficult to protect potential human life fully when relevant legislative enactments are scattered and made part of several differing chapters or sections within the compilation of state laws. In such situations, integration of related acts and uniformity of policy is more difficult to pursue.

[170] While gaps also exist regarding the unintentional acts of expectant mothers and their medical counselors, such gaps are quite difficult to discern given prevailing childbearing, childrearing, and personal autonomy rights, and thus are left for another day.

[171] Both the Missouri and Illinois criminal abortion schemes described earlier require an intent to terminate potential human life. *See supra* notes 164 & 165 and accompanying text. In reviewing criminal abortion laws through 1973, the Supreme Court confined itself to laws with similar intent requisites. *See* Roe v. Wade, 410 U.S. 113, 129–48 (1973).

[172] Each of the Iowa laws described earlier contained a requirement of bad intent, though not all contained a mens rea element directed to the fetus. *See supra* notes 149–52 & 154–55 and accompanying text.

[173] N.Y. PENAL LAW §§ 125.00, 125.05(2) (McKinney 1975) (homicide includes certain abortional acts, all defined to include intent to cause a miscarriage); CAL. PENAL CODE § 187 (West Supp. 1983) (murder is the unlawful killing of a human being, or fetus, with malice aforethought).

[174] In New York, for example, an unborn fetus carried for more than twenty-four weeks can be a victim of intentional homicide, but not of criminally negligent homicide. *See* N.Y. PENAL LAW §§ 125.00, 125.05(1), 125.10 (McKinney 1975). *But see* Commonwealth v. Cass, 392 Mass. 799, 801, 467 N.E.2d 1324, 1325 (1984) (finding fetus can be a victim of reckless or negligent vehicular homicide).

[175] 448 A.2d 1257 (R.I. 1982); *see also* State v. Willis, 98 N.M. 771, 652 P.2d 1222 (1982); People v. Guthrie, 97 Mich. App. 226, 234–236, 293 N.W.2d 775, 779–80 (1980).

state's vehicular homicide statute because his reckless driving caused the death of a fetus. The Supreme Court of Rhode Island, however, directed that the case be dismissed. The rationale was that a fetus is not a "person" within the meaning of the Rhode Island Vehicular Homicide Statute.[176]

Unintentional killing of the fetus may encompass varying types of conduct, ranging from the negligent to the extremely reckless. Several hypothetical situations illustrate these types of unintentional conduct and demonstrate that criminal laws are necessary. First, there exists the example of the intoxicated motorist who operates a car too fast or on the wrong side of the freeway, causing a collision and the death of an unborn child. Though the fetus is killed, the negligent driver typically cannot be prosecuted for the fetus's death, as there was no intentional killing of the fetus and no bad intent regarding others. For a homicide case to proceed, the pregnant woman or some other living person would have had to die. The nightclub or motel proprietor who recklessly and wantonly exposes patrons to fire hazards provides another example. If an ensuing fire and smoke inhalation is fatal to a woman's unborn child, the owner usually cannot be held criminally responsible for the fetus's death. At best, prosecution can occur only if others suffer severe personal injuries. The acts of a mugger or a rapist against a pregnant woman exemplify yet other types of unintentional conduct that could lead to the termination of potential life. Although the mugger or rapist intentionally inflicts injury to the mother, he usually cannot be prosecuted for the ensuing death of the fetus if he is unaware of the pregnancy; he has not "willfully" killed the unborn child as is often required.[177] Though prosecutions

[176] *Amaro*, 448 A.2d at 1260. Such a determination of legislative intention is particularly surprising for Rhode Island, because that state's legislature has on at least a few occasions urged a reversal of *Roe* in order to protect fetal life. S. 7052, Gen. Assembly, Jan. Sess. 1974 (*cited in* 3 FAM. PLAN./POP. REP. 46 (1974)); H. 5159, Gen. Assembly, Jan. Sess. 1977, (*cited in* 123 CONG. REC. 14649, 15539 (1977)).

[177] *See, e.g.*, Act of Aug. 21, 1982, § 1, ILL. ANN. STAT. ch. 38, § 9-1.1 (Smith-Hurd Supp. 1983) (feticide requires that person knew or reasonably should have known woman was pregnant). *But cf.* ARIZ. REV. STAT. ANN. § 13-702(D)(10) (West Supp. 1983) (the death of any unborn child resulting from the commission of a felony shall be considered an aggravating circumstance in sentencing offenders). One might think that the Illinois legislation reflects the legislature's reluctance to recognize the existence of a life at so early a stage in the pregnancy. But in Illinois, legislature has expressed a desire to protect human life beginning at conception and to ensure equal protection for the unborn where knowledge of the pregnancy exists. Abortion Law of 1975, § 1, ILL. ANN. STAT. ch. 38, § 81-21 (Smith-Hurd 1979 & Supp. 1983); S.J. Res. 32, 78th Gen. Assembly, 1974 Sess., 1974 Ill. Laws 1674. Maybe legislators are sympathetic to intoxicated motorists, muggers, and rapists, for irrespective of any prosecution for negligent fetal destruction, these potential defendants have other troubles.

for such unintentional acts may not always be proper,[178] contemporary criminal law often relieves the prosecutor of the discretion to decide what is appropriate. The prosecutor is left only to decide upon possible prosecutions for crimes against the living, often where the harm to the living pales in significance to the harm incurred by the unborn. The noted examples of unintentional conduct leading to fetal death demonstrate that both the general public interest and certain individuals' particularized interests in protecting the potentiality of life are probably undermined.

2. Inadequate Protection from Conduct Resulting in Injury

Criminal sanctions for acts causing injury, but not death, to the unborn are possible to protect the unborn's potentiality of life. Such acts can be both intentional and unintentional, and can affect potential life either before or after conception. These acts undermine the unborn's potential life in a qualitative sense.

In analyzing criminal sanctions for intentional acts causing the death of fetuses, much consideration was given to homicide, feticide, and abortion statutes. At least some of these statutes served to protect the unborn's potentiality of life. But consider what often happens when an act intending fetal death is undertaken, but is unsuccessful: the pregnancy is continued and a child is born with disabilities attributable to the act. The act of injuring the fetus and the child, thereby impairing his or her potential and continued life, is not addressed by statute.[179] Similarly, acts undertaken to harm a fetus, but not to terminate its potential life, often cannot be prosecuted. In failing to permit prosecution for such acts, general and particularized interests in protecting qualitatively the unborn's potentiality of life are left unpromoted.

Occasionally, state law does appear to protect the fetus by criminalizing acts causing harm to the unborn. One relevant state act says:

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[178] Here, more than with acts accompanied by bad intent, tort law may serve the interests of the unborn in potential life protection.

[179] Prosecution for the act of trying to destroy the fetus might occur. In at least one jurisdiction, an illegal abortion occurs with the commission of an act with the intent of producing an abortion not legitimated under law, even though the act does not lead to the delivery of a nonliving being. ARK. STAT. ANN. §§ 41-2551, 2553 (1977). Prosecution for the offense of attempted performance of an unlawful abortion is possible. State v. Lewis, 429 N.E.2d 1110, 1111 (Ind. 1981), *cert. denied*, 457 U.S. 1118 (1982).

> If a termination of pregnancy is performed during viability, no person who performs or induces the termination of pregnancy shall fail to use that degree of professional skill, care, and diligence to preserve the life *and health* of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. . . . The woman's life and health shall constitute an overriding and superior consideration to the concern for the life and health of the fetus when such concerns are in conflict.[180]

Violation of this statute is a third degree felony.[181] Given that emphasis is placed on the "life *and* health of the fetus," a physician who commits a third trimester abortion, whether or not vital to the woman's life and health, should be criminally liable for injuries suffered by a fetus at birth as a result of a lack of medical diligence.

California criminal laws on the abandonment and neglect of children provide another illustration of punishment for intentional prenatal acts that cause a child to be born disabled. One provision says: "If a parent of a minor child willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter or medical attendance, or other remedial care for his or her child, he or she is guilty of a misdemeanor . . . ."[182] The statutory definition of "minor child" includes "a child conceived but not yet born."[183] Notwithstanding this significant protection of the unborn's potentiality of life, California has failed to extend similar protections in such other areas as child endangerment.[184]

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[180] FLA. STAT. ANN § 390.001(5) (West Supp. 1984) (emphasis added). *See also* Abortion Law of 1975, § 6(1), ILL. ANN. STAT. ch. 38, § 81-26(1) (Smith-Hurd 1977).

[181] FLA. STAT. ANN. § 390.001(10) (West Supp. 1984). The offense is punishable by a maximum of five years incarceration and a fine of $5000. *Id.* § 715.082(3)(d) (West 1976). *Compare* Abortion Law of 1975, § 6(1), ILL. ANN. STAT. ch. 38, § 81-26(1) (Smith-Hurd 1977) (analogous offense is a class 2 felony, punishable by not less than three and not more than seven years in jail under Act of Feb. 1, 1978, § 3(a)(5), ILL. ANN. STAT. ch. 38 § 1005-8-1(a)(5) (Smith-Hurd 1982)).

[182] CAL. PENAL CODE § 270 (West Supp. 1982).

[183] *Id.*

[184] *See* Reyes v. Superior Court, 75 Cal. App. 3d 214, 141 Cal. Rptr. 912 (1977) (finding the felony child endangering law did not encompass protection for the unborn). Regarding state restrictions designed to promote the unborn's potentiality of life from actions of pregnant women, Professor Robertson notes:

> There is no question that a state could prohibit actions by a pregnant woman that might reasonably be thought to kill a viable fetus in utero or cause it to be born in a damaged state. Laws that prohibited pregnant women from obtaining or using alcohol, tobacco, or drugs likely to damage the fetus would be constitutional, even if these laws applied only to pregnant women. Because there is no fundamental right to use psychoactive substances, the state would not have to show a compelling interest in order to restrict their use by pregnant women. A statute forbidding pregnant women the use of alcohol or tobacco in

Because states bestow upon the fetus and other unborn virtually no criminal law protection from intentional infliction of nonfatal injury by a third party, great injustices may prevail. The assailant who repeatedly strikes an expectant woman, intending to damage and actually damaging the fetus, can often only be prosecuted for crimes against the woman.[185] Assault on the fetus does not constitute a separate crime. Likewise, there often is no criminal penalty available for a rapist who knows that his victim is pregnant and that her rape may well cause damage to her developing fetus, and who injures that fetus. Since the fetus may suffer severe injury at birth, current statutory schemes directed only toward the expectant mother provide for insufficient penalties. The interests in protecting potential life are not fully vindicated.

As with intentional acts, the unborn is relatively unprotected from unintentional acts causing nonfatal harm. Criminal statutes that proscribe unintentional prenatal conduct resulting in harm to the fetus, or the later-born infant, are rare. A possible sanction against the mother for negligent acts might be included in criminal child support statutes. But no states, including even California,[186] appear to include fetuses explicitly in the class of victims. Criminal negligence or recklessness resulting in fetal injury is ignored. Consequently, state prosecutors are powerless to act in a number of circumstances. The case of an intoxicated motorist again is illustrative. If a collision causes fetal injury surfacing at birth, but such an injury is not within the scope of applicable criminal provisions, the drunken driver may not be prosecuted for any injury to the later-born child. Lack of sanctions is especially troubling when the absence of personal injury to the mother precludes charging the motorist with any serious offense. Similarly, the physician in a nonconsensual abortion context who administers harmful doses of radiation or medication to a pregnant woman that cause disabilities for her later-born child could not be prosecuted for a crime against the child. The lack of criminal sanctions for unintentional injury to the

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order to minimize risks to their fetuses would pass the courts' "rational basis" test.

Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405, 442–43 (1983) (citations omitted).

[185] *See, e.g.*, Keeler v. Superior Court, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970).

[186] The California child neglect statute requires willful conduct. *See supra* note 182 and accompanying text.

fetus represents a salient legislative failure to consider the protection of potential life under the criminal law.

3. The Focus and Force of the Sanctions

Thorough study of criminal statutes that appear to protect the unborn requires consideration of their focus and of the force of available sanctions. Many criminal statutes that seem to protect the unborn actually are meant to protect the life and health of the expectant mother. Furthermore, criminal statutes that seemingly protect the born and the unborn from similar wrongful conduct often contain less forceful sanctions for crimes against the unborn.

The decision in *Roe v. Wade* is instructive on this point. The *Roe* opinion indicates that the preservation and protection of the expectant mother constitutes a compelling state interest at the end of the first trimester,[187] while the protection of the unborn's potentiality of life becomes compelling only at viability.[188] Thus, the states can proscribe late abortions where the life or health of the mother is not in need of preservation.[189] Yet, the states remain hesitant to prosecute mothers and their medical counselors under criminal abortion statutes barring late abortions. Such hesitancy exemplifies the lack of fetal protection actually afforded by the criminal abortion statutes and suggests that the focus of many criminal laws prohibiting late abortions continues to be the protection of the mother. Maternal protection would seem to be the objective when only physicians are prosecuted for illegal third trimester abortions leading to termination of potential life. As noted in *Roe*, expectant mothers may be in need of state protection during the third trimester because their health risks increase in the later stages of pregnancy.[190] But such late abortions also run contrary to the general public interest in many states favoring protecting potential life.

When the states do prosecute expectant mothers, their counselors, and others for terminating potential human life during

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[187] *Roe*, 410 U.S. at 163 (until the end of the first trimester mortality in abortion may be lower than mortality in childbirth).

[188] *Id.*

[189] *Id.* at 164–65. The court specifically found: "For the stage subsequent to viability, the state in promoting its interests in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life and health of the mother." *Id.*

[190] *See supra* note 121 and accompanying text.

the later stages of pregnancy, the available sanctions are far less severe than the sanctions for terminating the continued life of one already born. As noted, the refusal of some state courts to protect the fetus due to the live-birth requirement for homicide has resulted in the enactment of "feticide" or other protective statutes.[191] The need for any distinction in penalties assessed for similar crimes against the born and the unborn is doubtful, particularly when third party conduct is involved, the right to privacy is not affected, and both the public's and the individuals' interests support protecting the unborn's potential life. Yet arbitrary distinctions remain concerning the statutory penalties permitted.

In *People v. Greer*, the Illinois Supreme Court held that until it was born alive, a fetus was not a person within the meaning of the state homicide statute.[192] Because of the possibility of unpunished or lightly-sanctioned atrocities against the unborn in the aftermath of *Greer*,[193] the Illinois legislature passed a feticide statute which became law the following year.[194] Illinois also has a criminal abortion law prohibiting nonlife and non-health related third trimester abortions.[195] The existence of distinct homicide, feticide and abortion statutes results from a legislative attempt to satisfy the judicial requirement of express inclusion of the unborn within the class protected by criminal statutes.[196] Offenses against the unborn, however, remain less severely punished. The penalty allowed in Illinois under the feticide law is "the same as for murder, except that the death penalty may not be imposed."[197] The criminal abortion law in-

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[191] *See supra* notes 127–28 and accompanying text.

[192] People v. Greer, 79 Ill. 2d 103, 116, 402 N.E.2d 203, 209 (1980).

[193] Any available sanctions presumedly would be founded on convictions of crimes against the expectant mother.

[194] Act of Aug. 21, 1981, P.A. 82-303, 1981 Ill. Laws 1676, *codified at* Act of Aug. 21, 1981, § 1, ILL. ANN. STAT. ch. 38, § 9-1.1 (Smith-Hurd Supp. 1984).

[195] Act of Oct. 30, 1979, § 1, ILL. ANN. STAT. ch. 38, § 81-25(2) (Smith-Hurd Supp. 1984).

[196] *See, e.g.*, *Greer*, 79 Ill. 2d at 115, 402 N.E.2d at 208; *see also* Justus v. Atchison, 19 Cal. 3d 564, 579, 565 P.2d 122, 132, 139 Cal. Rptr. 97, 107, (1976) ("[W]hen the Legislature determines to confer legal personality on unborn fetuses for certain limited purposes, it expresses that intent in specific and appropriate terms; the corollary, of course, is that when the Legislature speaks generally of a 'person' . . . it impliedly but plainly excludes such fetuses . . . ."). Besides the express inclusion of fetuses by the enactment of new feticide laws, inclusion of fetuses can occur by defining such terms as person or human being as expressly encompassing the unborn. *Id.*

[197] Act of Aug. 21, 1981, § 1(d), ILL. ANN. STAT. ch. 38, § 9-1.1(d) (Smith-Hurd Supp. 1983); *see also* GA. CODE § 16-5-80 (Supp. 1984) (willful killing of a 'quick' unborn child punishable by life imprisonment).

volving viable fetuses provides for punishment by imprisonment from three to seven years.[198]

Even more dramatic differences in punishment for feticide as compared to homicide are found in Iowa. Feticide is punishable by a maximum of ten years imprisonment and a $5,000 fine[199] and attempted feticide by five years in jail and a $1,000 fine.[200] By contrast, homicide is punishable by life imprisonment without parole,[201] and attempted homicide is punishable by a twenty-five year sentence.[202] In New York, murder in the first degree is punishable by death,[203] and murder in the second degree is punishable by a minimum of fifteen to twenty-five years imprisonment with a maximum life sentence.[204] By contrast, criminal abortion in the first degree is subject to a maximum of seven years imprisonment with a minimum one-year term,[205] and abortion in the second degree is subject to a maximum of seven years in jail with no mandatory minimum at all.[206] Even where the unborn are afforded protection, they receive less of it.

C. *The Inadequate Respect for the Unborn Under Contemporary Criminal Law*

A major obstacle facing states that attempt to promote respect for the unborn independent of the unborn's potentiality of life is the judicial tendency to misinterpret the span of the *Roe v. Wade* decision. In *Margaret S. v. Edwards*,[207] a federal district court declared unconstitutional a state statute that required fetal remains be disposed of "in a manner consistent with the disposal of other human remains."[208] Such a statute, the district court said, "impermissibly raises the status of a fetus to that of a

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[198] Act of Oct. 30, 1979, § 1, ILL. ANN. STAT. ch. 38, § 81-25(2) (Smith-Hurd Supp. 1984); Act of Feb. 1, 1978, § 3(a)(5), ILL. ANN. STAT. ch. 38, § 1005-8-1(a)(5) (Smith-Hurd 1982).

[199] IOWA CODE ANN. §§ 707.7, 902.9 (West 1979).

[200] *Id.*

[201] *Id.* §§ 707.2, 902.1.

[202] *Id.* § 707.11 (West Supp. 1983-1984); *id.* § 902.9 (West 1979).

[203] N.Y. PENAL LAW § 60.06 (McKinney 1975).

[204] *Id.* §§ 70.00, 125.25.

[205] *Id.* §§ 70.00, 125.45.

[206] *Id.* §§ 70.00, 125.40; *see also* LA. REV. STAT. ANN. §§ 1299:35.4, 1299:35.18 (West Supp. 1983) (illegal abortion of viable fetus triggers a maximum sentence of $1,000 fine and two years of imprisonment).

[207] 488 F. Supp. 181 (E.D. La. 1980).

[208] LA. REV. STAT. ANN. § 40:1299.35.14 (West 1984).

human being."[209] The court apparently reasoned that because the Supreme Court in *Roe* found that the word "person" as used in the Fourteenth Amendment does not include the unborn, a fetus is not a person and therefore cannot be characterized as a human being in the disposal setting.[210] While the *Roe* decision does exclude the unborn from the definition of person for Fourteenth Amendment purposes, the Supreme Court did not hold that a fetus may not, under any circumstances, be treated as a person. As noted earlier, the court did not define when life begins,[211] thereby declining to provide a unitary demarcation of personhood that would apply in all legal situations. By referring to situations outside of the Fourteenth Amendment context where the fetus is given recognition at law,[212] the Court suggested that the legal definition of personhood may vary from context to context.

By holding that the Fourteenth Amendment does not cover the unborn, the Supreme Court was left with only one constitutionally mandated right, that of the mother's privacy, to be considered along with the legitimate state interest in protecting an unborn's potential life. The *Roe* decision, therefore, forbids the state's protection of the unborn's interests only when these interests conflict with the constitutional rights of the prospective parent. The Court did not rule that the unborn's interests could not be recognized in situations where there was no conflict. The district court in *Edwards*, however, incorrectly interpreted the breadth of the holding in *Roe v. Wade*, thus denying the unborn any legal protection across a wide spectrum of both federal and state law.

That the state may require humane, post-mortem treatment of human fetuses, limited only by the mother's Fourteenth Amendment right to privacy, was intimated by another federal court. In *Planned Parenthood Association v. Fitzpatrick*,[213] a district court found that a regulation which requires an "elaborate" funeral for fetuses may, as it would entail great expense,

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[209] *Id.* at 222.

[210] Alternately, the court found the statute invalid because it represented an impermissible attempt of the state to influence a woman's abortion decision. *Id.* at 222–23.

[211] *Roe*, 410 U.S. at 159; *see also supra* notes 72–76 and accompanying text.

[212] *Id.* at 161–62. Specifically, the court noted that tort law often recognizes a duty to the unborn to exercise due care, though suits based on breaches of such a duty typically can be brought only after live birth. *Id.*

[213] 401 F. Supp. 554 (E.D. Pa. 1975) (three-judge court), *aff'd. mem. sub nom.* Franklin v. Fitzpatrick, 428 U.S. 901 (1976).

burden the abortion decision and thus invade the woman's constitutional right to privacy.[214] The court found, however, that a less burdensome regulation regarding disposal of fetuses could be upheld.[215] A legitimate regulation would be designed to "preclude the mindless dumping of aborted fetuses on garbage piles."[216] The same concern about infringing upon the choice of the expectant mother by imposing expensive means of fetal disposal seemingly appeared in the recent United States Supreme Court decision of *City of Akron v. Akron Center for Reproductive Health, Inc.*[217] In *Akron Center for Reproductive Health*, the Court held unconstitutional an ordinance provision that required physicians to "insure [sic] that the remains of the unborn child are disposed of in a humane and sanitary manner."[218] The Court based its holding on the vagueness of the term "humane,"[219] rather than on the per se impropriety of any state requirement regarding respectful treatment of the aborted fetus. Furthermore, in declaring this ordinance of the City of Akron unconstitutional, the Court looked at the city's intent in passing the ordinance and found that it might go beyond merely preventing "mindless dumping."[220] Thus, while in *Akron Center for Reproductive Health* the Supreme Court reaffirmed its view on the invalidity of statutes that heavily burden the maternal decision to abort, it seemingly condoned nonburdensome and easily understood fetal disposal legislation. Such legislation would promote the state interest in recognizing and respecting the humanness of the fetus.

Notwithstanding the foregoing case law, the concern for the burden-free exercise of the mother's right has been extended beyond its proper scope in another disposal setting. In *Leigh v. Olson*,[221] a federal district court invalidated a regulation requiring a woman seeking to terminate her pregnancy to decide on a

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[214] *Fitzpatrick*, 401 F. Supp. at 572–73.
[215] *Id.* at 573.
[216] *Id.* (quoting the state's post-trial brief's characterization of the legislative purpose).
[217] 103 S. Ct. 2481 (1983).
[218] *Id.* at 2504.
[219] *Id.*
[220] *Id.* The Court held that the requirement of "humane and sanitary disposal" suggested a possible intent to mandate some unspecified type of decent burial, and that this lack of specificity created by the breadth of the term "humane" failed to provide fair notice. *Fitzpatrick* was distinguished, because the state sanction involved there was regulatory rather than criminal. *Akron Center for Reproductive Health*, 103 S. Ct. at 2504 n.44.
[221] 497 F. Supp. 1340 (D.N.D. 1980).

method of fetal disposal. The court found that the need to make a disposal decision constituted too great a burden on the mother's choice and therefore invaded her right to privacy, even though one of her alternatives was disposal initiated by another.[222] But the court could have reasonably distinguished between a fetal disposal regulation invalidated due to resulting financial pressures, a conceded burden on the mother's right to privacy, and a fetal disposal regulation as in *Olson*, that requires a mother merely to choose from alternatives and that apparently allows one choice to be made cost-free.[223] The court in *Olson* failed to recognize the legitimate state interest, reflecting significant popular sentiment, in respecting the humanity of the fetus—even when live birth is foreclosed.[224]

The failure of states to promulgate laws governing the disposal of fetal remains or prohibiting fetal experimentation, and the unnecessary judicial invalidation of those few laws that do exist, undermine the promotion of respect for the humanity of the unborn. In formulating laws that promote respect for the unborn, lawmakers must express clearly their legal constraints and underlying rationales, thereby avoiding the due process problems of *Akron Center for Reproductive Health*.[225] Prevailing criminal laws often do not demand that the human fetus be treated with dignity and respect. Significant public sentiment and often individual particularized interests favor bestowing such respect.

D. *Incomplete State Laws Exemplified*

Illinois statutes and judicial decisions illustrate the prevailing inadequacies in contemporary state criminal law treatment of

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[222] *Id.* at 1351–52 (one option for a woman desiring an abortion was disposal of fetal remains by the hospital in a "humane" fashion).

[223] *Compare Olson*, 497 F.Supp. at 1351–1352 *with* Maher v. Roe, 432 U.S. 464, 478–80 (1977) *and* Harris v. McRae, 448 U.S. 279, 325 (1980) (in *Maher* and *McRae*, the Court found state law provided no obstacle to the exercise of the right to abort, for there were no new financial burdens accompanying the exercise).

[224] *See Olson*, 497 F. Supp. at 1351 ("The state's legitimate interests in maternal health and the preservation of potential life are not furthered by the [disposal] requirement."). The judicial failure to recognize the state interest in respecting potential life may be due to the legislative failure to assert such an interest. *See* Fla. Women's Medical Clinic, Inc. v. Smith, 536 F. Supp. 1048, 1058 (S.D. Fla. 1982) (state only asserted an interest in maternal health).

[225] As noted in *Akron Center for Reproductive Health*, 103 S. Ct. at 2504, uncertainty regarding the precise reach of a statute or ordinance is particularly troublesome when criminal liability is imposed, because this uncertainty creates fair notice problems.

the unborn. Such inadequacies exist even though the state of Illinois has demonstrated a public policy strongly supportive of the unborn. In the Abortion Law of 1975, the General Assembly of Illinois expressed its desire to protect the unborn:

> [T]he General Assembly of the State of Illinois do solemnly declare and find in reaffirmation of the longstanding policy of this State, that the unborn child is a human being from the time of conception and is, therefore, a legal person for purposes of the unborn child's right to life and is entitled to the right to life from conception under the laws and Constitution of this State. Further, the General Assembly finds and declares that longstanding policy of this State to protect the right to life of the unborn child from conception by prohibiting abortion unless necessary to preserve the life of the mother is impermissible only because of the decisions of the United States Supreme Court and that, therefore, if those decisions of the United States Supreme Court are ever reversed or modified or the United States Constitution is amended to allow protection of the unborn then the former policy of this State to prohibit abortions unless necessary for the preservation of the mother's life shall be reinstated.[226]

Similar expressions of support for the unborn can be found in a variety of Illinois Supreme Court pronouncements of Illinois public policy. Thus, in recognizing a Wrongful Death Act claim for the death of a child who died as a result of prenatal injuries, the court relied in part on the right of a child to commence life unimpaired by injuries caused while in the mother's womb.[227] And, in removing the requirement that a plaintiff in a common law tort action must have been conceived prior to the negligent acts, the court's decisions were founded on the "right to be born free from prenatal injuries foreseeably caused by a breach of duty to the child's mother,"[228] as well as the longstanding "public policy of this State to protect children not in being."[229]

Notwithstanding the foregoing evidence of Illinois's policy reflecting both general popular interest and certain individuals' particularized interests in protecting potential life, contempo-

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[226] Abortion Law of 1975, P.A. 79-1126, 1975 Ill. Laws 3462 (codified at Abortion Law of 1975, § 1, ILL. ANN. STAT. ch. 38, § 81-21 (Smith-Hurd 1979 & Supp. 1983)). For a compilation of earlier Illinois laws, see Quay, *supra* note 22, at 465–67.

[227] Amann v. Faidy, 415 Ill. 411, 428, 432, 114 N.E.2d 412, 416, 417–418 (1953); *see also* Rodriguez v. Patti, 415 Ill. 496, 497, 114 N.E.2d 721, 721 (1953) (*Amann* ruling relied on in suit brought for prenatal injuries by one still living).

[228] Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 357, 367 N.E.2d 1250, 1255 (1977) (plurality opinion).

[229] *Id.* at 366, 367 N.E.2d at 1259 (Dooley, J., concurring).

rary Illinois criminal law protection of the unborn is inadequate. Many forms of both intentional and unintentional misconduct against the unborn are not covered by the criminal statutes. Further, the statutory provisions that do extend some measure of protection and respect to the unborn are often undermined by a legislative history suggesting that the main emphasis of the law is not the protection of the unborn, but some other policy goal. Such indirect laws[230] serve to weaken further the implementation of the policy protective of the unborn.

The most serious omission regarding intentional acts against the unborn occurs in the area of third party conduct.[231] The new feticide law of 1981[232] did increase the protection afforded the unborn for culpable third party conduct resulting in fetal death, but only in a very limited way. First, the new crime of feticide requires that the criminal actor knew, or reasonably should have known under all the circumstances, that the fetus's mother was pregnant.[233] Second, the crime requires that the actor attempted or committed a felony crime against the mother carrying the fetus,[234] or acted in a way which evidenced intent to cause death or great bodily harm or knowledge that the acts would likely cause death or great bodily harm to the mother.[235] Thus excluded from the crime of feticide are felonious assaults against a woman not visibly pregnant[236] or otherwise reasonably known to the

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[230] *See* Parness, *supra* note 71, at 442, in which direct and indirect laws are distinguished in the following manner:

> Laws promoting the prevention of handicaps to newborns are often indirect, in that one of their central aims is not the maintenance of a duty to the newborn to prevent handicaps. Instead, the laws focus on the maintenance of a duty to undertake reasonable conduct toward others. Both tort and criminal laws reflect this indirect tack, and cases involving their implementation demonstrate that the laws often fail to promote prevention of handicaps to newborns without justification.

[231] Maternal and medical counselor activity is covered. Besides regulating access to abortions by establishing limits involving medical judgment, informed consent, and spousal consultation, Act of Oct. 30, 1979, § 1, ILL. ANN. STAT. ch. 38, §§ 81-23.1, -23.2, -23.4 (Smith-Hurd Supp. 1984), Illinois forbids abortions of viable fetuses not necessary to the life or health of the mother, *id.* § 81-25. *See also id.* § 81-26(1) (no person who terminates a pregnancy after viability shall fail to use the degree of care to preserve the life and health of a fetus which such person would be required to use on a fetus intended to be born; punishment ranges from three to seven years imprisonment).

[232] Act of Aug. 21, 1981, § 1, ILL. ANN. STAT. ch. 38, § 9-1.1 (Smith-Hurd Supp. 1984).

[233] *Id.* § 1(a)(4), ILL. ANN. STAT. ch. 38, § 9-1.1(a)(4).

[234] *Id.* § 1(a)(2), ILL. ANN. STAT. ch. 38, § 9-1.1(a)(2).

[235] *Id.* § 1(a)(1), 1(a)(3), ILL. ANN. STAT. ch. 38, § 9-1.1 (a)(1), (a)(3).

[236] ILL. HOUSE OF REPRESENTATIVES, TRANSCRIPTION OF DEBATES, 82d Gen. Assembly 169 (66th legislative day) (June 18, 1981) (statement of Rep. Davis) (on file at HARV. J. ON LEGIS.).

actor to be pregnant, as well as successful assaults against a pregnant woman which are designed to kill her fetus, though there is no intent to cause, or no strong likelihood of, bodily harm to the woman. Furthermore, a third limit is that only fetuses capable at the time of their death "of sustained life outside the mother's womb" can be victims of the crime of feticide.[237] Such limited protection of fetuses from third party assaults is not assuaged by the statutory declaration that prosecutions under other provisions of law are not prohibited.[238] The "born alive" rule remains applicable to other Illinois homicide laws.[239]

The focus of the feticide law suggests that the protection afforded the unborn is perhaps only a secondary objective of a scheme designed primarily to protect pregnant women. Feticide can be committed without any intention of harming a fetus, but cannot be committed by one who intends no harm or other misconduct toward a pregnant woman.[240] Legislative intent chiefly to promote maternal interests via the feticide statute also surfaces in the act's legislative history. During debate on the act, one of its chief sponsors said: "What we've attempted to do with Senate Bill 192 is offer some assurances to pregnant mothers, that they can expect to carry that child full term without fear of aggravated assault . . . resulting in the loss of that child."[241] The act promotes only partially the particularized interests of the expectant mother in her unborn's potential life and fails to promote the state's general interest in protecting potential life.

Regarding unintentional conduct resulting in fetal death, as well as both intentional and unintentional conduct resulting in harm to a fetus other than death, Illinois criminal law appears silent. Use of any existing criminal sanctions to punish reckless or negligent conduct causing fetal death seems foreclosed by the "born alive" rule, as well as the "absence of specifically inclusive statutory language"[242] covering the unborn. Use of any existing statutory provisions for cases involving nonfatal injuries

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[237] Act of Aug. 21, 1981, § 1(b), ILL. ANN. STAT. ch. 38, § 9-1.1(b) (Smith-Hurd Supp. 1984).

[238] *Id.* § 1(e), ILL. ANN. STAT. ch. 38, § 9-1.1(e).

[239] *See* People v. Greer, 79 Ill. 2d 103, 116, 402 N.E.2d 203, 209 (1980).

[240] *See supra* text accompanying notes 233–35.

[241] ILL. SENATE, TRANSCRIPTION OF DEBATES, 82d Gen. Assembly 198 (41st legislative day) (May 19, 1981) (statement of Sen. Thomas) (on file at HARV. J. ON LEGIS.).

[242] People v. Greer, Ill. 2d 103, 115, 402 N.E.2d 203, 208 (1980); *see supra* note 196.

to the unborn also is foreclosed by the absence of express language.

Finally, where the Illinois General Assembly has afforded some protection to the unborn, the force behind such laws is often weak in comparison to the force of laws protective of the born. Thus, a conviction for the murder of one born alive may trigger a sentence of death,[243] while a conviction for the voluntary manslaughter of one born alive will trigger a sentence of four to fifteen years in prison.[244] By contrast, the illegal abortion of a viable fetus, or the illegal failure to preserve the life or health of a viable fetus, will only trigger a three to seven year prison sentence.[245] Thus even in a state where the legislature clearly supports the use of the criminal law to protect the unborn, the lack of a complete, coherent scheme results in inadequate protection.

III. INADEQUACIES OF CONTEMPORARY CIVIL AND REGULATORY LAWS PROMOTING PROTECTION AND RESPECT FOR THE UNBORN

Although contemporary criminal law extends inadequate protection and respect to the unborn, other branches of law offer opportunities for promoting such objectives. Tort claims and civil statutes on child abuse, neglect, and custody are two alternate means of deterring, preventing, or remedying acts harmful to the unborn. Regulatory laws provide another vehicle for advancing these objectives. A review of these and other branches of civil law will reveal continuing inadequacies regarding the extension of protection and respect for the unborn. These civil law inadequacies are likely to be more quickly eliminated if new criminal laws promoting these objectives are enacted. Often, in failing to extend protection to potential human life in civil cases, courts rely upon the lack of protection afforded by criminal laws.

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[243] Criminal Code of 1961, § 9-1(b), ILL. ANN. STAT. ch. 38 § 9-1(b) (Smith-Hurd 1979).

[244] Act of Jan. 1, 1982, § 1, ILL. ANN. STAT. ch. 38, § 9-2(c) (Smith-Hurd Supp. 1984); Act of Feb. 1, 1978, § 3(a)(4), ILL. ANN. STAT. ch. 38, § 1005-8-1(a)(4) (Smith-Hurd 1982).

[245] Act of Oct. 30, 1979, § 1, ILL. ANN. STAT. ch. 38, §§ 81-25(2), 81-26(1) (Smith-Hurd Supp. 1984); Act of Feb. 1, 1978, § 3(a)(5), ILL. ANN. STAT. ch. 38, § 1005-8-1(a)(5) (Smith-Hurd 1982); *see supra* text accompanying note 197.

A. *Tort Law Inadequacies: Too Little Compensation and Deterrence*

The wrongs under criminal and tort laws are occasionally similar, so that a person may be liable criminally and civilly for the same acts. Criminal statutes are said to have "disclosed a public policy which the courts in civil cases may further effectuate by using that policy in deciding the law in civil cases."[246] Conversely, however, criminal liability does not necessarily follow tort liability. Within civil tort law, the courts are free to formulate and to apply prospectively new legal duties reflective of social sentiment, although not expressed by statute. Within criminal law, public policy must be set out in explicit statutory provisions; to apply newfound public policy retrospectively to criminal prosecutions creates due process problems.[247]

Confusion abounds as to when state legislatures intend to impose criminal liability for harmful acts against the unborn. As noted, many acts against the unborn which would seem to be embodied within a criminal statute are unpunished because courts decline to include the unborn in the class of victims under the statute.[248] Given the greater judicial discretion in tort law than in criminal law, it appears that tort law developments could fill many of the gaps in the criminal law regarding the protection and respect of the unborn.

One possibly relevant form of tort law is the wrongful death action. For example, while an intoxicated motorist may not be criminally responsible for a fetal death that he proximately caused, he could be held liable in tort for the wrongful death of a fetus as a result of harm inflicted prenatally upon the mother. While this would provide some measure of protection and respect for the unborn, some state courts still decline to define a stillborn fetus as a "person" under their wrongful death statutes, even though a suit would be allowed if the unborn that was harmed during the accident was born alive but subsequently died.[249] Other states allow suit on behalf of a fetus who is

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[246] W. LAFAVE & A. SCOTT, *supra* note 83, § 3, at 14.

[247] *See* City of Akron v. Akron Center for Reproductive Health, 103 S. Ct. 2481, 2504 (1983).

[248] *See supra* note 128 and accompanying text.

[249] Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97 (1977); Stokes v. Liberty Mut. Ins. Co., 213 So.2d 695 (Fla. 1968); McKillip v. Zimmerman, 191 N.W.2d 706 (Iowa 1971). *See* Robertson, *Toward Rational Boundaries of Tort Liability for Injury to the Unborn: Prenatal Injuries, Preconception Injuries and Wrongful Life*, 1978 DUKE L.J. 1401, 1423 n.130. The trend is in favor of allowing recovery on a death

stillborn, but only if the stillborn fetus was viable.[250] When states fail to recognize wrongful death actions based on fetal death, the particularized interests of those individuals desirous of that fetus's birth go unrecognized, as does the state's interest in protecting potential life.

Even when a wrongful death suit involving fatal harm to the unborn is allowed, the protection of potential life remains limited. Courts may construe the main legislative intent to be the promotion of the parents' interests in bearing a living child rather than the state's interest in securing the fetus's live birth:

> In a recent development, generally opposed by the commentators, some states permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent with the view that the fetus, at most, represents only the potentiality of life.[251]

Such an interpretation is too grudging a reading, implying that the potentiality of life is a virtually negligible interest. Finally, when permitting wrongful death suits, some courts limit recovery to attendant medical and funeral expenses and to pain and suffering, excluding as too speculative the loss to the parents of

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claim regardless of live birth. *See, e.g.*, Mone v. Greyhound Lines, Inc., 368 Mass. 354, 331 N.E.2d 916 (1975); O'Grady v. Brown, 654 S.W.2d 904 (Mo. 1983) (en banc); Evans v. Olson, 550 P.2d 924 (Okla. 1976).

[250] Green v. Smith, 71 Ill. 2d 501, 504, 377 N.E.2d 37, 39 (1978); Toth v. Goree, 65 Mich. App. 296, 303–304, 237 N.W.2d 297, 301 (1975); Wallace v. Wallace, 120 N.H. 675, 679, 421 A.2d 134, 137 (1980).

"It is important to note . . . that in order to bring an action under a wrongful death statute when the child is stillborn, the majority of courts require the fetus to have been viable at the time the injuries were incurred." Note, *A Century of Change: Liability for Prenatal Injuries*, 22 WASHBURN L.J. 268, 275 (1983). In death act claims where the negligent acts, the onset of resulting injuries, and the eventual resulting fetal death are separated in time, states need to define personhood for the three distinct settings. A requirement of viability at the time of death may be accompanied by a requirement of viability at the time of injury or negligent act, or at the time of conception, or by no requirement at all. One commentator has suggested that "there is as much reason to allow a cause of action in cases involving previability injury and postviability death as there is in those involving postviability injury and postviability death." Robertson, *supra* note 249, at 1419. In addition, there is some reason to allow a cause of action for preconception negligent acts, when there follows postconception injury and death. *See* Parness & Pritchard, *supra* note 87, at 272–75.

[251] Roe v. Wade, 410 U.S. 113, 162 1973); *see also* Dunn v. Rose Way, Inc., 333 N.W.2d 830, 833–34 (Iowa 1983) (no recovery allowed on behalf of fetus under survival statute, but parents' claims under wrongful death statute are based on their own legal status and are actionable).

future support and services of the child.[252] This limited compensation fails to deter fully the negligent actor.

In addition to wrongful death actions, there are other possible tort actions that could be recognized for injuries inflicted prenatally. Such actions may not include an undesired death and may be outside the reach of the criminal law. Thus, the rapist of a pregnant woman, who may escape criminal liability for injury to a fetus, can still be deemed responsible in tort if disabilities at live birth were proximately caused by the earlier assault. Traditionally, however, such a cause of action has been available, at best, only to a fetus viable at the time of the assault and subsequently born alive.[253] More recently, civil duties to the unborn are recognized regardless of viability at the time of tortious injury.[254] Variations from the traditional requirement in tort of conception at the time of initial injury are also attaining some judicial acceptance, so that the consequences at birth of an act against the unborn prior to its conception may even trigger liability in tort.[255]

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[252] *See, e.g.*, Miller v. Highlands Inc., 336 So.2d 636, 641 (Fla. 1976); Rice v. Rizk, 453 S.W.2d 732, 735 (Ky. 1970). In New Jersey, parents of a stillborn fetus may not recover even though there is no viability requirement because proof of pecuniary loss is too speculative as a matter of law. Graf v. Taggert, 43 N.J. 303, 311, 204 A.2d 140, 145 (1964). However, recovery has been allowed for the wrongful death of a five month old child. Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960).

[253] W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 55, at 337–38 (4th ed. 1971). Like the live birth requirement, the viability rule was the subject of much negative commentary. *See, e.g.*, Smith v. Brennan, 31 N.J. 353, 367, 157 A.2d 497, 509 (1960) ("Whether viable or not at the time of the injury, the child sustains the same harm after birth and, therefore, should be given the same opportunity for redress."). *See also* Morrison, *Torts Involving the Unborn—A Limited Cosmology*, 31 BAYLOR L. REV. 131, 144 (1979); Robertson, *supra* note 249, at 1415 ("It became apparent that the viability-at-the-time-of-injury criterion made little practical, legal or medical sense in injury cases.").

[254] Wolfe v. Isbell, 291 Ala. 327, 333–334, 280 So.2d 758, 764 (1973); La Blue v. Specker, 358 Mich. 558, 563, 100 N.W.2d 445, 448 (1960); Sinkler v. Kneale, 401 Pa. 267, 273, 164 A.2d 93, 96 (1960). *See generally* Robertson, *supra* note 249, at 1418 ("It appears that the viability rule is dead in causes of action for prenatal injuries brought by living infants."); Note, *Preconception Negligence: Reconciling an Emerging Tort*, 67 GEO. L.J. 1239, 1249 (1979).

[255] Bergstresser v. Mitchell, 577 F.2d 22 (8th Cir. 1978) (an action could be maintained on behalf of an infant injured during an emergency caesarian section necessitated by the defendants' negligence in performing a prior caesarian); Jorgensen v. Meade Johnson Laboratories, Inc., 483 F.2d 237 (10th Cir. 1973) (mongoloid twins could sue manufacturer of birth control pills that caused chromosomal changes in the mother); Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 367 N.E.2d 1250 (1977) (plurality opinion) (complaint based on negligent transfusion to mother resulting in disability to child born nine years later stated cause of action for child); *see also* McAuley v. Wills, 251 Ga. 3, 303 S.E.2d 258 (1983) (relying on the three cited cases to find a duty of care to the unconceived to be recognized in certain unnamed circumstances); Robertson, *supra* note 249, at 1435–38 (a discussion of the three cases). *But see, e.g.*, Albala v. City of New York, 54 N.Y.2d 269, 429 N.E.2d 786 (1981) (disallowing recovery for preconception torts).

When one moves from the scenario of a rapist injuring potential human life to circumstances involving one or both of the potential parents, further limits on any postbirth civil action in tort by the child appear. Intrafamily immunity under state law serves to limit further the scope of any assessment of civil liability.[256]

Despite scattered cases extending protection for the unborn,[257] uncertainty still prevails as to whether or not the unborn will have standing to sue in tort equal to that of a person born alive. Application of tort law principles to a specific example illustrates the incomplete protection afforded the unborn in tort law. Requirements of conception, viability, and live birth often limit the protection provided the unborn. Consider again the intoxicated motorist whose negligence results in a collision with a pregnant woman. As a result of the accident, the fetus is injured. As noted, the drunk driver probably cannot be prosecuted under the criminal statutes for death or injury to the fetus. Tort liability in a wrongful death action may be predicated on the fetus's being born alive, or on the fetus's being viable at death, or on the fetus's being viable at the time of the accident. Likewise, the drunk driver's tortious acts injuring a woman not then pregnant, but resulting in inevitable injuries to any later-conceived fetus, may be beyond civil liability to the later-born child because of a requirement of conception at the time of the tortious acts. And when a negligent tortfeasor such as an intoxicated motorist loses a suit involving the fetus, usually an insurance company will be the only real loser. This leaves the true wrongdoer virtually untouched and substantially unpunished. Absence of full punishment means absence of maximum deterrence, as well as a societal failure to register fully its own interests in the loss of potential life.

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[256] At least one court has held that a mother bore the same liablity for negligent conduct causing prenatal injuries as would a third party, because intrafamily tort immunity had been abolished. *See* Grodin v. Grodin, 102 Mich. App. 396, 400, 301 N.W.2d 869, 870 (1981). For a discussion of suits by children, see Robertson, *supra* note 249, at 1413; King, *The Juridical Status of the Fetus: A Proposal for Legal Protection of the Unborn*, 77 MICH. L. REV. 1647, 1678, 1682–83 (1979) (suggesting maternal responsibility can only be fully assessed after fetal viability); Comment, *Parental Liability for Prenatal Injury*, 14 COLUM. J.L. & SOC. PROBS. 47, 85–87 (1978) (suggesting a "reasonably prudent expecting parent standard," which is to be maintained only after the parents were aware or had reason to be aware of the pregnancy—even if awareness predated the fetus's viability); Note, *supra* note 254, at 1260–61 (suggesting recognition of claims by children against their parents for prenatal or preconception negligence would be desirable, but that such recognition awaits substantial statutory or common law development).

[257] *See supra* notes 254–56 and accompanying text.

In the absence of express statutory changes, courts will remain cautious in extending protection to the unborn under tort law. While acts that have a negative impact on the unborn have increasingly triggered civil liability, legal change has been slow and many acts harmful to the unborn still remain outside the parameters of tort law. The inadequacies in the criminal law protection and respect for the unborn are not obviated by tort law advances. While the number of tort actions for disabilities at live birth caused by prebirth conduct is rising, the live birth rule, the requirement of viability, and intrafamily immunity stand as barriers to many civil suits.

B. *Family Law Inadequacies: Too Little Prevention and Deterrence*

The area of family relations is a second realm where civil laws could extend protection and respect for the unborn by preventing and deterring harmful conduct. In particular, potential parents could be deemed to owe certain duties to their future offspring. In the possible range of parents' legal responsibilities would be both preconception and postconception acts. As more is learned of the links between a living person's preventable genetic disorders and resulting disabilities to his or her offspring, it should be possible to contemplate parental responsibilities to nonimminent offspring. An examination of family relations laws demonstrates, however, that adequate protection of potential life has not been realized.

Illustrative of the inadequacies is the fact that most child abuse and neglect statutes exclude fetuses and unconceived children.[258] Thus, a pregnant woman's heroin use during pregnancy, a heinous if not willful act against her unborn child, often escapes civil injunctive liability for harm to the unborn.[259] Two

[258] *See, e.g.*, Baby X v. Misiano, 373 Mass. 265, 366 N.E.2d 755 (1977) (father's duty of support does not extend to unborn fetus); *see* Parness, *supra* note 71, at 458–61.

[259] *In re* Steven S., 126 Cal. App. 3d 23, 178 Cal. Rptr. 525 (1981) (no juvenile court jurisdiction to declare a fetus the ward of the state as a fetus is not a person under the relevant statute). *See also* Reyes v. State, 75 Cal. App. 3d 214, 141 Cal. Rptr. 912 (1977) (Criminal Child Endangering Act could not be applied to a fetus). *But see* Kyne v. Kyne, 38 Cal. App. 2d 122, 100 P.2d 806 (1940) (permitting civil action on behalf of unborn child to enforce parental duty to provide food and medical support); *In re* Baby Doe Ridgeway, No. 82-J-319 (Ill. 6th Cir. 1982) (enjoining a pregnant heroin addict from drug use), reviewed in Parness, *Protection of Potential Human Life in Illinois: Policy and Law at Odds*, 5 N. ILL. U. L. REV. (1984)(in press); Taft v. Taft, 388 Mass. 331, 446 N.E.2d 395 (1983) (implying state might be able to force pregnant woman to undergo medical treatment for the benefit of the fetus).

states do specifically include fetuses within child support and abuse statutes.[260] And a few states do protect the potentiality of life by permitting custody of an abused, neglected or endangered fetus to be awarded to the state in the absence of an express statute.[261] But such cases are rare, even though the state would fulfill a general public interest in protecting the future life of a child not yet born, just as it does in protecting the future life of a born child.[262]

A specific example of the inadequate protection afforded the unborn's potentiality of life in family relations law is found in the case of *In re Dittrick*.[263] There, the Michigan child neglect statutes were held to exclude the unborn. In *Dittrick*, the rights of the parents over the mother's first child had been terminated due to "continuing physical and sexual abuse."[264] While the court, based on the abuse of the first child, found neglect of the fetus which the mother was carrying, it refused to allow the Department of Social Services to take custody of the fetus. The rationale for refusing custody was that the legislature did not

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[260] *See, e.g.*, CAL. PENAL CODE § 270 (West Supp. 1984) (parental duty to furnish food and medical and remedial care to a child conceived but not yet born); N.J. STAT. ANN. § 30:4C-11 (West 1981) (child abuse statute proscribes abuse to an unborn child). These laws, however, are criminal statutes, and thus do not contain provisions for injunctive relief.

[261] *See* Jefferson v. Griffin Spalding County Hosp. Auth., 247 Ga. 86, 274 S.E.2d 457 (1981); Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 42 N.J. 421, 201 A.2d 537 (1964), *cert. denied*, 377 U.S. 985 (1964). In *Jefferson*, a woman refused to undergo a caesarian section on religious grounds, creating a virtual certainty that the child would die and a fifty percent chance that the woman would die. The court granted temporary custody of the fetus to a state agency, with authority to consent to medical procedures necessary for a successful birth. 247 Ga. at 88, 274 S.E.2d at 459. In *Raleigh-Fitkin*, the court found that a woman would need blood transfusions before delivery in order to preserve her life and that of the fetus. The court ordered the treatment when deemed necessary. 42 N.J. at 424, 201 A.2d at 538. The precedential value of these two cases for promoting the fetus's interests is unclear because the medical care ordered helped preserve the mother's health as well as the fetus's. *See also* Taft v. Taft, 388 Mass. 331, 334, 446 N.E.2d 395, 397 (1983) (in some situations, state's interest might be sufficiently compelling to justify curtailing religious rights and ordering a woman to submit to medical treatment in order to assist in carrying a child to term).

[262] While the general state interests may be similar, parental interests—particularly those of a woman—are quite different in the two settings. The woman's heightened interests involved in the unborn child setting (right to privacy, including right to bodily integrity and right to undertake childbearing decisions) make state intervention more difficult to justify. For a discussion of a woman's interests while bearing a child, see Hubbard, *Legal and Policy Implications of Recent Advances in Prenatal Diagnosis and Fetal Therapy*, 7 WOMEN'S RTS. L. REP., 201, 213–17 (1982).

[263] 80 Mich. App. 219, 263 N.W.2d 37 (1977). Since *Dittrick*, a Michigan court has found that prenatal neglectful behavior can cause termination of parental rights, but this behavior can only be brought to court after the birth of the neglected child. In re Baby X, 97 Mich. App. 111, 293 N.W.2d 736 (1980).

[264] 80 Mich. App. at 221, 263 N.W.2d at 38.

intend sections of the probate code to apply to the unborn.[265] The court, however, noted: "The legislature may wish to consider appropriate amendments to the probate code. Indeed, the background of the present case has convinced us that such amendments would be desirable."[266] Thus, although neglect of the unborn was shown and the need to protect the unborn was recognized, the fetus remained unprotected by laws which afforded protection to its already born siblings.

C. *Regulatory Law Inadequacies: Too Little Prevention, Deterrence and Punishment*

Regulatory law is a third potential source of civil rules that can serve to promote protection and respect for the unborn. Regulatory rules could punish those who have already undertaken acts harmful to the unborn, prevent additional harmful conduct, and deter similar conduct by those with no history of such conduct. Yet, in receiving areas of responsibility from the legislature, agencies are often foreclosed from even considering rules serving such purposes. Litigation surrounding the U.S. Supreme Court's decision in *Burns v. Alcala*[267] illustrates legislative and regulatory determinations not to promote the protection of the unborn's potentiality of life.

In *Burns*, the Court found that Congress had not required states receiving financial aid under the Aid to Families with Dependent Children Act (AFDC) to offer welfare benefits to pregnant women for their unborn children.[268] In so finding, the Court construed the statutory term "dependent child" to refer only to "an individual already born, with an existence separate from its mother."[269] The finding was based upon the absence of

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[265] *Id.* at 223, 263 N.W.2d at 39.

[266] *Id.* A similar holding regarding legislative intent is found in *In re* Steven S., 126 Cal. App. 3d 23, 178 Cal. Rptr. 525 (1981). Another case where state intervention on behalf of an unborn child had to await birth is Custody of Minor, 377 Mass. 876, 389 N.E.2d 68 (1979); *see also* Custody of a Minor, 378 Mass. 712, 393 N.E.2d 379 (1979) (custody of one day old infant sought by state where mother had no other children, had not yet harmed her baby, but had rejected assistance regarding prenatal care and had a substantial history of mental disorders). *But see* State v. Pointer, 10 FAM. L. REP. (BNA) 1270 (Cal. App. Feb. 17, 1984) (mother convicted of child endangerment might have to submit periodically to pregnancy testing and to follow an intensive prenatal and neonatal treatment program if she becomes pregnant).

[267] 420 U.S. 575 (1975).

[268] *Id.* at 577–79.

[269] *Id.* at 581.

congressional intent to promote potential human life through the AFDC program.[270] The Court went on to note that this finding did not mean Congress intended to ignore fully the "desirability of adequate prenatal care."[271] In fact, the Court found the Maternal and Child Health and Crippled Children's Services program[272] promoted potential life by providing funding for prenatal and postnatal care of mothers and infants.[273] Yet, benefits—if received—in this latter setting would reach far fewer expectant mothers than would benefits under AFDC. The Court also noted that states still had the option of bringing unborn children under the AFDC program.[274]

After the decision in *Burns*, several courts were confronted with equal protection claims involving state differentiations between born and unborn children.[275] For example, in *Green v. Stanton*,[276] the issue was:

> whether in the context of the state's welfare system as a whole, it is a violation of the equal protection clause for the state to provide assistance for the benefit of born children without providing comparable assistance for the benefit of unborn children, assuming plaintiffs can demonstrate that equal assistance is not provided to these two groups by the state's welfare system as a whole.[277]

The court in *Green* ruled there was no constitutional infirmity. Specifically, it found that the state's interest in "administrative convenience" was sufficient to justify the variation.[278]

Faced with a similar issue, another court found that the state

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[270] *Id.* at 583–84 (the Court noted that federal funding for prenatal health care is provided in 42 U.S.C. §§ 701–08 (1982), and that because Congress had heard proposals to provide AFDC benefits on behalf of an unborn child, it likely would have been explicit had it intended to make such provisions).

[271] *Burns*, 420 U.S. at 583.

[272] 42 U.S.C. §§701–708 (1982).

[273] *Burns*, 420 U.S. at 583 n.10. *See also* 42 U.S.C. § 701(A)(2) (1982) (purpose of Maternal and Child Health Services Block Grant Program is to reduce infant mortality and preventable diseases by providing prenatal care for low-income mothers).

[274] *See Burns*, 420 U.S. at 586. On remand, the Eighth Circuit held that pregnant women could only challenge the AFDC scheme on their own behalves and not by asserting the rights of their unborn children, thus implying that fetuses have no rights to welfare payments made to pregnant women. *See* Alcala v. Burns, 545 F.2d 1101, 1104 (8th Cir. 1976).

[275] *See, e.g.*, Alcala v. Burns, 545 F.2d at 1101 (8th Cir. 1976); Wisdom v. Norton, 507 F.2d 750 (2d Cir. 1974); Taylor v. Hill, 420 F. Supp. 1020 (W.D. N.C. 1976) (three judge court), *aff'd* 430 U.S. 961 (1977); Murrow v. Clifford, 404 F. Supp. 999 (D. N.J. 1975).

[276] 451 F. Supp. 567 (N.D. Ind. 1978).

[277] *Id.* at 568.

[278] *Id.* at 571.

was justified in giving preference to increasing benefits for those who were currently eligible for AFDC rather than to expand benefits to include mothers of unborn children, particularly given the existence of other state programs to aid pregnant mothers.[279] It would appear that in the absence of congressional directive or federal administrative agency mandate, states are free to exclude the unborn from their welfare programs, or to provide them with lesser benefits than those granted to the born.[280] Even when state and federal agencies have been delegated powers allowing for consideration of the interests of the unborn, they may fail to rule in ways serving to extend adequate protection and respect.

Outside the welfare and medical benefits context, there remains much administrative agencies can do to promote prevention, deterrence, and punishment of acts harmful or disrespectful to the unborn. Agencies can promote scientific and public understanding of the needs and interests of the unborn by promoting and undertaking research into the reproductive process, by disseminating literature and other information on that process, by providing counseling and medical treatment for nonex-

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[279] Taylor v. Hill, 420 F. Supp. 1020, 1029 (W.D. N.C. 1976). For a summary of some other reasons supporting such justifications, see *id.* at 1032.

[280] Consider Dandridge v. Williams, 397 U.S. 471, 487 (1970), where the Court said:

> The intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration. But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of public recipients (citations omitted).

It appears that many states make such exclusions and distinctions. "There is evidence that because of the recession and unemployment, as well as state and local health service cutbacks resulting from federal and state budget cuts and state revenue shortfalls, an increasing number of pregnant women in some areas may be receiving little or no prenatal care." Rosenbaum, *The Prevention of Infant Mortality: The Unfilled Promise of Federal Health Programs for the Poor*, 17 CLEARINGHOUSE REV. 698, 703 (1983). *But see* Act of Jan. 1, 1984, P.A. 83-604, 1983 Ill. Laws 4010 (expanding Medicaid coverage, including pregnancy related care, to include needy dependent minors), *amended by* Act of July 1, 1984, P.A. 83-866, 1983 Ill. Laws 5606, *codified at* Act of July 1, 1984, § 1, ILL. ANN. STAT. ch. 23, § 5-2 (Smith-Hurd Supp. 1984) (substituting "disabled minors" for "needy minors"); MISS. CODE ANN. § 43-13-115 (Supp. 1983) (expanding Medicaid coverage to include unborn children as soon as pregnancy is verified, if the unborn would be eligible for public assistance if considered a live dependent child); OHIO REV. CODE ANN. § 5111.02 (Page Supp. 1984) (expanding Medicaid coverage, including pregnancy related care, to include dependent minors). For a discussion of these laws, see *States Expand Health Care For Poor Children, Mothers To Cut Down Future Costs*, CONG. Q. WEEKLY REP. 2413 (Nov. 19, 1983) (an expansion of Medicaid may provide the preventive care necessary to take pressure off such expensive programs as AFDC).

pecting but potential parents, and by collecting data and otherwise receiving information regarding potential or actual harm or disrespect to the unborn, which could be passed on to law enforcement officials, legislators, and others.

Agencies can also be delegated particular tasks geared toward preventing, deterring, and punishing individual acts harmful or disrespectful to the unborn. Agencies could be assigned the job of regulating workplaces, so as to require exclusion of pregnant women (or other potential parents) from environments inimical to fetal health (or potential fetuses' health).[281] One barrier to the performance of this task is prevailing civil rights law protective of the employment rights of "women affected by pregnancy, childbirth, or related medical conditions."[282] Nevertheless, the United States Department of Labor used the statutory mandate that "no employee will suffer material impairment of health or functional capacity"[283] to adopt a rule requiring employers using lead in the workplace to ensure the continuing capacity of employees to produce healthy children.[284] The issue that must be resolved is "whether and, if so, on what basis, employment practices avowedly designed to protect the unborn fetuses of women workers from workplace dangers can be justified . . . despite their disproportionate adverse impact upon women's employment opportunities."[285] Such controversies would dissipate if agencies were to require that employers remove hazards to the unborn from the workplace[286] and to provide reasonable

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[281] Robertson, *supra* note 184, at 443 ("statutes excluding pregnant women from workplaces inimical to fetal health and those requiring women to take certain medications or tests to assure their health or that of the fetus would be valid").

[282] 42 U.S.C. § 2000e(k) (1982).

[283] 29 U.S.C. § 655(b)(5) (1982).

[284] The rule is found in 29 C.F.R. § 1910.1025 (1983). Supplemental information supporting the rule is found in 43 Fed. Reg. 52,952–53,006 (1978). "Temporary medical removal may in particular cases be needed for workers desiring to parent a child in the near future or for particular pregnant employees." *Id.* at 52,974. The rule is criticized in Comment, *Birth Defects Caused by Parental Exposure to Workplace Hazards: The Interface of Title VII with OSHA and Tort Law*, 12 U. MICH. J.L. REF. 237, 249 n.72 (1979). *But see* Furnish, *Prenatal Exposure to Fetally Toxic Work Environments: The Dilemma of the 1978 Pregnancy Amendment to Title VII of the Civil Rights Act of 1964*, 66 IOWA L. REV. 63, 67 (1980) (noting that the Occupational Safety & Health Act as a whole and its accompanying legislative history support a view that unborn children are not excluded from the Act's protection).

[285] Wright v. Olin Corp., 697 F.2d 1172, 1188 (4th Cir. 1982) (holding that a company's fetal vulnerability program which adversely affected women's employment opportunities constituted a prima facie case of sex discrimination that could only be rebutted by an objectively justified business necessity defense).

[286] State, as well as federal, agencies may possess such power. *See* CONN. GEN. STAT.

means for temporary work transfers for those who believe continued employment at a worksite may cause injury to their unborn children.[287]

Similarly, agencies could be delegated the task of regulating those who provide counseling, medical assistance, and other services related to childbirth; those who market drugs and other products that will or may cause injury to the unborn; those who are considering or engaged in childbirth; and those who are responsible for the disposal of fetal remains. Such agencies could require that certain information be conveyed to those considering or engaged in childbirth, certain tests or other activity be undertaken by those involved in childbirth, and certain respect be afforded the unborn even when live birth is foreclosed. The choice of an agency as the governing regulatory body in these areas seems particularly appropriate due to the everchanging scientific understanding of the reproductive process. Because of this fluidity, it may not be possible to keep traditional civil and criminal statutes fully up-to-date, and thus statutes cannot fully promote societal interests in protecting and respecting the unborn.[288]

Regulatory law is perhaps the best device in the long run to serve many societal interests in protecting and respecting the unborn;[289] unfortunately it is presently a device seldom used.

D. *Inadequacies Common to the Various Forms of Civil and Regulatory Law*

Civil and regulatory laws often extend inadequate protection and respect to the unborn, and even those laws that do attempt

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ANN. § 31-372(a) (West Supp. 1984) (where no federal standards are applicable, labor commissioner can develop occupational and health standards such as may be necessary in "special circumstances"); *see also id.* § 31-372(b) (where federal standards do apply, the commissioner cannot adopt different standards unless they are "required by compelling local conditions and do not burden inter-state commerce").

[287] CONN. GEN. STAT. ANN. § 46a-60(a)(7)(E)–(G) (West Supp. 1982) (establishing as a prohibited employment practice an employer's failure to provide reasonable means for temporary work transfers for pregnant women who reasonably believe continued employment in a position may cause injury to the fetus).

[288] Certain federal and state agencies already undertake some of the regulatory tasks described. Examples of such agencies include the Maryland Commission on Hereditary Disorders, established by MD. PUB. HEALTH CODE ANN. § 13-101 to -111 (1982); the programs of the California State Department of Health Services regarding the prevention of blindness under CAL. HEALTH & SAFETY CODE § 428 (West 1979); and the federal Labor Department's undertakings regarding exposure to lead in the workplace, *see supra* notes 283–284 and accompanying text.

[289] It should be noted that at times legislatures act in areas that otherwise could have

to promote protection and respect often are not successful. The laws lack uniformity, so that from context to context the unborn's protection changes, though the state interests and the competing considerations remain relatively unchanged. Illustrations include the various rules in tort sharply differentiating parental claims for prenatal injuries that cause death prior to birth and for prenatal injuries that result in death shortly after birth.

Even when civil laws do protect the unborn's potentiality of life, enforcement often depends upon the initiative of individuals to bring suit against offenders. Competing interests influence whether civil enforcement by anyone will be pursued. For example, parents or other concerned parties may lack the financial resources to hire an attorney to initiate a tort suit involving prenatal acts harming the unborn, a third party tortfeasor may be insolvent, or a state social service agency may not have available the economic resources necessary to secure a remedy for proven instances of nonsupport or abuse. The existence of civil law protections for the unborn does not necessarily mean that enforcement always follows.

Further, the operation of many relevant civil laws does not provide for the full protection of the unborn through preventive and deterrent action. To the extent family law serves the interests of the unborn, it usually focuses on promoting protection for the unborn by preventing further harmful acts, not by deterring harmful acts before any harm is done. Additionally, neither tort nor family law principles can be easily extended to recognize interests in the unborn beyond those of the unborn and its immediate family. By contrast, criminal law purports to reflect the moral fabric of society, to promote the interests of the state in protecting all persons, and to safeguard persons against wrongdoers for the sake of the state. Tort law, with a primary goal of compensation, and family relations law, with a primary focus on the prevention of further harm, do not promote fully the state's general public interest and many individuals' particularized interests in promoting protection and respect for the unborn.

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been delegated to administrative agencies' authority. The statutory requirement of new labels on cigarettes and in cigarette advertising, warning of harm to the unborn, is one example of such action. *Tough New Cigarette Warning OK'd*, CONG. Q. WEEKLY REP. 1929 (Sept. 17, 1983).

IV. Implementing Protection and Respect for the Unborn Through Criminal Law

A. *The Need for Increased and Clear Legislative Concern for the Unborn's Potential Life*

If protection and respect were afforded the unborn to the socially desirable degree by regulatory and other civil laws, the need for additional protections proffered by criminal sanctions would be less compelling. Penal sanctions arguably would then serve simply as an often duplicative promotion of the state's interests in the unborn. But civil statutes and regulatory rules do not adequately promote the interests in the unborn.

In view of the inadequacies outside the criminal law, legislatures need to extend clear additional protection and respect for the unborn through criminal statutes. The positive impact of coexistent civil, regulatory, and criminal laws serving the unborn would be multifold. First, when a state adopts penal sanctions, public policy with regard to the punished conduct is communicated to agencies and to the courts. This expression of legislative sentiment may prove decisive in a later debate over whether to extend protection to the unborn under regulatory or common law. Courts are often hesitant to recognize a cause of action protecting the unborn's potential life where there is no supporting legislative policy.[290] Where the legislature has acted to protect the unborn, though the particular enactment may not be determinative, the intent of the legislature to promote protection is communicated.[291] Judicial expansion of similar legal protections through the common law, founded on such communications of legislative intent, is advocated by section 874A of the Restatement (Second) of Torts, which provides:

> When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purposes of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action

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[290] *See, e.g., In re* Dittrick, 80 Mich. App. 219, 223, 263 N.W.2d 37, 39 (1977); *see supra* notes 264–66 and accompanying text.

[291] *See* W. La Fave & A. Scott, *supra* note 83, § 3, at 13–14 (where the legislature has expressed its ideas on public policy, courts will naturally give them great weight).

> or a new cause of action analogous to an existing tort action.[292]

The United States Supreme Court has recognized the propriety of such a judicial determination in *Cort v. Ash*.[293] In *Cort*, the Supreme Court stated that "in situations in which it is clear that federal law has granted a class of persons certain rights, it is not necessary to show an intention [of the legislature] to *create* a private cause of action . . . ." in order actually to find such an action.[294] The Court noted that such actions might at times arise even when "there was nothing more than a bare criminal statute, with absolutely no indication that civil enforcement of any kind was available to anyone."[295]

The enactment of comprehensive criminal laws dealing with conduct theretofore unregulated but harmful to the unborn also allows for legislative influence on the exercise of judicial power. An unequivocal statutory mandate to protect the unborn would help prevent decisions such as *State v. Brown*.[296] Yet the judiciary's flexibility in applying the civil law would be maintained, which is especially important in a field that is changing quickly because of significant advances in medical technology. The general public interest and many individuals' particular interests regarding the unborn would be indicated by criminal laws, whose enforcement would be subject to the exercise of prosecutorial discretion. Within the confines of this legislative sentiment, judges would be free to prune from the civil law doctrines that hinder the protection of and respect for the unborn. Criminal laws protective and respectful of the unborn would serve

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[292] RESTATEMENT (SECOND) OF TORTS § 874A (1979). *See also* Williams, *Statutes as Sources of Law Beyond Their Terms in Common Law Cases*, 50 GEO. WASH. L. REV. 554, 571 (1982), where the author states:

> Violations of statutes or ordinances may establish negligence per se, a presumption of negligence, or merely evidence of negligence. The statutes usually say nothing about civil liability; however, courts will extract from the statutes' purpose and the class of persons they were enacted to protect a standard of care upon which to base a civil liability . . . (citations omitted).

[293] 422 U.S. 66 (1975).

[294] *Id.* at 82 (emphasis in original).

[295] *Id.* at 79–80. Given the due process requirements of fair warning within criminal statutes, it is more problematic for a court to use tort law as a basis for interpreting a criminal statute as protective of the unborn. *See, e.g.*, People v. Greer, 79 Ill. 2d 103, 112–116, 402 N.E.2d 203, 208–209 (1980) (the court examined the common law to determine whether the unborn is a "person or individual" for purposes of the Illinois homicide statute); *see generally* W. LA FAVE & A. SCOTT, *supra* note 83, § 3, at 14 (civil statutes have been important in the development of substantive criminal law, but criminal law is more hesitant to borrow from civil statutes than civil law from criminal statutes, because of the advance warning requirement).

[296] 378 So. 2d 916 (La. 1979). *See supra* text accompanying notes 145–48.

as a general guide to civil and regulatory law developments, even though there may be an absence of legislative foresight regarding the particular factual circumstances underlying developing civil cases or regulatory forays.

A second benefit of new criminal laws on the unborn is that they should prompt new debate on, and increased public sensitivity toward, prevailing social views. The educational function of criminal law would trigger compliance with laws protecting the unborn outside the criminal law context. Potential tortfeasors, for example, would be made aware of social sentiment through their acquaintance with the new criminal laws. They would be better able to anticipate the cost of their actions undermining that policy. This anticipation may dissuade certain potential actors from behaving in ways which would have been harmful to the unborn. New criminal laws would also facilitate the courts' task of dealing with such necessary elements as foreseeability and notice in any later tort or other civil action.

To remedy the prevailing inadequacies in the protection of the unborn's potentiality of life will require the concerted efforts of legislators and judges. Legislatures must enact criminal provisions which expressly include the unborn as victims of crime, as these bodies are chiefly responsible for enlarging the scope of penal statutes. Courts should permit enforcement of such criminal provisions and should not be forestalled by an overly broad reading of *Roe v. Wade*.

A particularly important effort in any attempt to remedy prevailing inadequacies involves the adoption, enforcement, and consistent application of a comprehensive statutory scheme embodying all crimes against the unborn. To date, states have intermingled within their criminal statutes crimes against the born with crimes against the unborn. Where certain crimes against the unborn, such as feticide, have been legislatively differentiated, they tend to be scattered and separated from other legislative acts of a similar type, perhaps failing to convey fully the strength of the legislature's desire to protect the unborn.[297] Protections afforded the unborn are insufficient because

[297] *See, e.g.*, the California feticide statute and the child support statute protective of the fetus's interests, CAL. PENAL CODE §§ 187, 270 (West Supp. 1984); the Illinois feticide and criminal abortion statutes, Act of Aug. 21, 1981, § 1, ILL. ANN. STAT. ch. 38, § 9-1.1 (Smith-Hurd Supp. 1984); Abortion Law of 1975, § 1, ILL. ANN. STAT. ch. 38, § 81-23.1(A) (Smith-Hurd 1977). If these and similar statutes protective of the unborn were placed together in a separate section, the intent of the legislature would be clearer. Instead, feticide is often isolated and placed with homicide provisions dealing with the

statutes primarily written to protect the born cannot be easily used to afford full protection to the unborn, and because they usually do not contain legislative history about protecting the unborn. Explicit protections afforded the unborn to date are also inadequate. Even when individually sufficient laws can be found in a statutory scheme, other complementary laws are lacking and thus there is incomplete protection.[298]

By considering an integrated series of criminal statutes exclusively or primarily geared to protecting only the unborn, legislators would be better able to focus their attention on determining the extent to which a social consensus calls for protection and respect for the unborn. They would be able to implement such sentiment in a coherent way. The courts would be provided with clearer guidance. Statutory questions involving who is encompassed within the class of victims would be eliminated, or at least reduced. Irrational gaps in the protection afforded the unborn would be lessened. Because contemporary criminal actions involving the unborn typically encompass conduct against the fetus, the integrated series of criminal statutes might be assembled under a chapter on "Crimes Against the Fetus." As scientific advances lead to a more vivid awareness of crimes against those as yet unconceived, the chapter heading might be altered to refer to "Crimes Against the Unborn."

B. *Protecting the Potential Life of the Fetus*

State legislatures must expressly include the fetus within the class of persons protected by criminal statutes which sanction both intentional and unintentional acts. For the most part, distinctions between viable and nonviable fetuses should be eliminated. The failure to protect the fetus from intentional acts resulting in the termination of potential life is well illustrated by

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born. One commentator has observed:

> It is certainly odd to lump together the crimes of feticide and of murder. The consent of a third party (the mother) is a good defense to the former; but not even the consent of the victim constitutes a defense to the latter. The principle of lesser evils provides a justification for the former, but it is not applicable to the latter.

G. FLETCHER, *supra* note 89, at 378.

[298] Illinois, for example, does not have laws complementary to the criminal abortion and feticide acts. *See supra* notes 243–45 and accompanying text. *See also* G. FLETCHER, *supra* note 89, at 378 (noting the oddity in California's legislative scheme which criminalizes the murder, but not the manslaughter, of a fetus).

Keeler v. Superior Court,[299] which held that the defendant was not subject to the state homicide law though unquestionably he intended to kill, and did kill, the unborn child that his ex-wife was carrying. Prosecution only for the assault on the former wife promotes neither the general public interest in protecting potential life, nor the particularized interests of certain individuals, including the ex-wife, in securing the birth of the fetus whose potential life was terminated. The creation of private legal duties and governmental programs designed to prevent handicaps to newborns reflects the broad interest in protecting the fetus from intentional acts that cause injury appearing at birth without resulting in the termination of potential life.[300]

In addition to intentional acts, legislatures should protect the fetus from unintentional acts that result in harm at birth or potential life termination. Express protection of the unborn in vehicular homicide, manslaughter, assault, and similar statutes will avoid injustices, such as sometimes occur when the mugger of a pregnant woman seriously injures her fetus but can only be prosecuted for assault on the woman. The existence of a new comprehensive package would give the judiciary clear guidance and make frustration of the legislative will, whether intentional or not, a good deal less likely.

C. *Protecting Preconception Forms of Potential Life*

The general public interest, as well as any individualized interests, in protecting the potentiality of human life most often entails a concern with developing fetal life. These interests, however, extend beyond the bounds of postconception fetal life and embrace preconception potential life. Preconception potential life encompasses at least the present possibilities for future conception, fetal development, and birth represented in the fertility of living men and women. While there has been some concern in tort law about the potential of endless litigation should legal consequences attach to preconception acts resulting in potential life impairment, such concerns should sometimes yield to state legislation protecting the preconceived's poten-

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[299] 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970). The effect of *Keeler* has been only partially ameliorated by subsequent legislation. *See supra* notes 141–144 and accompanying text.

[300] *See* Parness, *supra* note 71.

tiality of life. In recognizing a tort claim based on preconception acts, one court said:

> While we are aware that there may be . . . potential for perpetual claims arising from chemical accident or long term radiation exposure . . . [w]e feel confident that . . . the judiciary will effectively exercise its traditional role of drawing rational distinctions, consonant with current perceptions of justice, between harms which are compensable and those which are not.[301]

Criminal law protection of the potential life of those now unconceived is also possible in the preconception context. One relevant factor in the preconception context is the recognition in *Roe* that as the days of a pregnancy proceed, the state interest in protecting potential life becomes greater. The state interest in potential unconceived human life may be less than the state interest in conceived human life.

Obviously, the quantitative and qualitative development of future generations depends upon the state of human fertility. Genetic damage may cause harm to the potential life of future generations just as surely as do certain impairments of fetal development. Thus, a chemical company that injures a fertile woman by rendering her sterile eradicates the potentiality of human life represented by her fertility, a potentiality not too dissimilar from that embodied within a developing fetus. The preconceived can suffer much the same quantitative and qualitative depletion of their potential lives as can developing fetuses. Key differences, of course, include the imminence of the actual life after birth, and the increased probability that a potential parent will become an actual parent. Yet the fact that the state may need to accommodate the preconceived unborn's interests differently than the fetus's interests does not detract from the recognition that there is a legitimate state interest in both preconception and postconception protections of potential life.

The nature, urgency, and legitimacy of protecting preconception potential life can be illustrated by reviewing a hypothetical situation. The illustration seems in order, as far too frequently courts and legislatures have failed to address harmful preconception conduct. The hypothesized scenario involves the exposure of fertile men and fertile women to chemical substances

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[301] Renslow v. Mennonite Hosp., 67 Ill. 2d 348, 355, 367 N.E.2d 1250, 1255 (1977) (plurality opinion). *See supra* note 255 and accompanying text.

in the workplace. The development and use of new and extremely powerful chemicals has opened up new and dangerous possibilities for harm to the unborn.[302] The extent of harm to the preconceived unborn children of workers triggered by exposure to certain potent chemicals is limited only by the imagination. The scenario can be said to include chemicals that affect only the fertility of the men and women exposed to them. These chemicals may cause no pain or emotional or physical harm to these workers but may have a negative impact on their unconceived children. Because such chemicals only dramatically affect the health of future fetuses and children, the exposed men and women may feel they suffer no personal injuries; they may not be concerned about any exposure, and may actually demand exposure by suggesting an employer cannot forbid them from pursuing their jobs in the relevant workplace area.

The exposure of fertile men and women to such chemicals can occur in at least two possible settings. In the first setting, the employer exposes named individuals to the chemical. The individuals might include a six year old child, as well as a twenty-one year old employee. Because the exposure victims can be specified, the resulting harm is limited to only certain unborn. The second setting involves the exposure of a number of unknown, but fertile, individuals to the chemical. Here, it is known that a number of persons have been exposed, but it is not known which individuals have been affected. Consequently, whatever harm might arise falls upon unforeseeable future fetuses and children.

These two settings can be combined with a number of differing variables. One variable is the exposer's state of mind; the potential dangers to the unborn may or may not be known. A second variable involves the degree of certainty that harm will result to the future fetuses and children. A third variable is the nature and extent of the harm that will certainly, probably, or possibly, result. It may be predicted, for instance, that the chemical will only slightly affect fetal development, so that the child will be born with a treatable malady. Another chemical, in con-

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[302] *See* Ashford & Caldart, *The Control of Reproductive Hazards in the Workplace: A Prescription for Prevention*, 5 INDUS. REL. L.J. 523, 524–29 (1983); Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII*, 69 GEO. L.J. 641, 655–63 (1981); Furnish, *supra* note 284, at 119–29 (summarizing scientific evidence linking parental exposure to certain chemicals, metals, and other environmental factors to injuries to fetuses).

trast, may so seriously affect development that severe and nontreatable disabilities such as blindness or deafness may result. These variables, in combination with the two settings, suggest an array of possible criminal sanctions to distinguish the relative seriousness of the acts.

This Article strongly suggests that the states' protection of the potentiality of human life should include the protection of preconception potential life. To determine when criminal sanctions are appropriate in order to deter and to punish conduct harmful or potentially harmful to preconception potential life requires a delicate balancing. The utility of the chemical substance, that is, the present societal benefits from its use, together with the rights of those now living and the availability of alternative means of securing the benefits, must be balanced against the harm that it causes or may cause.[303] When exposure of a fertile individual to a chemical is almost certain to cause serious harm to any future fetus or child, the protection of the potentiality of life should often outweigh any benefits from such exposure. If exposure is necessary, it may be possible to limit it to those who can be identified on objective grounds as least likely to have children. On the other hand, when exposure to a chemical creates only a one percent possibility of nonserious harm to future fetuses and children, the social utility of more widespread exposure may well outweigh the resulting harm to potential life.

On the other extreme, even when no fertile person is scheduled to be or has yet been exposed to a certain noxious chemical, criminal sanctions might still be imposed on the possessor if the chemical is so dangerous to future generations that mere possession can be deemed a wrong per se. In order fully to protect potential life, states must begin to discern the urgency and legitimacy of protecting even preconception potential life. They must act with foresight and courage in enacting criminal legislation affording such protection in ways that take into account medical and scientific understanding regarding the dangers to the unconceived. While not all of the hypothesized chemical exposures should be criminalized, at least some mandate state legislative action. Awaiting the onslaught of tort suits before

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[303] For a discussion of the balancing act courts must perform in determining negligence, see United States v. Carroll Towing, 159 F.2d 169, 173 (2d Cir. 1947).

considering possible criminal sanctions may constitute an attempt to close the barn door after all the horses are gone.[304]

D. *Respecting the Unborn*

In addition to protecting the potentiality of life, state legislatures should employ criminal laws to require that due respect be afforded the unborn human. While lawmakers may not infringe upon a mother's right to privacy by enacting statutes that require "elaborate funerals" for aborted fetuses,[305] they must not allow "the mindless dumping of fetuses on garbage piles."[306] A minimal level of dignity should not be denied simply because the mother's right to privacy has been held to supercede the unborn's potentiality of life. Rather, legislatures must mandate, and the courts must help promote, the respectful handling of fetal remains within the constitutional constraints of *Roe v. Wade* and in line with significant social sentiment.

Furthermore, legislatures must act to ensure that the human fetus does not encounter demeaning or disrespectful treatment. Fetal experimentation laws can provide such assurances. Although some states have already adopted limits on fetal experimentation in line with social sentiment regarding the dignity of the human unborn,[307] more legislative action is necessary.

V. CONCLUSION

The purpose of this Article has been to challenge state legislators and state judges to discern the urgency of protecting and respecting the unborn through criminal laws. Far too often, laws criminalizing acts against the unborn remain unwritten, though strong social sentiment favors such writings. Laws mandating respect for the dignity of the human unborn and laws protecting against the termination or dimunition of potential life are con-

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[304] If the horses are not to be lost, states may need to consider and to implement criminal provisions applicable to certain corporations, such as those dealing in very toxic substances. On corporate criminal responsibility, see Granite Constr. v. Superior Court, 149 Cal. App. 3d 465, 197 Cal. Rptr. 3 (1983); Brickey, *Corporate Criminal Liability: A Primer for Corporate Counsel*, 40 BUS. LAW. 129 (1984).

[305] Planned Parenthood v. Fitzpatrick, 401 F. Supp. 554, 572 (E.D. Pa. 1975) (three judge court), *aff'd mem. sub nom.* Franklin v. Fitzpatrick, 428 U.S. 901 (1976).

[306] *Id.* at 573 (quoting from State's post-trial brief); *see supra* text accompanying note 216.

[307] *See supra* note 14 and accompanying text.

sistent with the public interest in equating the fetus with the living person for nonabortion purposes, as well as with many individuals' particularized interests in a similar equation. A distinct statutory scheme covering crimes against the unborn represents the most sensible means of implementing full protection and respect for the unborn. "Crimes against the fetus" laws would include provisions designed primarily or exclusively to protect the potential life of fetuses, or to promote due respect for fetuses. When scientific advances yield further insights on the potentiality of life of those now unconceived, consideration should be given to a more expanded statutory scheme encompassing crimes against all the unborn.

ARTICLE

OBSCENE TELEPHONE CALLS: AN INTRODUCTION TO THE READING OF STATUTES

REED DICKERSON*

Members of the legal profession continually confront problems of statutory interpretation. Unfortunately, most lawyers have been inadequately trained to read and to draft statutes, resulting in poorly reasoned judicial decisions and policy choices.

In this Article, Professor Dickerson explores common problems associated with statutory interpretation. In exploring these problems, he describes the cognitive process involved in reading a statute and the large fund of tacit assumptions that condition this process. Through a case study analysis, he suggests a method of approaching problems of statutory interpretation.

This Article presents an exercise in statutory interpretation, for the most part as it was presented several years ago to the appellate judges of Florida at their annual educational meeting.[1] The following hypothetical case, which is based on an actual statute from another state,[2] was submitted to more than twenty-five judges, each of whom was invited to complete an unfinished opinion in advance of the meeting.

I. THE UNFINISHED OPINION

IN THE DISTRICT COURT OF APPEALS OF FLORIDA, SECOND DISTRICT

SAMUEL POLITTE, Appellant	:	
v.	:	No. 80-1690
THE STATE OF FLORIDA, Appellee	:	

REED, Judge.

Defendant is a twenty-three year old interstate truck driver who has a citizens band (C.B.) radio with an outside range of

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[1] The meeting was held at Innisbrook, Tarpon Springs, Florida, on June 18–20, 1981.

[2] LA. REV. STAT. ANN. § 14-285 (West 1983).

ten miles. At about 2:00 a.m. on January 20, 1980, while operating his radio in one of several frustrating attempts to locate vulnerable female companionship to break his boredom on Route 41 between Naples and Miami, defendant made radio contact with a thirty-five year old unaccompanied woman who had an immediate problem of her own.

A resident of Bonita Springs, complainant was driving to be with her husband, who had been hospitalized while on a business trip to Miami Beach. Some miles past Ochopee, she realized that she was running low on gasoline and that, without a map of the area, she had no idea as to where she might refuel. Starting to panic over the possibility of being stranded alone on a dark highway, she turned to her C.B. radio. The resulting coincidence produced an interesting conversation. Irritated at finding trouble rather than release, defendant offered a stream of obscenity and profanity. Then, sensing that the situation might not be all that bad, defendant tried a friendlier tone. He offered to convoy complainant to the Paolita truck stop, where, he said, there was lots of gas, good booze, and a nice place to have sex. After some further agonizing, complainant reluctantly agreed to being tailgated into Paolita. No names were exchanged. The conversation was overheard by the police and, when the two vehicles arrived at Paolita, a squad car was waiting.

Defendant was charged and convicted before the Circuit Court, Collier County, of violating the following Florida statute: "No person shall engage in or institute a local telephone call, conversation, or conference of an anonymous nature and therein use obscene, profane, vulgar, lewd, lascivious or indecent language, suggestions or proposals of an obscene nature and threats of any kind whatsoever." Fla. Stat. § 899.999 (1984).

The applicable federal statute provides: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both." 18 U.S.C. § 1464 (1982).

The case is on appeal on the narrow question of whether, on the facts just recited, the Florida statute was violated. In view of *Thigpen v. State*, 350 So. 2d 1078 (Fla. Dist. Ct. App. 1977), *cert. dismissed*, 354 So. 2d 986 (Fla. 1978), no question has been raised about the constitutionality of the statute.

II. Applying Principles of Statutory Interpretation

Five judges responded with completed opinions that not only raised valuable relevant considerations but, through a number of significant omissions, also confirmed the previously expressed suspicion that American judges need to be further sensitized to problems of meaning.[3]

At the meeting, the following principles for interpreting statutes were offered. But first there must be a word of caution.

In a search for guiding principles for interpreting statutes, it is tempting to assume that the problem is to unravel a unitary concept called "interpretation." What many lawyers do not realize is that what lawyers call "interpretation" includes, in the case of statutes, more than what that term normally means outside the law, which is finding whatever meaning there is in a writing.[4]

In litigation, unfortunately, finding whatever meaning there is in the writing does not necessarily resolve the issue being litigated. Suppose a court, after exploring all the resources of meaning, concludes that the statute is invincibly uncertain or incomplete with respect to the case at hand. Unless the statute is so defective as to be unconstitutionally vague or unfair, the court is still faced with resolving the controversy. It must repair the statute, and it can do this only by making new law. Unfortunately, the idea that a court could make law on its own, instead of "discovering" it, was until recently so abhorrent that courts have maintained surface respectability by calling their lawmaking with respect to statutes "interpretation." This Article, however, is concerned only with interpretation in its normal sense of cognition.

Every successful, written communication consists of two factors: the written communication, which may consist of more than one instrument, and its external context.[5] No message is complete without both. Interpretation, conversely, should be limited to both.

The more difficult concept is external context.[6] Figure 1 be-

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[3] *See* R. Dickerson, The Interpretation and Application of Statutes 3, 10–11 (1975).

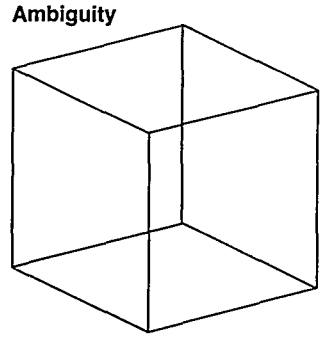
[4] *See id.* at 13–21.

[5] *Id.* at 103, 124.

[6] *See generally id.* at 105–24 (materials describing the elements of external context).

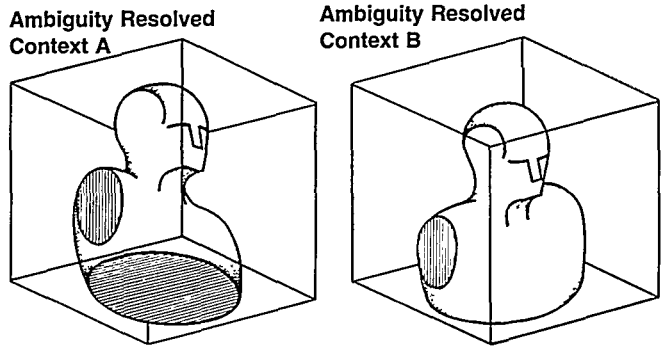
low, consisting of the well-known Necker cube,[7] exemplifies unresolvable ambiguity.[8] The question is whether the cube is being seen from above or from below.

Figure 1



The ambiguity is immediately resolved when the same cube appears in a persuasive context (Figure 2). In Context A, the

Figure 2



[7] Louis Albert Necker first observed perspective reversal, or two ways of seeing, in line drawings of rhomboid crystals in 1832. The same phenomenon occurs in line drawings of transparent cubes, best seen from the perspective exemplified by the figure in the text. Hence, the term "Necker cube" was born. Attneave, *Multistability in Perception*, SCI. AM., Dec. 1921, at 63, 67.

[8] *See generally* R. DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING 23–27 (1965) [hereinafter cited as R. DICKERSON, FUNDAMENTALS]; Dickerson, *The Diseases of Legislative Language*, 1 HARV. J. ON LEGIS. 5, 6–9 (1964) (discussions of statutory ambiguity).

cube is inevitably seen from below. In Context B, it is inevitably seen from above.

Although its usual role is simply to limit the sweep of otherwise overly general terms, context is sometimes strong enough to override otherwise clear express language, as in the following example: ". . . one (1), two (2), two (3), four (4) . . . ." In this example, the numeral "3" overrides the word "two" that immediately precedes it.

It is remarkable that a concept as basic as external context has received so little attention from any source. Although there is widespread agreement that external context is a vital ingredient,[9] only a handful of writers have undertaken to explain what it consists of or how it works.[10]

Briefly, the external context of a statute is that part of the total statutory message that is already in the minds of the legislative audience. For the most part, it appears in the form of factual, tacit assumptions that are shared by the author and the audience or, in special instances, that are available to the audience through sources, such as a dictionary, that are customarily consulted. This concept can be clarified by looking at several diagrams.

Figure 3 represents the statutory provision being interpreted.

Figure 3

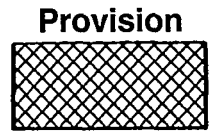


Figure 4 represents the same provision in the context of the rest of the statute, the relevant parts of which provide the statute's internal context. This goes well beyond the part of micro-context called "syntax."

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[9] *See, e.g.*, E. DRIEDGER, CONSTRUCTION OF STATUTES 149–63 (2d ed. 1983); *see also* R. DICKERSON, *supra* note 3, at 103 n.2 (compilation of additional authorities that discuss the role of context in communication).

[10] *See, e.g.*, R. DICKERSON, *supra* note 3, at 105, 108–09, 111, 117.

Figure 4

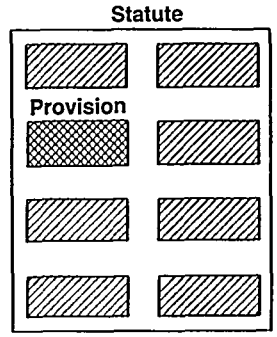


Figure 5 shows the same provision and the statute in the field of relevant word habits and express or tacit assumptions that constitute the external context of the provision and statute.

Figure 5

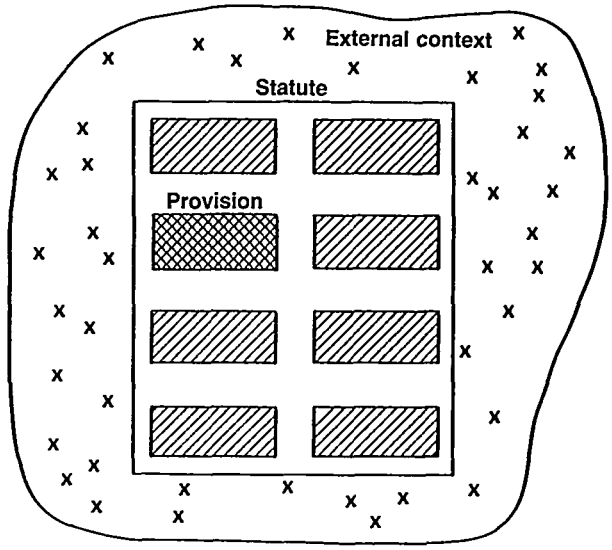
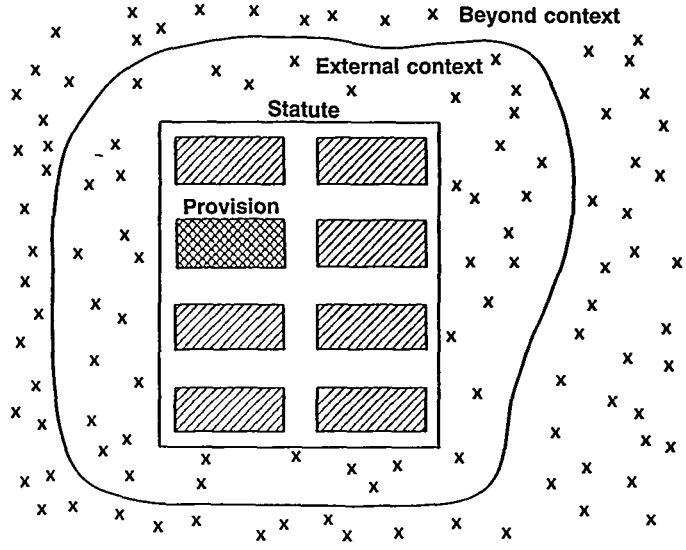


Figure 6 shows the same concepts in relation to information or material that lies beyond the scope of external context.

Figure 6



The critical question is, how does the reader know what extrinsic material is part of external context and what lies beyond it? All the following questions must be answered affirmatively before extrinsic material can be considered part of external context:

(1) Is it relevant?

(2) Is it reliable and reliably revealed?

(3) Is it shared or readily shareable by the author with typical members of the legislative audience?

(4) Do both author and typical members of that audience rely on it to carry part of the message or to affect it?[11]

Nonstatutory material that does not meet the standards of context should not be considered, except for confirmatory purposes, while the court is determining what the statute, as en-

[11] R. DICKERSON, *supra* note 3, at 124.

acted, means. Exclusion of such material is necessary to protect the legislative audience against unfair surprise.

Knowing this, how does the reader find the meaning of a statute? The first step is to explicate it.[12] Here are Justice Frankfurter's three famous rules: "(1) Read the statute; (2) read the statute; (3) read the statute!"[13] Unfortunately, most judges, lawyers, and law professors have been inadequately trained to read statutes. Indeed, many are reluctant even to try.

Justice Frankfurter has also admonished the reader that in interpreting statutes "[t]he aids of formal reasoning are not irrelevant; they may simply be inadequate."[14] The ascertainment of meaning is not so much one of deductive logic as it is one of reacting to a total situation, to which that reaction is psychological, immediate, and typical of the legislative audience and results from recognizing established symbols and meanings.

Ascertaining the meaning of a statute is something like answering the question, "Is the picture before me one of Burt Reynolds?" The primary method of cognition is the informed "gut reaction," which is ultimately based on verbal habits. It is one of recognition and perception. Either the reader recognizes the symbols, or he does not. Either he perceives the aggregate message, or he does not. This method falls within the pragmatic dimension of semiotics, providing a fertile field for the psycholinguists.

The main job of statutory interpretation, therefore, is not to discover specific rules for unlocking meaning in specific cases, but to try to react normally to a complex situation. This means developing a wholesome, sympathetic attitude that is sensitive to the appropriate total context.

Constitutionally valid cognition in the case of statutes involves looking at the right materials with the right attitude. Here are some specific recommendations for doing this:

(1) Look at all the relevant language of the statute.

(2) Look at it from the vantage point of a typical member of the legislative audience. This vantage point is defined by

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[12] *Id.* at 217–37.

[13] H. FRIENDLY, BENCHMARKS 202 (1967) (quoting a statement reportedly made by Frankfurter).

[14] Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 529 (1947).

what is generally understood about the meanings of words in that speech community, which is the semantic dimension, and what is taken for granted in that speech community as conditioning this kind of provision, which is the contextual dimension.

(3) Look at it with an attitude of unbiased inquiry, which is a form of empathy. Individual predilections should be saved for the creative phase.

(4) React!

(5) If this does not provide a persuasive answer, balance the respective probabilities using the normal legislative assumptions and principles of deductive logic. This step is roughly analogous to the mathematician's vector analysis.

This process should handle the resolvable doubts. The unresolvable ones, by hypothesis, can be handled only by an act of judicial lawmaking,[15] which this Article does not consider.

A large fund of tacit assumptions conditions the cognitive process. These assumptions include many rebuttable assumptions of fact that, as part of external context, are based on established tendencies. The force of these tacit assumptions in a particular case must be determined in light of the peculiar circumstances surrounding that case. For example, in a statute it is generally assumed that the draftsman used his words in their normal senses and that he meant what he said. The statistical force of this generally reliable assumption inheres in the nature of language. It is further assumed that the draftsman did not intend to contradict himself. This, too, is a strong assumption. Third, it is assumed that the statute is intended to produce a constitutional result. This assumption is somewhat less reliable. Fourth, it is assumed that "the legislature was made up of reasonable persons pursuing reasonable purposes reasonably."[16] This assumption is highly tentative. Finally, it is assumed that the draftsman did not include language unless it contributed to the ideas expressed. This assumption is relatively weak.

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[15] *See generally* R. DICKERSON, *supra* note 3, at 13–21 (ascertainment of meaning distinguished from judicial lawmaking).

[16] H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1415 (tent. ed. 1958).

These assumptions coalesce into a broad and highly tentative assumption that the draftsman followed sound drafting practices. The general strength of this assumption can be tested by inspecting the statute being interpreted. This inspection will disclose the degree of professionalism of the author and thus the general extent to which it can be assumed that he complied with the principles of good drafting.

Professor Elmer Driedger has crystallized these insights by suggesting that, when interpreting a statute, it is useful to reverse the drafting process.[17] This is a good idea, but to do it the reader must know what legal drafting is and what good legal drafting entails.

Legal drafting, like other sophisticated expository writing, operates not only in the domain of language but also in the domain of concepts. It is a two-level operation in which the two levels interact: substantive concepts shape the author's language, and the disciplined use of language helps shape his concepts.[18]

If Professor Driedger is right, the surest way to find the meaning of a statute is to rewrite it. This forces the reader to read deeply instead of merely reading what others, usually judges or law professors, have said about it. As an educational exercise, it heightens the lawyer's sensitivity to the trouble zones of language and their matching concepts. Most importantly, systematic writing strategies can greatly improve the substance of the author's message.[19]

In summary form, the main strategies of good drafting are these:

(1) Be strictly consistent. Always state the same idea in the same way. Always state different ideas differently. As far as possible, arrange similar things similarly.[20]

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[17] Driedger, *A New Approach to Statutory Interpretation*, 29 CAN. B. REV. 838, 843 (1951).

[18] *See* R. DICKERSON, FUNDAMENTALS, *supra* note 8, at 10–13, 46–47, 133; Dickerson, *Legal Drafting: Writing as Thinking, Or, Talk-Back from Your Draft and How to Exploit It*, 29 J. LEGAL EDUC. 373, 374–75 (1978) [hereinafter cited as Dickerson, *Legal Drafting*]; *see also* R. DICKERSON, MATERIALS ON LEGAL DRAFTING, 99–106 (1981) (compilation of additional sources that discuss the two levels of legal drafting) [hereinafter cited as R. DICKERSON, MATERIALS].

[19] *See* Dickerson, *Legal Drafting*, *supra* note 18, at 377.

[20] R. DICKERSON, FUNDAMENTALS, *supra* note 8, at 11–12; Dickerson, *Legal Drafting*, *supra* note 18, at 378–79; *see also* R. DICKERSON, MATERIALS, *supra* note 18, at 168–74 (compilation of additional sources that discuss the importance of consistency).

(2) Arrange so as to clarify structure. As far as possible, arrange ideas hierarchically, and juxtapose the ideas that share the strongest affinities.[21]

(3) Follow established usage.[22] As far as possible, conform to the established usages of the speech communities to which the statute is addressed. In other words, avoid "Humpty-Dumptyism."[23]

These strategies and the principles already discussed can be used to explicate and improve the state statute that governs the *Politte* case. That statute provides:

1 **No person shall engage in or institute a local telephone call,**
2 **conversation or conference of an anonymous nature and therein**
3 **use obscene, profane, vulgar, lewd, lascivious or indecent language,**
4 **suggestions or proposals of an obscene nature and threats**
5 **of any kind whatsoever.**

Literally, line 1 says that no person is *required* to "engage in." This form of statement is grammatically undesirable, because negating a requirement does not necessarily negate a power or privilege to act, which it is necessary to do in order to imply the prohibition that context clearly calls for here. Literal meaning and context should support each other, not conflict with each other. The statute should read, "No person may . . ." or preferably "A person may [or 'shall'] not . . ." or "A person who . . . ."

The inclusion of both "engage in" and "institute" is redundant in this context. How can a person institute a telephone call in which he uses obscene language without "engaging" in the call? The words "or institute" should be omitted.

Lines 1 and 2 pose a potential syntactic ambiguity. Does "telephone" modify only "call" or does it also modify "conver-

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[21] R. DICKERSON, FUNDAMENTALS, *supra* note 8, at 12, 55–72; Dickerson, *Legal Drafting*, *supra* note 18, at 377–78.

[22] R. DICKERSON, FUNDAMENTALS, *supra* note 8, at 12–13, 103–04; Dickerson, *Legal Drafting*, *supra* note 18, at 379.

[23] R. DICKERSON, FUNDAMENTALS, *supra* note 8, at 13, 103–04; Dickerson, *Legal Drafting*, *supra* note 18, at 379. The term "Humpty-Dumptyism" stems from Lewis Carroll's tale, in which Humpty-Dumpty tells Alice that a word means whatever he chooses it to mean. L. CARROLL, ALICE IN WONDERLAND 163 (Gray ed. 1971).

sation" and "conference"? Grammatically, if it modifies "conversation," it must also modify "conference." A similar question arises for the term "local." Stated in tabular form, the grammatical alternatives are these:

(1) No:
  (a) local telephone call;
  (b) conversation; or
  (c) conference.

(2) No local:
  (a) telephone call;
  (b) conversation; or
  (c) conference.

(3) No local telephone:
  (a) call;
  (b) conversation; or
  (c) conference.

Syntax fortified by total context suggests that alternative C is what the legislature intended. The syntax is supplied by the concluding modifier, "of an anonymous nature," which necessarily modifies "conference" and must also modify "conversation" and "call," because it would make no sense to apply the anonymity requirement to only one of three obviously overlapping concepts. Also, it would be hard to have an anonymous conversation or conference unless it were conducted by telephone.

The next question is whether all three terms are needed. The word "conference" may be dropped as included in the broader word "conversation." The word "conversation" may then be dropped as included in the broader word "call." The latter term is needed because the legislature probably intended to include the situation where a caller merely utters a stream of obscenities and hangs up, thus precluding "conversation." There are also semantic problems, which will be discussed later.

In line 3, the question arises whether some of the modifiers may be dropped as covered by others. "Lewd" and "lascivious" may be dropped as included in the sex oriented "obscene."

"Vulgar" may be dropped as unconstitutionally vague.[24] Although "obscene" is included in "indecent," the former is needed because it targets one of the two basic evils to which the statute seems to be directed—obscenities and threats. The term "indecent" is presumably needed to cover other, though less significant, forms of indecency.

The most difficult problem of meaning appears in lines 3 and 4, where the syntax does not make immediately clear whether the primary series consists of two main elements, the first of which is a subseries of three, or of three main elements. In other words, are the phrases within the statute properly grouped as:

(1) obscene or profane language, suggestions, or proposals; and
(2) threats;

or as:

(1) obscene or profane language;
(2) obscene suggestions or proposals; and
(3) threats?

The tip-off is "suggestions," which demands a modifier. The most logical modifier is "of an obscene nature." If in addition to modifying "proposals" it modifies "suggestions," it must also modify "language," assuming that the latter is part of the subseries of three under the first alternative reading. But if this is so, it collides with "obscene" and its fellow modifiers in line 3. Conversely, if the modifiers that precede "language" also modify "suggestion," they must also modify "proposals" and thus collide with "of an obscene nature."

If the reader accepts the second alternative reading, reinforced with penultimate commas after "lascivious" in line 3 and "nature" in line 4 but *not* after "suggestions," and if the reader recognizes that "suggestions" includes "proposals," the various pieces fall into place.

The final problem involves "and" in line 4. Semantically, the word is crystal clear. It means conjunction, not disjunction, and

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[24] *See, e.g., Cohen v. California*, 403 U.S. 15, 25 (1971) ("[i]t is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.").

nothing in the syntax suggests otherwise. External context, on the other hand, indicates that the legislature could hardly have meant what it expressly said. It is generally accepted that anonymous harassment by telephone, whether by obscene or profane language, obscene proposals, or threats is a social evil that a legislature may properly try to curtail. But it strains credulity to assume that the legislature did not intend to punish an obscene telephone call unless it also contained both a threat and dirty words. Here, clear context prevails over otherwise clear words. As the last touch up of this provision, therefore, "and" should be changed to "or" in line 4.

In more modern legal language, we finally get something like this:

A person who, in a local telephone call and without revealing his identity:

(1) uses obscene, otherwise indecent, or profane language;

(2) makes an obscene suggestion; or

(3) makes a threat of any kind;

commits a class C felony and shall be punished as provided in section 775.908.

Clauses (1) and (2) make good substantive sense because the concept of offensive language may appropriately have a broader sweep than that of offensive suggestions.

Along the way, meanings have been assumed based only on probabilities. Although the conclusions are thus only best guesses, this is an unavoidable risk that further checking can usually reduce.

This drafting exercise is also helpful in the much more sophisticated task of applying the statute to the *Politte* case. That case also presents the semantic problems of whether "local telephone call" includes use of a C.B. radio and whether Politte's call was "anonymous." Finally, the corresponding federal statute raises the ultimate contextual problem of negative implication.[25]

The following opinion, to be added to Judge Reed's statement

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[25] *See generally* R. DICKERSON, *supra* note 3, at 41–42; R. DICKERSON, FUNDAMENTALS, *supra* note 8, at 26–28 (discussions of the concept of negative implication).

of facts set forth at the beginning, is designed to suggest what might go into an ideal judicial exercise in statutory interpretation. It is ideal only in its attempt to exhaust the aspects of meaning that are worth exploring during the law finding phase of the judge's mission. So limited, it does not necessarily rule out later resort to extrinsic materials, such as legislative history. It implies only that noncontextual materials should not be consulted unless the law finding phase has been completed without satisfactorily disclosing the meaning of the statute.[26] Drawing the line here is not easy, because the two phases shade imperceptibly into each other. One unrealistic aspect of this opinion, which was distributed at the end of the meeting and suggested only as a goal to strive for, is that it benefited from time and other resources that are normally unavailable to most judges. The opinion is also unrealistic in that the semantic and syntactic discussion is overly detailed for the published draft.

Although none of the responding judges voted for affirmance, perhaps correctly, their reasons for reversal, all of which are discussed in the following opinion, were not conclusive. As is often the case, what is ultimately involved here is good faith judgment. The real challenge is to see the relevant legal and factual issues.

III. The Opinion Completed

OPINION BY JUDGE REED (continued):

* * *

Defendant makes several points in urging that the conviction below be reversed.

His first point is that his use of a C.B. radio did not constitute a "local telephone call," because a C.B. radio is not a "telephone," as required by the statute.

This argument assumes several things. It first assumes that "telephone" modifies not only "call," but "conversation" and "conference." This is one grammatical possibility, but not necessarily the only one. It is arguable that, instead, it modifies only "call," in which case defendant's actions fall easily into

[26] *See* R. Dickerson, *supra* note 3, at 137–97; Dickerson, *Statutory Interpretation: Dipping into Legislative History*, 11 Hofstra L. Rev. 1125 (1983).

the category of the unmodified "conversation," if not "conference." On the other hand, it is hard to envision a conversation or conference other than a telephonic one that could create the kind of problem to which the statute is directed.

If it is assumed, more plausibly, that "telephone" modifies all three terms, the question arises as to why the last two were used, since both are included in the first. The answer seems to be that the draftsman, following a now indefensible legal tradition, was overgenerous with his words.

Defendant's argument also seems to assume that "telephone" includes only its most common exemplification, the conventional commercial telephone. The underlying fallacy here is the assumption that because something is a radio it is precluded from also being a telephone. *The New Encyclopædia Britannica*, for example, tells us that the word "telephone" is assigned to an "apparatus for producing articulate speech and other sounds at a distance through the medium of electric waves." 18 *The New Encyclopædia Britannica* 82 (15th ed. 1975).

Radio is a common part of even conventional telephone service, since many segments operate without wires. Even where radio is the main instrument of sending voice messages, it is often referred to as "radiotelephone." Semantically and functionally, a radiotelephone is an established form of "telephone." That C.B. radios are not ordinarily called "telephones" no more challenges the aptness of that designation than the almost universal use of "aspirin" challenges the aptness of "acetylsalicylic acid." There is nothing in the text, or in its broadest context, to make it plausible that the legislature intended to connote an omission or exception based on the absence of wires at any point, on the fact that popular usage has conferred an alternative name on this kind of telephone, or on the fact that the instrument was private rather than commercial or quasi-public.

Defendant reinforces his point by arguing that the limitation to "local" calls assumes the traditional dichotomy between "local" and "long distance," a dichotomy foreign to radiotelephones operating outside the established commercial systems, thus implying their exclusion from the statute. Defendant points out, correctly, that the meaning of a composite term, such as "local telephone call," cannot safely be identified with the sum of the meanings of its respective parts, which in this case would include "any telephone call that is local." Having pointed out that "root beer" is not beer and that the "parol evidence rule" is not

a rule of evidence, defendant contends that "local telephone call," having been used so long to distinguish it from "long distance telephone call" has acquired a composite meaning that is narrower than, if not different from, the broad generic sweep of its constituent language.

Defendant's examples, unfortunately, are inapt, because the established meanings of those composite terms are inconsistent with and therefore exclude a literal reading of the aggregate or the parts. In the present case, there is no inconsistency in expressly referring to what is inherently local in a C.B. radio call as a "local call." At worst, there is harmless surplusage resulting from making one expression do the work of two.

Defendant contends that if the legislature had intended to cover C.B. radios, it could easily have referred to them in the statute. This is, of course, true. Silence in such a case, however, is a weak reed on which to hang a negative implication. It is more likely that the legislature intended to use language broad enough to encompass not only C.B. radios but also any other form of telephone. Specifically mentioning C.B. radios without mentioning other telephonic devices could have set up an unintended negative implication.

Indeed, defendant also argues that in spite of these considerations, it is unlikely that the legislature at any point had C.B. radios in mind. Although this may be readily conceded, it is irrelevant. It would show a serious ignorance of the legislative process to assume that a statute is intended to cover only what the legislature specifically adverted to during the process of enactment. The specifics that move it to action rarely, if ever, encompass the full dimensions of the problem to which the statute is addressed. Statutes are normally intended to control the future, which the legislature can only see in general terms, with the result that it normally intends to cover by such terms aspects of the overall problem that it did not, and even could not, specifically anticipate. The term "electronic devices," for example, readily accommodates electric devices, falling within the general description, that at the time of its enactment in a statute had not yet been invented and could not even have been foreseen.

Rather, with their inherently limited range, C.B. radios fall comfortably within the generic concept of immediacy that helps define the reach of the statute. Certainly, nothing suggests that the legislature had any purpose that would be served by not

giving "local call" its full semantic sweep, however superfluous "local" might be for C.B. radios.

The overriding consideration is the general presumption that a legislature in striking at a disclosed evil intends to strike at all of it. Why would the legislature want to exclude an abuse that differs from the abuses plainly within the statute only in irrelevant technological details? There is nothing to make the abuse *de minimis* or its prohibition administratively less enforceable. Nor is the generic meaning unconstitutionally vague in its application to C.B. radios, which are inherently local.

Lingering doubts force us to face defendant's contention that he is entitled to the benefit of the time-honored principle that ambiguous or otherwise uncertain criminal statutes should be construed "strictly." Against this contention, the State argues that in this context the term "strict" has no fixed or established meaning and that the best way to resolve the consequent uncertainty is to examine the objectives behind the so-called rule. It further argues that the most plausible objective of the principle is to induce the legislature to give the potential criminal fair warning of the kind of action that the state is proscribing. *See* R. Dickerson, *The Interpretation and Application of Statutes* 205–11 (1975). This concept fits comfortably with constitutional due process. Indeed, it inheres in it.

It is our opinion that the obscenity statute adequately warned the defendant, and thus complies with the implied constitutional requirement. That resort to a C.B. radio did not relieve defendant from criminal stigma should not surprise him, especially when there was a confirmatory warning of impropriety in the federal obscenity statute applicable to "radio communication." *See* 18 U.S.C. § 1464 (1982).

It is of no consequence that such a defendant is likely never to have examined either statute. The requirement of fair warning is fully satisfied if the statute and its context, which assumes knowledge of the normal meanings of words and the access to generally shared assumptions, gave the defendant a decent opportunity to know the legal hazards. And if a defendant has chosen to tread closely to the margins of vague criminal words, he cannnot necessarily complain if a court happens to draw the outer boundaries of illegality more broadly than he would have done, especially "where the function of notice and hearing is assisted by common knowledge and understanding of conventional values as in the case of offenses which are malum in se."

3 C. Sands, *Statutes and Statutory Construction* § 59.03, at 8 (4th ed. 1974). "[T]here is usually a twilight zone between honest conduct and crime, in which the defendant should move at his peril . . . ." Hall, *Strict or Liberal Construction of Penal Statutes*, 48 Harv. L. Rev. 748, 761 n.66 (1935).

Defendant also contends that because the parties arranged to meet and did in fact meet, the statutory requirement of anonymity was defeated. This assertion seems inconsistent with the thrust of the statute, because anonymity is normally determined as of the time of the offending act, not on the basis of what happens later. To conclude otherwise would defeat criminality in every instance in which the call succeeded in luring a weaker party into a sexual liaison.

The defendant makes the additional point that, however obscene or profane his conduct may have been, he had not met the requirements of the statute because it also requires a threat. Semantically, the observation seems sound. On the other hand, it would be the grossest literalism not to recognize the force of total context. This is especially true in a statute that gives evidence of having been carelessly crafted. The significant context in this instance is the obvious immediate purpose of the statute.

It would be highly unlikely that a legislature so clearly opposed to obscene telephone calls would be willing to suffer them if they were unaccompanied by a threat. Conversely, is a serious threat any less serious if it is unaccompanied by obscene or profane language? The same problem arises for obscene suggestions unaccompanied by obscene or profane language. The notion that the statute so conjoins three independent kinds of reprehensible action is so absurd as to make a literal reading highly implausible. Even if the literal meaning had been intended, defendant's conduct in this case might well have implied a threat to abandon the complainant if she did not comply.

Defendant's final contention is that any attempt to apply this statute to C.B. radios would thwart federal supremacy, because the federal obscenity statute applicable to radio communication preempts the field by negative implication, thus precluding state legislative action in that area. He cites *People v. Vogler*, 90 Misc. 2d 709, 395 N.Y.S.2d 881 (1977), and *Phillips v. General Finance Corp.*, 297 So. 2d 6 (Fla. 1974).

Vogler is hardly impressive authority because it is a New York town court's interpretation of a federal statute. Moreover,

its rationale misstates the accepted concept of statutory preemption, which is a form of negative implication. In that case, the court stated that "[t]he establishment of a regulatory commission . . . plus Federal licensing and enforcement of violations . . . are evidence of a Congressional intent to pre-empt the sphere of radio broadcasting." *Vogler*, 90 Misc. 2d at 713, 395 N.Y.S.2d at 884. But it is simply not true that federal occupation of an area of law is by itself sufficient to exclude state legislation in the same area. It is not even evidence of an intent to do so.

It is obvious that no state by its own legislative action can nullify otherwise valid federal legislation. A problem of preemption arises only where express federal action relates to part, but not all, of an area and is silent with respect to the rest. The question may then arise whether federal silence in the residual area means "hands off" to the states by reason of a negative implication or has left the area open to supplementary action by the states. Such questions can be resolved only by total context, not mere federal silence.

In any event, the issue is hardly foreclosed by the views of a minor state court, especially when they are contradicted by those of a court of our own state, which, in *Phillips*, 297 So. 2d at 6, declared that preemption depends on whether state action frustrates federal action. This statement, unfortunately, fails to indicate whether the state statute must frustrate an express provision of the federal statute or need frustrate only a negative implication from it. If the former, the statement misstates the preemption principle. If the latter, the frustration test cannot be applied until it is determined whether the circumstances surrounding the express federal provisions create a general implication that the federal action was intended to be exclusive. If the federal provisions do create such an implication, the reader need go no further, because any state statute in the area would automatically frustrate the negative implication. The *Phillips* statement fails in either event.

There being no indication in the federal statute or its context that Congress intended to exclude supplemental state action or that the particular state action otherwise undermined that statute, defendant's contention has no merit.

Judgment affirmed.

NOTE

HOME HEALTH CARE FOR THE ELDERLY: PROGRAMS, PROBLEMS, AND POTENTIALS

CHAI R. FELDBLUM*

The current provision of health care for our country's elderly is inadequate for several reasons. First, government health care programs offer inadequate benefits to those elderly who wish to avoid institutionalization and remain at home with their families. Services authorized by such programs are ill-equipped to satisfy the growing needs of an elderly population that is projected to constitute an increasingly significant percentage of our country's total population. Second, current programs fail to provide services to help alleviate the psychological and emotional stress experienced by unpaid family caregivers. Finally, policymakers have often failed to consider the effects of these programs on women in their roles as providers and recipients of home health care.

In this Note, Ms. Feldblum analyzes the federal and federal-state programs that currently provide home health care services for the elderly. After this analysis, she offers her own description of a comprehensive home health care system. She then reviews, in light of this system, the strengths and weaknesses of home health care legislation recently proposed in the Ninety-eighth Congress. Finally, Ms. Feldblum recommends that an expansion of home health care services for the elderly must properly reflect the changing roles of women in our society.

Many politicians have sounded the call for expanding home health care services for the elderly. These politicians have often done so on the grounds that home health care offers a more humane and less expensive approach to long-term care than the use of nursing home services. This Note analyzes the current provision of home health care services in government programs and reviews and critiques legislative initiatives introduced to expand such care.

The Note pays particular attention to the role that women play in the provision of home health care. Home health care is a women's issue from a variety of perspectives. The majority of the elderly receiving home health care services are women;[1] the majority of family members delivering unpaid care are women;[2] and the majority of paid home health care workers are

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[1] B. Soldo, A National Perspective on the Home Care Population, Working Papers in Demography, Center for Population Research, Kennedy Institute of Ethics, Georgetown University 7–8 Table 3 (November 1983) (on file at HARV. J. ON LEGIS).

[2] E. Brody, *"Women in the Middle" and Family Help to Older People*, 21 THE GERONTOLOGIST 471, 474 (1981).

women.[3] Expanding government reimbursement for home health care services could serve the needs of these various groups. The role that women have traditionally played in providing unpaid health care, however, needs to be re-evaluated in light of women's changing roles in society. All too often, policy recommendations for home health care have ignored the special needs that women bring to the home health care field.

I. The Aging of America: Implications for Health Care

Since the beginning of this century, the number of elderly people in this country and the percentage of the elderly relative to the country's overall population have steadily increased. In 1900, there were approximately three million people aged 65 and older, constituting 4% of the population.[4] By 1950, the absolute number of elderly people had increased to twelve million, or 8% of the population.[5] By 1981, the elderly were 26 million strong and had grown to 11% of the population.[6]

The number of elderly will continue to grow in the coming decades, resulting in 45 million elderly by 2020 and 55 million by 2030.[7] Individuals aged 65 and over will make up 13.1% of the population in the year 2000 and 21.7% of the population in 2050.[8]

This increase in the elderly population has two notable characteristics. First, the proportion of those over 75 years old is growing faster than the number of elderly in general.[9] While the elderly population is expected to increase by 28% over the next twenty years, the population over 75 will increase 53%, and the population over 85 will increase 64%.[10] Of the seven million person increase in the elderly population expected between 1980 and 2000, five million of these individuals will be 75 or older.[11]

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[3] Terlizzi, *Homemaker-Home Health Aides*, Occupational Outlook Quarterly, U.S. Dep't of Labor, Fall 1976, at 62.

[4] Soldo, *America's Elderly in the 1980's*, Population Bull., Nov. 1980, at 6 (available from the Population Reference Bureau, Wash., D.C.).

[5] *Id.*

[6] U.S. Bureau of the Census, Population Estimates and Projections, Current Population Reports, Series P-25, No. 922, at 1 (Oct. 1982).

[7] Soldo, *supra* note 4, at 7.

[8] U.S. Bureau of the Census, *supra* note 6, at 1.

[9] Soldo, *supra* note 4, at 10.

[10] *Id.* at 11.

[11] *Id.*

Second, the current elderly population is predominantly female: 60% of all persons 65 or older are women. In 1981, there were 5.1 million more elderly women than elderly men.[12] This imbalance becomes more pronounced in older age groups. Women are 57% of all persons aged 65 to 74, 63% of persons aged 75 to 84, and 70% of persons aged 85 or older.[13] Thus, in the 75 and older group, there are one hundred women for every fifty-one men. Women's greater life expectancy largely explains this imbalance.[14]

The majority of these elderly women are widowed and poor. Only 39% of women aged 65 or older in 1980 still lived with spouses, as compared with 74% of men in the same age group.[15] In 1980, of the 15.2 million women over age 65, 9.3 million had no spouses. In contrast, of the 10.2 million men over 65, only 2.6 million had no spouses.[16] In addition, although the median income in 1981 of a man over 65 was $8,173, the median income for a woman over 65 was $4,757, just slightly above the 1981 poverty level of $4,359.[17]

As the number of elderly grows and as a greater proportion of them live longer, the number of individuals in the general population that will require medical and health services will increase as well.[18] There are several reasons for this increased

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[12] U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P-20, NO. 374, at 19 Table 3-1 (Sept. 1982).

[13] New York State Office for the Aging, Family Caregiving and the Elderly: Policy Recommendations and Research Findings 6 (March 1983) (on file at HARV. J. ON LEGIS.) [hereinafter cited as Family Caregiving and the Elderly].

The vastly greater number of women in the older age groups is a relatively recent phenomenon. Fifty years ago, there were approximately equal numbers of older men and women. After 1930, however, women began to outlive men as deaths due to childbirth and infectious diseases decreased and deaths due to heart disease, cancer, and stroke increased. Soldo, *supra* note 4, at 11.

[14] The average life expectancy for a woman 65 years old in 1980 was 18.7 years, while it was 14.3 years for a man. Soldo, *supra* note 4, at 6.

[15] Family Caregiving and the Elderly, *supra* note 13, at 6.

[16] *Id.* at 6 Table 1.

[17] U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P-60, NO. 134, at 16 Table 10 (July 1982). *See generally* George Washington University Women's Studies Center, Older Women: The Economics of Aging (Dec. 1980) (on file at HARV. J. ON LEGIS.).

[18] Although most researchers believe that the elderly will continue to experience acute and chronic health problems as their life expectancy increases, some have argued that the need for medical care will decrease in later years as chronic illnesses are postponed by changes in life style and morbidity begins to occur immediately following the collapse of a period of extended vigor. *See* Fries, *Aging, Natural Death, and the Compression of Morbidity*, 303 NEW ENG. J. OF MED. 130 (1980). *But see* Schneider & Brody, *Aging, Natural Death, and the Compression of Morbidity: Another View*, 309 NEW ENG. J. OF MED. 854 (1983).

demand for health care. First, older people are more prone than other age groups to suffer acute illnesses. They visit physicians more often than members of the general population and occupy a disproportionate number of the hospital beds reserved for the acutely ill.[19] Second, the majority of elderly suffer from low level, long-term chronic disabilities. Approximately eighty-six percent of the elderly report some form of chronic condition; most common among these are heart problems, arthritis, hypertension, and diabetes.[20] Moreover, 3.4 million of the noninstitutionalized elderly have functional disabilities that limit their ability to move around or that confine them to the home.[21]

As may be expected, a higher incidence of chronic and disabling conditions is found in the 75 and older age group. Although only 3.5% of the elderly aged 65 to 74 need help in carrying on the activities of daily living (such as bathing, eating, dressing, and toileting), 11.3% of those aged 75 to 84 and 35.1% of those aged 85 and older are dependent in these activities.[22] Almost 50% of individuals in the 75 and older age group have some substantial limitations in walking, climbing, and bending.[23] Because women outnumber men in this age group, a significantly greater number of women suffer from such chronic impairments.[24]

The unique needs of the chronically ill give rise to a whole range of services known as home health care or home and

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[19] Soldo, *supra* note 4, at 18.

[20] *Id.* at 17.

[21] Trager, *Home Health Care and National Health Policy*, HOME HEALTH CARE SERVICES Q., Summer 1980, at 1, 45. The more successful we are in conquering acute disease and postponing death, the more we aggravate the problems of long-term disability. "Most of those whose lives were saved from acute heart attacks, strokes, early deaths from cancer, complications of diabetes or other chronic diseases, and accidents were added to the millions who require lifetime medical surveillance and often some form of long-term care." Somers, *Long-Term Care for the Elderly and Disabled: A New Health Priority*, 307 NEW ENG. J. OF MED. 221, 222 (1982).

[22] Family Caregiving and the Elderly, *supra* note 13, at 27.

[23] U.S. GENERAL ACCOUNTING OFFICE, REPORT NO. PAD-80-12, ENTERING A NURSING HOME: COSTLY IMPLICATIONS FOR MEDICAID AND THE ELDERLY 17 (Nov. 26, 1979) [hereinafter cited as GAO].

[24] As may therefore be expected, women receive more home health care than do men. Although this situation is explained largely by women's greater life expectancy, various researchers have noted that women are also more likely than men to suffer from chronic conditions. *See* B. Soldo, *supra* note 1. "Women . . . are more likely to have multiple chronic conditions, which limit their mobility and self care capability. Older men, on the other hand, have a greater prevalence for life threatening conditions (*e.g.*, cerebrovascular disease and arteriosclerosis) which may be associated with shorter periods of functional limitation." *Id.* at 6.

community based care.[25] If elderly individuals wish to continue living independently, they need access to services that will help them manage despite chronic and disabling conditions. Because the inability to shop for food, take a bath, or monitor blood pressure may force an individual to move into an institution, services delivered to the individual at home can effectively remove the need for institutionalization. These health care services may be provided by one care provider or by a group of care providers, depending on the client's particular situation. Physicians and nurses can provide medical check ups and treatment; therapists can provide speech, physical, audiological, or occupational services; nutritionists can help plan diets and meals; homemaker-home health aides can assist in personal care services (such as eating, bathing, and dressing) and in household tasks (such as cleaning, laundry, and shopping); and social workers can provide counseling and emotional support. In addition, community based services, such as adult day health care programs or congregate meals, can supplement this care.

One of the key strengths of a home health care program is that it can be tailored to an individual's specific needs. Chronic conditions cause varying types and degrees of impairments. A home health care professional is trained to identify those activities with which the elderly person needs assistance and to note any medical conditions that need monitoring or treatment. The professional can then develop a mix of services that will change to meet shifts in the individual's physical, mental, or social condition.

II. Federal Involvement: Programs and Problems

Several federal and joint federal-state programs currently provide home health care services to the elderly. Many of the elderly's needs, however, are not properly met because of restrictions or omissions in these programs. This Part will review existing government programs and analyze their effectiveness in delivering long-term health care services to the nation's elderly population.

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[25] The health needs of an individual suffering from a chronic condition differ substantially from those of a patient undergoing an acute, short-term illness. Chronic conditions generally cannot be cured completely. Rather, a chronic disabling condition continually impairs an individual's ability to perform the activities necessary for daily living.

A. *Medicare*

The Medicare statute, Title XVIII of the Social Security Act, was passed in 1965 to establish a federal health insurance program for the elderly and disabled.[26] The primary purpose of the statute was to provide insurance for hospitalization and physician expenses. Thus, Part A of the statute, the Hospital Insurance Program, paid for hospitalization expenses,[27] and Part B, the Supplementary Medical Insurance Program, paid for individual physician care.[28] In line with the purpose of the legislation, reimbursement was initially limited to diagnosis or treatment of illness or injury.

Medicare's emphasis on hospital and acute illness care resulted in a series of restrictions on reimbursement for home health care. Until 1981, a maximum of one hundred home health care visits was allowed under Part A, provided that these visits followed and were related to a hospital stay of at least three days.[29] Part B did not require prior hospitalization, but it did impose a similar maximum of one hundred visits, as well as a sixty dollar deductible.[30]

Although Congress repealed the restrictions of these particular provisions in 1980, it left intact the statute's limited definition of what constitutes home health care and the statute's restrictive conditions for eligibility.[31] To qualify for services, individuals must be homebound and in need of "skilled nursing care on an intermittent basis, or [in need of] physical or speech therapy."[32] Once an individual satisfies these threshhold require-

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[26] Health Insurance for the Aged Act, Pub. L. No. 89-97, §§ 101–102, 79 Stat. 286, 290–91 (1965) (codified as amended at 42 U.S.C §§ 1395–1395xx (1982)). No income test is required to qualify for the program; anyone who is over 65 and insured under Social Security is eligible.

[27] *Id.* § 102, 79 Stat. at 291 (codified at 42 U.S.C. §§ 1395c–1395i).

[28] *Id.* § 102, 79 Stat. at 291 (codified at 42 U.S.C. §§ 1395j–1395w).

[29] 42 U.S.C.S. §§ 1395d(a), 1395x(n) (1973 & Supp. 1984) (repealed 1981).

[30] 42 U.S.C.S. § 1395k (1973 & Supp. 1984) (imposing a one hundred visit limit) (repealed 1980); 42 U.S.C.S. § 1395*l* (1973 & Supp. 1984) (imposing $60 deductible) (repealed 1981). Medicare also includes restrictions on institutional care. It denies reimbursement for custodial nursing home care, 42 U.S.C. §§ 1395c–1395i (1982), and will only cover skilled nursing facility care to a limited extent. *See* 42 U.S.C. § 1395d (1982).

[31] Omnibus Budget Reconciliation Act of 1980, Pub. L. No. 96-499, § 930, 94 Stat. 2599, 2631 (1980) (codified in scattered sections of 42 U.S.C.).

[32] 42 U.S.C. § 1395f(a)(2)(D) (1982). The Omnibus Budget Reconciliation Act of 1980 had included the need for occupational therapy as an additional factor that would trigger eligibility for Medicare's home health care services. 42 U.S.C. §§ 1395f(a)(2)(D), 1395n(2)(A) (1976 & Supp. 1981). The Omnibus Budget Reconciliation Act of 1981, however, repealed that addition. 42 U.S.C. §§ 1395f(a)(2)(d), 1395n(a)(2)(A) (1982).

ments, she or he may receive reimbursement for the costs of a limited range of home health care services.[33] These services include the following: part-time or intermittent skilled nursing care; physical, occupational, or speech therapy; medical social services under the direction of a physician; part-time or intermittent services of a home health aide; and medical supplies and appliances.[34] A physician must establish and periodically review the plan for furnishing services, and the individual must be under the care of a physician while services are being furnished.[35]

Medicare's eligibility requirements for home health care, as well as the services Medicare provides, are oriented towards patients recovering from acute illnesses. For example, professional nursing includes such services as early identification of health problems, assessment of service needs, health monitoring, counseling, and education. Medicare, however, reimburses the cost of only those services it terms "skilled nursing care."[36] Thus, individuals who may need a nurse merely for reinforcement of care routines, monitoring of medications and diets, or attention to incipient problems, are ineligible to receive these necessary and valid nursing services.[37]

Medicare also limits its coverage of home health aide services. The program only reimburses for the costs of home health aides who perform functions analogous to those of hospital aides, such as help with bathing, eating, and dressing.[38] Although most impaired individuals also need help with cleaning, shopping, and cooking, they cannot receive reimbursement from Medicare for the cost of such services.[39]

Finally, Medicare's coverage of only part-time or intermittent skilled nursing care and home health aide services has further restricted needed services. The provision may be necessary to prevent the coverage of full-time private nursing care. Because the statutory language does not explicitly define intermittent care, however, the Health Care Financing Administration and various regional intermediaries have had extensive leeway in interpreting the requirement. In July of 1983, a Wisconsin in-

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[33] 42 U.S.C. § 1395x(m) (1982).
[34] *Id.*
[35] *Id.* § 1395f(a)(2)(D).
[36] 42 C.F.R. § 409.42(b)(3) (1983); 42 U.S.C. § 1395x(m) (1982).
[37] Trager, *supra* note 21, at 16.
[38] 42 C.F.R. §§ 409.40–.41, 405.1227 (1983); *see also* Trager, *supra* note 21, at 22.
[39] *See* Trager, *supra* note 21, at 22–23; *see also* 42 C.F.R. § 409.40–.41 (1983).

termediary alerted its home health care agencies that if patients required daily visits of a nurse or a home health aide beyond an initial period of two to three weeks, the care would no longer be considered intermittent and would therefore be ineligible for reimbursement.[40] Although the Ninety-eighth Congress considered legislation that would have explicitly allowed daily home health care visits for up to ninety days upon a physician's certification, this legislation ultimately did not pass.[41] Even if the Ninety-ninth Congress passes this legislation, reimbursement for long-term daily home care (such as daily two hour visits from a nurse) would still be unavailable to Medicare beneficiaries.

These restrictions limit Medicare expenditures for home health care services. Out of total expenditures of $35.7 billion in 1980, Medicare paid out $662 million for home health care services, or 1.9% of its overall budget.[42] A second and less apparent result of the regulations has been the distortion of the range and type of services available across the country. Most professionals define home health care as the delivery of comprehensive services for the promotion and maintenance of

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[40] 8 Home Health Line 167 (Sept. 12, 1983). Similar notifications were sent by intermediaries in Ohio and Minnesota. *Id.* at 168.

[41] In July of 1983, Rep. Waxman (D-Cal.) introduced H.R. 3616, providing Medicare coverage of daily nursing or home health aide services for a period of up to 90 days on the basis of physician certification and the continuation of such services for an additional 90 days upon physician certification that exceptional circumstances required such services. H.R. 3616, 98th Cong., 1st Sess., 129 CONG. REC. E3648–49 (daily ed. July 21, 1983). A similar bill, S. 2328, was introduced by Sen. Heinz (R-Pa.). In April of 1984, during Senate consideration of H.R. 2163, the Miscellaneous Tariff, Trade, and Customs Matters Bill (commonly referred to as the Deficit Reduction Bill), Sen. Heinz succeeded in having a modified version of his bill pass as an amendment to the House bill. The amendment allowed visits of up to 45 days rather than 90, but retained an extension of the 45 day period if a physician certified that "exceptional circumstances" warranted the services. 130 CONG REC. S4548–49 (daily ed. April 12, 1984) (Part II). The House, however, did not agree to the Senate amendment in conference, and the provision was dropped.

[42] HEALTH CARE FINANCING ADMINISTRATION, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, PUB. NO. 03156, THE MEDICARE AND MEDICAID DATA BOOK, 1983, at 27 Table 2.6, 38 Table 2.14 (1983) [hereinafter cited as DATA BOOK].

Although Medicare's support of home health services is miniscule compared to the actual need for these services, use of and reimbursement for home health services have increased since the program's inception. In 1969, Medicare spent $78 million on 8.5 million home care visits; in 1980, the program paid $662 million for 22.4 million visits. *Id.* Part of the increase was due to the Social Security Amendments of 1972, Pub. L. No. 92-603, 86 Stat. 1329, which extended coverage to the disabled and to individuals suffering from end stage renal disease, and increased payments and expanded coverage for home health care. *Id.* §§ 201, 251, 299I, 89 Stat. at 1370, 1445, 1463; *see* DATA BOOK, *supra*, at 31. Costs per visit increased as well. Reimbursements rose nearly 2.3 times faster than did the number of visits. *Id.*

health. This definition, however, is quite different from the definition of home health care in federal funding sources. Brahna Trager, a home health care researcher, comments that:

> What is contained in Title XVIII . . . is not a definition of Home Health Services. It is a description of those services which are selectively covered by the insurance system . . . . This description has, however, become, for purposes of program development and service delivery, a publicly supported definition of Home Health Services . . . .[43]

Trager argues that after the passage of Medicare, service providers distorted their programs in an effort to conform to the statute's definitions.[44] Nursing and home health aide services became fragmented, emphasis was placed on curative and rehabilitative care, and provider agencies began to limit their services to reimbursable care.[45]

Trager clearly articulates the bankruptcy of an approach to home health care that so closely resembles institutionalized care:

> Effective Home Care Services do not resemble hospital care; they do not resemble extended facility care; they do not resemble nursing home care although there may be a similarity in some of the services and functions. The site of care is different: home and community. Service relationships are different: combined, individually planned and adapted, and capable of immediate change in service combination, frequency, and duration. The nursing home patient does not move in and out of care as his [or her] needs change; the Home Health Services consumer may use concentrated services, single services, or no services in a continuing planned and appropriate sequence.[46]

The key to an effective home health care system is the availability of a wide range of services and a system that allows for a selected number of services to be chosen and combined in individually designed packages. Therefore, the available services must include not only those that are curative or rehabilitative, but also those that merely stabilize or maintain an individual's physical and mental status.

In 1982, Congress took an important first step towards expanding home health care services under Medicare by amending

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[43] Trager, *supra* note 21, at 12.
[44] *Id.* at 11–13.
[45] *Id.* at 11–12, 22.
[46] *Id.* at 23.

the program to include reimbursement of hospice services.[47] Hospice care includes palliative and support services delivered to a terminally ill patient. When a doctor certifies that a Medicare beneficiary is terminally ill, that beneficiary may choose to receive hospice care in lieu of the usual services available under Parts A and B of Medicare.[48]

The covered hospice benefits, available for two periods of ninety days each, with one subsequent period of thirty days, are quite broad. They include nursing care; physical, occupational, or speech therapy; medical social services; home health aide and homemaker services; medical supplies; physician services; short-term inpatient care, including respite care and pain control management care, provided on an intermittent, nonroutine basis; and family counseling regarding care of the individual and adjustment to her or his death.[49]

The new hospice benefit coverage, however, incorporates certain limitations. In order to control excessive costs that might be generated by the new coverage, the legislation requires that hospice reimbursements not exceed $6,500 per enrollee.[50] In addition, the current hospice coverage is geared towards individuals who have a family member available to supplement the hospice care. The legislation mandates that inpatient care may not exceed twenty percent of the aggregate number of hospice care days provided, during any twelve-month period, to patients of a particular hospice.[51] This restriction can cause hospice programs to limit services to those individuals who have access to family members who can assume primary responsibility for home care.[52] Although elderly men are likely to be married and have a spouse available to provide home care, elderly women are likely to be widowed and dependent solely on their children for support.[53] When a child's support is unavailable, these women will find it difficult to benefit from the hospice care coverage.

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[47] Tax Equity and Fiscal Responsibility Act of 1982, § 122(a)(1), 42 U.S.C. § 1395c (1982) (TEFRA).

[48] *Id.* §§ 1395f(a)(8), 1395d(d).

[49] *Id.* § 1395x(dd).

[50] *Id.* § 1395f(i). Because the cap is to be multiplied by the number of Medicare beneficiaries in each hospice program and then aggregated, a hospice program may provide more than $6,500 worth of services to some patients as long as it provides less than that amount to others. 48 Fed. Reg. 56,019 (1983) (comment to a Final Rule).

[51] 42 U.S.C. § 1395x(dd)(2)(A)(iii) (1982).

[52] *See Equity Issues Seen in Hospice Regulations*, HOSPITALS, June 1, 1983, at 46.

[53] *See supra* text accompanying notes 15–16 and *infra* text accompanying notes 122–29.

Despite these limitations, inclusion of the hospice benefit is an important step towards changing Medicare's medical and acute care orientation. The breadth of the covered benefits, including custodial care provided by a home health aide, respite care, and psychological counseling to patients and the caregiving family, provides a useful foundation for expanding home health care benefits to those Medicare beneficiaries who are not terminally ill.

B. *Medicaid*

Medicaid, Title XIX of the Social Security Act,[54] differs from Medicare in that it is an assistance program for poor people of all ages rather than an insurance program for those who have contributed to a fund. Authorized in 1965 with Medicare, it was established as a joint federal-state program.[55] States receive matching federal grants for their expenditures and are allowed extensive flexibility in deciding questions of eligibility, administration, services, and reimbursement.[56]

The Medicaid program covers home health care services but does not define its components.[57] Administrative regulations require states to provide a minimum range of home health services, including part-time or intermittent nursing care, home health aide services, and medical supplies and equipment.[58] In addition, states are free to offer speech, physical, audiological, and occupational therapies among their optional services.[59] The services are provided, however, only upon a physician's recommendation.[60]

Although the Medicaid statute never incorporated the three-day prior hospitalization requirement found in Part A of Medicare, many states developed their own restrictions in order to limit costs. Many of these restrictions were patterned after Medicare restrictions. As of April 1982, thirty-six states limited part time nursing services; thirty-five states limited home health aide

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[54] 42 U.S.C. §§ 1396–1396p (1982).

[55] Health Insurance for the Aged Act, Pub. L. No. 89-97, § 121, 79 Stat. 286, 343 (1965) (codified as amended at 42 U.S.C. §§ 1396–1396a).

[56] *Id.*

[57] *Id.* § 1396d(a)(7).

[58] 42 C.F.R. § 440.70 (1983).

[59] *Id.*

[60] *Id.*

services; forty-two states either limited or did not cover speech, physical, audiological, and occupational therapies; and forty-five states limited medical supplies and equipment.[61] The most common approach is to limit the allowable number of nurse and home health aide visits or service hours.[62] In addition, in many states, home health care providers must obtain prior authorization from the state in order to receive reimbursement.[63] This requirement deters numerous agencies from ever filing for Medicaid. Moreover, because states establish the reimbursement level for services, some have elected to pay approximately one-half of what Medicare pays for similar services.[64] As a result, many home health care agencies either limit the number of Medicaid patients they accept or refuse to accept Medicaid patients at all.[65]

These restrictions achieve the states' goal of limiting Medicaid expenditures. In 1980, federal and state Medicaid expenditures for home health care services totaled $331.8 million, or 1.4% of the total Medicaid budget.[66] Although the majority of home health care recipients in 1980 were female (67.4% female vs. 32.2% male), it is interesting to note that the majority were also under age 65: 11.4% of recipients were ages 6 or younger; 12.8% were ages 6 to 20; 39.1% were ages 21 to 64; while 35.4% were ages 65 or older.[67]

Despite Medicaid's low expenditures for home health care, it does play a major role in providing long-term institutionalized care. Unlike Medicare, Medicaid does not include restrictions on reimbursements for skilled and intermediate care facility services.[68] Reimbursements for nursing home care have been a primary cause of Medicaid's soaring expenditures. The Medicaid program has become the predominant source of reimburse-

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[61] DATA BOOK, *supra* note 42, at 100–03 Table 4.8.

[62] *Id.* at 101.

[63] *Id.*

[64] GAO, *supra* note 23, at 19.

[65] *Id.*

[66] DATA BOOK, *supra* note 42, at 43 Table 2.18, 121. A few states, such as New York, which spent 5.6% of its Medicaid budget on home health care services in 1980, and Massachusetts, which spent 2%, raised the program's national average. Thirty-three states spent only .01% to .05% of their 1980 Medicaid budget on home health care services. *Id.* at 121.

[67] *Id.* at 110 Table 4.11. As with Medicare, Medicaid's support of home health care is limited relative to the need that exists, yet the cost of the services it does cover has increased over the years. Between 1973 and 1980, the number of recipients increased at an average annual rate of 20%, and payments grew at a rate of 44.4%. *Id.* at 41.

[68] *See supra* note 30 (Medicare restrictions).

ment for these expensive services. In 1979, when government was shouldering 53% of the national nursing home care bill, Medicaid was the primary funding source, paying 45% of the total bill.[69] In 1980 almost half of Medicaid's expenditures were devoted to nursing home care.[70]

The irony of Medicaid's high level of reimbursement for nursing home care is that many beneficiaries may not need the intensive level of care provided in such settings. In 1977, the Congressional Budget Office analyzed fourteen studies of the appropriateness of placement in nursing homes and concluded that 10% to 20% of skilled nursing facility patients and 20% to 40% of intermediate care facility patients were receiving unnecessarily high levels of care.[71] A General Accounting Office report in 1979 discussed a number of reasons for inappropriate nursing home placement, one of which was Medicaid's eligibility policies: many elderly poor are not eligible for Medicaid assistance if they remain in the community, and become eligible only if and when they enter a nursing home.[72]

In response to criticisms directed at Medicaid's restrictive home health care policies, Congress modified the program in the Omnibus Budget Reconciliation Act of 1980.[73] States are now allowed to apply to the Secretary of Health and Human Services (HHS) for a waiver that will permit them to include home and community based care among their Medicaid services.[74] Home care services, under what is commonly termed the 2176 Waiver, may include case management, homemaker-home health aide services, personal care services, adult day

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[69] U.S. GENERAL ACCOUNTING OFFICE, REPORT NO. IPE-84-1, MEDICAID AND NURSING HOME CARE: COST INCREASES AND THE NEED FOR SERVICES ARE CREATING PROBLEMS FOR THE STATES AND THE ELDERLY 3–4 (1983) [hereinafter cited as GAO].

[70] DATA BOOK, *supra* note 42, at 5, 11 Figure 1.1.

[71] M. BALTAY, CONGRESSIONAL BUDGET OFFICE, LONG-TERM CARE FOR THE ELDERLY AND DISABLED 18 (1977).

[72] GAO, *supra* note 23, at 30.

[73] Omnibus Budget Reconciliation Act of 1980, Pub. L. No. 96-499, 94 Stat. 2599 (1980) (codified in scattered sections of 42 U.S.C.).

[74] 42 U.S.C. § 1396n(c)(1) (1982). The new program was passed largely as the result of extensive efforts that had been devoted to a bill previously introduced by Rep. Waxman and Rep. Pepper (D-Fla.). That bill, the Medicaid Community Care Act of 1980, H.R. 6194, 96th Cong., 2d Sess., would have allowed for the provision of a comprehensive program of home care benefits under Medicaid with substantial federal financial support. In the pervasive budget cutting days of July 1981, H.R. 6194 had little chance of passage. Nevertheless, the comprehensive groundwork laid through hearings and lobbying on H.R. 6194 enabled Congressman Waxman and his supporters to help pass the waiver program in the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 (1981).

health care, habilitation services, respite care, and any other service requested by the state.[75]

In order to receive the waiver, a state must meet certain requirements. First, a state must provide the services only to individuals who, except for the provision of home health care services, "would require the level of care provided in a skilled nursing facility or intermediate care facility."[76] Second, a state must assure HHS that its estimate of the average per capita cost for the new services does not exceed the average per capita cost that would have been incurred without the waiver.[77] Third, if a state requests permission to cover services in addition to the ones explicitly listed in the legislation, it must demonstrate that the services are both cost effective and necessary to prevent the institutionalization of the individuals for whom the services are provided.[78] Once these requirements are met, the state then has extensive leeway in organizing the scope and structure of the program it wishes to offer. Medicaid's usual requirements—that all services be offered on a statewide basis and that any services offered to certain groups of recipients be offered to all—are waived for purposes of the new home based services.[79]

Although a number of states have submitted waivers under the new program,[80] there has not been a substantial expansion of home health care services for large numbers of Medicaid recipients. Because states are not required to offer the home based services on a statewide basis or to all Medicaid eligible groups, most of the waivers have been targeted to small numbers of individuals, usually fewer than 500, located in limited geographic areas.[81]

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[75] 42 U.S.C. § 1396n(c)(4)(B) (1982).

[76] *Id.* § 1396n(c)(1).

[77] *Id.* § 1396n(c)(2)(D). The Health Care Financing Administration (HCFA) has interpreted this provision to mean that states must assure the Secretary that the estimated average per capita expenditure for all services under the waiver, institutional and noninstitutional, will not exceed the estimated average per capita expenditure of all services in the absence of the waiver. 42 C.F.R. §§ 441.302(e), 441.303(d)(1) (1983).

[78] 42 U.S.C. § 1396n(c)(4)(B) (1982); I M.J. Krieger, W. Weisert & J. Cohen, Characteristics of Medicaid Home- and Community-Based Waiver Program Applications: Background and Summary, Working Paper, 3198-2, The Urban Institute, Wash., D.C. 2–3 (Dec. 9, 1982) (on file at HARV. J. ON LEGIS.).

[79] 42 U.S.C. § 1396n(c)(3) (1982). Medicaid's "statewideness" requirement is found in *id.* § 1396a(a)(1), and its "comparability" requirement in *id.* § 1396a(a)(10).

[80] As of October 1983, the Department of Health and Human Services had approved 58 waivers. Internal Memorandum from the Office of Legislation, Dep't of Health and Human Services (Nov. 10, 1983).

[81] M.J. Krieger, W. Weisert & J. Cohen, *supra* note 78, at 19; *see* Luehrs, *Medicaid Waivers*, in State Health Notes, Intergovernmental Health Policy Project 1 (July 1983).

Caution by the states is understandable. First, because of statutory requirements, the federal government will not approve a waiver if the state fails to present adequate assurances that the new home based services will not increase total state expenditures.[82] Because recent studies have presented conflicting evidence regarding the costs of providing home health care services,[83] states are reluctant to request authority to provide extensive services that may not ultimately meet the required assurance. Second, apart from the statutory requirement, states are themselves reluctant to offer services that might potentially increase their own expenditures. As with other Medicaid services, states would be responsible for slightly more than half of any newly generated costs. Not surprisingly, at a time when states are seeking to cut back on their social service expenditures, they are unlikely to initiate a program that could require an increase in state taxes. Thus, although the 2176 Waiver program is a welcome beginning in expanding Medicaid's home health care benefits, it has failed to extend those benefits to significant numbers of the needy elderly.

C. *Social Services Block Grant*

Title XX of the Social Security Act[84] traditionally supplemented Medicaid by providing various types of home care services. Like Medicaid, Title XX was established as a joint federal-state program, designed to provide services not only to the elderly but also to all needy individuals.[85]

The Omnibus Budget Reconciliation Act of 1981 consolidated Title XX, along with several other social services programs, into a Social Services Block Grant and simultaneously reduced

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[82] *See supra* note 77 and accompanying text.

[83] *See infra* text accompanying notes 183–85.

[84] 42 U.S.C. §§ 1397–1397f (1976) (repealed 1981).

[85] *Id.*; C. O'Shaughnessy & K. Reiss, Long Term Care: Community Based Alternatives to Institution, Library of Congress, Congressional Research Service, Issue Brief No. IB8101, at 9 (March 10, 1983). Title XX had required that a portion of appropriated funds be designated for welfare recipients, that services be limited to families with incomes below 115% of the state median income, and that fees be charged to individuals whose incomes exceeded either 80% of the state's median income or the median income of a family of four in the fifty states and the District of Columbia. 42 U.S.C. § 1397a(4)–(6) (1976) (repealed 1981).

funding for those programs.[86] The legislation also repealed the requirement that states provide matching funds and target services to the most needy.[87]

In 1980, all Title XX plans included at least one type of home based service.[88] Because states have a great deal of flexibility in designing services under Title XX, several types of home based services developed within the various Title XX programs. The four most common categories of service providers are "homemakers," "chore persons," "home management persons," and "home health aides." The homemaker is usually a trained person who performs general household tasks, including meal preparation and child care. The chore person is an untrained individual who takes care of household repairs, shopping, and cleaning, and in some states, performs personal care services. The home management person usually delivers instruction and training in child care and home management. The home health aide is usually a nursing aide who performs medical services, such as the administration of medication.[89]

The Social Services Block Grant is important for many elderly individuals because it can provide the range of personal care and social services that are often unavailable under Medicare or Medicaid. Nonetheless, problems exist with the program. Many of the social services for the sick poor funded out of the Social Services Block Grant would more appropriately be a part of the home health care funded under Medicaid.[90] Furthermore, varying interpretations by states as to the functions that particular service providers may perform can lead to inconsistencies in the quality of care.[91] For example, in some states, a chore person may shovel snow and make household repairs, activities

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[86] Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 2352(a), 95 Stat. 357, 867 (1981); *see also* M. Smith & K. Spar, Social Services Block Grant, Library of Congress, Congressional Research Service, Issue Brief No. IB81102, at 5–6 (Feb. 16, 1982). If the Title XX, day care, and training programs had not been consolidated into a block grant, funding for the separate programs would have been approximately $3.1 billion in 1982. Instead funding was reduced to $2.4 billion for the combined programs in the block grant in 1982. *Id.* at 6. In 1983, Congress appropriated $2.6 billion for the Block Grant, and a similar level of expenditures was requested for 1985. Budget of the United States Government, FY 1985, Government Printing Office, 1984, at 8–94.

[87] M. Smith & K. Spar, *supra* note 86, at 6.

[88] C. O'Shaughnessy & K. Reiss, *supra* note 85, at 3. After day care services, homemaker services represented the second largest service expenditure in 1980. *Id.*

[89] OFFICE OF THE ASS'T SEC'Y FOR PLANNING AND EVALUATION, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, TECHNICAL NOTES: SUMMARIES AND CHARACTERISTICS OF STATES' TITLE XX SOCIAL SERVICES PLANS FOR FY 1980, at 174–81.

[90] Trager, *supra* note 21, at 15.

[91] *Id.* at 19.

for which professional supervision is not necessary.[92] In other states, however, the chore person may provide such services as shampooing and bathing, services ordinarily performed by a trained paraprofessional under strict supervision.[93] Finally, the limited amount of funding available to states under the Block Grant will restrict their ability to provide the range and amount of home health care services needed in their communities.[94]

D. *Administration on Aging*

One of the greatest deficiencies in the current provision of home health care services is the lack of coordination among the various agencies providing services and reimbursement. Services that agencies provide may overlap, and individuals often have to apply to different sources in order to receive needed home based services.[95] In some communities, certain services are simply unavailable.[96]

Congress established the Administration on Aging in 1965 to carry out the provisions of the Older Americans Act (OAA), including those designed to improve coordination.[97] Title III of OAA, Grants for State and Community Programs on Aging, is designed to strengthen and coordinate the various social service systems for the elderly.[98] Under Title III, the governor of each state establishes a State Agency on Aging (AOA), which has responsibility for Area Agencies on Aging (AAAs).[99] These smaller area agencies coordinate existing services and provide

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[92] *Id.*

[93] *Id.*

[94] *See supra* note 86. The Children's Defense Fund has documented that the Social Services Block Grant, with its reduced level of funding, has not triggered more effective state administration of day care, but rather has triggered greater or equivalent cuts in the state child care systems. Children's Defense Fund, Children and Federal Child Care Cuts: A National Survey of the Impact of Federal Title XX Cuts on State Child Care Systems, 1981-1983, at 5 (1983) (available from the Children's Defense Fund, Wash., D.C.). It is likely that state home health care programs are suffering similar cutbacks. In fact, O'Shaughnessy and Reiss note that future increases in Title XX homemaker programs are unlikely unless states transfer available funds from other service categories, like child care, or increase the use of state funds. C. O'Shaughnessy & K. Reiss, *supra* note 85, at 3–4.

[95] Trager, *supra* note 21, at 58; GAO, *supra* note 23, at 75–76.

[96] Trager, *supra* note 21, at 58; GAO, *supra* note 23, at 78.

[97] *See* 42 U.S.C. §§ 3011–3012 (1982).

[98] *See* 42 U.S.C. §§ 3021–3030g (1982).

[99] *See* 42 U.S.C. §§ 3025–3027 (1982).

funds for needed services that are unavailable.[100] In 1982, federal grants totaling $603 million were made to 674 AAAs.[101]

In certain places the AAAs have been successful in coordinating service delivery; in others, the services are still nonexistent or difficult to integrate.[102] In any case, the agencies alone cannot guarantee accessible home health care services because they lack adequate financial resources with which to do so. Changes in the benefit and reimbursement structures of Medicare, Medicaid, and the Social Services Block Grant, as well as formal coordination among these programs, are the more radical steps needed to improve home health care.

III. Private Response: Resources and Tensions

Current government programs do not fully meet the long-term care needs of elderly people who live at home. Yet the majority of our country's dependent elderly reside in their own homes and not in nursing homes. In our current system, unpaid care provided by families is an essential complement to the care provided by government programs. An understanding of how such family caregivers operate within the current medical delivery system, the social services profession, and the government health programs is necessary for the development of an appropriate home health care policy.

A. *The Family As a Resource*

Ethel Shanas, a noted gerontologist, has analyzed the different social functions that families have performed over recent decades.[103] In our industrial societies, families are no longer

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[100] E. Tager, The Older American Act of 1965: Major Provisions as Amended and Development of Selected Major Provisions, 1965-1981, updated and revised by C. O'Shaughnessy, Library of Congress, Congressional Research Service, Report No. 82-158EPW, at 34–39 (Sept. 17, 1982). The Older Americans Act is codified at 42 U.S.C. §§ 3001–3037a (1982).

[101] E. Tager, *supra* note 100, at 62. The funds supported in-home support services, such as homemaker-home health aide services ($240 million), congregate meals ($284 million), home delivered meals ($57 million), and administration and coordination ($22 million). *Id.* In 1982, the agencies provided homemaker services to 563,029 people, chore services to 203,454 people, and home health aide services to 166,909 people. C. O'Shaughnessy & K. Reiss, *supra* note 85, at 4.

[102] Trager, *supra* note 21, at 59.

[103] Shanas, *The Family as a Social Support System in Old Age*, 19 The Gerontologist 169 (1979).

required to be the sole source of care and support for their elderly kin.[104] In this country, programs such as Social Security, Medicare, and social services programs provide a modicum of financial security, medical care, and medical and social services to the elderly.[105] Nevertheless, the family remains the major source of support for elderly kin. As Shanas notes, "the major finding of social research in aging in all Western countries has been the discovery and demonstration of the important role of the family in old age."[106]

Family involvement is a crucial factor in both avoiding and postponing institutionalized care. Stanley Brody and other researchers have highlighted the importance of family involvement by comparing chronically ill elderly residents of nursing homes with those living in the community.[107] They found that members of the nursing home and community populations had similarly impaired abilities to perform such activities as dressing, eating, and bathing.[108] The critical variable in the elderly's living arrangement was not the degree of the elderly's functional impairment but rather their access to family care.[109]

The large number of families providing care permits a high percentage of elderly individuals to remain in the community. Although it is difficult to develop precise estimates of the number of elderly who need assistance in their daily living activities but do not reside in nursing homes, most studies have found that the number of impaired elderly who live in the community is substantially higher than the number who are in institutions. An Urban Institute study estimated that of 2.8 million individuals who suffered personal care dependency in 1977, over sixty percent did not reside in institutions.[110] Others have estimated

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[104] *Id.*

[105] *Id.*

[106] *Id.* In 1982, *the Home Health Care Services Quarterly* devoted an entire issue to family home care, compiling impressive evidence on the extent and importance of families' provision of unpaid home care to their elderly and handicapped members. HOME HEALTH CARE SERVICES Q., Fall/Winter 1982.

[107] Brody, Poulshock, & Masciocchi, *The Family Caring Unit: A Major Consideration in the Long-Term Support System*, 18 THE GERONTOLOGIST 556, 560 (1978).

[108] *Id.* at 558–60.

[109] *Id.* at 560. Similar findings have been noted by other authors. *See* B. Soldo & M. Sharma, Families Who Purchase Care vs. Families Who Provide Care Services to Elderly Relatives 1–2 (Nov. 22–26, 1980) (unpublished paper presented at the annual meeting of the Gerontological Society, San Diego, Cal.); Family Caregiving and the Elderly, *supra* note 13, at 14–18.

[110] GAO, *supra* note 69, at 23 (citing W. Weissert & W. Scanlon, Determinants of Institutionalization of the Aged, Urban Institute, Wash., D.C. 10–11 (Nov. 1982)).

that three to four million elderly individuals are not capable of independent daily living and that over two-thirds of these individuals are living in noninstitutional settings.[111] As Shanas points out, "The majority of sick and frail elderly . . . are not in institutions or group quarters. They are living in their own homes or in the homes of family members."[112]

The family deters institutionalization by providing a range of necessary health and social support services. National Health Surveys of home care patterns show that 80% of home health care for the elderly is delivered by family members.[113] A New York City survey found that of the services that were most critical to maintaining an elderly person at home, 77% were provided by family members.[114] Using a special Home Care Supplement to the 1979 National Health Interview Survey, gerontologist Beth Soldo found similarly high rates of family care. Nearly 90% of the elderly receiving home health care relied in some way on helpers from an informal support network of relatives, friends, and neighbors, and almost 75% were totally dependent on this network.[115] These figures correlate with survey results regarding a family's willingness to care for an aged member: 81% of families surveyed said they would accept an elderly relative in their home.[116]

Many families deliver services to an elderly person living in a separate, independent household. Mindel's work shows that the majority of elderly live either alone or with a spouse; a much

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[111] Perlman & Giele, *An Unstable Triad: Dependents' Demands, Family Resources, and Community Supports*, HOME HEALTH CARE SERVICES Q., Fall/Winter 1982, at 12, 21. Elaine Brody estimates that the overall number of elderly who may need some support services may be as high as eight million. She notes that about 8% to 10% of the noninstitutionalized are as functionally impaired as those in institutions, about 10% are bedfast or homebound, and another 6% to 7% can go outside only with difficulty. E. Brody, *supra* note 2, at 472.

[112] Shanas, *supra* note 103, at 171.

[113] HOUSE SUBCOMM. ON HUMAN SERVICES, SELECT COMM. ON AGING, FUTURE DIRECTIONS FOR AGING POLICY: A HUMAN SERVICES MODEL, 96th Cong., 2nd Sess. 67 (Comm. Print 1980) [hereinafter cited as SELECT COMM. ON AGING].

[114] GAO, *supra* note 23, at 44 (citing Community Council of Greater New York, Dependency in the Elderly of New York City: Report of a Research Utilization Workshop Held on March 23, 1978, at 21–22 (Oct. 1978)); *see also* U.S. GENERAL ACCOUNTING OFFICE, REPORT NO. IPE-83- 1, THE ELDERLY SHOULD BENEFIT FROM EXPANDED HOME HEALTH CARE BUT INCREASING THESE SERVICES WILL NOT INSURE COST REDUCTIONS 37 (noting that 60% to 85% of long-term care services received by the disabled elderly are provided by relatives and friends) [hereinafter cited as U.S. GENERAL ACCOUNTING OFFICE].

[115] *See* B. Soldo, *supra* note 1, at 10; *see also* Lurie, Robinson & Barbaccia, *Helping Hospitalized Elderly: Discharge Planning and Informal Support*, HOME HEALTH CARE SERVICES Q., Summer 1984, at 25, 39–40.

[116] GAO, *supra* note 23, at 79.

smaller percentage live with their children.[117] Nevertheless, extensive contact is maintained between the family and the elderly person. Studies show that eighty percent of individuals over age 65 live near at least one of their children and see that child at least once a week.[118] In Shanas's samples, three out of four elderly people with children saw their children within the week preceeding the interview, and among persons who did not see their children, four out of ten saw a brother, sister, or other relative.[119] Of course, these statistics do not focus specifically on the elderly person's degree of functional disabilities. Thus, much of the family contact documented may not be related to the delivery of services. Nevertheless, these statistics do reflect a trend that has been extensively documented in recent years: the elderly prefer to maintain independent living arrangements while still retaining a high degree of contact with their children.[120] Often an elderly person may try to maintain this intimacy at a distance even with an increase in her or his functional disabilities.[121]

B. *The Female Caregiver*

An analysis of the sequence in which changes in living arrangements and care patterns occur highlights the particular role that women play in caregiving. Primary care is usually provided by one designated family member.[122] If the elderly person is married, the primary caregiver is most often the spouse.[123] Because elderly men are two to three times more likely than

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[117] Mindel, *Multigenerational Family Households: Recent Trends and Implications for the Future*, 19 THE GERONTOLOGIST 456 (1979); *see also* Family Caregiving and the Elderly, *supra* note 13, at 7 Table 2 (noting that 53% of all individuals 65 and older live with a spouse, 30% live alone, 15% live with a relative (usually a child), and 2% live with nonrelatives). At all ages, women are more likely than men to live alone. *Id.*

[118] SELECT COMM. ON AGING, *supra* note 113, at 67.

[119] Shanas, *supra* note 103, at 173.

[120] A. SCHORR, SOCIAL SECURITY ADMINISTRATION, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, PUB. NO. 13-11953, A SECOND LOOK AT FILIAL RESPONSIBILITY & FAMILY POLICY 13–21 (1980).

[121] It is interesting to note that the higher an elderly person's income, the more likely she or he is to live alone. Among widowed or unmarried elderly women in 1976, less than half of those with incomes under $2,000 lived alone; 77% of those with incomes over $5,000 lived alone. SELECT COMM. ON AGING, *supra* note 113, at 67 n.5.

[122] Soldo & Myllyluoma, *Caregivers Who Live with Dependent Elderly*, 23 THE GERONTOLOGIST 605, 607 (1983).

[123] *Id*; Lurie, Robinson & Barbaccia, *supra* note 115, at 31.

women to be married,[124] they are more likely to have access to a spousal caregiver.

Elderly couples usually develop a balance of mutual care and compensation, establishing a system of complementary nursing and housekeeping tasks.[125] The wife is often the primary caregiver within this system, and a daughter or daughter-in-law may provide additional support. Many researchers, including Soldo and Treas, have noted that married couples can and will maintain their independence for long periods of time by developing various flexible arrangements. As Soldo notes, the threshold level—the level up to which caregiving strains are able to be maintained—is extremely high for spousal caregivers, and couples will remain together and independent even under the harshest circumstances.[126]

Widowed women lose this crucial potential for flexibility and endurance. As these women become increasingly impaired, individual primary caregivers must provide them with essential support. Those caregivers will most likely be the women's daughters or daughters-in-law.[127] The elderly person may live alone, and the caregiver will assist with transportation, shopping, preparing meals, housekeeping, and personal care.[128] This maintains the preferred intimacy-at-a-distance relationship. If the elderly individual becomes progressively impaired, however, she or he is likely to consider moving in with the primary caregiver. As may be expected, the household will be that of the female relative; Soldo and Myllyluoma found that in cases where unmarried elderly were living with others, approximately eight out of ten designated caregivers were women.[129]

The predominance of women as both spousal and filial caregivers is striking in a number of studies. Soldo and Myllyluoma point out that, "because of persistent sex-role differences and greater female life expectancy, women are much more likely than men to assume responsibility for providing for direct

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[124] Family Caregiving and the Elderly, *supra* note 13, at 6; *see also supra* text accompanying note 15.

[125] Treas, *Family Support Systems for the Aged: Some Social and Demographic Considerations*, 17 THE GERONTOLOGIST 486, 487 (1977).

[126] Interview with Beth J. Soldo, Senior Research Scholar, Center for Population Research, Kennedy Institute of Georgetown University (Oct. 4, 1984); Soldo & Myllyluoma, *supra* note 122, at 608.

[127] Soldo & Myllyluoma, *supra* note 122, at 607.

[128] E. Brody, *supra* note 2, at 474.

[129] Soldo & Myllyluoma, *supra* note 122, at 607.

care."[130] Treas similarly notes that "the major responsibility for psychological sustenance and physical maintenance of the aged has fallen traditionally to female members of the family."[131] Women's primary role in caregiving has thus led many commentators to note that, in essence, family caregiving is women's caregiving. As one witness noted in hearings before the Senate Finance Committee in 1983, "Sometimes 'the family' is cited as the caregiver; other frequently used references include 'informal support systems,' 'community supports,' and simply 'relatives' or 'children.' But 'caregivers,' whether in institutional or non-institutional settings, is a euphemism for women."[132]

Demands on women may be expected to increase rather than decrease in coming years. The growing number of elderly will create a higher ratio of aged to young; and two-tiered dependencies, in which both a mother and a grandmother need care, will become increasingly common. In 1920, there were 76 elderly for every 100 middle-aged individuals. In 1980, there were 180 elderly for every 100 middle-aged persons. In 2020, the ratio will be 216 elderly for every 100 middle-aged persons.[133] If current policies and attitudes do not change, larger numbers of middle-aged women will face an increasing responsibility for a burgeoning elderly population. The woman who has been termed the woman in the middle—in middle age, in the middle of a generational family, and in the middle of competing demands—may become an increasingly common phenomenon on the national scene.[134]

C. *Family and System Interactions*

Extensive gerontological research conclusively documents that family members, primarily women, are indeed those who

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[130] *Id.* at 606. In research conducted by the Community Services Society in New York, caregivers ran the gamut from single to married, working to retired, old to young, and rich to poor. The one characteristic common to caregivers was gender: 81% of the caregivers were female while 19% were male. J. Mellor & G. Getzel, Stress and Service Needs of Those Who Care for the Aged 3 (Nov. 23, 1980) (unpublished paper presented the annual meeting of the Gerontological Society, San Diego, Cal.).

[131] Treas, *supra* note 125, at 488.

[132] A. Quinlan, Statement of the Older Women's League on Long-Term Care Before the Health Subcomm., Senate Finance Comm. 4 (Nov. 14, 1983) (on file at HARV. J. ON LEGIS.); *see also* E. Brody, *supra* note 2, at 474 (noting that the "natural or informal support system" is only a euphemism for adult daughters and daughters-in-law).

[133] U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P-23, NO. 78, at 20 (Jan. 1979).

[134] E. Brody, *supra* note 2, at 471.

will assume care of dependent elderly kin. The issue is whether these family caregivers are helped or hindered by existing public and private systems. We have noted that federal health programs often create incentives for use of nursing home care. Do other service delivery systems work with or militate against family care of the elderly? Do they aggravate or ameliorate the tensions attendant to personal caregiving?

Trained health professionals, including doctors, nurses, social workers, and hospital discharge planners, help families determine health care plans for ill or impaired kin.[135] Many of these professionals often do not have the orientation, time, or information with which to recommend and to coordinate home health care services.[136] For example, before a patient is discharged, hospital discharge planners are responsible for developing an appropriate long-term care plan, possibly including a home health care plan.[137] Actually, many planners devote their time to finding available nursing home beds.[138] Underfunding and understaffing of discharge planning offices, a lack of expertise among planners in assembling a package of home health care services, and at times, the dearth of available home health services produce this result.[139]

Social workers and nurses, working with the chronically impaired elderly in the community, often suggest nursing home care for similar reasons. Acute illness and chronic conditions create multidimensional problems. If an individual is to be cared for at home, the health professional must be equipped to determine, to locate, and to coordinate the proper mix of medical, social, economic, and mental health services that the individual will require.[140] Many health professionals lack the necessary awareness, expertise, or opportunity for effective coordination.[141]

In most cases, physicians are the pivotal medical professionals that determine an individual's long-term care program. The prominence of physicians, however, has often hindered rather than helped families who wish to provide home care. A General Accounting Office study has noted that:

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[135] GAO, *supra* note 23, at 66–70.
[136] *Id.*
[137] *Id.* at 68.
[138] *Id.* at 68–69.
[139] *Id.* at 68.
[140] *Id.*
[141] *Id.*

> Physicians generally play the most important role in the decision to institutionalize an elderly person . . . . The physician is often more likely to encourage rather than deter institutionalization because of a lack of awareness of alternatives, a narrowly focused medical view of the patient's needs, and an unwillingness or inability to oversee the packaging and coordination of the services required to keep the person in the community.[142]

A Texas study found that physicians not only exercised greatest control over the decision to institutionalize but also often bypassed other professionals in the decisionmaking process.[143] Only 10.8% of physicians surveyed in the study consulted hospital discharge planners, and only 19.1% consulted social workers.[144]

The antipathy or indifference of physicians to home health care is a particularly critical problem because they are the gatekeepers to the provision of such care.[145] All federal programs require that a physician authorize and supervise the home health care plan,[146] and most families are strongly influenced by their physicians' recommendations. Unfortunately, most medical schools do not provide adequate training in geriatrics or community health to help expand their students' awareness of various options in long-term care.[147]

D. *Fragmentation of Services*

If a health professional recommends the use of home health care, or if a family is already caring for an elderly person and is seeking outside help, further difficulties may arise in obtaining services. As the General Accounting Office has noted, the current system of home health care "is really a conglomeration of several Federal, State, and local programs, each of which provides specific types of services, such as medical care, nutrition, and social services. Each program has its own administrative unit, eligibility requirements, and financing mechanisms."[148]

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[142] *Id.* at 69.

[143] *Id.* at 69 (citing Joint Committee on Long Term Care Alternatives, Admission to a Nursing Home: An Exploratory Study of the Decision-Making Process, Technical Report III, Fall 1978, at 6).

[144] *Id.*

[145] *Id.* at 70 (citing Institute of Medicine, National Academy of Sciences, Aging and Medical Education, Sept. 1978, at 16).

[146] *See supra* text accompanying notes 35, 60.

[147] GAO, *supra* note 23, at 69.

[148] *Id.* at 73.

Fragmentation of services and a lack of coordination—the major complaint voiced in regional hearings held around the country in 1976—is the result.[149] Because there is neither a single source for evaluation of needs nor a single point of access to care, elderly persons or their families seeking home health services often must make trips to several agencies, each with a different application form, eligibility standard, and assessment procedure.[150] In addition, it is possible for a client to be ineligible for one of three necessary home care services because the program or agency providing that particular service has a different eligibilty standard from the others. Because an effective home health care plan depends on having all needed services filled, the absence of one key service may well mean that the effort to maintain the individual in the community will fail.[151]

Within the overall fragmentation of care, there is a striking lack of coordination of homemaker-home health aide services. This lack of coordination is particularly unfortunate in light of the role that homemaker-home health aides are ideally designed to play. The National Council of Homemaker-Home Health Aide Services defines the homemaker-home health aide as a member of a health and social services team whose job is to "help preserve, improve or create wholesome family living."[152] This job involves many responsibilities. These responsibities include *homemaking* tasks, such as cleaning, shopping, preparing meals, and doing laundry; *personal care* services, including help with bathing, moving around, simple exercises, and medications; *instruction* in performance of daily tasks, planning of meals, and establishment of health schedules; *psychological support* through listening to and interacting with the client; and *observing* and *reporting* changes regarding the client's status to the appropriate health professional.[153]

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[149] Pegels, *Institutional vs. Noninstitutional Care for the Elderly*, 5 J. OF HEALTH POL., POL'Y & L. 205 (1980).

[150] A study of stresses felt by women caregivers who sought to find formal support services for their elderly parents found that the caregivers experience frustration from endless telephone calls and interviews. Archbold, *An Analysis of Parentcaring by Women*, HOME HEALTH CARE SERVICES Q., Summer 1982, at 5, 15.

[151] GAO, *supra* note 23, at 75–76. The GAO report further notes that the lack of coordination and limited program funding may help to explain why many needy elderly go without services. For example, only 3% of the eligible elderly benefit from community services, and only 1% participate in the hot meals program sponsored by Title IV of the Older Americans Act. *Id.* at 54.

[152] L.P. Terlizzi, Human Resources Issues in the Field of Aging: Homemaker-Home Health Aide Services, Administration on Aging, Dep't of Health and Human Services, OHD (77-20086), at 1 (1977).

[153] *Id.*

The Council's definition of homemaker-home health aides is noteworthy for several reasons. First, it emphasizes that excessive service encourages dependence, while guided instruction fosters an individual's self control and independence. Second, the client's medical, household maintenance, social, and emotional needs are seen as constituting a single unit, all necessary for maintaining the client's health and independent living status. As part of a whole, all these needs can best be met by one trained paraprofessional. Third, the concept of teamwork between the homemaker-home health aide and a supervisor is emphasized. The supervisor determines which services are needed by a client, and the homemaker-home health aide then performs those services that fall under her or his function. The provision of services is constantly monitored, and the homemaker-home health aide reports back to the supervisor if a change in the client's status occurs.

Operating on these principles, homemaker-home health aide services can be a key element in effective home health care. Unfortunately, the present government health system discourages a uniform approach by the homemaker-home health aide. Medicare uses the term home health aide and pays strictly for medically oriented services. Most state Medicaid programs follow a similar policy, although a small number allow for more expansive service.[154] The Social Services Block Grant and the Administration on Aging, on the other hand, fund homemaker and home health aide services, as well as other services under various titles: chore worker, manager, and attendant.[155] As a result, individuals needing care must often apply for the services of various paraprofessionals, each performing fragments of a job that would best be undertaken by one person. This lack of uniformity and coordination causes the duplication of services, the transfer of a client from one provider to another, and increased administrative costs.[156] Further, it distorts the orientation that homemaker-home health aide agencies seek to instill in their workers: that a continuum exists between mental, medical, and environmental service needs and that the provision of these services as a totality is essential for the client's well-being.[157]

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[154] *See supra* note 66 and accompanying text.
[155] *See supra* text accompanying notes 85–102.
[156] Trager, *supra* note 21, at 19.
[157] An interesting effect of the varying federal definitions is apparent in a policy

E. *The Tensions of Caregiving*

Despite the difficulties in finding and coordinating home health care services, most dependent elderly will still remain in the community and not enter institutions. One person, usually a woman, will assume the role and burden of the primary caregiver and will supply most of the needed services without extensive support from government or community agencies. Although this free labor is initially useful in reducing government expenditures,[158] families who extend themselves to care for elderly kin without assistance are likely to reach a breaking point beyond which caregiving is no longer sustainable.[159] As Trager notes:

> The continuous pressures entailed in caring for sick and severely disabled individuals can be sustained by family members who are without assistance only for relatively brief periods after which the personal support system tends to break down—a circumstance which may then require the use of the institution and subsequent breakup of the family unit.[160]

Thus families often decide to place the elderly individual in a nursing home after a period of unassisted caregiving. Many of these individuals might have remained at home at a savings to the government if home health care support had been accessible.

Researchers have not only studied the presence of a breaking point but have also analyzed the tensions that form its components. With the assumption of care, extensive demands are placed on an individual's time, finances, and emotional capabilities. Over forty percent of adult offspring participating in one survey reported that the time spent on caregiving tasks was equivalent to the time required by a full time job.[161] The cost of

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statement of the National Council of Homemaker-Home Health Aide Services. "The Homemaker-Home Health Aide is one and the same person. The term 'home health aide' may be required for certain funding or legislative purposes; it should not, however, influence the services rendered . . . in the home." *Id.* at 18 (citing National Council for Homemaker-Home Health Aide Services, Standards, available from NCHHAS, 67 Irving Place, N.Y., N.Y.).

[158] *See* U.S. GENERAL ACCOUNTING OFFICE, REPORT NO. HRD-78-19, A NEED FOR A NATIONAL POLICY TO BETTER PROVIDE FOR THE ELDERLY 15–20 (Dec. 30, 1977); Family Caregiving and the Elderly, *supra* note 13, at 16–18.

[159] *See* Family Caregiving and the Elderly, *supra* note 13, at 18–21.

[160] Trager, *supra* note 21, at 62; Perlman and Giele also stress that "[o]ne of the most critical problems in home care is the risk of exhausting [family] resources as the process extends over time. The result can be 'burn-out' for families in which the demands exceed the available resources." Perlman & Giele, *supra* note 111, at 14.

[161] Soldo, *supra* note 4, at 28.

special diets, rental equipment, home modifications, and transportation often strains a family's budget. Some primary caregivers give up social activities, privacy, or paid employment; these losses contribute to the burden upon primary caregivers.[162] The provision of care also entails intense physical and psychological stress. Much of the work, such as bathing or changing beds, is tiring and unenjoyable. It may be especially depressing if the caregiver was close to the elderly person when the elderly person was once capable and independent. In addition, certain illnesses, such as strokes, cause depression and hostility in their victims. The primary caregiver will bear the brunt of these emotions.[163]

It is not surprising that caregivers are thus often prone to intense feelings of frustration, disappointment, ambivalence, guilt, and anger.[164] Many of these feelings are generated by the primary caregiver's dual responsibility of providing both physical and emotional support to the impaired individual.[165] If family caregivers have a limited amount of time and no assistance with physical tasks, they are forced to expend the majority of their efforts on these tasks, with little or no time remaining to provide emotional support.[166] The dual responsibility—and often the imbalance of the responsibility—ultimately precipitates burnout. If a family could depend on a homemaker-home health aide to provide the bulk of physical care, the family caregiver would then be free to give the emotional support she or he is uniquely capable of providing.[167]

Family income and a woman's career choice are two significant factors that influence the type of family caregiving chosen and the resultant stresses on the caregiver. In the winter of 1980, Patricia Archbold interviewed thirty women who were providing

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[162] *Id.*

[163] Interview with Beth J. Soldo, *supra* note 126; *see* V. Colman, Till Death Do Us Part: Caregiving Wives of Severely Disabled Husbands, Older Woman's League, Gray Paper No. 7, at 1–4 (January 1982) (on file at HARV. J. ON LEGIS.) (analyzing the emotional stress, familial and personal isolation, and physical exhaustion experienced by caregiving wives of disabled husbands); *see also* Polansky, *Take Him Home, Mrs. Smith*, 2 HEALTHRIGHT, Winter 1975–76, at 1, col. 1 (offering a compelling description of the difficulties inherent in caregiving for a disabled husband when unaided by formal social supports).

[164] Fengler & Goodrich, *Wives of Elderly Disabled Men: The Hidden Patients*, 19 THE GERONTOLOGIST 175, 179 (1979).

[165] Interview with Beth J. Soldo, *supra* note 126.

[166] *Id.*

[167] *Id.*

care to dependent parents.[168] Half of these women were defined as care managers: individuals who identified the services needed by their parents and managed the provision of these services by others. The other half were defined as care providers: individuals who both identified and directly provided the services needed by the parent.[169]

The major factor influencing the decision to provide care rather than to manage care was socio-economic status. The average income of a care provider was $7,000 to $10,000, while care managers had an average income of $15,000 to $20,000. For most care providers, the financial possibility of arranging care by others simply did not exist.[170] In addition, sixty-seven percent of the care managers were employed full time, in contrast to twenty percent of the care providers.[171] Archbold noted that the care managers tended to be professional women who never seriously considered giving up their jobs or decreasing their work hours. In contrast, care providers tended to hold nonprofessional jobs with salaries too low to purchase needed services.[172] Consequently, care providers "became torn between their work and their feelings of obligation to their parents."[173]

The tensions experienced by the two groups were related to the roles they assumed. Care providers became immersed in a daily, rigid routine of providing physical care. The task of providing for a parent's bathing, toileting, feeding, and housekeeping needs became the focal point of the care provider's day, and little energy remained available for devotion to the parent's psychological or social needs.[174] The frustrations voiced by providers centered on their feelings of decreased freedom, both in their daily activities and in their long-term plans, and on their feelings of lack of privacy, daily irritation, and guilt.[175]

In contrast, the frustrations of care managers centered on the energy and time required to maneuver through a complex and disorganized community system of care. Once the necessary services were obtained, care managers devoted their energy to

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[168] Archbold, *supra* note 150, at 8.
[169] *Id.* at 9.
[170] *Id.* at 10.
[171] *Id.* at 9.
[172] *Id.* at 9–10.
[173] *Id.* at 11.
[174] *Id.* at 15.
[175] *Id.* at 18–19. Half of the providers could not identify any benefits of caregiving. Responses to questions in this area elicited comments reflecting "sad resignation, tired fustration, and hostility toward the parent." *Id.* at 17.

ensuring that the care system functioned smoothly. For example, the managers built personal relationships with the paid caregivers or made physical modifications in the parents' home environments. They also devoted time to satisfying their parents' social and emotional needs.[176] Although care managers noted that their time was more restricted as a result of caring for their dependent parent, a number identified benefits of caregiving. These benefits included increased knowledge of their own inner resources, greater knowledge and empathy for elderly disabled, and for some, an improvement in their relationship with their parents.[177]

The availability of paid, trained workers who can assume the bulk of physical tasks is thus crucial for relieving the stress on primary family caregivers and for enabling them to satisfy the social and emotional needs of their impaired family members.[178] In addition, various studies have found that caregivers experience a marked decrease in tension when other relatives, children, and friends are involved in the provision of care.[179] Family meetings to discuss the tensions attendant to caregiving and mutual support groups among caregivers are two methods that have been used successfully to ease the burden experienced by caregivers.[180] Ultimately, however, the most useful change would be for family members to realize that caregiving is the responsibility of every family member and not inherently that of one female caregiver. The general feminist movement in this country, as well as the participation of family members in counseling groups with a strong feminist orientation, can best bring about this change.

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[176] *Id.* at 15–17.

[177] *Id.* at 17–18. Most providers did not receive this last benefit because their relationships with their parents generally worsened during the caregiving period. *Id.* at 18.

[178] Respite care is another critical service that performs a similar function. It allows a family to place an elderly relative temporarily in another living arrangement or to have someone live in the house with the elderly person for one to two weeks. During this time the family, particularly the primary caregiver, can take a respite from caregiving. Soldo notes that many families try to enjoy the benefits of Medicare payments by finding a doctor who will agree to place the person in a hospital for one to two weeks, or try to convince a sibling or child to stay with the elderly individual. If neither of these approaches is possible, the caregiver will remain at home, and the psychic stress of caregiving will continue to mount. Interview with Beth J. Soldo, *supra* note 126.

[179] *See* Zarit, Reever & Bach-Peterson, *Relatives of the Impaired Elderly: Correlates of Feelings of Burden*, 20 THE GERONTOLOGIST 636, 652–53 (1980).

[180] *Id.* at 654; *see* V. Colman, *supra* note 163, at 7–10; London & Barry, *Older Women Caring for Disabled Spouses: A Model for Supportive Services*, 21 THE GERONTOLOGIST 464, 465–67 (1981).

IV. THE COST OF EXPANDING HOME HEALTH CARE SERVICES

Many health care professionals and policymakers persuasively argue that the deficiencies in current government health programs must be remedied by expanding government reimbursement for home health care services.[181] Various legislative initiatives have been introduced in response to such arguments.[182] In the current deficit-conscious Congress, however, acceptance of any legislative initiative on home health care appears to depend primarily on "cost-game" questions: Will this legislation cost more money? Will it save money?

Proposals to expand home health care are interesting in that they often appear to answer both questions in the affirmative. On the one hand, the rising costs of nursing home care and the increasing percentage of Medicaid expenditures allocated to such care motivate many policymakers to explore alternative long-term care options. Home health care is an attractive option because various studies conclude that home health care may be provided at substantially lower costs than institutional care.[183] Other studies, however, warn that individuals who ordinarily would use neither nursing home care nor formal home health care services would use the latter if such services were readily available.[184] Because home health care services do cost money, even if at a lower rate than nursing home care, these commentators estimate that expanded provision of home health care programs will result in increased total expenditures.[185] A number of these researchers have therefore recommended restrictive approaches for expanding home health care. The most popular

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[181] *See, e.g.*, Trager, *supra* note 21, at 59–64; E. Brody, *supra* note 2, at 478–79.

[182] *See infra* text accompanying notes 207–69.

[183] *See, e.g.*, Eggert, Bowlyow & Nicholas, *Gaining Control of the Long-Term Care System: First Returns from the ACCESS Experiment*, 20 THE GERONTOLOGIST 356, 359 (1980) (committee screened Medicaid patients applying for nursing home care and found the costs of providing home health care services to those denied admission were 52% of the costs of comparable institutional services); Kurland, *The Medical Day Care Program in New Jersey*, HOME HEALTH CARE SERVICES Q., Summer 1982, at 45, 58 (costs of home health care for medical day care patients averaged $3861 for an 18 month period; institutional care would have cost $8070 for the same period); Health Policy Alternatives Inc., Expansion of Cost-Effective Home Health Care 12–18 (May 1983) (on file at HARV. J. ON LEGIS.) (summarizing studies demonstrating cost savings from early discharge from hospitals and from prevention of admission to nursing homes).

[184] *See, e.g.*, U.S. GENERAL ACCOUNTING OFFICE, *supra* note 114, at 26–31 (surveying eleven studies using control or comparison groups: five studies showed increases in total costs; one study showed an increase in hospital costs; three studies showed no difference in costs; two studies showed reductions in total costs).

[185] *See id.*

approach is to develop techniques that would identify the group of elderly most likely to enter a nursing home in the absence of publicly funded home health care programs and to restrict home health care eligibility to that targeted group.[186]

A number of legislative initiatives have sought to adopt some form of the targeting approach.[187] There are several problems, however, with accepting this approach as a legitimate national health policy. First, commentators who advocate that approach are quick to concede that it is currently difficult to identify the exact level of disability that will characterize the group most likely to require institutionalization.[188] Assessment techniques that would appropriately target the desired group have not yet been sufficently developed.[189] In fact, some studies have produced conflicting results regarding the level of disabilty that would characterize the desired target group.[190]

Second, accepting targeting as a legitimate approach may ultimately become a decision to ignore the needs of thousands of unpaid family caregivers who currently ensure that many impaired elderly individuals do not enter nursing homes. A non-targeted home health care program generates higher total costs because most elderly individuals who have personal dependency needs sufficent to qualify them for nursing home care tend not to enter an institution despite those needs.[191] These individuals remain at home because of the extensive care delivered primarily by unpaid, female caregivers—care that often comes at a high personal and emotional cost to the individual.[192]

Although no system of targeting presented in the various legislative initiatives discussed below explicitly proposes using the presence of a family caregiver as a criterion for denying eligibilty for home care services, such an approach would constitute one of the most effective targeting systems.[193] It would

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[186] *See id.* at 31; Health Policy Alternatives Inc., *supra* note 183, at 28–31.

[187] *See infra*, text accompanying notes 228–30, 238–39, 253–56.

[188] *See* U.S. GENERAL ACCOUNTING OFFICE, *supra* note 114, at 31.

[189] *See* Health Policy Alternatives, Inc., *supra* note 183, at 30–31; *see also* Letter from John Smith, Chairman of the Bd. of the Home Health Services and Staffing Ass'n (HHSSA), to Sen. Durenburger (R-Minn.) (Jan. 5, 1984) (noting that there is no one accepted system that generates most effective targeting) (on file at HARV. J. ON LEGIS.).

[190] *See supra* note 189 and accompanying text; *see also* U.S. GENERAL ACCOUNTING OFFICE, *supra* note 114, at 28–31.

[191] U.S. GENERAL ACCOUNTING OFFICE, *supra* note 114, at 37.

[192] *See supra* text accompanying notes 158–77.

[193] One commentator has already noted the cost saving potential of using the presence of a family caregiver as a criterion upon which elderly individuals would be disqualified for government supported home health care. Dunlop, *Expanded Home-Based Care for*

be both inequitable and unwise, however, to institute such a targeting policy. First, family caregivers often deliver care until they reach a breakpoint level at which they are no longer able to deliver care.[194] Waiting until caregivers reach this breakpoint level before offering home health care services to the elderly recipient may constitute intervention that is too late to be either useful or cost effective. Second, although family caregivers may succeed in keeping their elderly relatives out of nursing homes, the stress of providing physical care often prevents them from adequately providing the emotional support so desperately needed by their elderly family members.[195] Thus, excluding those elderly already served by a family caregiver from home health care eligibility could mean that those individuals may be denied an opportunity to receive more satisfying emotional care.[196] Third, and most important, the nation's health and social services programs have a responsibility to address the needs of the caregiver as well as those of the care recipient. Lower income and lower class women, who hold low paying jobs and who are therefore most pressured to become full time caregivers,[197] particularly should not be penalized for having assumed

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the Impaired Elderly: Solution or Pipe Dream, 70 AMER. J. OF PUB. HEALTH 514, 517 (1980). It is unclear from his article whether Dunlop supports this approach or whether he is simply noting that it would be an extremely effective targeting system. Dunlop does recognize that caregivers experience severe stress and that establishing such a requirement would mean forfeiting the goal of relieving that stress. In his discussion of the usefulness of relieving caregiver stress, however, Dunlop focuses primarily on possible financial ramifications:

> To the extent that [alleviating stress and raising morale of the caregiver] occurs, it has positive implications in terms of reducing health costs. Stress and fatigue associated with sustained caregiving have been implicated in the mental and physical symptomatology of caregivers. Many of these caregivers, especially spouses, may also be elderly and thus eligible for Medicare and Medicaid coverage of their health expenses.

Id. at 516–17. Clearly, if one utilizes a strictly economic cost-benefit analysis, the costs of providing home health care services to the elderly will outweigh the costs generated by the physical and mental ill health of middle-aged caregivers. Other social and moral values, however, should be taken into account.

[194] *See supra* text accompanying notes 160–61.

[195] *See supra* text accompanying notes 174–77.

[196] Denying home health care eligibility may also mean that family caregivers will be unable to perform other varied tasks. For example, one study noted that the initiation of formal care resulted in redirection, not cessation, of family support. After homemaker services were begun for a group of 178 near poor elderly in New York City, the percentage of family help decreased in the areas of personal care and housework and increased in the areas of meal preparation, shopping, help with finances, and help in taking medication. Family Caregiving and the Elderly, *supra* note 13, at 22 (citing M. Cantor, The Entry of the Formal Organization on the Informal Support Systems of Older Americans, AOA Grant No. 90-A-1329 (1980)).

[197] *See supra* text accompanying notes 170–73.

the role of a primary caregiver. Instead, those women should be aided by having access to a full range of health and social services that would support or replace their caregiving.

All legislative initiatives to expand home health care take place against the background of various, and sometimes conflicting, cost efficiency arguments. The bottom line may be that a truly accessible system of home health care may cost more money. That fact, however, does not relieve society from the responsibility of assuring that needed health care services are available to our elderly. Policymakers opposed to expanded home health care benefits often warn that such benefits will merely stimulate latent demand.[198] But latent demand, after all, is only another term for unmet need. The very reason an expansive home care program may ultimately fail to be cost effective is because the majority of elderly are currently cared for by unpaid, female, family caregivers. Curtailing any expansion of home health care services on the normative assumption that such care will and should continue to be provided in such a way, unaided by formal services, is both unwise and inequitable.

V. Legislative Initiatives: The Ninety-eighth Congress

For the past several congressional sessions, members of the House of Representatives and the Senate have introduced bills to expand funding of home health care services under various government programs.[199] Although some liberalizing provisions have been passed in recent years,[200] the major programs of Medicare and Medicaid still primarily support acute care and institutional long-term care. In the Ninety-eighth Congress, a number of bills to expand home health care services were introduced. Based on the belief that home health care services could be effectively targeted to groups most at risk of institutionalization, these bills purported to expand home health care in a cost effective manner.[201]

This Part presents a description of a comprehensive home health care system and then analyzes the legislative initiatives of the Ninety-eighth Congress to see how closely they conform

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[198] *See supra* text accompanying notes 184–85.

[199] *See, e.g.*, S. 2809, 96th Cong., 2d Sess. (1980); H.R. 6194, 96th Cong., 2d Sess. (1980); H.R. 639, 96th Cong., 1st Sess. (1979).

[200] *See supra* text accompanying notes 47–49, 73–79.

[201] *See infra* text accompanying notes 207–69.

to that system. In addition, the cost factors of the bills are explored, and suggestions for modified legislative initiatives are presented.

A. *A Comprehensive Home Health Care System*

An effective home health care system must be part of an overall system of health care services. Texas State Senator Chet Brooks, in testimony before the U.S. House of Representatives Health and Environment Subcommittee in 1980, noted:

> The challenge of long-term care policy does not come down to a choice between institutional and non-institutional care. The need and desirability of institutional services for many will always remain. What is needed, however, is . . . a range of related services that function together in a coherent progression to assist the individual client.[202]

The underlying philosophy of the proposal by Senator Brooks is that effective long-term care requires the availability of a wide range of services and the flexibility to choose and modify those services over time.

An effective service system must also include a multidimensional assessment of needs. The General Accounting Office (GAO), after analyzing results from long-term care research in five states, concluded that there was a pressing need for a gatekeeping mechanism that would screen clients applying for long-term care and that would assess the proper level and types of services needed.[203] The GAO emphasized that traditional medical examination of patients was inadequate and that a multidimensional assessment that took into account the elderly's social, mental, financial, and environmental needs, as well as their medical needs, was crucial for proper treatment.[204] Fur-

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[202] *The Medicaid Community Care Act of 1980: Hearings on H.R. 6194 Before the Subcomm. on Health and the Environment of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 2d Sess. 51 (1980) (statement of Texas State Sen. Brooks).

[203] GAO, *supra* note 23, at 92–93.

[204] *Id.* The GAO cited a study that found that physicians' diagnoses of proper nursing home admittances were inaccurate in 64% to 80% of the cases. The authors of the study noted that physicians were trained to concentrate on structural changes in the body caused by disease and not on functional changes due to long-term disorders. It appeared to be more difficult for them, therefore, to include in their diagnoses other factors that affected a person's capacity to function on a sustained basis. *Id.* at 90–91. It seems necessary for medical schools to incorporate a broader understanding of "health status" in the curricula and for other health professionals, such as geriatric nurse practitioners and social workers, to be given clearly defined roles and responsibilities in the assessment process.

thermore, in order to maintain the proper mix of services, it is necessary to incorporate continuous monitoring and periodic reassessment of the client's needs and status.

Most of the services in this proposed service system would focus on the elderly individual. These services would include medical treatment by physicians and nurses; speech, physical, audiological, and occupational therapies for rehabilitation and maintenance; homemaking and personal care assistance; environmental maintenance work such as snow clearance in the winter; transportation services; mental health and financial counseling; and congregate housing provisions or assistance in finding housing.

In addition to addressing and meeting the needs of the elderly, however, the service system would also ensure that the needs of family caregivers were assessed and met. This would be accomplished by providing services such as geriatric day care, respite care, counseling for caregivers, and assistance in the building of support networks.[205] In an ideal system, these services would be provided through a single funding source that would promote easy accessibility and ongoing coordination of home health care services.

B. *Current Legislative Initiatives*

The bills introduced in the Ninety-eighth Congress to expand reimbursement of home health care services attempted to include most of the components of this ideal system. This Part describes four Senate bills: S. 1244, introduced by Senator Robert Packwood (R-Or.); S. 410, introduced by Senator Daniel K. Inouye (D-Hawaii); S. 1614, introduced by Senator John Heinz (R-Pa.); and S. 1539 and S. 1540, introduced by Senator Orrin G. Hatch (R-Utah).[206]

1. S. 1244

S. 1244, introduced by Senator Packwood as the "Senior Citizens Independent Community Care Act," proposed the ad-

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[205] *See supra* note 178 (describing respite care).

[206] Although a number of bills proposing some changes in Medicare and Medicaid were introduced in the House of Representatives during the 98th Congress, no bills making major changes were actively debated in the House this past Congress.

dition of a new Part D to Title XVIII of the Social Security Act, the Medicare statute.[207] Under Part D, states could establish statewide prepaid capitation programs for the delivery of both acute and long-term care to Medicare beneficiaries suffering from disabling impairments.[208] Although the bill's sponsors may have envisioned a time when all states would deliver long-term care under this section, the bill provided that only four states would be chosen to develop Part D programs for the first four years. After this initial period, the Secretary of Health and Human Services could limit the number of new state programs to ensure that the resulting payments did not exceed amounts available from the Medicare Trust Fund.[209]

The benefits that a demonstration state could have offered under a Part D program were relatively extensive. In addition to the usual medical services covered under Parts A and B of Medicare, states could cover the following services: homemaker-home health aide services; adult day health care; respite care of up to fourteen days or 336 hours per year; intermediate care for up to twenty days; pre-admission screening and assessment; coordination of home health care services; and any other service that the Secretary determined to be of value.[210] Elderly individuals who elected to receive services under the program would waive their right to receive the usual reimbursements provided by Parts A and B of Medicare.[211] More importantly, the restrictions of Parts A and B, such as the requirements that an individual be homebound and in need of skilled nursing care, physical therapy, or speech therapy to qualify for home health care, would not apply to the new program.[212]

There are several positive aspects to the benefits covered by

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[207] S. 1244, 98th Cong., 1st Sess., 129 CONG. REC. S6406-12 (daily ed. May 10, 1983).

[208] *Id.* § 2 (proposed 42 U.S.C. § 1890(a)(1)).

[209] *Id.* § 2 (proposed 42 U.S.C. § 1890(a)(2)-(3)). This provision stands in sharp contrast to the approach taken by Sen. Packwood in the home health care bill he introduced in the 96th Congress, S. 2809, The Non-Institutional Long-Term Care Act for the Elderly and Disabled. That legislation created a new title for the Social Security Act, Title XXI, and provided that any individual receiving long-term care assistance, whether eligible under Medicare, Medicaid, or Title XX, was required to undergo Title XXI's screening and assessment procedure in order to receive benefits under Title XXI. S. 2809, 96th Cong., 2d Sess. § 2 (1980). Any state could establish a program under the new title, deliver a range of home and community based services, and receive reimbursement through a new fund formed by the bill, the Federal Long-Term Care Trust Fund. *Id.*

[210] S. 1244, *supra* note 207, § 2 (proposed 42 U.S.C. § 1891(a)(1)-(8)).

[211] *Id.* (proposed 42 U.S.C. § 1891(b)).

[212] *Id.* (proposed 42 U.S.C. § 1891(b)-(c)(2)). The bill also eliminated the requirement that extended care services be primarily post-hospital in order to qualify for reimbursement.

the bill. S. 1244 categorized the homemaker-home health aide as one service provider and delineated the broad range of services to be provided by that individual. Homemaker-home health aide services were defined as "services designed to maintain or increase the personal care of [an] individual and [a] home (not including the structure of such home) in a manner which promotes the functional independence of the individual and avoids the need for institutionalization."[213] The designated personal care services could include aid in bathing, exercising, personal grooming, and mobility; household care tasks could include maintaining a safe living environment, light housekeeping, and buying and preparing food. These services, however, could only be offered to an individual "who would require institutionalization but for the provision of such services."[214]

The bill also included specific descriptions and criteria for adult day care services and respite care. The former could include, but were not limited to, the "provision of health care, recreation and educational activities, physical and vocational rehabilitation, and social, developmental, or independent living services."[215] These services, unlike those provided by a home health aide, could be given to an individual who did not necessarily require institutionalization but was in need of social or developmental activities during daytime hours.[216] Respite care included services provided on a full time, temporary basis "to provide relief for the person who normally cares" for the individual and to "lessen such individual's dependence" on the primary caregiver.[217]

To be eligible for benefits under Part D, an elderly person

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[213] *Id.* (proposed 42 U.S.C. § 1891(c)(3)(A)).

[214] *Id.* (proposed 42 U.S.C. § 1891(c)(3)(A)(i)–(ii)). This qualification was not present in the comparable section of Sen. Packwood's previous bill, S.2809, 96th Cong., 2d Sess., § 2 (1980). This provision is but one of many instances throughout this bill, and the others reviewed in this section, where the targeting approach was attempted.

It is also important to note that excluding coverage for modifying the structure of a home may be counterproductive. Soldo notes that there are various cost effective structural modifications that may promote an individual's ability to live independently. For example, constructing a rail around a bathtub may allow an elderly person to bathe by herself or himself; the alternative is to pay a homemaker-home health aide weekly to assist in bathing. Interview with Beth J. Soldo, *supra* note 126. Although jurisdictional complications with agencies like the Department of Housing and Urban Development could arise if Medicare provided assistance for home modifications, it may be worthwhile to develop language allowing for cost effective home modifications that promote functional independence.

[215] S.1244, *supra* note 207, § 2 (proposed 42 U.S.C. § 1891(c)(4)).

[216] *Id.*

[217] *Id.* (proposed 42 U.S.C. § 1891(c)(5)).

had to be enrolled in Medicare and could not currently be a resident of an institution. Furthermore, the individual had to be certified as having an "unmet need" for two services related to activities of daily living, such as preparing meals, shopping, or personal care, and had to demonstrate a physical or mental impairment resulting in one of several specified degrees of disability.[218]

To receive benefits, an individual's situation first had to be evaluated by a Preadmission Assessment Team (PAT).[219] This procedure included an initial screening to determine what long-term care services were needed, preparation of a plan of care based on the health status and the functional capabilities of the individual, and a continual monitoring of the individual's status and of the appropriateness of the services the individual was receiving. The PAT had to consult with the individual's personal physician in developing the plan of care, and when possible and appropriate, had to utilize services provided by volunteers so as to encourage the continued provision of such services.[220] Although the legislation required that PATs be designated in as many areas of the state as was necessary, new structures were not necessarily required. An existing Area Agency on Aging, hospital department, local department of health, rural health clinic, health maintenance organization (HMO), or any other group that met the law's requirements could serve as a PAT.[221] Each PAT had to include a physician, preferably the individual's personal physician; a registered nurse, nurse practitioner, or physician assistant; and a social services worker.[222]

The legislation required that reimbursement for services be on a prepaid capitation basis. The Secretary of HHS, together with the state, would establish a per capita reimbursement amount that could not exceed sixty percent of the average monthly rate for skilled nursing facilities in that state.[223] This per capita amount, combined with any copayments for which an individual beneficiary was responsible, would constitute a provider entity's total payment for services. If the amount expended for services were less than the total, the entity retained

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[218] *Id.* (proposed 42 U.S.C. § 1892(a)(6)(A)–(b)(2)(F)).
[219] *Id.* (proposed 42 U.S.C. § 1893(a)–(b)).
[220] *Id.* (proposed 42 U.S.C. § 1893(a)–(b)).
[221] *Id.* (proposed 42 U.S.C. § 1893(c)(2)).
[222] *Id.* (proposed 42 U.S.C. § 1893(c)(3)(B)).
[223] *Id.* (proposed 42 U.S.C. § 1894(a)).

the excess payment; if the services cost more, the entity would be responsible for the difference.[224]

Beneficiaries would be responsible for paying a twenty percent copayment for those services not currently covered under Parts A and B of Medicare.[225] Those services include custodial homemaker-home health aide services, respite care, adult day care, and other services that may have been added by the state. Copayments, however, would be tied to the individual's income. Thus, copayments for an individual with an income of $3,500 to $5,000 would not exceed one percent of that person's income or $30 to $50; for the person with an income of $5,000 to $8,500, copayments would not exceed two percent of income or $100 to $170. These percentages would continue to rise in proportion to the person's income.[226]

S. 1244 included many of the positive features necessary for an effective home health care system. It required a broad and periodic assessment of long-term care needs, and its assessment team included both health and social service professionals. It provided for enhanced coordination because the PAT would serve as both a single access point and as an arranger of services. The bill's benefits covered a range of services allowing for the maintenance, stabilization, and rehabilitation of the elderly individual. Although the legislation did not explicitly provide for reimbursement of services directed at the caregiver, such as family counseling and support groups, it did cover other essential support services, such as respite care and adult day health care.[227]

Despite its positive aspects, the bill included certain problematic provisions. First, although prepaid capitation payments can

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[224] *Id.* (proposed 42 U.S.C. § 1894(d)–(e)).

[225] *Id.* (proposed 42 U.S.C. § 1895(a)–(b)).

[226] *Id.* (proposed 42 U.S.C. § 1895(c)(1)). The legislation included the following graduated table:

INCOME:	APPLICABLE PERCENT
$8,501–$10,500:	3%
$10,501–$15,000:	4%
$15,001–$20,000:	5%
$20,001–$30,000:	6%
$30,001–$40,000:	7%
$40,001+:	8%

[227] *Id.*

prevent excessive and unanticipated cost increases, they also provide a built-in incentive to enroll individuals needing minimal care and to reduce services to all individuals after enrollment. S. 1244 contained no explicit safeguards against entities that engaged in such methods of cost saving.

Second, the bill's eligibility standards could potentially be implemented in a restrictive manner by HHS. The bill merely requires that eligible applicants demonstrate a designated level of impairment and an "unmet need" in selected services.[228] This section is clearly designed to target services to those individuals most likely to be institutionalized. Nonetheless, because the bill establishes impairment as the qualification for benefits, and not the absence of a family caregiver, it is possible that more individuals will ultimately receive services under the bill than would have entered a nursing home in the absence of the new program.[229] Although the per capita payment for each individual would be set at sixty percent of the average skilled nursing facility rate, no cap is set on the total number of individual payments; thus, total expenditures could potentially rise. In order to ensure immediate cost savings, HHS might therefore be inclined to interpret the eligibility requirements in an unduly stringent fashion, thereby excluding many elderly individuals and family caregivers who could benefit from the services.[230] It is even possible that the statutory requirement that an elderly individual display an unmet need in two daily living activities would be interpreted so as to exclude individuals who have access to a family caregiver currently fulfilling those needs. S. 1244 should therefore include a provision explicitly disallowing any such interpretation of the eligibility requirement.

Finally, by providing for a demonstration project in four states, S. 1244 proposes a slow and modest expansion of home health care. Although this limitation may be understandable as a necessary strategy for passage of the bill, it will leave the majority of the nation's elderly and their families in need and unserved for an extended period of time.

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[228] *Id.* (proposed 42 U.S.C. § 1892(a)(6)–(7)); *see supra* note 218 and accompanying text.

[229] *See supra* text accompanying notes 184–85.

[230] Although short-term savings may, in fact, be realized by depending on unpaid family care, such caregivers who are unsupported by outside resources are more likely to reach a breaking point that will induce them to place their elderly kin in an institution. *See supra* text accompanying notes 158–60.

2. S. 410

S. 410, the "Community Nursing Centers Act of 1983," introduced by Senator Inouye, offered an expansion of home health care benefits to Medicare beneficiaries in all states.[231] The expanded services would have been available, however, only if delivered through a free standing community nursing center (CNC). To be eligible to deliver services, a CNC had to be engaged primarily in providing nursing services, had to deliver substantially all of its nursing services and the major portion of its other services directly, and had to be directed and operated by registered, professional nurses.[232] The Secretary of HHS was mandated to establish service areas within each state and to designate one CNC for each service area. This designated CNC would be the only agency eligible to deliver the new services established by the legislation. Priority in the selection process was to be given to CNCs that were founded by community or public organizations and that had demonstrated the capacity to deliver economical and professional services.[233]

The reimbursable services available through a CNC would have been fairly broad: part-time or intermittent nursing care; speech, physical, or occupational therapy; social services; part-time or intermittent home health aide services; the provision of medical supplies; and any of the services allowed under the 2176 Waiver program that the Secretary found appropriate to prevent institutionalization. The 2176 Waiver services include case management, home health aide and personal care services, adult day health care, and respite care.[234] S. 410 would have added patient and family training to these services.[235]

The legislation required that services be provided pursuant to a nursing plan of care developed by a registered nurse at the CNC. Because this provision overtly interfered with the almost sacred control usually exerted by physicians in devising plans of care, the legislation understandably required that the plan also be submitted to the patient's personal physician for review.

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[231] S. 410, 98th Cong., 1st Sess., 129 CONG. REC. S973–79 (daily ed. Feb. 3, 1983).

[232] *Id.* (proposed 42 U.S.C. § 1861(bb)(2)(A), (2)(D)). The CNC would also have to assure timely referral or consultation with other health professionals. *Id.* (proposed 42 U.S.C. § 1861(bb)(2)(F)).

[233] *Id.* (proposed 42 U.S.C. § 1861(bb)(4)(A)–(B)). The Secretary could designate an additional CNC if the service need was too great to be met by one center. *Id.*

[234] *See supra* text accompanying note 75.

[235] S. 410, *supra* note 231 (proposed 42 U.S.C. § 1861(bb)(1)(A)–(G)).

Payment for services would be withheld if the physician disapproved of the plan in writing within ten days of receiving the plan.[236] In addition, the CNC was required to have the plan approved by an independent review committee, the majority of whose members would be registered professional nurses in practice.[237]

To be eligible for CNC benefits, a Medicare beneficiary had to meet the current requirements for home health care under Medicare or be assessed as needing institutionalization in a hospital or skilled nursing facility.[238] This assessment was to be based on the presence of impairments that created a "strong presumption" that the individual would be institutionalized.[239] Although Senator Inouye's legislation did not include the detailed set of impairments set out in S. 1244, it operated on a similar premise that a designated level of disability would identify the proper, limited population. To the extent that level of impairment does not itself define a sufficiently narrow group, however, greater numbers of beneficiaries might enroll in the program than originally expected. Thus, a similar incentive exists under S. 410, as under S. 1244, for the implementing agency to interpret strictly the eligibility standards.

S. 410, like S. 1244, required that services be delivered on a prepaid capitation basis. The CNC would receive a negotiated, monthly per capita fee for each individual enrolled in its program. This fee would be based on such factors as diagnosis, severity of illness, and age group. Services would subsequently be delivered in accordance with the established plan of care, without regard to duration or scope of services. The legislation explicitly provided that if a CNC deliberately altered its patient mix or patient flow, or lowered its quality of care to produce excess income over expenses, the Secretary would be empowered to determine the amount of excess income and recover that amount.[240]

S. 410 did offer the welcome possibility of expanded home health care benefits. Unlike S. 1244, the bill placed an overall

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[236] *Id.* (proposed 42 U.S.C. § 1861(bb)(3)(A)–(B)). The physician could also request that modifications be made at any point beyond the ten days. *Id.*

[237] *Id.* (proposed 42 U.S.C. § 1861(bb)(3)(C)(iv)). No member of the review committee could be connected to or have a financial interest in the CNC or a competitor. *Id.* (proposed 42 U.S.C. § 1861(bb)(3)(D)(iv)(II)).

[238] *Id.* (proposed 42 U.S.C. § 1861(bb)(3)(A)–(C)).

[239] *Id.*

[240] *Id.* (proposed 42 U.S.C. § 1861(bb)(5)(A)(iv)).

cap on expenditures by requiring that the negotiated fee be set so that the total amount of payments to a CNC would not exceed the payments that would have been made for such individuals absent the provision of home health care services.[241] Even this, however, is not a foolproof cap. The amount that would have been expended can be calculated by assuming that all individuals receiving home health care services would have entered a hospital or a nursing home in the absence of such services. Because the negotiated fee is set at a substantially lower level than the fee charged by hospitals and skilled nursing facilities, the cap would automatically cover all enrolled individuals. The number of individuals who may enroll under this bill's eligibility standard may actually be much higher, however, than the number who would have entered a hospital or nursing home in the absence of expanded services.[242] Thus, as is the case with S. 1244, if the bill's sole justification is its ability to achieve immediate cost savings, the possibility of broadened enrollment and increased expenditures may both reduce its chances for passage and give the implementing agency an incentive to achieve cost savings through methods more restrictive than those contemplated by the legislation.

S. 410, if reintroduced, would face an additional hurdle. The bill was designed to be as much a boost for Visiting Nursing Associations (VNAs) and the nursing components of municipal and county health departments as it was designed to expand services for the elderly. Senator Inouye essentially acknowledged the bill's dual purpose by noting that the economic viability of many VNAs had been threatened by budget cutbacks and by a decrease in the proportion of paying patients to non-paying and part-paying patients. Thus, the Senator expected that payments received through the bill's programs would ultimately be used to underwrite the free and below cost care that these nursing organizations were currently delivering to the poor and the near poor.[243]

Supporting VNAs is certainly a worthy goal. These nursing organizations were the pioneers in delivering home based care to the elderly and disabled and have long been the mainstay of health care in many communities.[244] It is also refreshing to

[241] *Id.* (proposed 42 U.S.C. § 1861(bb)(5)(A)).

[242] *See supra* text accompanying notes 184–85.

[243] 129 CONG. REC. S974 (daily ed. Feb. 3, 1983) (statement of Sen. Inouye).

[244] *See* Trager, *supra* note 21, at 7–8; E. BENSON & J. MCDEVITT, COMMUNITY HEALTH AND NURSING PRACTICE 219 (1980).

contemplate a system of care that would be explicitly directed and implemented by nurses and other health care providers rather than solely by physicians.[245]

Nevertheless, giving CNCs the exclusive ability to deliver these expanded home health care services presents difficulties. First, although Senator Inouye emphasized that the CNC nursing orientation would differ from the medical orientation that characterizes many other home health care agencies,[246] a CNC is still likely to retain a stronger focus on nursing and medical services than on general social services. Thus, although a CNC may be an appropriate organization to deliver and to supervise nursing and home health aide services, it may not be the best entity for organizing an adult day care center or a family counseling and support service. S. 410 would restrict the delivery of all services to the CNC, except to the minor extent that it is allowed to contract with others.

Second, many members of the Senate and House may not find the emphasis on nursing rather than physician control as refreshing as some of the bill's supporters do. Thus, they would have no reason to favor a provision that automatically disqualified every health care delivery group, other than a free standing nursing center, from delivering the expanded home care services. The bill's proponents could argue in response that this legislation provides the best method for supporting competent, nonprofit entities and ensuring their survival. Although it may be legitimate to claim that public policy requires that nonprofit entities should consistently be supported over for-profit entities, it would be useful to buttress that claim with some studies documenting the differences in quality of care and treatment between nonprofit and for-profit home health care agencies. Almost no such studies have been done to date.[247] In addition,

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[245] In an interesting comment, Sen. Inouye noted that the purpose of requiring the CNC to be directed and operated solely by nurses was to "avoid domination by non-professional nursing personnel and practioners with concerns, training, and interests which may well differ from the nursing perspective and commitment to those ambulatory services supportive of maximum independent capacity and living." 129 CONG. REC. S974 (daily ed. Feb. 3, 1983). America's nurses, noted Inouye, "have been a grossly underutilized and often misutilized resource in terms of . . . their . . . capacity to identify and meet patient needs." *Id.*

[246] *Id.* at S975.

[247] The author expects that the studies may justify giving preference to nonprofit entities. For example, any such study should document not only the quality of care received by clients but also the quality of treatment given by the agency to its workers—including salary, benefits, and personal control. Most home health care workers, almost all of whom are women, are in low status and low paying positions. Nonprofit entitities,

the bill would also exclude various nonprofit entities, such as hospital and nursing home based agencies, from participation in the program. Although Senator Inouye justified the exclusion of these agencies by simply characterizing them as way stations for funneling patients to institutional beds, a number of such agencies have provided comprehensive and caring home health care.[248]

Any bill that allows one group of health care providers the exclusive ability to provide expanded services inevitably creates a political obstacle course for itself. Nonetheless, it is certainly legitimate to use public funds to support and encourage those providers who are advancing the goals of a fair and humane health care system. Thus, it would be appropriate to include in a home health care bill a preference, although not an exclusive option, for entities such as VNAs or worker controlled cooperatives that have demonstrated both compassion and competence in their delivery of health care.

3. S. 1614

Unlike the two bills described above, S. 1614, the "Health Care Coordination Act of 1983," was designed to expand home health care services only for individuals eligible for both Medicare and Medicaid.[249] Introduced by Senator Heinz, the legislation would have allowed states to apply for a waiver establishing a program of home health care services. Like the 2176 Waiver program, these services did not have to be provided statewide or made available to all covered groups. If the state instituted programs in different areas, however, each program would have been required to provide the same services and to be administered by a single state agency.[250]

The only services that a state would have been required to cover under its program were case assessment and management,

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or better yet cooperatively owned enterprises, might offer better working conditions for their staffs.

[248] Brickner, *Health Care Services for Homebound Aged Maintain Independence, Limit Costs*, HOSPITAL PROGRESS, Sept. 1980, at 56, 57; *see* 129 CONG REC. S974 (daily ed. Feb. 3, 1983) (statement of Sen. Inouye).

[249] S. 1614, 98th Cong., 1st Sess., 129 CONG. REC. S9886 (daily ed. July 14, 1983) (this bill would have expanded services only for low income elderly).

[250] *Id.* § 3 (proposed 42 U.S.C. § 1918(a)(2)). In addition, the bill required that "[t]he percentage of individuals enrolled . . . who are disabled individuals or frail elderly individuals must be approximately equal to or greater than the percentage of the population of such individuals who are eligible." *Id.* (proposed 42 U.S.C. § 1918(c)(4)).

and those services currently provided under Medicare and the individual state's Medicaid program.[251] Homemaker-home health aide services and adult day health care were mandated for coverage to the extent that the state determined that such services were needed by the enrolled individual.[252] The state could also have requested that additional home and community based services be included in the program if they were "deemed necessary to maintain an enrolled individual in the community who would otherwise be institutionalized."[253]

Any individual who was eligible for Medicaid and enrolled in Medicare could apply for the program's home health care coverage. The Secretary could waive the usual home health care and extended care requirements of Medicare and could extend Medicaid eligibility to those elderly who would ordinarily be eligible only if they had entered an institution.[254]

The bill allowed states considerable leeway in choosing among methods of reimbursement. They could enter into prepaid capitation agreements with one or more HMOs or medical plans in the state; they could negotiate a set payment reimbursement rate for selected services; or they could use the established Medicare and Medicaid rates for services covered under those programs.[255] Whatever payment method was used, however, the state had to assure the Secretary in its waiver application that the total costs to the state and federal governments for each fiscal year would not exceed the total cost that would have been incurred by the governments for that fiscal year if the program had not been in effect.[256]

S. 1614 differed from the 2176 Waiver program by providing that the federal government would pick up a larger share of the state's cost. For each individual enrolled in the program, the federal government would have paid the state ninety-five percent of Medicare's adjusted average per capita cost for caring for such an individual under Medicare.[257] Thus, a set level of

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[251] *Id.* (proposed 42 U.S.C. § 1918(b)(1)).

[252] *Id.*

[253] *Id.* (proposed 42 U.S.C. § 1918(b)(2)).

[254] *Id.* (proposed 42 U.S.C. §§ 1918(c)(1), 1918(f)(2)).

[255] *Id.* (proposed 42 U.S.C. § 1918(e)(1)–(3)).

[256] *Id.* (proposed 42 U.S.C. § 1918(f)(1)). The Secretary was to take into account factors such as "trends in the rate of cost increases and changes in eligible populations which might occur in the absence of the program." *Id.* (proposed 42 U.S.C. § 1918(f)(1)(B)).

[257] *Id.* (proposed 42 U.S.C. § 1918(h)(2)(A)). For those individuals whom the state could have shown were dependent on personal assistance in at least two daily activities, and who would have required the level of care provided in a nursing home but for the

funds would have been provided by the federal government for each individual enrolled. It would have been up to the states, through capitation or negotiated rate arrangements, to ensure that those funds covered the home health care needs of the enrolled individuals.[258]

S. 1614 shared both positive and negative features with the two bills already discussed. The mandated benefit plan under S. 1614 was more limited than that provided for under S. 1244 or S. 410, although it did give states the opportunity to include a more expansive system if they so wished. Like the two other bills, S. 1614 allowed for some of the necessary caregiver support services, such as respite care and adult day health care, but failed to include any specific provisions for family counseling or mutual support groups for caregivers.

Unlike the two other bills, S. 1614 would have given states support in providing home health care services solely for their Medicaid population. It focused, however, on similar cost efficiency goals. Waivers were not to be granted if the total cost to the state and federal governments would have exceeded the costs that would have been incurred in the absence of the program. Again, the ramifications of this provision are uncertain. If this amount were calculated by assuming that all dependent elderly receiving home health care services under the new program would have entered nursing homes in the absence of the program, that amount could be artificially inflated and total expenditures could rise. Conversely, if the figure were calculated on the basis of the actual funds expended in the previous year, the amount could be so restrictive that states would be unable to offer any type of expansive home health care program. The result could thus be the same as the one observed in the 2176 Waiver program: states would offer very limited programs restricted to a small number of beneficiaries in targeted geographic areas.

4. S. 1540 and S. 1539

Two bills introduced by Senator Hatch proposed changes in the Medicaid program and the Public Health Service Act.

provision of home health care services, the state would have received from the federal government 95% of the adjusted average per capita costs of institutionalized care (a pre-set cost that is calculated at a higher rate). *Id.*

[258] If the federal payment were greater than the expenses incurred, the state was to use the excess funds to provide additional services under the program or to offset other expenditures under the state Medicaid plan. *Id.* (proposed 42 U.S.C. § 1918(h)(3)).

S. 1540, the "Community Home Care Services Act of 1983," would have allowed states to establish nonstatewide programs to deliver home health care services to Medicaid recipients.[259] The benefits covered were relatively broad: homemaker or home health aide services; speech, physical, occupational, or respiratory therapies; medical social services; medical supplies; selected drugs; respite care of up to fourteen days or 336 hours per year; physician services and nursing care; adult day care; dietary services; and any other supportive services that were appropriate to prevent the need for institutionalization, including appropriate patient and family training.[260] Services were to be provided according to a plan of care developed by an assessment team consisting of a physician or nurse and a social services worker.[261] Individuals could participate if they were eligible for Medicaid or would have been eligible if institutionalized, and if they would have required institutional care but for the furnishing of home health care services.[262] The bill offered states a carrot for instituting such programs by requiring the federal government to pay ten percent more than its usual share of the state's Medicaid costs for these new services.[263]

S. 1539, the "Home and Community-Based Services for the Elderly and Disabled Act of 1983," would have established a home health care services block grant under the Public Health Service Act.[264] Based on the number of elderly in its population, each state would have received a share of the $700 million authorized for 1986, $750 million authorized for 1987, and $800 million authorized for 1988.[265] This money would have been available to coordinate home health care services provided by public and private organizations; to develop better assessment techniques to measure home health care needs and to meet those needs in a cost effective manner; to provide a range of home

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[259] S. 1540, 98th Cong., 1st Sess., 129 CONG. REC. S9013–14 (daily ed. June 23, 1983).
[260] *Id.* § 4 (proposed 42 U.S.C. § 1918(c)).
[261] *Id.* (proposed 42 U.S.C. § 1918(a)(3)).
[262] *Id.* (proposed 42 U.S.C. § 1918(b)(1)). The printed text of the bill actually read: "An individual may participate in the program . . . if such individual—(A) is eligible for medical assistance under the State plan, or would be eligible if institutionalized, *or* (B) would require institutional care, but for the furnishing of home care services . . . ." (emphasis added). It appears, however, that the text was meant to read "and" and not "or." *See, e.g.*, 129 CONG. REC. S9011 (daily ed. June 23, 1983) (statement of Sen. Hatch).
[263] *Id.* (proposed 42 U.S.C. § 1918(b)).
[264] S. 1539, 98th Cong., 1st Sess. 129 CONG. REC. S9011–14 (daily ed. June 23, 1983).
[265] *Id.* § 2 (proposed 42 U.S.C. § 1941(a)).

and community based services directly; and to educate medical and social service professionals concerning the availability and usefulness of home health care services.[266] States would have been required to designate one agency to administer the funds and to ensure that no duplication occurred among the various public programs.[267]

If states were sufficiently attracted by S. 1540's incentive of an extra ten percent above the usual federal reimbursement, the passage of the bill could result in a significant and useful expansion of home health care for the poor. The benefits available for coverage are relatively broad, and with the elimination of the waiver requirement, states would not have to demonstrate beforehand that either the per capita or total costs of the program would not exceed current expenditures. Expanded home health care programs, however, may generate higher total costs for a state. An additional ten percent federal reimbursement may be insufficent to induce states to establish extensive programs for which they will still be responsible for approximately forty percent of total expenditures.[268] Thus, states may take advantage of the nonstatewide requirement of S. 1540 and establish only limited programs, or interpret the eligibility standard of the bill in an extremely restrictive manner.[269] For example, a state could restrict the reach of the statute by limiting eligibility to those individuals who have reached the point of actually applying to a nursing home. The ultimate outcome would be a system not much different from the one in place today.

C. *Suggestions for Future Legislation*

What type of legislation would remedy the current deficiencies in federal and state health programs? First, the Medicaid program should be amended so that states can offer a range of home and community based services on a statewide basis to all eligible groups. The services should include those noted in the four Senate bills, together with an explicit mention of family counseling groups and mutual support groups for caregivers. Federal reimbursements must be sufficient, however, to ensure

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[266] *Id.* (proposed 42 U.S.C. § 1944(a)(1)–(5)).

[267] *Id.* (proposed 42 U.S.C. § 1945(c)(3)).

[268] *See* 42 U.S.C. § 1396 (1982).

[269] A useful example of states' potential responses may be found in the states' implementation of the 2176 Waiver program. *See supra* text accompanying notes 80–81.

that the states will offer such programs. Guidance can be taken from the bill introduced by Representative Henry Waxman (D-Cal.) and Representative Claude Pepper (D-Fla.) in the Ninety-sixth Congress that offered a ninety percent federal reimbursement to the states for the costs of expanded home and community based services.[270]

Such legislation would mean that home health care covered under Medicaid would essentially become a federal program rather than the traditional federal-state effort that currently characterizes Medicaid. There is no reason, however, why Medicaid must necessarily remain primarily a state program. When the program was enacted in 1965, a tradition of state provided health care for the poor already existed.[271] It seemed natural to graft Medicaid onto that structure. The traditional rationale advanced to justify this approach was that local entities, such as states, were the best focal points for organizing and controlling local services, such as health care.[272] As Professor Sylvia Law has pointed out, however, the services that should most appropriately be subject to democratic pressures present on the state and local levels are those that will be used by all the people in the particular democracy. School, sewer, and police services would fall into this category. But services that are to be delivered to discrete, vulnerable minorities, such as health care delivered to a low income population, may be precisely the type of services that need to be protected from a local majority and are best provided for at the federal level.[273]

In addition, it is clear that the proposed legislation could result in increased federal expenditures. The federal government, however, is already spending a substantial amount of money on its share of Medicaid's nursing home bills. The delivery of home health care services would, in all likelihood, deter some individuals from entering nursing homes at higher per capita costs. Thus, for a select group of individuals, the government would realize significant cost savings. In addition, although some individuals who would not have entered nursing homes may now

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[270] H.R. 6194, 96th Cong., 2d Sess. (1980).

[271] *See* Rosenblatt, *Dual Track Health Care—The Decline of the Medicaid Cure*, 44 U. CIN. L. REV. 643, 643–50 (1975).

[272] *Id.*

[273] Lecture by Sylvia Law at Harvard Law School (Mar. 20, 1983); *see also* Sparer, *Gordian Knots: The Situation of Health Care Advocacy for the Poor Today*, 15 CLEARINGHOUSE REV. 1 (1981) (discussing the problems created by tying Medicaid to states' relatively regressive tax systems).

receive home health care services, the unpaid family care supporting those individuals is often currently delivered at a high personal cost to the caregivers.[274] Delivery of home care services would ease those burdens for caregivers and result in better quality of care for the elderly recipients. Further, such care may enable a family caregiver to continue to deliver unpaid care for a longer period of time, creating long-term savings for the government. Thus, the recommended change for the Medicaid program, that may initially appear as merely a utopian proposal unsuited to this budget-cutting Congress, may in fact be ultimately supported as both a humane and cost-effective alternative.

The Medicare program should similarly reimburse a wide range of home health care benefits. A system of copayments, based on the one set out in S. 1244, should be used to recoup money from those in higher income brackets. It is clear, however, that changes must first be made in Medicare's basic financing structure if it is to be on sufficiently secure financial ground to provide these additional services.[275] One attractive recommendation is to merge the Health Insurance Fund and the Supplementary Medical Insurance Fund and to finance the resulting program through the existing payroll tax, general revenues, and a new income related premium administered through the income tax system.[276] In order to fund the additional home health care services, the new premium should be adjusted slightly upward, or a separate long-term care fund should be established and supported through a similar mix of income related premiums, payroll taxes, and general revenues.

In any case, with regard to both Medicaid and Medicare, the fact that expanding services may possibly increase total expenditures should not be accepted as an automatic justification for opposing the expansion of services or for restricting their reach. We do not yet have the information necessary to judge the budgetary consequences of expanding home health care ser-

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[274] *See supra* text accompanying notes 158–77.

[275] CONGRESSIONAL BUDGET OFFICE, AN INTRODUCTION TO THE MEDICARE FINANCING PROBLEM, CONFERENCE ON THE FUTURE OF MEDICARE, SUBCOMM. ON HEALTH, COMM. ON WAYS AND MEANS, 98th Cong, 1st Sess. 5, 7 (Comm. Print 1983) [hereinafter cited as CONGRESSIONAL BUDGET OFFICE].

[276] *See* K. Davis & D. Rowland, Reforming Medicare: A New Approach to Financing, Conference on the Future of Medicare; *see also* CONGRESSIONAL BUDGET OFFICE, *supra* note 275, at 121–34.

vices. More fundamentally, the terms of the debate in home health care must begin to focus on need and not merely on cost.

VI. A Feminist Paradox

When addressing the issue of home health care, feminists face a basic paradox. On the one hand, the predominant number of elderly who need long-term care are women. Thus, it is a women's concern that the best type and quality of long-term care, including home health care, be available.[277] On the other hand, women are the ones who provide, and will probably continue to provide, the bulk of care to elderly kin who remain at home. A dramatic shift to home health care, without appropriate safeguards, could increase the time demands placed on some women. Further, it may not decrease the demands on those who are already providing unpaid care. How can feminists help shape a home health care policy that will appropriately meet the needs of women in all age groups? How can feminists help develop a policy that will support women rather than exploit them?

Expanding the formal home health care system in order to maintain elderly individuals in their own homes will necessarily require the continued availability of family caregivers who will provide care supplementary to that provided by the formal services. For example, a 1982 Massachusetts study found that while formal caregivers delivered an average of 17.3 hours a week to ninety-three clients, family members and friends supplemented that care with an average of 46.6 hours of care a week.[278] Sociologist Abraham Monk has noted that "the initiative to expand home health services is actually predicated on the expectation that informal support networks of relatives, friends, and neighbors will be revitalized and will assume more explicit, if only supplemental, caregiving roles."[279] If such supplemental care were not delivered, Monk warns, the formal health care system by itself would not be able to contend with the large and expanding population at risk.[280]

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[277] Home health care is widely viewed as a preferable alternative to nursing home care. Studies have shown that individuals receiving home health care in lieu of nursing home care tend to live longer and to report higher satisfaction levels. U.S. General Accounting Office, *supra* note 114, at 20–22.

[278] B. Soldo & M. Sharma, *supra* note 109, at 16.

[279] Monk, *Family Supports in Old Age*, Home Health Care Services Q., Fall/Winter 1982, at 101, 107.

[280] *Id.* at 106–07.

In its most extreme form, an emphasis on revitalizing the family to help provide home health care may hurt women who are currently providing extensive unpaid care. For example, it could result in a targeting system that would disqualify a Medicare or Medicaid recipient from receiving government supported home health care solely because of the presence of a family caregiver. Thus, a woman who chose to stay home and deliver care to an elderly relative would be penalized for that choice. On the other hand, an awareness of the extensive role that family members currently play in providing care could appropriately and usefully inform health policy. For example, government programs could provide family caregivers with services necessary to relieve their stress and could provide more comprehensive services to those elderly who have no access to family members.

Public policymakers often find it appealing to emphasize revitalization of the family and community, even at the expense of ignoring actual changes in society. For example, a 1980 report by the House Select Committee on Aging emphasized that family, neighborhood groups, churches, volunteer associations, and racial or ethnic subgroups were institutions that should be more extensively drawn upon in the delivery of human services.[281] The Committee noted that its motivation for recommending expanded use of these groups was based on the prospect of cost savings and improved quality: "The knowledge elite views [these groups] as nonprofessionals or, at best, paraprofessionals, but we view them as natural, indispensable caregiving systems. Only by reempowering them can we expand, in the face of limited fiscal resources, the pool of human resources available for care to tomorrow's seniors."[282]

Policymakers must consider a number of factors before depending excessively on family support in programs for the delivery of home health care. These factors include women's increasing participation in the labor force, the increasing number of smaller families, the increasing geographic separation of family members, the erosion of the ability of families to provide care over time if outside support is unavailable, and the voluntary nature of family support.[283] Nevertheless, the Committee's

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[281] SELECT COMM. ON AGING, *supra* note 113, at 71.
[282] *Id.*
[283] Monk, *supra* note 279, at 107–08.

approach for addressing the problems inherent in excessive dependence on family support was either to ignore such problems or to decry them. For example, it warned that "there have been rumors that the voluntary sector is coming on to hard times, or at least is being radically rethought. This is especially true of women's attitudes toward volunteer work."[284] Although in the past such work constituted "a woman's best chance for personal development," the Committee noted that powerful competition had arisen in the form of "advanced schooling, [and] the promise of salaried careers without upward limit . . . ."[285] The Committee warned that the situation is further complicated "by a trend reflected in the 1974 resolution passed by the National Organization for Women, which asserted that practically all unpaid volunteer work now done by women is an unconscionable exploitation."[286] The report concluded:

> Census Bureau studies indicate that the most typical volunteer in America is a married, college-educated, upper middle-class woman under forty-five. It is widely believed that feminist ideas, together with the expansion of life opportunities outside the volunteer sector, are not only hampering recruitment but are also weakening commitment among volunteer workers already involved.[287]

The Committee decried this change in attitude among women and argued that "a shift back to such a natural system as the voluntary sector is in order."[288] Nevertheless, its sole recommendation was that voluntary organizations be incorporated into the national planning and decisionmaking process regarding provision of care to the elderly. It neither suggested that volunteer activity should be performed by men as well as by women, nor did it concede the possibility that women's labor force participation might indeed reduce the future contributions of America's voluntary sector.

A similar approach was evident in the report's description of family contributions to home health care. The Committee stated that changes in family lifestyle would significantly lessen in the next two decades. It argued that the decline in birth rate would stabilize, the increase in school enrollment would not be re-

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[284] SELECT COMM. ON AGING, *supra* note 113, at 74.
[285] *Id.*
[286] *Id.*
[287] *Id.* at 75.
[288] *Id.*

peated, and the "rate of increase in the proportion of women working outside the home . . . would slacken."[289] Thus, the Committee concluded that the family should easily be able to serve as a stable source of home health care support for the frail elderly.[290]

The problems inherent in excessive dependence on family support, however, cannot be simply ignored or bemoaned. The family is undergoing a number of changes that will necessarily affect its ability to provide care. Contrary to the Committee report's conclusions, families in which potential female caregivers are also full-time paid workers are becoming more numerous. Middle-aged women, aged 35 to 60, are the ones most likely to serve as caregivers. Labor force statistics for 1979 showed that 65% of women aged 35 to 44 and 58% of women aged 44 to 54 were in the paid labor force.[291] Projections for 1990 estimate that 70% of women aged 35 to 44 and 61% of women aged 45 to 54 will be full-time workers.[292]

Women's increasing labor force participation will influence families' decisions to deliver care directly as well as their ability to continue to provide such care. In Soldo's study sample, 49.6% of the families who purchased care through institutions consisted of a wife in the paid labor force and no other woman 18 years of age or older in the household. In contrast, only 2.3% of the families who provided care at home had these characteristics.[293] Soldo argues that a "[w]life's labor force participation

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[289] *Id.* at 66.

[290] *Id.*

[291] Family Caregiving and the Elderly, *supra* note 13, at 31.

[292] *Id.* The Committee's report, in predicting a slackening of women in the work force, relied on a Census Bureau article, U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P-23, NO.78, THE FUTURE OF THE AMERICAN FAMILY 1 (1979). The article stated, "[S]everal aspects of the present situation are at least consistent with an outlook of less change ahead. . . . Without a continuing decline in the birth rate and with less increase in the educational level of the young adult population, along with other changes not mentioned, the odds seem to favor a slackening of the rate of increase in the labor force participation of women over the next decade or two." *Id.* The author asked Dr. Paul Glick, author of the Census Bureau report, why he had projected a slackening of women's participation in the work force. He noted that there will always be women who will take time off to care for children; that there will always be men who would not want their wives to work, either because they are wealthy and want the "prestige" of having a nonworking wife or because they do not want their wives to "get tangled up with someone at work"; and that wives have other functions, such as being hostesses, that may consume all of their time. Upon further questioning, Dr. Glick agreed that he was basing his projection not on specific economic data but rather on various "sociocultural facts." Telephone interview with Dr. Paul C. Glick, Senior Demographer, Retired, U.S. Bureau of the Census (Jan. 22, 1981).

[293] B. Soldo & M. Sharma, *supra* note 109, at 16.

emerges as the most important structural constraint influencing the type of family involvement in the provision of care. Families in which the wife is in the labor force and there are no other adult women have a marked tendency to gravitate more toward purchasing care."[294] In addition, Soldo reports that the caregiving family most vulnerable to disruption and most likely to place its elderly in an institution consists of a primary caregiver who is employed and provides care to an older and widowed relative.[295] Twenty percent of such families are headed by women who must work for economic survival.[296] Soldo argues that the stress of a full-time paid job reduces the "tolerated threshold for caregiving demands" and precipitates placement of the elderly relative in an institution.[297]

Women's increasing labor force participation, together with declining fertility rates and increased geographic mobility, is likely to inhibit the ability of the family to continue to deliver its currently extensive level of support. Sociologist Robert Moroney notes that policymakers exhibit conflicting responses to this possibility. Some view the diminishing role of families in caregiving as desirable or inevitable, and therefore argue that the state must plan to expand its caregiving responsibilities accordingly. Others argue that a healthy society requires extensive family participation in health care, and that the current movement away from family responsibility must be vigorously resisted and reversed. As Moroney notes, "There is an American tendency to establish dichotomies, to argue that either families or the State should assume primary responsibility."[298]

Moroney argues that policymakers should not dichotomize the issue of caregiving in this manner, because families provide better care in some situations and the state is the proper caregiver in others. As Moroney emphasizes, "The needs of families and individuals vary in time and over time, and ideally the State would respond to these variations with policies that support families when they need support, and substitute for families when they are incapable of meeting the needs of their members."[299]

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[294] *Id.* at 21; *see also* Archbold, *supra* note 150, at 10–11.
[295] Soldo & Myllyluoma, *supra* note 122, at 610.
[296] *Id.*
[297] *Id.*
[298] Moroney, *Families, Care of the Handicapped, and Public Policy,* HOME HEALTH CARE SERVICES Q., Fall/Winter 1982, at 189, 209–10.
[299] *Id.* at 210.

The importance of achieving an effective joint effort between families and government is reinforced by the fact that most elderly would prefer not to enter institutions and that most children are willing to help their parents and relatives maintain this independence. Family caregivers are confronted, however, with immense personal costs if they attempt to deliver this care unaided by any formal supports. Unlike childrearing, in which a child's physical and emotional dependency gradually diminishes, in parentcaring an older person's physical and emotional dependency generally increases.[300] The task of caring for such an individual "cannot be incorporated into a woman's life without significant impact on her sense of self, time, freedom, career, and relationships with others."[301] Further, for middle-aged women, the commitment to parentcaring is made at a time when they themselves are experiencing such age related changes as lower energy levels, the onset of chronic ailments, retirement, and interpersonal losses.[302]

Despite the difficulties in caring for a dependent parent, most women receive a strong social message that it is their inherent responsibility to deliver that care. This value judgment, which pervades the medical profession as well as policy circles, often results in increased pressure on women. A Gray Paper issued by the Older Women's League points out that, although a doctor will often help a man find assistance in caring for an invalid, brain-damaged wife, he will send a husband home in the same condition to his wife with such words as, "Isn't he lucky to have a wonderful woman like you to take care of him!"[303] Eleanor Polansky, a former hospital social worker, noted that doctors and hospital administrators often took it for granted that a patient's closest female relative would take care of the patient, regardless of the relative's access to outside assistance. The primary role of the hospital social worker, Polansky noted, was "often to *persuade* the wife to take her husband home. We were expected to appeal to a woman's maternal instincts and wifely commitments to make her feel responsible . . . at all costs."[304]

Women's increasing participation in the labor force may shake

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[300] Archbold, *supra* note 150, at 6.

[301] *Id.* at 5.

[302] E. Brody, *supra* note 2, at 477. For example, each year nearly as many women aged 55 to 64 as women aged 65 and over are widowed. *Id.*

[303] V. Colman, *supra* note 163, at 1.

[304] Polansky, *supra* note 163, at 1 (emphasis in the original).

this prevailing presumption of female-delivered care. For example, women who must work because of economic necessity will find it financially difficult to give up their jobs in order to undertake full-time care. Women in professional jobs will often not even consider the possibility of leaving their work. Thus, various gerontological researchers who have focused on women's changing work patterns have come to the conclusion that increased governmental support to complement family care is essential. Gerontologist Stanley Brody noted that because almost eighty percent of home health care services were rendered by daughters, nieces, or sisters, whose rising labor force participation would make it more difficult for them to deliver home health care, the federal government should provide support services out of public funds.[305] Treas, a gerontologist studying family and women's work roles, advocated a similar policy:

> Already the limitations of the family support system are spawning a service industry and a professional corps to provide regular meals, housekeeping services, and institutionalized care. This trend can be expected to continue. We can also expect that public opinion will be increasingly disposed in favor of the inevitable—the growth of governmental and private intervention in the care of the aged.[306]

Treas's approach has not become the dominant approach in either policymaking circles or in our general mores. The House Select Committee on Aging easily glossed over the issue of women's changing roles and thus was able to advocate with ease an expansion of the family's role in caregiving. The goals of cost efficiency, embodied in many of the legislative initiatives analyzed above, may also be used to deny support to those women who attempt to care for an elderly relative while working in the paid labor force and caring for a family.

Nevertheless, we must come to terms with the changing roles of women in American society, and we must shape our health care programs to respond to those changes. The *New York Times*, in a recent editorial calling for the expansion of government-supported child care services, noted that "[to] deny the need for a comprehensive child care policy is to deny the revolution in American life."[307] A similar statement can and should

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[305] S. Brody, *Public Policy Issues of Women in Transition*, 16 THE GERONTOLOGIST 181, 182 (1976).

[306] Treas, *supra* note 125, at 490.

[307] N.Y. Times, Mar. 29, 1984, at A26, col. 1.

be made regarding the necessity to expand home and community based services for our elderly. Women, as elderly consumers and as caregivers, would benefit from a properly designed expansion. Expanded reimbursement of services, including adult day care, would make it possible for working women who could not care for their parents on a full-time basis to continue working. In addition, for working women who would need to place their elderly parents in nursing homes, there may be a greater likelihood that nursing home beds would be more readily available. For women who wish to continue to provide primary care at home, the availability of home health care services would lessen their feelings of burden, stress, and lack of mobility. For both groups of women, additional services would make it easier for them to provide better care for their elderly relative's emotional and social needs.

The expansion in home health care, however, must be appropriately designed. First, changes should not be enacted that simply make it more attractive to keep an elderly person at home but do not concomitantly ensure that home health care is itself less burdensome. For example, legislation has often been proposed to give families cash subsidies or tax credits to encourage and to support the care of elderly at home.[308] Although we should encourage such initiatives, they should be passed in conjunction with changes that would make the provision of care at home less stressful. Thus, use of professional homemaker-home health aides, day care, and respite care should be emphasized, and such services should be available and affordable. Second, we must ensure that the targeting approach, embraced so enthusiastically by various policymakers, does not become a hidden means for denying home health care eligibility to individuals who are already served by a primary caregiver.[309]

Finally, and perhaps of greatest importance, we should encourage and reimburse the important services of counseling and family meetings. Using these services as a vehicle, we can begin to attack the pervasive belief that the provision of care is automatically the province of a wife, daughter, or sister, and not

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[308] *See, e.g.*, H.R. 3797, 98th Cong., 1st Sess. (1983); H.R. 2094, 98th Cong., 1st Sess. (1983); H.R. 2029, 98th Cong., 1st Sess. (1983); S. 1301, 98th Cong., 1st Sess. (1983).

[309] Similarly, government pre-screening committees for nursing homes must take into account a family's ability and desire to provide home health care before denying an applicant admission to the nursing home on the assumption that the family will provide the necessary care.

that of a husband, son, or brother. There is nothing inherent in women's psyches that makes them better than men at providing nurture and care.[310] The provision of emotional and physical sustenance for either children or the elderly should be shared by men and women equally. Stanley Brody reflected on a future marketplace that would allow for such sharing: "allocation of an adult's time between market work and nonmarket activity may thus undergo important changes . . . . In the past this has been seen only as a need for women in meeting family obligations. The near future may see it as a shared need by men as well as women."[311]

I look to this vision of the future. To provide the best quality of life for our elderly women and men, we must offer them the opportunity and the capability to remain in the community, and we must eliminate the current biases towards institutional and acute medical care. For families who are and will be providing home based care, we need to establish structures in which their support complements agency provided services, and in which they remain well below their tolerance threshold. Finally, we need to work through the feminist movement and through specific counseling structures to change underlying attitudes regarding the separate and unequal roles of men and women in the province of caregiving.

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[310] Not all feminists would agree with this assertion. *See, e.g.*, L. GLENNON, WOMEN AND DUALISM: A SOCIOLOGY OF KNOWLEDGE ANALYSIS 119–46 (1979) (describes theory of feminism that women are inherently better at nurturing than men).

[311] S. Brody, *supra* note 305, at 183.

COMMENT

ACTION SPECIFIC HUMAN RIGHTS LEGISLATION FOR EL SALVADOR

KENNETH H. ANDERSON*

The United States has long been a party to international instruments calling for the protection of human rights.[1] In the 1970's, Congress became increasingly concerned about human rights abuses in countries that received United States military and economic aid.[2] This concern was first expressed in the Foreign Assistance Act of 1973,[3] but key policymakers in the Executive Branch appeared not to share Congress's enthusiasm for using military aid to encourage respect for human rights.[4] Congress subsequently tightened the requirements of the For-

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[1] *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/1810, at 71 (1948); U.N. CHARTER art. 55; International Covenant on Economic, Social, and Cultural Rights, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966); International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966).

[2] Congress held hearings on the subject in 1973. *International Protection of Human Rights: The Work of International Organizations and the Role of U.S. Foreign Policy: Hearings Before the Subcomm. on Int'l Organizations and Movements of the House Comm. on Foreign Affairs*, 93d Cong., 1st Sess. (1974). The subcommittee released a significant report shortly afterwards, concluding that the United States should use restrictions on military aid as a tool to promote human rights. SUBCOMM. ON INT'L ORGANIZATIONS AND MOVEMENTS OF THE HOUSE COMM. ON FOREIGN AFFAIRS, 93D CONG., 2D SESS. 11, HUMAN RIGHTS IN THE WORLD COMMUNITY: A CALL FOR U.S. LEADERSHIP (Comm. Print 1974).

[3] Pub. L. No. 93-189, 87 Stat. 714 (1973) (codified as amended in scattered sections of 22 U.S.C.). The Foreign Assistance Act provided in part that "[i]t is the sense of Congress that the president should deny any economic or military assistance to the government of any foreign country which practices the internment or imprisonment of that country's citizens for political purposes." *Id.* § 32, 87 Stat. 733. For a discussion of this Act and its subsequent amendment, see Comment, *Constitutional Impediments to Enforcing Human Rights Legislation: The Case of El Salvador*, 33 AM. U.L. REV. 163, 167–76 (1983); Cohen, *Conditioning U.S. Security Assistance on Human Rights Practices*, 76 AM. J. INT'L L. 246, 249–56 (1982).

[4] *See* CONGRESSIONAL RESEARCH SERVICE, 96TH CONG., 1ST SESS., HUMAN RIGHTS AND U.S. FOREIGN ASSISTANCE: PREPARED FOR THE SENATE COMM. ON FOREIGN RELATIONS 84–85 (Comm. Print 1979); Weissbrodt, *Human Rights Legislation and U.S. Foreign Policy*, 7 GA. J. INT'L & COMP. L. 231, 241 (1977).

eign Assistance Act,[5] and in some cases went so far as to make United States aid to specific countries contingent upon their respect for human rights.[6]

One example of such country specific legislation is the El Salvador certification requirement. In 1981, Congress enacted legislation requiring that the President certify human rights progress in El Salvador as a condition for United States military aid to that country.[7] Beginning in January 1982 and proceeding at six month intervals, the Executive Branch has regularly certified that respect for human rights in El Salvador has improved.[8] On the strength of those certifications, the United States has provided El Salvador with increasing quantities of armaments.[9]

Members of Congress, along with independent human rights organizations, have criticized the accuracy of the certifications, arguing that human rights abuses in El Salvador have persisted and in some respects have become worse.[10] The vague language

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[5] Foreign Assistance Act of 1974, Pub. L. No. 93-559, § 46, 88 Stat. 1795, 1815 (1974) (current version at 22 U.S.C. § 2304 (1982)); International Development and Food Assistance Act of 1975, Pub. L. No. 94-161, § 116, 89 Stat. 849, 860 (1975) (current version at U.S.C. § 2151n (1982)). For a discussion of these changes, see Comment, *supra* note 3, at 167–73.

[6] Congress reduced military aid to South Korea and denied it to Chile in the Foreign Assistance Act of 1974, Pub. L. No. 93-559, 88 Stat. 1795, 1802 (1974) (codified as amended in scattered sections of 22 U.S.C.).

[7] International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, § 728, 95 Stat. 1519, 1555 (1981).

[8] The first certification was made on January 28, 1982. Presidential Determination No. 82-4, 47 Fed. Reg. 6417 (1982), *reprinted in The Presidential Certification on El Salvador (Volume I): Hearings Before the Subcomm. on Inter-American Affairs of the House Comm. on Foreign Affairs*, 97th Cong., 2d Sess. 2 (1982) [hereinafter cited as *House Presidential Certification Hearings I*]. The second certification was made six months later. Report on the Situation in El Salvador With Respect to the Subjects Covered in Section 728(d) of the International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, *reprinted in The Presidential Certification on El Salvador (Volume II): Hearings and Markup Before the House Comm. on Foreign Affairs and its Subcomm. on Inter-American Affairs*, 97th Cong., 2d Sess. 467 (1982) [hereinafter cited as *House Presidential Certification Hearings II*].

President Reagan pocket vetoed an extension to the certification requirement in November 1983. 19 WEEKLY COMP. PRES. DOC. 1627 (Nov. 30, 1983). The legal validity of that pocket veto has been disputed. Telephone interview with Charles Shapiro, U.S. Dep't of State (Nov. 7, 1984). The administration submitted additional certifications, stipulating that they were voluntary, in January 1984 and July 1984. *Id.* The D.C. Circuit refused to declare provision of military aid to El Salvador illegal, *see* Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982), *aff'd per curiam*, No. 82-2461 (D.C. Cir. Nov. 18, 1983), but the plaintiffs in that case did not base their claim on the certification requirement. *See generally* Comment, *supra* note 3.

[9] U.S. military aid to El Salvador was $5.9 million in 1980, $35.5 million in 1981, $82.0 million in 1982, $81.3 million in 1983, and $196.6 million in 1984. Telephone interview with Charles Shapiro, U.S. Dep't of State (Nov. 1, 1984); *see also* N.Y. Times, Mar. 30, 1984, at A4, col. 1.

[10] Congressional criticism was voiced during the certification proceedings. *See, e.g., House Presidential Certification Hearings II*, *supra* note 8, at 12–13 (statement of Rep.

of the certification requirement, however, has provided the President with considerable leeway in determining whether certification is justified.[11] At the same time, Congress is apparently unwilling to withhold all military aid to El Salvador, even in the face of disturbing abuses, for fear that the government could fall and that even greater violence could follow.[12] Congress has thus continued to accept the certifications, despite the concern among some of its members that the certifications are inconsistent with the goal of conditioning military aid on human rights progress.[13]

This Comment describes an approach to human rights legislation that seeks to overcome the limitations of congressional influence over human rights progress manifest in the presidential certification process. The approach relies on "action specific" conditions on military aid, in contrast with the "country spe-

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Barnes (D-Md.)); *id.* at 75 (statement of Rep. Studds (D-Mass.)); C. PELL & P. LEAHY, EL SALVADOR: THE UNITED STATES IN THE MIDST OF A MAELSTROM. A REPORT TO THE SENATE COMM. ON FOREIGN RELATIONS, 97th Cong., 2d Sess. 4 (1982); *House Presidential Certification Hearings I*, *supra* note 8, at 13 (statement of Rep. Bonker (D-Wash.)); *id.* at 61 (statement of Rep. Solarz (D-N.Y.)); *Presidential Certification on Progress in El Salvador: Hearing Before the Senate Committee on Foreign Relations*, 98th Cong., 1st Sess. 4 (1983) (statement of Sen. Cranston (D-Cal.)) [hereinafter cited as *Senate Hearing on Certification on Progress*]. For a representative reaction of human rights groups, see C. ARNSON, A. NEIER & S. BENDA, AS BAD AS EVER: A REPORT ON HUMAN RIGHTS IN EL SALVADOR, JANUARY 31, 1984 FOURTH SUPPLEMENT (1984); A. NEIER & J. MENDEZ, JULY 19, 1983 THIRD SUPPLEMENT TO THE REPORT ON HUMAN RIGHTS IN EL SALVADOR (1983); C. ARNSON & A. NEIER, JANUARY 20, 1983 SECOND SUPPLEMENT TO THE REPORT ON HUMAN RIGHTS IN EL SALVADOR (1983); C. BROWN, JULY 20, 1982 SUPPLEMENT TO THE REPORT ON HUMAN RIGHTS IN EL SALVADOR (1982); AMERICAS WATCH COMMITTEE AND THE CIVIL LIBERTIES UNION, REPORT ON HUMAN RIGHTS IN EL SALVADOR (1982) [hereinafter cited as REPORT ON HUMAN RIGHTS].

[11] One illustration of the difficulties raised by the statute involves the requirement that the Salvadoran government make a "concerted and significant effort to comply" with human rights principles. International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, § 728, 95 Stat. 1519, 1555 (1981). While the administration and some legislators interpret that language merely to require some showing of progress, other congresspersons have argued that it requires substantially more. *See, e.g.*, *House Presidential Certification Hearings I*, *supra* note 8, at 17–18 (statement of Rep. Bonker).

[12] *See House Presidential Certification Hearings II*, *supra* note 8, at 219 (statement of Rep. Studds):

> We clearly have a problem. At some point we have to be willing to cut off aid. There must be a point which is unacceptable even to this Congress and to this administration. The trouble is that people . . . are postulating that the aid cut off is unthinkable because of some of the consequences which would flow from that. If that is the case, then nothing we do by way of conditions will have any credibility down there because they know we do not think our interests are served by the cutting off of aid. It seems we are in a box of our own making . . . .

[13] *See supra* note 10; *see also* Horton & Sellier, *The Utility of Presidential Certification of Compliance with United States Human Rights Policy: The Case of El Salvador*, 1982 WIS. L. REV. 825.

cific" conditions imposed by the current certification process. Action specific human rights legislation defines the human rights objectives of Congress in narrow, specific terms, and it conditions particular items of military aid on that progress. In this way, the legislation avoids the vagueness of the certification process and provides Congress with a wider range of conditioning options than simply cutting off all military aid. Action specific human rights legislation can be used to supplement, rather than replace, other types of human rights legislation. It would be particularly appropriate where more general efforts have failed to produce the degree of human rights progress sought by Congress, as appears to be the case in El Salvador.[14]

I. The Country Specific Certification Requirement for El Salvador Military Aid

Congress expressed the general foreign policy of the United States regarding human rights in section 502B of the Foreign Assistance Act, stating that "a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries."[15] The provision directed that no government "which engages in a consistent pattern of gross violations of internationally recognized human rights" shall receive military aid.[16] Nonetheless, the Salvadoran government received increasing amounts of military aid[17] despite allegations of serious human rights abuses. Large numbers of civilian noncombatants were killed, driven into foreign exile, or internally displaced from their homes and lands.[18] Major independent human rights organizations report that the majority of human rights abuses were the fault of the Salvadoran government rather than the guerrillas

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[14] *See supra* note 10.

[15] Foreign Assistance Act of 1961, Pub. L. No. 93-559, § 46, 88 Stat. 1795, 1815 (1974) (codified at 22 U.S.C. § 2304 (1982)).

[16] *Id.* § 502B(c)(1) (22 U.S.C. 2304(a)). Exceptions are permitted where "extraordinary circumstances exist which necessitate a continuation [of military aid] in the national interest of the United States." *Id.* The elasticity of the "extraordinary circumstances" exception is described in Report on Human Rights, *supra* note 10, at 305 n.24. For an account of the development and application of § 502B, see Cohen, *Conditioning U.S. Security Assistance on Human Rights Practices*, 76 Am. J. of Int'l L. 246 (1982).

[17] *See supra* note 9.

[18] *See, e.g.*, N.Y. Times, Oct. 16, 1984, at A1, col. 6 (estimating 50,000 civilian deaths); C. Arnson, A. Neier & S. Benda, *supra* note 10, at 49 (estimating 500,000 refugees abroad and 500,000 internally displaced).

or the uncontrollable right wing, and that the "death squads" were composed mainly of members of the police and military.[19]

The certification legislation, enacted shortly after a series of highly publicized murders of United States citizens,[20] reinforced the "gross violations" restriction by requiring the President to certify every 180 days that the government of El Salvador was attaining the following goals:

> (1) making a concerted and significant effort to comply with internationally recognized human rights;
>
> (2) achieving control of the armed forces to end the indiscriminate torture and murder of Salvadoran citizens;
>
> (3) reforming the economic and political system, including land reforms;
>
> (4) preparing to organize early elections with international observers and to initiate discussions with all major political factions in the country.[21]

The legislation required the President to submit the certifications to the Speaker of the House and the Chairman of the Senate Committee on Foreign Relations.[22] As long as the President continued to submit certifications, his ability to send military aid to El Salvador would not be hampered; he could ad-

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[19] Americas Watch and the American Civil Liberties Union jointly concluded that "the government [of El Salvador] is in control of its security forces—that in fact, for all practical purposes, the security forces are the real government—and that torture and murder are instruments of policy." C. BROWN, *supra* note 10, at 132. The two organizations also found "considerable evidence that the unofficial paramilitary groups, or death squads, that are responsible for many anonymous killings include on- and off-duty members of the security forces." *Id.* at 143.

[20] Four American churchwomen were murdered in December 1980 under circumstances that strongly implicated the Salvadoran security forces. *See* LAWYERS COMMITTEE FOR INTERNATIONAL HUMAN RIGHTS, A REPORT ON THE INVESTIGATION INTO THE KILLING OF FOUR AMERICAN CHURCHWOMEN IN EL SALVADOR (1981). Two American land reform advisers were murdered in January 1981 in the lobby of the San Salvador Sheraton Hotel. *See* REPORT ON HUMAN RIGHTS, *supra* note 10, at 54. The Archbishop of San Salvador, Monsignor Romero, was shot and killed during Mass in March 1981 after delivering a homily urging army soldiers not to fire on unarmed civilians; those circumstances again suggested military complicity. *Id.*

[21] International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, § 728(d), 95 Stat. 1519, 1555 (1981). The first two certifications also required a special finding that the government was making progress in investigating the murders of the American churchwomen and land reform advisers. *Id.* Congress amended the Act to require a report on John Sullivan, an American journalist in El Salvador who has been missing since 1960. Act of July 15, 1983, Pub. L. No. 98-53, 97 Stat. 287 (1983).

[22] International Security and Development Cooperation Act of 1981, Pub. L. No. 97-113, § 728(d), 95 Stat. 1519, 1555 (1981).

minister the aid programs previously authorized by Congress without further impediment. If the President did not submit a certification when required, however, the legislation directed the President to suspend all military assistance to El Salvador immediately.[23] If the President failed both to submit a certification and to suspend military aid as required, Congress could, of course, sue to obtain a judgment declaring the President's actions illegal.[24] Congress defined the assistance covered by the certification requirement to include equipment, services, and credits extended under the Foreign Assistance Act of 1961[25] and the Arms Export Control Act.[26]

The improvement in human rights resulting from the certification process has been, at best, limited. In issuing the required certifications, President Reagan has pointed to the land reform program, the detention of National Guardsmen suspected in the murder of the four churchwomen, the elections of 1982, and claimed reductions in the number of death squad victims in the urban areas of San Salvador.[27] While such developments should be welcomed, they do not address the fundamental problems of human rights abuse in El Salvador, which stem from widespread military violence against peasants in the countryside.[28] This vio-

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[23] *Id.* § 728(c).

[24] The equitable discretion doctrine applied in Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982), *aff'd per curiam*, No. 82-2461 (D.C. Cir. Nov. 18, 1983), would probably not prevent such a judgment. In *Crockett*, the court declined to examine the merits of plaintiffs' Foreign Assistance Act claim that El Salvador was engaging in "a consistent pattern of gross violations," 22 U.S.C. § 2304(a), holding that the dispute was one among legislators (those favoring aid and those opposing it) rather than between branches. 558 F. Supp. at 1002. Failure to submit a certification, however, would be more clearly an instance of a President failing to comply with congressional directives; no judicial inquiry into the condition of human rights in El Salvador would be necessary.

[25] Pub. L. No. 87-195, 75 Stat. 424 (1961) (codified as amended at 22 U.S.C. §§ 2151–2431 (1982)).

[26] Pub. L. No. 90-629, 82 Stat. 1320 (1968) (codified as amended at 22 U.S.C. §§ 2751–2796 (1982)).

[27] DEP'T OF STATE, JUSTIFICATION FOR PRESIDENTIAL DETERMINATION TO AUTHORIZE CONTINUED SECURITY ASSISTANCE FOR EL SALVADOR 4 (1982) (land reform); *id.* at 5 (murder suspects); *id.* at 4–5 (elections). Thomas Enders, Ass't. Sec'y of State for Inter-American Affairs, claimed in congressional testimony in 1982 that the level of noncombat violence had been reduced by one-half during 1981. *Presidential Certification Hearings I, supra* note 8, at 30. This claim was sharply disputed by Morton H. Halperin on behalf of the American Civil Liberties Union. *Certification Concerning Military Aid to El Salvador: Hearings Before the Senate Comm. on Foreign Relations*, 97th Cong., 2d Sess. 73 (1982).

[28] "As human rights workers in all of El Salvador's human rights organizations have stressed, the focus of killing in El Salvador, during this period of intensified armed conflict between government forces and armed insurgents of the left, has shifted to the countryside." C. ARNSON & A. NEIER, *supra* note 10, at 19; *see also* C. ARNSON, A. NEIER & S. BENDA, *supra* note 10, at 18–21.

lence has included aerial bombardments of peasant hamlets, massacres of civilian noncombatants in massive infantry sweeps through the countryside, and destruction of crops and agricultural infrastructure in an effort to undercut the guerrillas' logistical base.[29] Major human rights organizations, as well as members of Congress, have therefore argued that the certifications were improper.[30]

The certification requirement suffers from several difficulties. First, the statute is vague, giving little guidance to the Executive Branch on what Congress considers to be "progress" or "good faith efforts."[31] Second, it provides no mechanism for Congress to review the determinations of the Executive Branch, short of enacting additional legislation to curtail the aid.[32] Finally, the statute provides no alternative to a complete cutoff of United States military aid. Given the importance of the national security interests that many leaders in both branches perceive to be at stake in the Salvadoran conflict, the certification process is a clumsy tool for reducing human rights abuses.[33] Action specific legislation seeks to cure those defects.

II. An Example of Action Specific Legislation for El Salvador: The Specter Amendment

By 1983, despite administration certifications that the Salvadoran government was making good faith progress in bringing the murderers of the American churchwomen to justice, little

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[29] Infantry atrocities are described in the Boston Globe, Sept. 9, 1984, at 1, col. 5. The author's account of aerial bombardments, based on his personal observations and interviews with Salvadoran peasants in August 1984, appears in the Boston Globe, Oct. 1, 1984, at 19, col. 1.

[30] *See* C. Brown, *supra* note 10, at 9–20; *Presidential Certification Hearings II*, *supra* note 8, at 521; Amnesty International, Amnesty International Report 1983, at 136 (1983); Horton & Sellier, *The Utility of Presidential Certifications of Compliance with United States Human Rights Policy: The Case of El Salvador*, 1982 Wis. L. Rev. 825.

[31] *See supra* note 11.

[32] The use of a legislative veto to check executive action with regard to military aid would probably be invalid under INS v. Chadha, 103 S. Ct. 2764 (1983), which held that Congress cannot reserve one-house veto power when delegating authority to the Executive Branch. *See generally* Tribe, *The Legislative Veto Decision: A Law By Any Other Name?*, 21 Harv. J. on Legis. 1 (1984); DeConcini & Faucher, *The Legislative Veto: A Constitutional Amendment*, 21 Harv. J. on Legis. 29 (1984). Therefore, Congress could counter executive action only through the passage of formal legislation, which would be subject to a presidential veto.

[33] Rep. Barnes, for example, laments that the process has created "an all or nothing legislative game." *House Presidential Certification Hearings II*, *supra* note 8, at 221.

progress had in fact been made.[34] Some low level National Guardsmen had been detained, but no officers had been indicted; observers generally agreed that the paralysis of the Salvadoran judicial system and the traditional protection that the armed forces provided for their men prevented any substantial results.[35] Congress therefore adopted an amendment offered by Senator Arlen Specter (R-Pa.) and Representative Clarence D. Long (D-Md.) blocking one third, or $21 million, of one of President Reagan's supplemental requests for El Salvador military aid until the Salvadoran government obtained convictions in the churchwomen case.[36]

The amendment succeeded for a variety of reasons. First, Congress wanted action on that particular case. The murders were especially disturbing, as the victims were female religious workers who had been raped and brutalized. The murders were also reported extensively in the United States press.[37] Even some members of Congress who generally favored President Reagan's policy in El Salvador were disturbed by this case.[38] Second, the amount of aid at risk gave the Salvadoran government a strong inducement to conduct a trial, without posing an immediate threat to the government's security. The Specter Amendment thus provided a realistic carrot and stick approach. By March 1984, a trial had been held, though with considerable United States involvement;[39] for the first time in Salvadoran history, members of the armed forces were convicted of political violence against civilians.[40]

Although these convictions were an important first step in curbing human rights abuses, the Specter Amendment was only a limited success. First, the circumstances of the case were unique. The case dealt with a privileged class of victim—United States citizens—and involved somewhat sensational facts. Second, responsibility for the violations was assigned no further up

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[34] *See* C. ARNSON, A. NEIER & S. BENDA, *supra* note 10, at 56.

[35] *See* DeWind & Kass, *Justice in El Salvador: A Report of a Mission of Inquiry of the Association of the Bar of the City of New York*, 38 REC. A.B. CITY N.Y. 112, 129 (1983).

[36] Act of Nov. 14, 1983, Pub. L. No. 98-151, 97 Stat. 970 (1983).

[37] *See, e.g.*, N.Y. Times, Dec. 5, 1980, at A3, col. 3; L.A. Times, Dec. 5, 1980, at 1, col. 3; Chi. Tribune, Dec. 5, 1980, at 3, col. 1.

[38] *See, e.g.*, *House Presidential Certification Hearings II*, *supra* note 8, at 336 (statement of Rep. Gilmer (R-N.Y.)).

[39] *See* N.Y. Times, May 25, 1984, at A11, col. 2.

[40] "Salvadoran judges said it was the first time a jury had convicted any member of the armed forces for a slaying with political overtones." *Id.* at A4, col. 12.

the military chain of command than enlisted men; no officers were punished.

The first qualification is important because further progress requires extension of protection to less privileged classes of victims. If one envisions a continuum of victims ranging from United States citizens at one end to socially important Salvadorans (for example, priests, urban union officials, important members of Duarte's Christian Democratic Party) to ordinary middle class Salvadorans down to peasants in the countryside, one would find that the last group is the most numerous, the most defenseless, and has suffered the most in the civil war.[41] In short, the group most urgently requiring protection is the one made up of those individuals who are lowest on the continuum.

The second qualification is important because further progress requires accountability at higher levels of the military when those levels are indeed responsible for the violations that occur. Some have argued that the Salvadoran military resists any punishment of its members.[42] A significant barrier to generally improving human rights protection in El Salvador is the difficulty of making individuals, including military officers, who are ultimately responsible for human rights violations, accountable for their actions. Human rights observers contend that in some cases, including the murder of Archbishop Romero, the direct reponsibility lies with the high command, while in other cases lower officers are directly reponsible with the high command giving tacit approval.[43]

III. A Proposal for Action Specific Human Rights Legislation

Congress can assert more control over its efforts to demand respect for human rights without jeopardizing its concern for stability in the region by adopting action specific human rights legislation. Constructing such legislation requires that Congress choose a particular manifestation of progress and a particular aid package to be conditioned on that progress. In making the first choice, Congress can build on the Specter Amendment by

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[41] Report on Human Rights, *supra* note 10, at 51.

[42] *See, e.g., Senate Hearing on Certification on Progress*, *supra* note 10, at 538 (statement of Michael Posner, Exec. Dir. Lawyers Comm. for Int'l Human Rights).

[43] *See, e.g.*, N.Y. Times, May 24, 1984, at A11, col. 1; Amnesty International, *supra* note 30, at 137 (1983).

identifying an objective that will both extend accountability further up the military chain of command and extend protection further down the social continuum described in Part II.

One objective that might meet these requirements would be to require the Salvadoran government to investigate a massacre that occurred in the Cabanas province in July 1984. According to accounts collected by the Archdiocese of San Salvador and by newspaper reporters, infantry troops swept through the area and left forty to sixty civilians dead, including men, women, and children.[44] An investigator for the Archdiocese brought back photographs that showed bodies burned, mutilated, and decapitated.[45] Survivor testimony named the army as the perpetrator, and later reports identified the United States trained Atlacatl Battalion as probably responsible.[46]

Some argue that the investigation of the Cabanas massacre has become a public test of President Duarte's will and ability to control the armed forces in El Salvador.[47] On August 27, 1984, Duarte ordered an investigation into the charges, although the investigator will be a military officer.[48] The investigator stated that he must move with "lead feet" for fear that the investigation will "tear apart the armed forces."[49] Such a beginning does not bode well for finding and punishing those responsible for the massacre.

To reinforce the power of Duarte's civilian government, and to further Congress's concern for human rights progress in the country, the United States should exert direct pressure on the Salvadoran military to complete an investigation, even though such an investigation could well implicate officers. The level of backing the United States provides Duarte in investigating this well-publicized, well-documented incident could have a great effect on Duarte's long-term credibility and on his control over the army. The United States thus has an independent reason to demand a complete investigation of the Cabanas province massacre, quite apart from the goal of reducing human rights abuses in the Salvadoran countryside. The prestige of a United States

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[44] *See* Boston Globe, Sept. 9, 1984, at 1, col. 5.

[45] The photographs are on file at Americas Watch, 36 West 44th St., New York, NY 10036. Telephone interview with Aryeh Neier, Vice Chairman, Americas Watch (Nov. 1, 1984).

[46] *See* Boston Globe, Sept. 9, 1984, at 1, col. 5.

[47] *See* N.Y. Times, Sept. 13, 1984, at A3, col. 1.

[48] *See* Boston Globe, Sept. 9, 1984, at 1, col. 5.

[49] *See id.*

supported civilian president is at stake, both inside and outside El Salvador. The identification and punishment of those responsible for the Cabanas massacre also provides an opportunity to discipline members of the military, perhaps including officers, for the murder of the most defenseless category of Salvadorans—the peasants in the countryside.

In choosing an appropriate military aid package to withhold pending punishment of the responsible individuals—the second prong of an action specific legislative approach—Congress must tread a fine line, withholding aid of sufficient importance to induce the armed forces to limit the internal loyalty code protecting brother officers, but not so important that its loss would jeopardize the government itself. One package that might meet these requirements is the administration's plan to build a second helicopter base in the eastern region of El Salvador, to continue delivery of UH-1H helicopters, and to deliver two C-47 airplanes.[50] Withholding this package pending the punishment of those responsible for the Cabanas massacre is especially appropriate because these weapons would leave civilian lives even more threatened than before.[51] If the Salvadoran government were to hold culpable officers responsible for a massacre like the one in Cabanas, it would provide some evidence that the Salvadoran army is ready to assume responsibility for the safety of civilians.[52]

IV. Objections to Action Specific Human Rights Legislation

There are several possible objections to a proposal for action specific legislation. One general objection is that action specific conditions on military aid, whether tied to human rights or not, excessively limit the discretion of the President in conducting foreign policy. While a significant body of scholarship indicates

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[50] This plan was confirmed in a telephone interview with Charles Shapiro, U.S. Dep't of State (Nov. 1, 1984).

[51] *See* Uhlig, *Torpedoing Salvador's Talks*, N.Y. Times, Oct. 24, 1984, at A27, col. 2.

[52] The evidence would actually be quite tenuous. Since the Cabanas massacre was better documented than most, the lesson that Salvadoran officers will take from any convictions that follow might simply be to exercise more care in covering their tracks.

that legislation of this sort is constitutional,[53] this objection does implicate the wisdom of the policy. Some have argued that the Executive Branch makes better foreign policy decisions because it has more information and flexibility;[54] the Reagan Administration has argued that action specific legislation would unduly interfere with that decisionmaking.[55] If used appropriately, however, action specific legislation will have only a limited effect on presidential discretion. As noted earlier, Congress can limit its use of action specific conditions on military aid, attaching such conditions only where other measures have failed. Congress can continue to use general measures such as the "gross violations" rule or the certification process. By using action specific legislation only as a supplement to more general measures, Congress can leave the President's discretion in foreign policy matters largely intact.

A second potential objection is that this proposal would give the Salvadoran government an incentive to satisfy the aid conditions by punishing scapegoats rather than the actual offenders. If the Salvadoran army wants the helicopters, and it must have a conviction by a certain date to get them, then it might conduct a kangaroo court. The aid conditions should therefore require not only convictions, but also respect for due process standards. The convictions of the National Guardsmen for the murders of the American churchwomen is an apt example. There, the United States not only set standards, but also played an active role in the pretrial investigation and in the administration of the trial.[56] Although interfering with the integrity of another country's judicial system would not ordinarily be desirable, the Salvadoran judicial system at this time of internal disarray apparently has little integrity to lose. According to the U.S. State Department and independent human rights organizations, the

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[53] Congress has the power under the Constitution "to regulate commerce with foreign nations," U.S. CONST. art. I, § 8 cl. 3, and "to make rules for the government and regulation of the land and naval forces," *id.* cl. 14; *see* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 114 (1972); Moeller, *Human Rights and United States Security Assistance: El Salvador and the Case for Country Specific Legislation*, 24 HARV. INT'L L.J. 95 (1983); Comment, *supra* note 3, at 176–78. *But see* Wallace, *The President's Exclusive Foreign Affairs Powers Over Foreign Aid* (pt. 1), 1970 DUKE L.J. 293 (arguing that it is unconstitutional for Congress to attach any conditions to foreign aid appropriations).

[54] See Comment, *supra* note 3, at 178–80, for a discussion of the relative merits of these contentions in the human rights field.

[55] *See* DEP'T STATE BULL., June 1984, at 79.

[56] *See* N.Y. Times, May 25, 1984, at A11, col. 2.

judicial system is virtually paralyzed.[57] Stephen Kass, speaking for the Association of the Bar of the City of New York, has testified that "the collapse of El Salvador's criminal justice system is general and pervasive,"[58] and Senator Christopher J. Dodd (D-Conn.) has declared that it "isn't a judicial system at all."[59] Far from interfering with its integrity, United States participation would probably improve the Salvadoran judiciary.

Finally, one could argue that the proposed legislation, by limiting the discretion of the Salvadoran army, could reduce the army's ability to pursue the counterinsurgency war against the guerillas. Limiting the discretion of the army, however, is precisely the purpose of the proposal: it is meant in the long term to eliminate certain unacceptable tactics used by an army supported by the United States government. The question of whether the utility of those tactics outweighs the losses inflicted on noncombatant civilians is debatable, perhaps, but in effect it has already been settled by the international law of warfare. The 1949 Geneva Conventions, to which the United States is a signatory, prohibit the murder, mutilation, or torture of civilian noncombatants, even in the absence of a declaration of war and even if the hostilities are confined to the territory of a single country.[60]

V. CONCLUSION

Just as the presidential certification requirement permitted Congress to voice its concerns about human rights with more specificity than the general policy enunciated in section 502B of the Foreign Assistance Act, action specific conditions on military aid enable Congress to achieve greater specificity than the

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[57] While claiming that there had been some improvement, Ass't Sec'y of State Thomas Enders has testified that "[t]he basic issue in these cases is the nonfunctioning in most of its aspects of the Salvadoran judiciary system." *House Presidential Certification Hearings II*, *supra* note 8, at 68. For the views of representative human rights organizations, see Charney, *Failed Justice in El Salvador: Most Murder Cases End in Acquittals; Trial Procedures, Juror Alienation Blamed*, L.A. Daily J., Mar. 13, 1984, at 4, col. 3; *Visiting Lawyers Find Collapse of Justice in El Salvador*, N.Y.L.J., Feb. 17, 1983, at 1, col. 2; *House Presidential Certification Hearings II*, *supra* note 8, at 105 (statement of William Doherty, Exec. Dir., American Institute for Free Labor Development); *id.* at 381 (statement of Morton Halperin, Dir. Center for Nat'l Security Studies).

[58] *Senate Hearing on Certification on Progress*, *supra* note 10, at 480.

[59] *House Presidential Certification Hearings I*, *supra* note 8, at 59.

[60] Geneva Conventions, Aug. 12, 1949, art. 3, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

certification requirement. They also remove Congress from the quandary of either withholding all military aid, a choice inconsistent with its security objectives, or continuing to stand aside while human rights violations persist. Congress now has an opportunity to build on the tentative results of the Specter Amendment, not only increasing the accountability of Salvadoran military officers, but also extending greater protection to the least privileged members of Salvadoran society. In time, Congress could extend action specific legislation to other countries receiving United States aid, if and when Congress determines that more general human rights policies have failed to meet their objectives.

COMMENT

A NEW GENERATION OF STATE TAX AND EXPENDITURE LIMITATIONS

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GARTH B. RIEMAN**

Provisions restricting government spending have been common in state constitutions since the late nineteenth century.[1] For the most part, these constitutional controls on state finances have been of three basic types: 1) restrictions on the finances of local government;[2] 2) restricted financing of specific government programs;[3] and 3) limits on state government deficits.[4] Restrictions on local governments and specific programs were often responses to serious problems. For example, state constitutional limits on local government indebtedness followed closely on the heels of municipal bankruptcies in the 1870's.[5] The third type of control, limits on state deficits, simply precluded states from spending more money than they raised.[6] Today these old forms of budgetary restrictions are very much alive.[7]

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[1] *See, e.g.*, MINN. CONST. art XI, §§ 4–6 (adopted 1857); N.J. CONST. art IV, § 6, ¶ 4 (adopted 1844); *see generally* J. WRIGHT, TAX AND EXPENDITURE LIMITATION: A POLICY PERSPECTIVE 42 (1981)(many of these restrictions were prompted by financial panics and widespread corruption).

[2] *See, e.g.*, N.Y. CONST. of 1894, art. VIII, § 10; *see also* J. WRIGHT, *supra* note 1, at 41.

[3] *See, e.g.*, TEX. CONST. art. 7, §§ 11, 11a (1876, amended 1932)(providing a permanent fund for the University of Texas); *see also* E. GRIFFITH, A HISTORY OF AMERICAN CITY GOVERNMENT: THE CONSPICUOUS FAILURE 1870–1900, at 18 (1974)(education funding was least disturbed by economic crashes).

[4] *See, e.g.*, WIS. CONST. art. VIII, § 5 (adopted 1848); *see also* J. WRIGHT, *supra* note 1, at 41.

[5] *See, e.g.*, N.Y. CONST. of 1894, art. VIII, § 10; *see generally* E. GRIFFITH, *supra* note 3, at 20 (legislators thought the best way to ensure economical government was to make it impossible to incur large debts).

[6] *See, e.g*, MD. CONST. of 1864, art. III, § 34; MICH. CONST. of 1874, art. XIV, § 3; W. VA. CONST. art. X, § 4.

[7] *See, e.g.*, ALA. CONST. art. XI, § 213; ALASKA CONST. art. IX, §§ 8, 12; ARIZ. CONST. art. IX, § 5; CAL. CONST. art. XVI, § 1 (1849, amended 1908, 1956, 1960, 1962 & 1970); COLO. CONST. art. XI, § 3 (1876, amended 1922); FLA. CONST. art. VII, § 1;

A new generation of more sophisticated constitutional and statutory budgetary controls has emerged during the past eight years. Commonly referred to as "tax and expenditure limitations"[8] (TELs), these new controls are characterized as limits, rather than prohibitions, on increases in state taxing and spending.[9]

These limitations take a variety of forms. New restrictions on local property taxes, such as California's Proposition 13, are similar to the older limits on local taxation.[10] On the other hand, most modern TELs are new fiscal devices[11] which are primarily concerned with limiting the general growth of state government.[12] Traditional deficit limits allowed state government expenditures to increase to the extent that the governments could tax. In comparison, many modern TELs directly restrict the growth and freedom of state governments. For example, a 1978 Tennessee constitutional amendment prohibits growth in total state appropriations from exceeding the estimated rate of growth

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GA. CONST. art. VII, § 3 (1861, amended 1980); IDAHO CONST. art. VII, § 11; *id.* art. VIII, § 1 (1890, amended 1910); ILL. CONST. art. IX, § 9; IND. CONST. art. X, § 5; IOWA CONST. art. VII, § 2; KY. CONST. § 49; ME. CONST. art. IX, § 14 (1867, amended 1965, 1967, 1969, 1978 & 1982); MD. CONST. art. III, § 34; MINN. CONST. art. XI, §§ 4–5 (1857, amended 1924, 1928 & 1962), § 6 (1857, amended 1962); MO. CONST. art. X, § 20; MONT. CONST. art. VIII, §§ 8–9; NEV. CONST. art. 9, § 3 (1864, amended 1916 & 1934); N.J. CONST. art. IV, § 6, ¶ 4; N.M. CONST. art. IX, § 7; N.C. CONST. art. V, § 3 (1868, amended 1872 & 1880); OHIO CONST. art. VIII, § 1; OKLA. CONST. art. X, § 23 (1907, amended 1941, 1968 & 1975); OR. CONST. art. IX, §§ 2, 6; PA. CONST. art. VIII, § 7 (1874, amended 1918 & 1923), §§ 12, 13; R.I. CONST. art. XXXI, § 1; S.C. CONST. art. X, § 2; S.D. CONST. art. XIII, § 2; TENN. CONST. art. II, § 24 (1870, amended 1978); TEX. CONST. art. III, § 49; UTAH CONST. art. XIII, § 2 (1930, amended 1946, 1958, 1962, 1964 & 1968); VA. CONST. art. X, § 9 (1919, amended 1970); W. VA. CONST. art. X, § 4. *See generally* ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, SIGNIFICANT FEATURES OF FISCAL FEDERALISM 1982–83, at 98 (1984); COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 1982–83, at 368 (1984) [hereinafter cited as BOOK OF THE STATES].

[8] Wright, *Tax and Expenditure Limitations*, in BOOK OF THE STATES, *supra* note 7, at 417.

[9] Lile, Soule & Wead, *Limiting State Taxes and Expenditures*, 51 STATE GOV'T 204, 204 (1978) ("TELs that have been enacted are limits on the rate of increases in government spending or collections rather than an attempt to totally freeze taxes and expenditures.").

[10] *Compare* CAL. CONST. art. XIIIA (limiting local property taxes) *with* N.Y. CONST. of 1894, art. VIII, § 10 (limiting local government indebtedness).

[11] *See, e.g.*, Gold, *Contingency Measures and Fiscal Limitations: The Real World Significance of Some Recent State Budget Innovations*, 37 NAT'L TAX J. 421, 421 (1984); Kenyon & Benker, *Fiscal Discipline: Lessons from the State Experience*, 37 NAT'L TAX J. 433, 433 (1984).

[12] *See, e.g.*, Act of June 23, 1980, ch. 517, 1980 S.C. Acts 1507, 2202 (the General Assembly intends to adjust and control the growth of state government); WASH. REV. CODE ANN. § 43.135.010 (1983)(purpose of TEL is to limit rate of growth of state government); Lile, Soule & Wead, *supra* note 9, at 204–08; Gold, *supra* note 11, at 427.

of the state's economy.[13] Other TELs have placed more specific restrictions on legislative prerogatives by dictating where money may be spent. For example, in Delaware, a specific percentage of anticipated revenues must be appropriated into a reserve fund.[14]

Inasmuch as modern TELs provide for reductions in specific taxes or tax rates, they warrant their popular treatment as the primary weapons of the "Tax Revolt."[15] This label, however, fails to recognize that most TELs aim to replace annual legislative deliberations in budgetary affairs with single electoral decisions. Many proponents of modern TELs argue that the provisions not only limit tax burdens for particular groups, but also constrain irresponsible legislatures.[16]

Opponents of TELs offer wide ranging criticisms. Some critics characterize TELs as meaningless exercises designed solely to placate a disgruntled public.[17] Other commentators warn that TELs are too effective at foreclosing options that responsible legislatures may need to exercise.[18]

TELs exhibit a variety of purposes and features. This Comment establishes a scheme of classification of TELs based on their reasonable purposes. The Comment then describes existing TELs and focuses on the difficulties faced by three states—Hawaii, Colorado, and Michigan—in implementing their TEL provisions. The experiences of these and other states demonstrate that TELs are easily circumvented. Nonetheless, this Comment concludes that TELs can be positive instruments of budgetary control if they 1) are directed at expenditures, 2) are reasonably focused, 3) provide for flexibility in emergencies, and 4) are guaranteed by judicial enforcement.

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[13] TENN. CONST. art. II, § 24; TENN. CODE ANN. §§ 9-6-201 to -203 (Supp. 1984).

[14] DEL. CONST. art. VIII, § 6(b)–(d) (adopted 1980).

[15] *See* Kenyon & Benker, *supra* note 11, at 433.

[16] *See, e.g.*, Gold, *supra* note 11, at 427; Kenyon & Benker, *supra* note 11, at 443; Committee on State and Local Taxation, Real Property Div., *State and Local Property Taxation in Light of Proposition XIII and Similar Taxing Measures*, 15 REAL PROP., PROB. & TR. J. 501, 501 (1980).

[17] *See* Bails, *A Critique on the Effectiveness of Tax-Expenditure Limitations*, 38 PUB. CHOICE 129, 129 (1982); Lile, Soule & Wead, *supra* note 9, at 209. *Cf.* Bennett & DiLorenzo, *How the Government Evades Taxes*, 1982 POL'Y REV. 71, 76 ("For over three-quarters of a century, state and local governments have routinely evaded all restrictions on their financial independence by the simple expedient of moving large segments of the public sector 'off-budget' or to 'off-budget enterprises.'").

[18] *See, e.g.*, Hanson, *Effects on Metropolitan Growth: The Washington D.C. Area*, in TAX AND EXPENDITURE LIMITATIONS: HOW TO IMPLEMENT AND LIVE WITHIN THEM 203 (J. Rose ed. 1982) [hereinafter cited as TAX AND EXPENDITURE LIMITATIONS].

I. CLASSIFYING TAX AND EXPENDITURE LIMITATIONS

At present, nine states have modern TELs in their constitutions[19] and eleven states have statutory limitations.[20] Because these provisions often reflect particular political or accounting features of the individual states, any classification of TELs must be both general and tentative. Modern TELs can be classified into three categories:

1) TELs that attempt to limit specific types of taxation and spending, such as rollbacks in property tax rates.[21] Many of these TELs bear on local government finances.[22]
2) TELs that attempt to impose general limits on state government spending or taxation or both.[23] Unlike the first group, these TELs do not prescribe specific changes in the current tax and expenditure structure. Instead, they attempt to regulate the overall expansion of state government.
3) TELs that place restrictions on how a state may spend its money.[24] Such restrictions need not and usually do not limit tax levels.[25]

Several commentators have offered alternative TEL classification schemes that focus on specific features of individual TELs.[26] The categories suggested here are based primarily on the underlying purposes of the TELs. The purpose of the first

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[19] ALASKA CONST. art. IX, § 16; ARIZ. CONST. art. IX, § 20; CAL. CONST. arts. XIIIa, XIIIb; DEL. CONST. art. VIII, § 6(b)–(d); HAWAII CONST. art VII, § 9; MICH. CONST. art. IX, §§ 25–33; MO. CONST. art X, §§ 18–24; TENN. CONST. art. VIII, § 24; TEX. CONST. art II, § 22.

[20] ALASKA STAT. § 37.07.020 (Supp. 1984); COLO. REV. STAT. § 24-75-201.1 (Supp. 1983); IDAHO CODE §§ 67-6801 to -6803 (1980); LA. REV. STAT. ANN. §§ 47:5001 to :5010 (West Supp. 1983); MONT. CODE ANN. § 17-8-106 (1983); NEV. REV. STAT. § 353.213 (1983); OR. REV. STAT. § 291.355 (1983); R.I. GEN. LAWS § 35-3-7(5) (Supp. 1984); S.C. CODE ANN. §§ 11-33-10 to -80 (Supp. 1983); UTAH CODE ANN. § 59-27-3 (Supp. 1983); WASH. REV. CODE ANN. §§ 43.135.010–.901 (1983); *see also* Kenyon & Benker, *supra* note 11, at 436–37.

[21] *See, e.g.*, CAL. CONST. art. XIIIA; IDAHO CODE §§ 63-903, -923 (Supp. 1984); MASS. GEN. LAWS ANN. ch. 59, § 20A (West Supp. 1983).

[22] *See, e.g.*, CAL. CONST. art. XIIIA.

[23] *See, e.g.*, ARIZ. CONST. art. IX, § 17; CAL. CONST. art. XIIIB; MICH. CONST. art. IX, § 26; TENN. CONST. art. II, § 24; TENN. CODE ANN. § 9-6-201 to -203 (Supp. 1984).

[24] *See, e.g.*, DEL. CONST. art. VIII, § 6(b); MICH. CONST. art. IX, § 30.

[25] *See* DEL. CONST. art. VIII, § 6(b); MICH. CONST. art. IX, § 30.

[26] *See, e.g.*, J. WRIGHT, *supra* note 1, at 7 (identifying different features of TELs); Lile, Soule & Wead, *supra* note 9, at 205–09 (also identifying variant purposes behind TELs).

category of TELs is to curb taxes of a particular kind. Limiting one kind of tax may inhibit, but does not prevent, rapid government growth. Of course, a multitude of such restrictions will indirectly achieve the same end as a general limit on state revenues.

The second category of TELs, general limits on taxing or spending, most clearly limits the growth of state government. It does not, however, contain an implicit choice as to relative tax burdens. This type of TEL represents the desire to limit growth.

The purpose behind the third type of TELs is to limit state government choice in the spending of undedicated funds. For example, Michigan's requirement that a certain percentage of state funds be paid to local government[27] is the result of a desire to fix the relative sizes of these governmental units. Delaware's requirement that monies be paid to a reserve fund[28] reflects a belief that government should plan for lower revenue periods.

A. *Group I: Limitations Imposed on Specific Taxes*

In 1978, California voters passed Proposition 13, an initiative intended to limit local property taxes.[29] Proposition 13 reduced assessed property values to the assessment levels for fiscal year 1975–1976, and also limited annual valuation increases to 2%.[30] Following its enactment,[31] local revenues declined by 12%.[32] Proposition 13 included another "Group One" restriction stipulating that no new ad valorem, sales, or transaction taxes would be levied on local property.[33] This provision ensured that the general goal of property tax relief would not be undermined by new tax proposals.

Other states have also imposed limits on specific types of taxes. In 1980, Massachusetts passed Proposition 2½, which set

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[27] *See* MICH. CONST. art. IX, § 30.

[28] *See* DEL. CONST. art. VIII, § 6(b).

[29] CAL CONST. art. XIIIA. *See generally* Strauss, Mikels & Hagman, *Description of Propositions 13 and 4*, in TAX AND EXPENDITURE LIMITATIONS, *supra* note 18, at 19.

[30] CAL. CONST. art. XIIIA. *See generally* Vaughn, *What Should States Do About the Fiscal Limitation Movement?* in STATE TAXATION POLICY 127 (M. Barker ed. 1983).

[31] *See* CAL. CONST. art. XIIIA, § 5 (The "article shall take effect for the tax year beginning on July 1 following passage of this amendment.").

[32] *See* GOVERNMENT RELATIONS DEP'T OF SECURITY PACIFIC NAT'L BANK, TAXES AND OTHER REVENUE OF STATE AND LOCAL GOVERNMENT IN CALIFORNIA, at A-2 (1984) [hereinafter cited as STATE AND LOCAL REVENUE IN CALIFORNIA].

[33] *See* CAL. CONST. art. XIIIA, § 3.

a property tax ceiling of $25 for every $1,000 worth of property.[34] In 1978, Idaho cut property taxes by lowering the effective tax rate.[35]

Under specific tax limits such as Proposition 13, state governments are not necessarily forced to spend less money. In California's case, the state government shared some of its surplus with local governments in a comprehensive "bailout plan."[36] Local governments depended upon the state for an increasing share of support, creating a new intergovernmental relationship. The Proposition 13 experience demonstrates that, although a tax limitation targeted toward controlling a specific tax may succeed in narrow terms, it may still fail if its goal is to limit generally the size or growth of government.[37]

Despite Proposition 13's popular prominence as an opening shot in the battle for tax and expenditure limitations,[38] the property tax aspects of Proposition 13 do not exert direct or general control over the state budget. Single tax limitations are relatively simple and may be aimed more directly at easing the tax burdens of specific groups; the other categories of TELs appear to be informed by a clearer desire to control the growth of state government.

B. *Group II: General Limits on the Growth of Spending and Taxation*

The first constitutional TEL limiting growth in revenue or spending was passed in Tennessee in 1978.[39] Under this provi-

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[34] *See* MASS. GEN. LAWS ANN. ch. 59, § 20A (West Supp. 1983). *See generally* Angiolillo-Bent, *Effects of Massachusetts Proposition 2½ on Property Tax Administration and Reform*, in TAX AND EXPENDITURE LIMITATIONS, *supra* note 18, at 167, 171.

[35] IDAHO CODE §§ 63-903, -923 (Supp. 1984); *see also* "Tax Revolt Update," Fiscal Letter (Jan.–Feb. 1984, at 1, 6)(issued by National Conference of State Legislatures, 1125 Seventeenth St., Suite 1500, Denver, Colo. 80202).

[36] *See* Strauss, Mikels & Hagman, *supra* note 29, at 45. Local government revenue from state government rose 35% between 1977–1978 and 1978–1979 and 51% between 1977–1978 and 1979–1980. STATE AND LOCAL REVENUE IN CALIFORNIA, *supra* note 32, at A-10.

[37] *See* Lile, Soule & Wead, *supra* note 9, at 209. For example, government can continue to grow if it depends on user fees for services it provides, thereby becoming a "privatized" provider of services while remaining a government. *See* Hagman, *Statutory and Judicial "Loopholing" of California TELs through BHAPs*, 6 URB. L. & POL'Y 133 (1983) (BHAPs, or benefit based or harm avoidance payment schemes, are sources of revenues not subject to TELs.).

[38] *See* Vaughn, *supra* note 30, at 126; J. WRIGHT, *supra* note 1, at 6; Gold, *supra* note 11, at 422.

[39] *See* TENN. CONST. art. II, § 24; S. GOLD, STATE TAX AND SPENDING LIMITATIONS: PAPER TIGERS OR SLUMBERING GIANTS? 6, 9 (National Conference of State Legislatures, Legislative Finance Paper No. 33, 1983).

sion, "the rate of growth of appropriations from state tax revenues" may not exceed "the estimated rate of growth of the state's economy as determined by law."[40] Implementing statutes have tied the estimated rate of growth to an econometric model based on personal income.[41]

During the next few years, Arizona,[42] Hawaii,[43] Michigan,[44] Missouri,[45] and Texas[46] followed with constitutional limitations tying general fund or undedicated[47] spending growth to some measure of economic growth. Even though the precise methods vary, the effects of the several provisions are similar because economic growth is defined as growth in personal income.[48] Several other states using statutory TELs also link spending or revenue growth to personal income.[49]

California also places a general constitutional limit on spending growth, but ties the allowable increase to population growth and inflation.[50] This limitation applies to only 60% of the state budget once exemptions for federal funding, insurance funds, and debt service are taken into account.[51] Alaska follows California's approach in a constitutional provision.[52] Nevada has copied it in statutory form.[53]

A final means of limiting the growth of state budgets has been established by statute in Rhode Island[54] and Colorado.[55] In these states, spending growth is limited to a fixed percentage: 7% for

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[40] TENN. CONST. art. II, § 24.

[41] TENN. CODE ANN. § 9-6-201, -203 (Supp. 1984). The University of Tennessee maintains the economic model. *See id.*

[42] ARIZ. CONST. art. IX, § 17 (adopted 1978).

[43] HAWAII CONST. art. VII, § 9 (adopted 1978).

[44] MICH. CONST. art. IX, §§ 26, 28 (adopted 1978).

[45] MO. CONST. art. X, §§ 18, 22 (adopted 1980).

[46] TEX. CONST. art. VIII, § 22 (adopted 1978).

[47] *See id.* (stating Texas constitutional restrictions on permissible rate of growth of undedicated revenues).

[48] *See, e.g.*, ARIZ. CONST art. IX, § 17; TENN. CODE ANN. §§ 9-6-201 to -203 (Supp. 1984); *see also* Wright, *supra* note 8, at 418.

[49] IDAHO CODE §§ 67-6801 to -6803 (1980); MONT. CODE ANN. § 17-8-106 (1983); OR. REV. STAT. § 291.355 (1983); UTAH CODE ANN. § 59-27-3 (1983).

[50] CAL. CONST. art. XIIIB, § 1.

[51] REPORT OF THE LEGISLATIVE ANALYST OF CALIFORNIA, 1983–84, at 37 (1984) (on file at HARV. J. ON LEGIS.); J. WRIGHT, *supra* note 1, at 36.

[52] ALASKA CONST. art. IX, § 16.

[53] NEV. REV. STAT. § 353.213 (1983); *see also* "An Early Analysis of State Expenditure and Revenue Limitations," Fiscal Letter (May–June 1983, at 3) (issued by the National Conference of State Legislatures, 1125 Seventeenth St., Suite 1500, Denver, Colo. 80202).

[54] R.I. GEN. LAWS § 35-3-7(5) (Supp. 1984).

[55] COLO. REV. STAT. § 24-75-201.1 (Supp. 1983).

Colorado and 8% for Rhode Island.[56] Because of its simplicity, this method presents relatively few implementation difficulties.[57] It does not, however, respond effectively to rapid economic changes. Rising inflation and population growth could make it impossible to maintain existing levels of services under such a limit. Rapidly increasing wealth could produce artificially low tax rates.

Colorado's 7% statutory limit on annual expenditure growth came on the heels of unsuccessful proposals to change the constitution in 1976 and 1978.[58] The present limitation led to one-time tax rebates in 1980 and 1981 as components of general tax reduction bills.[59] The enacted bills included tax base reductions, such as an exemption of food from the state sales tax.[60] A major reason for the bills was a desire to avoid exceeding the limitation.[61]

While the limitation has reduced spending growth, it has also been circumvented, or at least weakened, by a number of measures. According to one independent analysis, in the first four years since enactment, appropriations increased by 50%, whereas the limit should only have permitted an increase of 31%.[62] This statistical inconsistency can be partially explained by the statute's exclusion of special funds used for tax relief, water projects, and highways.[63] For Colorado, the highway and water project exceptions are particularly important because the state is still engaged in developing its infrastructure.[64] The tax relief exception, however, has been interpreted so liberally as to become a means of avoiding the limit. For example, some state funding of schools has been treated as "tax relief" on the rationale that the money would otherwise have to come from local tax levies.[65] Overall, this exception allowed the state to spend an extra $143,000,000 during the fiscal year 1982.[66]

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[56] *Id.*; R.I. GEN. LAWS § 35-3-7(5) (Supp. 1984).

[57] *See infra* text accompanying notes 76–89.

[58] Sloan, *Spending Limitation Amendment: Defeat in Colorado*, 52 STATE GOV'T 8 (1979).

[59] COLO. REV. STAT. § 39-22-104(3)(b) (1982); S. GOLD *supra* note 39, at 6.

[60] COLO. REV. STAT. § 39-26-102, -203 (1982).

[61] Telephone interview with Douglas G. Brown, Dir. of Colo. Legislative Drafting Office (Oct. 11, 1984).

[62] S. GOLD, *supra* note 39, at 6.

[63] COLO. REV. STAT. § 24-75-201.1 (Supp. 1983).

[64] R. LAMM & M. MCCARTHY, THE ANGRY WEST: A VULNERABLE LAND AND ITS FUTURE 86–89 (1982).

[65] S. GOLD, *supra* note 39, at 6.

[66] *Id.*

Colorado further increased its total expenditures beyond the limit by granting agencies a "cash fund spending authority" in lieu of an appropriation.[67] Under such an authority, agencies can credit against appropriations any fees expected to be collected for services rendered.[68] The critical difference between an appropriation and an authority is that an authority allows the agency to spend only what it actually earns in fees during the fiscal year, while an appropriation limits the agency to a specific annual amount.[69]

This practice may or may not violate the spirit behind the limitation. If the limitation is designed to protect taxpayers, this practice may do little more than make these fee-supported agencies into the public analogs of private service providers. In this sense, the use of fees may be said to "privatize" the agencies, moving the burden from the general public to those benefiting from the service.

If, on the other hand, the limitation seeks to limit the role of state government, the practice merely supplements tax-supported growth with fee-supported growth and permits circumvention of the statute's purpose. Colorado's experience suggests that if restricting growth is the goal of a TEL, expenditure or revenue limitations should include earned and spent fees as well as taxes or general fund appropriations.

As illustrated by the "cash fund spending authority" example, TELs may have secondary effects on budgetary practices and political conflict. Because TELs are often cast in terms of "usual" government finances,[70] legislatures can avoid their requirements through unusual routes, such as creative bookkeeping or new financial instruments. These practices, in turn, can lead to confrontations between branches of government. In Colorado, the legislature made a policy of stipulating the source of funds for "cash fund spending authorities." The governor began

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[67] COLO. REV. STAT. § 24-75-202 to -203 (Supp. 1983).

[68] *Id.*

[69] *Id.*; *see also* Colorado Gen. Assembly v. Lamm, Nos. 82 CV 9345, 82 CV 5005, 81 CV 10058, slip op. at 5–6 (Colo. Dist. Ct. Jan. 17, 1984), *appeal docketed*, No. 84 SA 79 (Colo. Feb. 16, 1984). The district court noted:

> The agency may receive . . . general fund monies and/or the authority to retain and spend revenues generated by its own activities up to a legislatively determined maximum amount. It is self-apparent that the actual revenues earned by . . . the agency may be less than, equal to, or more than the cash funds appropriation.

Id.

[70] *See* Bennett & DiLorenzo, *supra* note 17, at 76.

vetoing these stipulations,[71] claiming that the power to decide the source of monies for nonappropriations spending authorities was an executive matter.[72] The Colorado legislature obtained a lower court ruling that the matter was within the legislature's authority;[73] the court did not address the issue whether such a designation had implications for the state's TEL.[74] The governor has appealed, and the matter is now before the state supreme court.[75]

For states using a variable figure instead of a fixed percentage, reliance on a "base year" for calculating tax rates is a weakness of TELs. To push the limit upward, legislators can "pad" base year budgets through such means as making appropriations that are not funded in that year.[76] Another avenue to push the limit upward is to redefine state accounts in the base year. Michigan[77] and Missouri[78] use a formula that calculates permissible annual revenue increases as a percentage of the state personal income from the preceding year. For Michigan, a 10% figure was derived from the 1978–1979 state revenue as a percentage of 1977 state personal income.[79]

In Missouri, the percentage was calculated using 1980–1981 state revenues as a percentage of 1979 state personal income.[80] In defining state revenues for 1980–1981, Missouri Governor Christopher Bond included the state's $416,000,000 surplus from 1979–1980 as part of the state's "revenues" for the next year.[81]

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[71] Colorado Gen. Assembly v. Lamm, Nos. 82 CV 9345, 82 CV 5005, 81 CV 10058, slip op. at 8 (Colo. Dist. Ct. Jan. 17, 1984), *appeal docketed*, No. 84 SA 79 (Colo. Feb. 16, 1984).

[72] Brief for Appellant at 7, Colorado Gen. Assembly v. Lamm, No. 84 SA 79, (Colo. 1984)(on file at HARV. J. ON LEGIS.).

[73] Colorado Gen. Assembly v. Lamm, Nos. 82 CV 9345, 82 CV 5005, 81 CV 10058, slip op. at 8 (Colo. Dist. Ct. Jan. 17, 1984), *appeal docketed*, No. 84 SA 79 (Colo. Feb. 16, 1984).

[74] The court understood the cash fund authority to be an appropriation, but not under the TEL's accounting. *See* Colorado Gen. Assembly v. Lamm, Nos. 82 CV 9345, 82 CV 5005, 81 CV 10058, slip op. at 16 (Colo. Dist. Ct. Jan. 17, 1984), *appeal docketed*, No. 84 SA 79 (Colo. Feb. 16, 1984).

[75] Colorado Gen. Assembly v. Lamm, No. 84 SA 79 (Colo. Feb. 16, 1984).

[76] S. GOLD, *supra* note 39, at 5, states, "One device employed in California to establish a high ceiling was to appropriate more than $500 million in FY 1980 for transportation programs not requiring funding that year. This appropriation raised the base from which future limitations were calculated."

[77] MICH. CONST. art. IX, §§ 26, 28.

[78] MO. CONST. art. 10, § 18.

[79] MICH. CONST. art. IX, § 30.

[80] MO. CONST. art. 10, § 18.

[81] *See* Beuchner v. Bond, 650 S.W.2d 611, 615 (Mo. 1983) (en banc) (unspent revenues from prior years cannot be included in "total state revenues"); Robertson & Kincheloe, *Missouri's Tax Limitation Amendment: Ad Astra Per Aspera*, 52 UMKC L. REV. 1, 4 (1983).

Because "state revenues" were enlarged as a percentage of state income, the state's revenue ceiling effectively moved upward and perhaps weakened the intended effect of the limitation. This experience suggests that TELs should define revenue periods more precisely.

Many constitutional and most statutory TELs have override provisions.[82] In Arizona, two-thirds of the membership in each house of the legislature can override the limit.[83] The same two-thirds can override the Michigan and Missouri limitations,[84] with the additional requirement that the governor request the legislature to declare an "emergency" requiring the additional revenues. In California, even if the provision is overridden, the extra above-limit expenditures must be offset by the below-limit expenditure levels for the three following years.[85]

In 1980, Hawaii amended its constitution to tie the rate of growth in general fund expenditures to "the estimated rate of growth of the State's economy as provided by law."[86] The limit initially set general fund expenditures at the percentage of personal income in the base fiscal year of 1978–1979.[87] The limitation may be overridden by a two-thirds vote of both houses so long as the vote states the dollar amount, the rate by which the ceiling will be exceeded, and its supporting reasons.[88] A second provision requires a tax rebate whenever the general fund has a closing surplus exceeding 5% for two successive years.[89]

With appropriations limited and revenues not similarly en-

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[82] *See, e.g.*, ARIZ. CONST. art. IX, § 17(3); CAL. CONST. art. XIIIB, § 3(c); HAWAII CONST. art. VII, § 9; MICH. CONST. art. IX, § 27; MO. CONST. art. X, § 19; MONT. CODE ANN. § 17-8-106(2) (1983); NEV. REV. STAT. § 353.213, ¶ 4 (1983); *see also* S. GOLD, *supra* note 39, at 4.

[83] ARIZ. CONST. art. IX, § 17(3).

[84] MICH. CONST. art. IX, § 27; MO. CONST. art. X, § 19.

[85] CAL. CONST. art. XIIIB, § 3(c).

[86] HAWAII CONST. art. VII, § 9.

[87] Implemented by HAWAII REV. STAT. §§ 37-91 to -94, -111 to -113 (1980), which provided that the Act should take effect on July 1, 1980. Hence, 1981–1982 was the first fiscal year in which the legislature was bound by the ceiling. *See* Letter from Corinne Watanake, Dep'ty Att'y Gen. of Hawaii to State Sen. Mamoru Yamasaki (April 28, 1981) (rendering opinion on the effective ceiling date). Nonetheless, the legislative and executive branches had tried to honor the ceiling since November of 1978, when it was added to the state constitution. *See* Letter from Richard F. Kahle Jr., Ass't Dir. for Research, Hawaii Legislative Reference Bureau to Justin Hughes (Oct. 12, 1984) (on file at HARV. J. ON LEGIS.). HAWAII REV. STAT. § 37-91 was renewed and amended by the General Fund Expenditure Ceiling Act of 1984, ch. 183, 1984 Hawaii Sess. Laws 313. The amendments only clarified and codified practices used under the original statute. Telephone interview with Richard F. Kahle, Ass't Dir. for Research, Hawaii Legislative Reference Bureau (Oct. 12, 1984) [hereinafter cited as Kahle Interview].

[88] HAWAII CONST. art. VII, § 9.

[89] HAWAII CONST. art. VII, § 6.

cumbered, the general fund has grown faster than appropriations. Hence, the state has had to make tax rebates for the past five years.[90] Because ceilings are calculated from the previous year's ceiling and not the year's actual appropriations, if the state exceeds the limit in any given year, it has increasing difficulty in falling within the limit in subsequent years.[91]

Together these two provisions have curbed spending in Hawaii. The 1983 budget may be the first to exceed the limit.[92] With the limit so close and some estimates putting the state over its spending ceiling, dissident legislators requested an opinion from the Hawaii Attorney General on the question of whether the constitution had been violated.[93] Controversy centered around the notice issue: if the ceiling had been surpassed, the constitution required the legislature to state adequately and explicitly the reasons for its actions. In an advisory opinion, the Attorney General decided that the discussion in the legislature constituted adequate notice.[94] A group of legislators threatened further legal action, but this opposition eventually dissipated.[95]

Attempts to circumvent the expenditure limitation through such devices as special funds and exempt budget lines have not succeeded in Hawaii.[96] Nonetheless, a current proposal to allocate general fund appropriations to a new reserve fund may frustrate at least the TEL's tax rebate provision.[97]

C. *Group III: Limitations That Restrict How A State May Spend Its Money*

The distinctive characteristic of Group III TELs is that they stipulate "where" the state government allocates its revenues.

[90] S. GOLD, *supra* note 39, at 6.

[91] LEGISLATIVE AUDITOR OF THE STATE OF HAWAII, STUDY OF THE STATE OF HAWAII'S EXPENDITURE CEILING, No. 82-5, at 15 (1982) [hereinafter cited as HAWAII EXPENDITURE CEILING STUDY].

[92] Kahle Interview, *supra* note 87.

[93] *See* Letter from Charleen Aina, Dep'ty Att'y Gen. of Hawaii, to State Sen. Benjamin Cayetano (June 16, 1983) (expressing opinion of the Hawaii Department of the Attorney General) (on file at HARV. J. ON LEGIS.).

[94] *Id.*

[95] Kahle Interview, *supra* note 87.

[96] Apparently "special fund appropriations . . . to circumvent the general fund ceiling" were not in place as of March, 1982. *See* HAWAII EXPENDITURE CEILING STUDY, *supra* note 91, at 16. According to the Chairman of the Hawaii House Finance Committee, none had been passed as of October, 1984. Telephone interview with Ken Kibayu, Chairman of the Hawaii House Finance Committee (Oct. 24, 1984).

[97] H.R. 360, 12th Leg., 1983 Sess. (passed by the Hawaii House of Representatives only) would eliminate some of the surplus funds and so avoid the required rebate. Money moving from the general fund into the emergency reserve fund would still count against the expenditure ceiling. *Id.*

Group III TELs are unique because they direct money in a specific way toward a specific purpose. This concern over budget priorities is not found in the other TELs.

Delaware's TEL limits general fund appropriations to a maximum of 98% of estimated general fund revenue for that year.[98] Revenues exceeding this limit are channeled into a reserve account that can accumulate up to 5% of estimated general fund revenues.[99] When the reserve account surpasses 5%, excess revenues are transferred to an unencumbered fund for use in the next fiscal year.[100] This type of TEL may, in a certain sense, be the least "selfish" restriction for a polity to impose; it is aimed solely at "fiscal housekeeping."[101]

Michigan's 1978 constitutional amendment includes a TEL provision, section 30 of Article IX,[102] that has posed tremendous problems.[103] Section 30 provides that the proportion of state spending paid to all units of local government may not fall below the proportion in the fiscal year 1978–1979.[104] In this base year, local governments received 41.6% of the Michigan budget.[105] Section 29 of Article IX prohibits the state from forcing new responsibilities upon local governments without covering the added costs.[106] Together these provisions assure a steady stream of income to local governments for programs over which they enjoy relative autonomy.

Whatever its intent, section 30 has created numerous compliance difficulties. Indeed, the economic downturn of 1981, with its attendant demands on the state's countercyclical programs, may have pushed Michigan's budget into an undeclared and officially unrecognized violation of the state constitution.[107]

In recent sessions, the Michigan legislature has considered a

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[98] DEL. CONST. art. VIII, § 6(b).

[99] *Id.* § 6(d).

[100] *Id.* § 6(b).

[101] *Id.* § 6(c), (d).

[102] MICH. CONST. art. IX, § 30.

[103] *See generally* Michigan Senate Fiscal Agency, Five Major Problems Associated with Section 30 (1982) (internal document on file at HARV. J. ON LEGIS.). *See also* Gold, *supra* note 11, at 424 (1984).

[104] *See* MICH. CONST. art. IX, § 30. Although a unique provision, the ratio of central state spending to payments to local governments is frequently studied for emerging trends in intergovernmental relations. *See* BOOK OF THE STATES, *supra* note 7, at 349–50.

[105] S. GOLD, *supra* note 39, at 8; *see also* Michigan Senate Fiscal Agency, *supra* note 103, at 1.

[106] MICH. CONST. art. IX, § 29.

[107] There was a $19,300,000 shortfall in section 30 payments in fiscal year 1981–82 and a $76,000,000 shortfall in 1982–83.

variety of bills proposed by the Governor that would liberally interpret section 30.[108] Some bills would have resolved general uncertainties in favor of permitting greater expenditures;[109] others are more blatant attempts to avoid the purpose of section 30.[110]

The recently passed Public Act 229 of 1983[111] provides a good example of the difficulty involved in determining whether the intent of the provision has been honored. Stated simply, Public Act 229 provides that a state expenditure in support of county mental health facilities, no matter what the form, will be calculated as a local expenditure for purposes of the ratio.[112] Normally, the state funds these hospitals through contracts with local mental health boards, which provide state required levels of services while enjoying considerable local autonomy. The bill was prompted by direct state financing for mental health facilities in a few counties that would not assume control of the facilities. The law causes a $50,000,000 "shift" in section 30 accounting: $50,000,000 that formerly was considered a central state expenditure is now considered a local expenditure, even though there has been no shift in program responsibility or state budget lines.[113]

To the extent that section 30 was intended to guarantee minimum funding to local programs, Public Act 229 honors its intent. It seems fair that, when the state handles a normally local expense, it should be included in the local government portion of the ratio. On the other hand, if the proponents of section 30 sought to decentralize government, strict construction would require that these expenditures be attributed to the state.

The state's reserve fund provides another example of the uncertainties involved with implementing TELs. Since 1977, Michigan has had a "Counter-Cyclical Budget and Economic Stabilization Fund," which cushions the state during economic downturns.[114] If this money is considered a central expenditure when appropriated, which has been the practice since the pas-

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[108] Act of July 30, 1984, ch. 229, 1984 Mich. Pub. Acts 739; S. 313, 314, 315, 476, 82d Leg., Reg. Sess. (Mich. 1983).

[109] Act of July 30, 1984, ch. 229, 1984 Mich. Pub. Acts 739.

[110] S. 313, 314, 82d Leg., Reg. Sess. (Mich. 1983).

[111] Act of July 30, 1984, ch. 229, 1984 Mich. Pub. Acts 739.

[112] Michigan Senate Fiscal Agency, Fiscal Note on S.B. 476 (Revised) 1 (1984) (on file at HARV. J. ON LEGIS.).

[113] *Id.* at 2.

[114] MICH. COMP. LAWS §§ 21.401 - .412 (1979).

sage of section 30,[115] care must be taken not to count it as an expenditure when it is actually spent.

Senate Bill 315, which failed to pass the Committee on Finance, is instructive of the accounting problems associated with TELs. It proposed that money appropriated to the fund not be counted in the ratio upon its appropriation;[116] presumably, the money would be counted when spent. The bill may have been motivated by short-term problems in meeting the ratio in 1983; it was abandoned in the late summer of 1984.[117] Such a shift might have required excessive allocations to local governments when the state could least afford it. Critics of the bill also pointed out that, because past appropriations had already been counted as central spending, passage of the proposal would have logically required a retroactive recalculation of the ratio.[118]

Opposition to the bill may also have been motivated by the fact that the present practice allows interest earned by the money in the fund to escape the constitutional ratio requirement; Michigan's state government can thereafter spend the earned interest without being required to share it with local governments.[119]

Senate Bills 313 and 314[120] embody a more explicit attempt to avoid section 30. The bills would have shifted state contributions to teachers' retirement funds from the state side of the ratio to the local side by funneling the money through local school districts.[121] In place of direct appropriations from the state, monies destined for the retirement fund would be distributed to local and intermediate school districts.[122] These local governmental units would then be obliged to contribute an equal amount to the pension fund within one working day.[123] At first blush, this arrangement seems to be a blatant subterfuge to avoid the TEL requirement. On the other hand, there is no reason why pension payments for teachers who work for local school districts should not be considered "local" expenditures.

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[115] Michigan Senate Fiscal Agency, Accounting for Budget Stabilization Fund Transfers in Meeting the Requirements of Article 9, Section 30, at 1 (1979) (on file at HARV. J. ON LEGIS.).

[116] S. 315, 82d Leg., Reg. Sess. (Mich. 1983).

[117] Telephone interview with Ted Ferris, Dir. of the Mich. Sen. Fiscal Agency (Oct. 10, 1984).

[118] *Id.*

[119] *Id.*

[120] S. 313, 314, 82d Leg., Reg. Sess. (Mich. 1983).

[121] *Id.*

[122] S. 314, 82d Leg., Reg. Sess. (Mich. 1983).

[123] *Id.*

II. CONCLUSION

As budgetary devices, TELs are inherently blunt instruments; they can be both ineffective and dangerous. When TEL provisions are circumvented, they are ineffective and the polity functions much as it would have without the provisions, save for the added inefficiency associated with such evasion. When TELs are too strict, they may hamstring needed government action, as the effect of Michigan's Section 30 on economic stabilization programs indicates. At this point, the TEL may become dangerous by preventing or stalling urgently needed government action.

The dominant experience of Group I TELs is that they succeed in reducing (if only temporarily) the growth of government by immediately denying the state one of its revenue sources. In the long run, however, Group I TELs do not prevent the state from raising other taxes or from imposing fees, and so governmental growth continues.[124] "Single issue" TELs focusing on one tax may provide an incentive to shift expenditures from one unit of government to another, as in moving programs from local to state governments when local property taxes are curbed. Although these changes may have little impact on governmental size, efficiency or equity may be affected.[125]

If a TEL is intended to limit the future growth of government, it is best directed at expenditures. Revenue limitations have more immediate appeal to voters because they can be presented as direct controls on taxes. Nonetheless, expenditure limitations hit more directly at government size and necessarily reduce the need for tax monies: there is no point in collecting added revenues if they cannot be spent. At the opposite extreme, state revenue structures have historically been relatively inelastic; in other words, revenues tend to limit themselves. Revenues in-

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[124] *See* Hagman, *supra* note 37, at 133. Hagman argues that:

> For a variety of reasons, local governments are now particularly desirous of finding sources of revenue which are not subject to the TELs. These sources include benefit-based or harm-avoidance payment schemes (BHAPs), various special forms of "taxes," user charges and exactions, which can be imposed on developers and consumers so that public lands, public works and other public goods need not be provided by general taxes.

Id.

[125] "To the extent they stimulated the utilization of BHAPs, the post TELs situation might be regarded as better both in terms of efficiency and equity." Hagman, *supra* note 37, at 134; *see also* Vaughn, *supra* note 30, at 130 ("Many areas will switch to fees and charges, which could, if properly used, increase efficiency.").

crease dramatically when the state decides to increase them (through new taxes); such increases, of course, follow only when the state increases its willingness and ability to spend the income. In this regard, an expenditure limitation more directly limits the size of government. Finally, an expenditure limitation coupled with a required rebate when a state surplus exceeds reasonable limitations has the features of both a tax and expenditure limitation. The expenditure limit and required surplus rebate act as a revenue limit along with the costs associated with providing the rebates.

Whatever the form of limitation, a TEL must aim toward a golden mean between overspecificity and ambiguous generality. Certain revenues and expenditures should not be counted in TELs unless the motivation is to control the size of government at *all* costs. For example, federal funds flowing to and through the state accounts should not be counted under a TEL; a large increase in such funds might push the state over its TEL. Because federal funds might be targeted toward specific programs, these externally determined expenditures might force the state to change its own spending priorities. A TEL that forces a state to refuse available federal funds may do a great injustice to the people of the state.

Similarly, earmarked funds probably should not be limited; if the intent of these TELs is to curb the yearly expenditures of state legislatures, then long established earmarked funds, often supported by special user groups (as with truck taxes for highways), are not intended targets. Self-supporting government authorities are another area that should be outside TELs, unless the intended goal is to reduce the public sector as a portion of the economy.

Colorado's experience demonstrates that general fund expenditures can easily be moved out from under a limitation through exceptions, redefinitions, and special budget lines. Thus, a TEL might wisely include language requiring that items presently in the general fund remain in the fund for purposes of calculating the limitation. Another approach would be to allow items (or "successor" items) presently in the general fund to be moved from that fund only with supramajoritarian approval.

Another lesson to be learned from present TELs is that "minor" details can make a TEL unwieldy, inappropriate, or ineffective. For example, the use of single base years has permitted legislatures implementing the TELs to weaken the limitations

by "padding" the base year. A TEL would be more effective if it incorporated a period of several years as a base, making it more difficult for the limitation to be weakened by a unique base year. Specific issues such as whether fees and cash authorities are part of limited expenditures or revenues must also be resolved.

Finally, the ultimate measure of a TEL's effectiveness is its abililty to be enforced by the courts. Such a review could invalidate either the TEL itself or legislative and executive maneuvers designed to avoid the limitation. As an example of the former, a TEL applicable to *all* state spending could easily be declared unconstitutional. If a TEL covering all expenditures began to endanger pension or state bond payments, it might run afoul of the contracts clause of the United States Constitution.[126]

Although implementing statutes may independently violate the constitutional TEL, state citizens may have difficulty showing the injury necessary to gain standing to bring suit for the enforcement of TELs. Currently, a few states, such as Michigan[127] and Missouri,[128] explicitly grant taxpayers standing to seek judicial enforcement of the TEL. In Missouri, this provision has cleared the way for the state courts to hear several cases and provide judicial interpretation of the state TEL and its terms.[129] Even if the standing doctrine poses no barrier, state executives and legislators might have difficulty bringing suits against other branches of government because of the justiciability problems raised by the "political question" doctrine.[130]

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[126] U.S. CONST. art. 1, § 10, cl. 1. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 9-6, at 467–73 (1978).

[127] MICH. CONST. art. IX, § 32.

[128] MO. CONST. art. XI, § 23.

[129] *See* Buechner v. Bond, 650 S.W.2d 611 (Mo. 1983) (en banc) (unspent revenues from prior years cannot be included in "total state revenues"); Roberts v. McNary, 636 S.W.2d 332 (Mo. 1982) (en banc) (upholding taxpayer suits and ability of courts to enjoin violations); Boone County Court v. State, 631 S.W.2d 321 (Mo. 1982) (en banc) (interpreting section prohibiting the state from imposing new activities on local government without funding).

[130] The "political question" doctrine was used by Governor Lamm in his legal dispute with the Colorado legislature. Opening Brief for Appellant, at 9, Colorado General Assembly v. Lamm, No. 84 SA 79 (Colo. Feb. 16, 1984); Reply Brief for Appellant, at 5, Colorado General Assembly v. Lamm, No. 84 SA 79 (Colo. Feb. 16, 1984). *See also* Note, *Article III Problems in Enforcing the Balanced Budget Amendment*, 83 COLUM. L. REV. 1065, 1075–77 (1983) (concluding that judicial review of a proposed federal balanced budget amendment would violate article III). For a general discussion of the political question doctrine, see P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 214–41 (2d ed. 1973). *See also* P. STRUM, THE SUPREME COURT AND "POLITICAL QUESTIONS": A STUDY IN JUDICIAL EVASION (1974).

In addition to clearing the way for judicial enforcement, a good TEL should still allow some room for legislative interpretation. Of necessity, legislatures must decide how to implement constitutional TELs. The resulting paradox is that TELs must limit the legislature's discretion while simultaneously providing it with enough flexibility to respond to crises and new circumstances without doing violence to the TEL itself.

COMMENT

SENTENCING BY DEATH QUALIFIED JURIES AND THE RIGHT TO JURY NULLIFICATION

BRUCE MCCALL*

A death qualified jury is one from which the state has excluded for cause all veniremen who state that they would automatically vote against imposition of the death penalty.[1] While the use of death qualified juries to determine guilt in a capital case has been upheld,[2] and its use in determining the sentence in a capital case has sometimes been approved in dicta,[3] the United States Supreme Court has never actually passed on the constitutionality of the use of death qualified juries to determine a capital defendant's sentence. The Supreme Court, however, recently granted certiorari in a case involving the validity of a capital sentence imposed by a death qualified jury,[4] and the issue is ripe for consideration.

Jury nullification occurs whenever a jury uses its discretionary power to modify or frustrate the requirements of the law.[5] Jury nullification was recognized as a significant element of the Anglo-American criminal trial system at least three centuries ago,[6] and despite some judicial attempts to limit the jury's power to

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[1] *See* Adams v. Texas, 448 U.S. 38 (1980); Witherspoon v. Illinois, 391 U.S. 510 (1968); *see also* Colussi, *The Unconstitutionality of Death Qualifying a Jury Prior to the Determination of Guilt: The Fair Cross-Section Requirement in Capital Cases*, 15 CREIGHTON L. REV. 595 (1982).

[2] *See* Lockett v. Ohio, 438 U.S. 586, 596 (1978).

[3] *See* Adams v. Texas, 448 U.S. 38, 50 (1980); Witherspoon v. Illinois, 391 U.S. 510, 522 (1968); *see also* Lockett v. Ohio, 438 U.S. 586, 596 (1978).

[4] Wainwright v. Witt, 714 F.2d 1069 (11th Cir. 1983), *cert. granted*, 52 U.S.L.W. 3791 (U.S. Apr. 30, 1984) (No. 83-1427).

[5] *See* Scheflin & Van Dyke, *Jury Nullification: The Contours of a Controversy*, LAW & CONTEMP. PROBS., Autumn 1980, at 51, 111.

[6] *See* Bushell's Case, 6 Howell's State Trials 999 (1670) (holding that jurors cannot be punished for exercising the jury's right to ignore the instructions of the trial judge ordering conviction and to acquit defendants despite the requirements of the law). *See generally* Scheflin & Van Dyke, *supra* note 5, at 56–57.

nullify the law and some courts' uneasiness with that power,[7] it continues to play an important role in our criminal system today.[8]

This Comment argues that the use of death qualified juries to determine the sentence in a capital case[9] violates a defendant's right to jury nullification; that is, it violates the defendant's right to be sentenced by a jury *not* systematically biased against the exercise of its powers of nullification.[10] Part I of this Comment defines the general notion of jury nullification, explores traditional rationales for allowing juries to exercise such power, and specifies how death qualified juries might infringe a right to jury nullification. Part II examines the Sixth Amendment and argues that it includes a right to jury nullification that should be recognized by the United States Supreme Court. Part III argues that several state constitutions provide an additional basis for recognizing the existence of such a right. Part IV examines how the use of death qualified juries violates that Sixth Amendment right to jury nullification.

I. JURY NULLIFICATION

Jury nullification is a general term referring to the criminal jury's power to avoid what it perceives to be a harsh or unfair application of the criminal law.[11] The exercise of this power can

[7] *See* United States v. Dougherty, 473 F.2d 1113, 1131–34 (D.C. Cir. 1972) (discussing the historical treatment of jury nullification and holding that a defendant does not have a right to instructions informing the jury of its prerogative to ignore the law); Sparf v. United States, 156 U.S. 51 (1895) (holding that the defendant does not have the right to have the trial judge instruct the jury that it may refuse to follow the law); United States v. Battiste, 24 F. Cas. 1042 (C.C.D. Mass. 1835) (No. 14,545) (opinion by Judge Story holding that the judge must instruct the jury as to the law and that the jury has a duty to follow that law). *See generally* Scheflin & Van Dyke, *supra* note 5, at 57–63.

[8] *See* United States v. Dougherty, 473 F.2d 1113, 1134 (D.C. Cir. 1972).

[9] In Gregg v. Georgia, 428 U.S. 153 (1976), Justice Stewart, in his opinion announcing the decision of the Court, recommended that states use a bifurcated procedure in capital cases requiring the jury to determine the defendant's guilt or innocence in one proceeding and then to determine the defendant's sentence in a second proceeding. Most states seem to have adopted this procedure. *See, e.g.*, CAL. PENAL CODE §§ 190–190.3 (West Supp. 1984); GA. CODE ANN. § 17-10-2 (1982 & Supp. 1984); LA. CODE CRIM. PROC. ANN. art. 905 (West 1984); N.J. STAT. ANN. § 2C:11-3 (West 1982 & Supp. 1984); TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 1981 & Supp. 1984).

[10] This Comment will use the term "right to jury nullification" as a shorthand for the longer and more awkward phrase "right to a jury not systematically biased against the exercise of its powers of nullification." The former phrase is not meant to suggest that every criminal defendant has a right to have the jury actually exercise its powers of nullification. Instead, it merely indicates that a defendant has a right not to have the choice of jurors stacked against him.

[11] *See* Scheflin & Van Dyke, *supra* note 5, at 54–55; Colussi, *supra* note 1, at 595.

proceed from two different motives. A juror may refuse to follow the precise dictates of the law because he believes that the particular application of the statute is contrary to the law's purpose or to the values of the community; or a juror may refuse to apply the law because he is generally opposed to the premises and purposes of the law itself. The line between these two forms of jury nullification is unclear in practice. The distinction, however, is important to any discussion of the right to jury nullification, because several rationales supporting the first form of nullification are inapplicable to the second form.

The first and narrower form of jury nullification is often defended as a means of overcoming the inherent inadequacies of statutory law.[12] Words are ambiguous and subject to manipulation; statutes are therefore inherently open to abuse, especially by "overzealous or mistaken prosecutor[s]."[13] Moreover, legislatures cannot foresee all possible fact situations to which a statute might be applied.[14] Consequently, the jury must be able to employ the "common sense judgment" of the community to ensure that the law is correctly applied in a particular case.[15] Jury nullification of this type thus works to achieve the purpose of the law and avoids blind application of statutory mandates.

The death qualification of juries, however, implicates the narrower form of jury nullification and its rationale only indirectly. Death qualification excludes only those jurors who are *absolutely* opposed to the death penalty and who would refuse to apply the penalty no matter how heinous the crime.[16] Consequently, if death qualified juries implicate any form of jury nullification, they must implicate the broader form where a jury, or a particular juror, may negate the law because he is generally opposed to its premise or purpose.

II. The Constitutional Right to Jury Nullification

The right to jury nullification is implicit in the Sixth Amendment and should be recognized by the United States Supreme

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[12] *See, e.g.*, Scheflin & Van Dyke, *supra* note 5, at 86–88.

[13] Taylor v. Louisiana, 419 U.S. 522, 530 (1975); *see* Scheflin & Van Dyke, *supra* note 5, at 112.

[14] *See* Scheflin & Van Dyke, *supra* note 5, at 112; Hart, *The Aims of the Criminal Law*, 23 Law & Contemp. Probs. 401, 405 (1958); Wigmore, *A Program for the Trial of a Jury*, 12 J. Am. Judicature Soc. 166, 170 (1929).

[15] Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

[16] *See* Witherspoon v. Illinois, 391 U.S. 510, 522 (1968).

Court. The Sixth Amendment states that: "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."[17]

The Supreme Court has held that the Sixth Amendment right to a jury trial for serious offenses applies to the states as well as to the federal government,[18] and that certain features of the traditional jury are a necessary part of any constitutionally valid jury.[19] As a traditional element of the jury in a criminal case essential to the accomplishment of the jury's most important functions, jury nullification should be recognized as part of the right to a jury guaranteed by the Sixth Amendment.[20]

Jury nullification has been recognized as an important aspect of English law since 1670,[21] and it played a prominent role in the early American legal system.[22] In more recent years the courts have seemed ill at ease with the presence of jury nullification in our legal system.[23] While the doctrine has been called a "safety valve" that helps to keep the law in line with prevailing community values,[24] the courts have nonetheless failed to define with any degree of clarity the role of jury nullification in the criminal law.[25]

The United States Supreme Court's treatment of the right to

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[17] U.S. CONST. amend. VI.

[18] *See* Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

[19] *See, e.g.*, Ballew v. Georgia, 435 U.S. 223 (1978) (holding that a five member jury is unconstitutional); Taylor v. Louisiana, 419 U.S. 522 (1975) (holding that a jury must be drawn from a fair cross-section of the community). *Cf.* Patton v. United States, 281 U.S. 276, 288 (1929) (stating that the Sixth Amendment guarantee of trial by jury "means a trial by jury as understood at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted").

[20] *Cf.* Scheflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168, 175 (1972) (arguing that the Sixth Amendment grants defendants a right to have a jury instructed of its powers to nullify the law); Scheflin & Van Dyke, *supra* note 5, at 75 (arguing that the Sixth Amendment grants defendants a right to have a jury instructed of its powers to nullify the law).

[21] *See* Bushell's Case, 6 Howell's State Trials 999 (1670).

[22] For example, in the libel trial of John Peter Zenger, an early American newspaperman, Alexander Hamilton argued that the jury should look to its own conscience and recognize the truth of Zenger's statements as a defense to the libel charge, despite the fact that truth was not a defense under the law. J. ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER 23–26 (2d ed. 1972); *see* United States v. Dougherty, 473 F.2d 1113, 1132 (D.C. Cir. 1972) (discussing the history of jury nullification in the American criminal justice system). *See generally* Scheflin & Van Dyke, *supra* note 5, at 57–59.

[23] *See* Scheflin, *supra* note 20, at 173; Scheflin & Van Dyke, *supra* note 5, at 63–65.

[24] United States v. Dougherty, 473 F.2d 1113, 1134 (D.C. Cir. 1972).

[25] *See generally id.* at 1131–33 (providing a brief history of jury nullification in the American legal system).

trial by jury has recognized the importance of jury nullification and has laid the foundation both in precedent and policy for recognizing the right to jury nullification as being embodied in the Sixth Amendment. In *Duncan v. Louisiana*, the Supreme Court held that any defendant accused of a serious crime, whether in state or federal court, has a right to trial by jury.[26] Because the *Duncan* Court relied heavily on the need to provide all defendants with the protection against the abuse of government power provided by the jury's powers of nullification, this rationale serves as a starting point for recognizing a constitutional right to jury nullification.

Justice White, in the majority opinion in *Duncan*, states that the right to trial by jury is granted to criminal defendants as a safeguard against "oppression by the Government."[27] In fact, it is that ability to prevent abuses of government power that provides the primary rationale for extending the jury trial right to state defendants:

> A right to jury trial is granted to criminal defendants in order to prevent oppression by the government . . . . Fear of unchecked power, so typical of our state and Federal Governments in other respects, found oppression in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause.[28]

While Justice White's endorsement of jury nullification runs only to the narrower sense of that phrase, the logic of his position supports jury nullification in its broader sense as well.[29] Support for the broader meaning of jury nullification is implicit in his argument because the jury is *essential* to the defendant's protection only where the prosecutor or judge applies a law consistent with its terms but in conflict with the views of the community. A court of appeals can protect a defendant where the "corrupt or overzealous prosecutor"[30] or a "compliant, biased or eccentric judge"[31] seeks to apply the law where its

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[26] 391 U.S. 145 (1968).

[27] *Id.* at 155.

[28] *Id.* at 155–56.

[29] Although Justice White focuses exclusively upon abuses of executive and judicial power, he nowhere rules out the extension of his rationale to include protection against the abuse of legislative power.

[30] Duncan v. Louisiana, 391 U.S. 145, 157 (1968).

[31] *Id.*

text does not permit. Only a jury, however, can protect the defendant from prosecution where application of the law falls within the letter of the statute but violates its purpose or contradicts the current attitude of the community. Thus, to fulfill its role as the defendant's last protection against improper government action, a jury must be allowed to exercise its broad powers of nullification, including its power to nullify the application of "bad law."

Taylor v. Louisiana,[32] a subsequent Supreme Court case fleshing out the Sixth Amendment right to jury trial, furthers this argument considerably. In *Taylor*, the Court held that the Sixth Amendment required juries to be chosen from a pool representing a "fair cross-section of the community."[33] The Court's reasoning was twofold. First, following *Duncan v. Louisiana*, the Court maintained that the jury's purpose "is to guard against the exercise of arbitrary power," and that the exclusion of distinctive groups from the jury pool diluted this protection.[34] Second, the *Taylor* Court reasoned that the jury also serves the purpose of allowing the community to participate in criminal decisions, expressing its views and stamping the acts of the criminal justice system with the imprimatur of fairness and community approval.[35] By excluding specific groups from the jury, the state undermines this role and weakens "public confidence in the fairness of the criminal justice system."[36]

This second rationale, like Justice White's in *Duncan*,[37] supports recognition of the right to jury nullification. By excluding from the capital sentencing pool those veniremen opposed to the death penalty, states may be eliminating a significant and distinctive part of the population.[38] The jury therefore would no

[32] 419 U.S. 522 (1975).

[33] *Id.* at 530. *See generally* Colussi, *supra* note 1, at 603–12 (discussing the impact of the fair cross-section requirement on the debate over the constitutionality of death qualified juries used to determine a defendant's guilt or innocence).

[34] Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

[35] *Id.* at 531.

[36] *Id.* at 530.

[37] *See supra* notes 27–28 and accompanying text.

[38] *See* Colussi, *supra* note 1, at 609–10 ("[T]he Supreme Court acknowledged in *Witherspoon* that persons who oppose the death penalty were not only sufficiently numerous and distinct in American society, but constituted nearly one-half of the population at the time the *Witherspoon* litigation commenced. [Witherspoon v. Illinois, 391 U.S. 510, 520 at note 16 (1968).] Though more recent studies suggest that less than one-half of the persons in the United States oppose the death penalty, no court has ever held that those who oppose capital punishment do not represent a distinct segment in the population. Even the Supreme Court in *Lockett* seemed to presume that those persons who are excluded during the death qualifying process of a capital case are a distinct group. [Lockett v. Ohio, 438 U.S. 586, 596–97 (1978).]" (footnotes omitted)).

longer represent a fair cross-section of the community, and the public's confidence that the actions of the criminal justice system will reflect its views is reduced.

This argument points to a third, closely related reason for including the right to jury nullification within the ambit of the Sixth Amendment: it guarantees that a jury's decision will truly reflect the moral judgment of society. A crime is an act viewed by society as deserving condemnation,[39] and a guilty verdict in a criminal trial represents society's approval of and participation in that condemnation.[40] The jury represents the common sense judgment of the community and provides the final guarantee that punishment meted out by the criminal justice system actually reflects, in kind and in extent, societal condemnation. In this capacity the jury is necessarily a representative body; it must combine the many disparate elements of the community in order to reflect society's judgment.[41] A jury biased against the exercise of its powers of nullification will not express accurately the moral position of the society it seeks to represent. Consequently, there is no guarantee that its judgments will reflect accurately the moral views of the larger society.

Reading the Sixth Amendment as granting criminal defendants a right to jury nullification is fully consistent with, and implicit in, the Supreme Court's previous treatment of the right to trial by jury. Jury nullification protects defendants from unfair or harsh laws and promotes citizens' faith in the criminal system.[42] Moreover, it ensures that criminal verdicts will truly express the moral condemnation of society.[43] For these reasons jury nullification must be considered an indispensable part of the Sixth Amendment.

Despite these considerations, proponents of death qualified juries oppose recognition of the right to jury nullification on the ground that it allows a single juror to frustrate the will of the legislature.[44] For example, in the context of capital sentencing

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[39] *See, e.g.*, Hart, *supra* note 14, at 405.

[40] *See* Gardner, *Bailey v. Richardson and the Constitution of the United States*, 33 B.U.L. REV. 176, 193 (1953).

[41] *See* Scheflin, *supra* note 20, at 186–87.

[42] *See supra* notes 29–36 and accompanying text.

[43] *See supra* notes 39–41 and accompanying text.

[44] *See* Simson, *Jury Nullification in the American System: A Skeptical View*, 54 TEX. L. REV. 488, 512–13 (1976) ("[W]hile Congress is elected by the people, a jury is a collection of a dozen randomly selected individuals with no constituency but themselves . . . . [I]f the undemocratic possibilities inherent in a nullifying jury are not patent when the jury is considered as a whole, it may be well to recall that it takes not twelve jurors

proceedings, many states make application of the death penalty contingent upon specified jury findings: if the jury answers yes to certain questions of fact, then the court must apply the death penalty; if the jury answers no to any of the questions, or if the jury, for any reason, is unable to answer yes unanimously to any of the factual questions, the defendant receives life imprisonment.[45] Other states ask a jury to consider a variety of aggravating and mitigating circumstances and require the jury or the court to impose the death penalty if the jury finds that the aggravating circumstances outweigh the mitigating ones.[46] Under either procedure, one juror or a jury opposed to the death penalty can choose to ignore the statutory mandate and frustrate the will of the legislature, which has determined that the death penalty should apply in some situations. The right to jury nullification is objected to on this basis.

While the argument that prohibition of death qualified juries improperly frustates the legislative will has some force, it is ultimately unconvincing. In large part, it is based on the notion that legislative power is inviolate: jury nullification is wrong simply because it allows a minority to frustrate the will of the majority. Yet the criminal justice system often operates on the premise that it is appropriate in some instances for one individual or small groups of individuals to check the will of the majority. Prosecutors are given broad discretion to decide whether to prosecute a suspect.[47] Trial judges may interpret the law and decide how it applies, and if a judge's trial decisions result in acquittal of the accused, those decisions are unreviewable.[48]

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but only one to prevent at least temporarily a conviction); *see also* Scheflin & Van Dyke, *supra* note 5, at 91.

[45] *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon 1981 & Supp. 1984), which states:

> (b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:
>
> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

[46] *See, e.g.*, CAL. PENAL CODE § 190.3 (West Supp. 1984); N.J. STAT. ANN. § 2C:11-3 (1982).

[47] *See* Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 4 DUKE L.J. 651 (1976).

[48] *See* Westen & Drubel, *Towards a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 122; *see also* U.S. v. Scott, 437 U.S. 82, 90–91 (1978).

The federal courts interpret the Constitution and therefore have considerable power to overturn acts of Congress.[49] Furthermore, in most cases we do allow a single juror to frustrate the legislature's will:[50] a single juror who believes driving while under the influence is not a serious crime may hang a jury and prevent conviction of a drunk driver; and any jury where members share the same view may acquit the driver without any chance for review. Jury nullification, even in its broadest manifestation, is just one more check on the exercise of government power in our society.

The argument that jury nullification should not be recognized because it limits the legislative will is not ultimately convincing. It rests more on rhetoric than on sound analysis of the reality of our criminal system and the policies that the system should serve. An appreciation of the role that the jury plays in our criminal system suggests that the defendant's right to be tried by a jury not prejudiced against the exercise of its powers of nullification should be recognized by the Court and incorporated into the Sixth Amendment.

III. Jury Nullification under Three State Constitutions

Three states, Georgia,[51] Indiana,[52] and Maryland,[53] have constitutional provisions that provide additional support for recognizing a right to jury nullification.[54] Under each provision the argument for recognition of such a right is straightforward. Each provision entitles a criminal defendant to be tried by a jury that is a judge of the law and of the facts.[55] Because of the jurors' lack of legal training, it is difficult to argue that the jury's judging function duplicates that of the trial judge. Instead, what the jury

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[49] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[50] *See* United States v. Dougherty, 473 F.2d 1113, 1134 (D.C. Cir. 1972). *See generally* Scheflin & Van Dyke, *supra* note 5, at 87.

[51] Ga. Const. art. I, § 1, ¶ 8 ("and the jury in all criminal cases shall be the judges of the law and the facts").

[52] Ind. Const. art. I, § 19 ("In all criminal cases whatever, the jury shall have the right to determine the law and the facts.").

[53] Md. Const. art. 23 ("In the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction.").

[54] *See* Schlefin & Van Dyke, *supra* note 5, at 79–85 (discussing Indiana and Maryland law).

[55] *See* Ga. Const. art. I, § 1. ¶ 8; Ind. Const. art. I § 19; Md. Const. art. 23.

function duplicates that of the trial judge. Instead, what the jury offers is the "common sense judgment of the community."[56] This renders it uniquely qualified to determine whether society intended the criminal law to treat the defendant in the statutorily prescribed manner. A determination that the criminal law should not act in this fashion should lead to a refusal to impose that law, if the integrity of the legal system is to be maintained. Thus, a jury required to act as judge of both law and fact clearly must be free to ignore the requirements of the law.

IV. Death Qualified Juries and the Right to Jury Nullification

The use of death qualified juries to determine the sentence in capital cases deprives a defendant of his right to jury nullification. A death qualified jury is explicitly biased against the exercise of its powers of nullification because the state has been allowed to remove from the jury those individuals most likely to exercise those powers. By excluding a potentially significant element of the population, the state reduces the broad representation thought desirable in a jury and reduces community faith in the criminal system. Moreover, death qualified juries are unable to provide the protection against abuses of government power that is an essential function of all juries. Because the state has been allowed to exclude for cause all veniremen unequivocally opposed to the death penalty, the jury will rarely, if ever, exercise its power to refuse to sentence a defendant to death because of opposition to capital punishment. In addition, without the excluded veniremen, a jury is deprived of those individuals most likely to be effective advocates against imposition of the death penalty. The jury will therefore be less likely to exercise its narrower powers of nullification to interpret the law favorably to the defendant. Finally, the death qualified jury will not necessarily express the appropriate degree of societal condemnation of the criminal act because those members of society who think no act is so damnable as to warrant imposition of capital punishment have been systematically excluded. For all of these reasons death qualification violates the right to jury nullification.

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[56] Taylor v. Louisiana, 419 U.S. 522, 530 (1975).

The Supreme Court's explicit approval of the use of death qualified juries to determine a defendant's guilt or innocence in a capital case[57] does not alter this conclusion. The state's interest in using a death qualified jury to determine guilt or innocence is much greater than its interest in using such a jury to determine a defendant's sentence. In the former case, a juror opposed to the death penalty could prevent a jury from returning a guilty verdict, and a jury opposed to the death penalty could acquit a guilty defendant outright. The substantive result of the trial would hinge upon the juror's view of the penalty that might be imposed. In contrast, in the sentencing proceeding the juror's opposition to the death penalty will affect only the penalty judgment itself. The defendant's guilt or innocence has already been decided, so the sentencing decision will be a choice between life imprisonment and death, not innocence or guilt.

In addition, both society and the individual have an extraordinarily high stake in the sentencing decision in a capital case. The decision to take a person's life is the most extreme exercise of government power. Certainly it deserves all of the safeguards, whether on judicial authority or on legislative power, that society can devise. The right to jury nullification provides such a safeguard. The death qualified jury violates it.

V. Conclusion

The Supreme Court's treatment of the right to trial by jury lays the precedential foundation for recognizing a defendant's Sixth Amendment right to trial by a jury not unfairly prejudiced against the exercise of its powers of nullification.[58] The Court's opinions in the area also suggest three policy reasons for recognizing such a right: the right is necessary as a check on legislative power; it ensures full community participation in and support of the criminal justice system; and it guarantees that pronouncements of the jury will reflect as closely as possible the moral condemnation of the community. Additional grounds for the recognition of this right can be found in at least three state constitutions.[59]

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[57] Lockett v. Ohio, 438 U.S. 586, 596 (1978); *see* Colussi, *supra* note 1, at 606–08.

[58] *See* Taylor v. Louisiana, 419 U.S. 522 (1975); Duncan v. Louisiana, 391 U.S. 145 (1968).

[59] *See supra* notes 51–55 and accompanying text.

The use of death qualified juries to determine sentence in a capital case violates the right to jury nullification by prejudicing the jury against the exercise of its powers of nullification. The United States Supreme Court should recognize that this use of death qualified juries violates a principle of jury nullification that is embodied in the Sixth Amendment.

RECENT PUBLICATIONS

WHAT DO UNIONS DO? By *Richard B. Freeman and James L. Medoff.* New York: Basic Books, 1984. Pp. 293, notes, index. $22.95 cloth.

A great deal of ink has been spilled in various efforts to evaluate the economic and political impact of labor unions in the United States. Economists have abstractly theorized about what are largely empirical questions, and partisan commentators have focused too narrowly on the arguments favoring their positions. Many conservative economists have portrayed unions as monopoly actors that raise wages indiscriminately and damage both the economy and unionized firms, while proponents of unions have seen only the positive effects of unions. Richard Freeman and James Medoff, both professors of economics at Harvard University, breathe new life into this tired debate in *What Do Unions Do?* Armed with both a tremendous body of empirical data and rigorous statistical analysis, Freeman and Medoff take a hard look at American unions. They conclude that while "there is some truth to both sides of the debate," (p. 246) "[o]n balance, unionization appears to improve rather than to harm the social and economic system" (p. 19). They argue that unions have "two faces." One is a "monopoly" face, which raises wages above competitive levels and introduces harmful economic distortions (pp. 6–7). The other face is that of a "collective voice," whereby unions improve communication between workers and management and thus accommodate competing interests (pp. 7–11). By recognizing and analyzing the collective voice face, the authors have produced an alternative to the predominantly negative views of American unionism that many economists have propounded.

The most striking aspect of *What Do Unions Do?* is the authoritative empirical evidence that the authors have marshalled. Each conclusion is assiduously documented by a number of studies, usually involving large samples and spanning long time periods. The authors note that "the computerized data revolution has provided economists with massive bodies of information on thousands of individuals and firms and thus has yielded more sophisticated and detailed analyses of union wage effects" (p. 44). This wealth of data has enabled the authors to compare "union and nonunion workers with similar demo-

graphic characteristics working in the same industry, occupation and area" and to impose similar controls on union and nonunion companies (p. 44). In addition, the authors frequently use a number of different types of studies to check their findings. They analyze three measures of the impact of the union on employee turnover including comparisons of "the proportion of union and nonunion workers who report quitting their jobs," "the average quit rate reported by establishments in industries that are heavily unionized with that in industries that are lightly unionized," and "the number of years union and nonunion workers remain with the same firm" (p. 94).

The authors methodically consider the effects of unions in a number of areas, and in some ways the book resembles some fifteen separate essays. The first of these essays deals with perhaps the most widely debated effect of unions—their impact on compensation. Freeman and Medoff conclude that "[i]n the 1970's, the archetypical union wage effect was on the order of 20 to 30 percent" (p. 46) and that unions have an even larger positive impact on the provision of fringe benefits such as pensions; life, accident, and health insurance; and vacation and holiday pay. These effects are especially notable, given the authors' finding that nonunion companies frequently improve their conditions and wages in order to avoid having their workers unionize. While the authors acknowledge that these gains "cause economic inefficiency" and "reduce national output," they find that these losses are "quite modest" on balance (p. 57). Confronted with allegations that the wage effect has a devastating impact on the economy, they respond that "empirical estimates and historical experience have shown such fears to be groundless" (p. 43).

While the authors are usually highly attuned to the role of the union voice in the workplace, they do make some significant oversights. In discussing which fringe benefits are provided in union and nonunion settings, the authors identify the opportunity for stock options as being "paternalistic" (p. 66). This categorization seems problematic: how are workers being treated in a condescending manner by being given part ownership of their company? Arguably, stock deals (such as the one entered into by Eastern Airlines and its unions) can give the workers a greater say in their future. Similarly, the authors address little attention to contracts placing union representatives on corporate

boards of directors. They do not acknowledge the potential of these devices to expand greatly the voice of workers on their jobs.

Unions are frequently accused of being organizations composed of relatively privileged workers and of becoming increasingly hierarchical. Freeman and Medoff, however, find that "unionism tends to be in general a powerful force for equalization of earnings in the economy" (p. 78). This conclusion is supported by empirical evidence that unions have curbed the arbitrary exercise of authority by supervisors, equalized wages within institutions, standardized rates within sectors, and reduced the gap between white collar and blue collar workers.

The "voice" side of unionism becomes most clear in the discussion of turnover. The authors note that unionism "changes the employment relationship from a casual dating game, in which people look elsewhere at the first serious problem, to a more permanent 'marriage,' in which they seek to resolve disputes through discussion and negotiation" (p. 94). While workers in a nonunion setting usually have no serious alternative to undesirable conditions other than to leave, "the union constitutes a source of worker power, diluting managerial authority and offering members protection through both the 'industrial jurisprudence' system, under which many workplace decisions are based on rules (such as seniority) instead of supervisory judgment or whim, and the grievance and arbitration system . . . " (p. 11). Through a variety of controlled studies the authors demonstrate that it is this voice effect, rather than the monopoly effect of raising wages, that is primarily responsible for the 31% to 65% lower quit rates under unionism (pp. 94–95).

The authors also analyze the voice effect through surveys of employee satisfaction. They note that while union workers are more likely to express dissatisfaction with their jobs, they tend to be "less willing than similarly paid nonunion workers to change jobs and are more convinced that it is hard to find jobs as good as their current jobs" (p. 136). After analyzing a variety of different surveys and measures, the authors conclude that the voice effect explains much of this anomaly: "[d]emocratic politics thrives on individuals expressing themselves loudly and dictatorial regimes suppress voice; the difference in expressed complaints has little if anything to do with actual objective conditions" (p. 140). In other words, the existence of the union

at a firm permits the workers to have greater freedom in expressing discontent in general.

Despite negative stories about unions fighting technological advances and closing down construction sites because of labor specificity, Freeman and Medoff demonstrate that unions improve productivity in the economy as a whole (p. 163). Unions improve productivity by reducing turnover, running apprenticeship programs, and stimulating the introduction of more rational personnel policies. The authors argue that the key variable in the productivity equation is management's response to the union. They cite studies that demonstrate that many companies reduce organizational slack and significantly improve management when confronted with a union, while others react spitefully and fight the union every step of the way (pp. 165, 176). In nearly all instances, in the former case productivity improves and in the latter case productivity declines.

The general increase in productivity attributable to unions does not outweigh the increase in wages, however, and the authors conclude that unions tend to decrease the profits of their companies. This effect is concentrated in less competitive areas, and thus has profound redistributive effects. The aggregate data reveals that "unionism has no impact on the profitability of competitive firms . . . . What unions do is to reduce the exceedingly high levels of profitability in highly concentrated industries toward normal competitive levels. In these calculations, the union profit effect appears to take the form of a reduction of monopoly profits" (p. 186). While the companies involved may not appreciate this service, it is possible to argue that shifting excess profits from noncompetitive firms to their workers is in the public interest. As the authors quip, "[w]hat is good for society at large is not necessarily good for GM" (p. 248).

The authors do not limit their work entirely to economic matters and provide a concise description of the political effects of unions. Their analysis concludes that "unions have been unable to win the legislation most important to them as institutions and to their monopoly power" (p. 192), but that unions have had success in promoting broader pieces of "social" legislation such as the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Occupational Safety and Health Act of 1971 (p. 192). The authors advance two explanations for this state of affairs. First, it is easier for unions to form coalitions with other groups when supporting broad social objectives than

when they are advancing narrow union interests. Second, the authors find that "general social legislation rarely invokes strong business opposition" (p. 201).

In answering the title's question, "What do unions do?," the authors address criticisms of the internal workings of labor unions. First, they find unions to be highly democratic organizations, at least at the level of the union local. This finding is supported by evidence that a high proportion of members participate in union activities, that many members run for office, and that many more vote (p. 208). In addition, surveys show high levels of satisfaction with internal union democracy and a high turnover in union local elections (p. 211). The authors also find that the incidence and importance of union corruption is exaggerated. While conceding that there are a number of corrupt unions, they conclude that fewer than one percent of union locals are corrupt and that these corrupt locals tend to be concentrated in a handful of industries (pp. 213–17). Finally, the authors demonstrate that corruption is even more prevalent in corporations, thus putting union corruption in perspective (p. 215).

After presenting this generally favorable picture of American unionism, the authors are disappointed to note that a declining percentage of the economy is unionized. Their data places some of the blame for this trend on decreased union organizing efforts, but the primary factor has been increased managerial opposition. This opposition has taken the form of anti-union consultants, delaying tactics, and illegal discharges in a startling number of cases (p. 223). Their data reveals that "one in twenty workers who favored the union [in 1980 organizing campaigns] got fired" (p. 232). Freeman and Medoff conclude that the inadequate sanctions provided by the National Labor Relations Act have failed to deter such illegal tactics and are in large part responsible for the decline of unions (p. 233). They view this decline as unfortunate, and urge reforms in American labor law to halt it.

What Do Unions Do? is a significant step in the scholarly debate about unions. Its conclusions are likely to generate debate and controversy for years to come. Clearly written and impressively researched, it is valuable to the student, the scholar, and anyone interested in this area of public policy.

F. Paul Bland

INSIDE THE JURY. By *Reid Hastie, Steven D. Penrod, and Nancy Pennington.* Cambridge, Mass.: Harvard University Press, 1983. Pp. viii, 277, notes, index. $25.00 cloth.

The Sixth Amendment to the United States Constitution guarantees an accused person the right to a "speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." Because this provision prescribes only minimal standards for decision rules or selection procedures, considerable variety in jury procedures for criminal and civil trials exists among the states. The authors of *Inside the Jury* use the results of a psychological study to conclude that the quality of jury deliberation and juror satisfaction is greater under a unanimous rather than a majority decision rule.

Inside the Jury explains and discusses the results of a study conducted by the authors to evaluate jury performance under different decision rule requirements. The authors have isolated five empirically measurable characteristics of effective jury performance: (1) representing a cross section of the community, (2) expressing a variety of viewpoints, (3) performing accurate and thorough factfinding, (4) remembering and properly applying the judge's instructions of the law, and (5) rendering accurate or proper verdicts (p. 7). The authors then conducted a study to measure the effect that the prevailing decision rule has on characteristics (2)–(5) during deliberation.

In this study, subject jurors were obtained from the Superior Court jury pools in three counties in Massachusetts. After a brief voir dire, the mock jurors were taken to a courtroom and shown a videotaped re-enactment of an actual murder trial. After an appropriate charge by a judge, one third of the juries were directed to return a verdict under a unanimous decision rule, whereby all twelve jurors had to agree on a verdict; one third were directed to return a verdict under a majority decision rule whereby ten of the twelve jurors were required to agree on a verdict; and one third were directed to return a verdict under a different majority decision rule whereby eight of the twelve jurors were required to agree on a verdict.

The deliberations of the mock jury were videotaped, and jurors completed questionnaires both before and after deliberation (pp. 51–52).

The unanimous rule juries were found to discuss both evidence and law more thoroughly and for a longer period of time

than the majority rule juries (p. 76). The researchers found that dissenting viewpoints, or views favored by a small number of jurors, were at a relative disadvantage in majority rule juries (p. 228). In the unanimous rule juries, a substantial number of important events, including error corrections, references to the standard of proof, and requests for additional instruction from the trial judge, were found to occur during deliberation after the largest faction had reached a size of eight members (p. 98). This deliberation would not occur under a majority decision rule. Majority factions with eight members constituting a quorum large enough to carry the verdict were on several occasions found to hang or reverse themselves under a unanimous rule (p. 98).

The effect of decision rules on verdict accuracy was not dramatically demonstrated in this study, but it is significant that the first degree murder verdict was rendered only by nonunanimous juries. The researchers interpreted these verdicts as errors by the juries because such findings would require truly exceptional consideration of the evidence presented (p. 228). It is interesting to note that five of the unanimous rule juries started deliberation with four or more jurors favoring first degree murder verdicts, but none of these juries rendered that verdict (p. 228). Eleven of the majority rule juries started with four or more jurors favoring first degree murder, and four of these juries rendered that verdict (p. 228).

These results have interesting implications for public policymakers. The authors conclude that a unanimous rule jury is preferable to a majority rule jury, because of the increased quality of deliberation associated with a unanimous decision and the probability that public respect for the jury system is diminished by the existence of minority factions and "holdout" jurors characteristic of majority rule juries.

Although they advocate a unanimous verdict requirement, the authors rightfully acknowledge the increased economic costs associated with the unanimous decision rule (p. 229). Deliberation under majority rule is more efficient; it is shorter, more direct, and unequivocal. Furthermore, use of the majority rule could decrease the drain on societal resources because it is less likely to result in deadlocked juries.

Nonetheless, perhaps policymakers should consider deadlocked unanimous juries as a sign that the jury system is effectively functioning (p. 166). The Sixth Amendment guarantee to

trial by jury was not designed to promote efficiency, but to effectuate justice. Forcing juries to deliberate thoroughly and to reach a consensus may occasionally result in deadlock because the answer, for whatever reason, is not discernible. It is necessary to acknowledge the possibility of circumstances where the legitimate concerns of a minority faction would be overruled. In such a situation, a majority vote would be an uncontrolled and inadequate means of administering justice. Furthermore, adhering to a policy that values efficiency over fairness may have an adverse impact on the credibility of the court system.

Based on the results of the study, the authors make some proposals that would increase the accuracy of jury verdicts under either majority or unanimous decision rules. They suggest that providing the jury with a written transcript, written summary, or audiotaped recording of the final charge would increase jury efficiency and accuracy and would remedy needless confusion (p. 231). The authors also recommend that the jury be cautioned to begin deliberation with a review of the evidence and to avoid early or frequent polling during deliberation, because high rates of jury voting are associated with the emergence of tight knit, defensive factions that do not devote all of their energies to an open-minded search for truth (p. 233).

Inside the Jury offers noteworthy and fascinating ideas and conclusions for anyone concerned with jury function and performance. Overall, the book provides a careful and thorough presentation of a psychological study. The explication of study methods and results can be repetitive and distracting. Nonetheless, the latter part of the book, which focuses on the legal implications of the study, is clear, concise, and thought provoking. But the reader must be willing to delve into behavioral science research methodology in order to appreciate the authors' results and conclusions.

Susan Apel

TAX INCENTIVES AND ECONOMIC GROWTH. By *Barry P. Bosworth.* Washington, D.C.: The Brookings Institute, 1984. Pp. viii, 208, notes, index. $26.95 cloth, $9.95 paper.

Much of the economic research that Barry Bosworth discusses in *Tax Incentives and Economic Growth* can be described as inconclusive and uncertain. Indeed, the overall bottomline of Bosworth's book can be described in much the same way.

The author's work is a response to the current supply-siders' contention that high taxes caused the sharp deterioration in America's economic growth during the seventies by destroying the incentives for saving, investment, and work. Bosworth explains that advocates of supply-side economics believe that "[t]here is a very large response by supply (capital and labor) to changes in relative prices" (p. 16), where the price of capital is the after-tax rate of return on saving, and the price of labor is the after-tax wage rate. According to Bosworth, supply-siders contend that a decrease in taxes will increase the supply of both capital and labor and thereby cause increased entrepreneurial innovation and a greater intensity of work effort (p. 16). Bosworth examines the supply-side school of thought and discusses whether a reduction in taxes could in fact cause the economic growth that supply-side proponents see as inevitable.

The author has structured the book as he might an economics textbook. Each chapter deals with a different economic relationship from both theoretical and empirical perspectives. Bosworth begins by laying out the theories of different macroeconomic schools of thought that concern themselves with government policies and economic growth. He does a good job of identifying the objectives and distinguishing the concerns and proposed solutions of supply-siders from those of other economists, most notably the Keynesians (p. 19). The Keynesians advocate the need for government intervention through the combined use of fiscal and monetary policies in order to set demand at a level consistent with the full utilization of available resources; they have provided the theoretical underpinning of the economic policy of the United States government for most of this century (pp. 3–5). Bosworth explains that "[t]he disagreements begin at the most basic level of accounting for past economic growth" (p. 19). Additionally, he states, there are "[s]ubstantial disagreements about the importance of relative prices as incentives affecting the growth of capital and labor" (p. 20).

After laying out the parameters of the debate, Bosworth launches into a series of discussions of the various issues, including the relationship between capital formation and productivity growth (p. 23); saving and private capital formation (p. 59); and investment demand and its relation to saving (p. 97). Bosworth proceeds through his comparisons against the backdrop of the supply-side argument that a reduction in taxes would

cause an increase in savings, a subsequent decrease in interest rates, a responsive increase in capital formation, and ultimately a rise in economic growth. Bosworth supplements the theoretical discussion with an abundance of empirical data and analysis.

The book has three major problems. First, it lacks focus. It leaves the reader without any sense of direction or sense of the author's objective. Bosworth compiles and rehashes material already available on the topics he discusses. Nowhere in the book does the reader find a central theme or idea that Bosworth can call his own. Second, the book is inconclusive. Bosworth completes his work with vague policy recommendations. After plodding through almost two hundred pages of material, the reader finds comments such as "Tax policy has an important role to play, but it must be evaluated within the confines of an overall fiscal-monetary strategy" (p. 203). The problems discussed could provide the basis for new sets of questions concerning the direction that government economic policy should take, but Bosworth does not use the opportunity to develop these ideas. Finally, the book is overly technical for the lay reader. Bosworth writes for the student of economics instead of the individual without a substantial background in this area.

Bosworth's work is an exhaustive, though at times confusing, discussion of supply-side arguments and issues. It provides another resource for the individual who is versed in economics, but fails to provide a new direction in government economic and tax policy.

Edward Lopez

BRANDEIS AND FRANKFURTER. By *Leonard Baker*. New York, N.Y.: Harper and Row, 1984. Pp. 493, bibliography, notes, index. $25.00 cloth.

Those who advocate the idea that lawyers should spend their lives working in the public interest will often cite the lives of Louis Brandeis and Felix Frankfurter. Both men had illustrious careers of public service which were capped by long tenures on the United States Supreme Court. In *Brandeis and Frankfurter*, Leonard Baker examines the lives and political times of these two Justices. Although the book is a well-documented, detailed account of what these Justices accomplished, it does not help us to understand why Brandeis and Frankfurter acted in the ways that they did.

The reader may ask why these Justices should be considered together. They did not serve together on the Court, and they grew up separated by a generation in which the prevailing legal and political ideas changed drastically. Further, historians have regarded the two Justices quite differently—Brandeis as a liberal and a civil libertarian, Frankfurter as the great advocate of judicial restraint. Baker, however, offers good reasons for considering the Justices together. First, they were friends and collaborated on a number of political and legal projects (p. 45). Second, their attitudes toward the proper roles of the lawyer and the judge within society were quite similar (p. 135). Baker identifies three ideas that were important to both Brandeis and Frankfurter: judicial restraint, pragmatism, and civic duty (pp. 15, 40, 135). He uses these connections between the two Justices to challenge implicitly the differences in the way recent writers have viewed Brandeis and Frankfurter.

Both Justices claimed allegiance to James Bradley Thayer's ideas about judicial restraint. Thayer argued that the judiciary should be hesitant to overturn the decisions of the legislatures, because of the legislatures' greater political accountability and the inevitable uncertainty about the proper interpretation of the Constitution. Brandeis argued for judicial restraint at a time when the Supreme Court was overturning social legislation (for example, statutes setting maximum hours for workers) under the Contract Clause and Due Process Clauses of the Constitution. Frankfurter argued for restraint when the Court was using the First Amendment as its weapon to overturn legislation.

Baker asserts that both men's belief in judicial restraint seemed to be based on a strong, if occasionally naive, faith in the democratic system (pp. 35, 402). Both Justices believed that an informed electorate would be able to direct the legislature and would use its power to enact just and constitutional laws. This faith in democracy can be seen in the way advocate Brandeis lobbied for legislative reform by giving public speeches and by writing newspaper editorials. This faith can also be seen in many of Justice Frankfurter's dissents, especially his dissent in *Baker v. Carr*.[1] In *Baker*, Frankfurter assumes that voters will be able to direct the actions of legislators in apportioning electoral districts, even though those legislators have entrenched themselves through the gerrymandering of those districts.

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[1] 369 U.S. 186 (1962).

Baker explores the pragmatic side of the Justices and argues that the actions of both Brandeis and Frankfurter expressed Justice Oliver Wendell Holmes's belief that the life of the law has been, and should be, experience (pp. 13, 433). Both men were friends and students of Holmes. The briefs, and later the opinions, of both men often included long factual descriptions and even longer appendices of empirical data. Brandeis used this empirical approach to argue for the constitutionality of social legislation at a time when empirical data was considered irrelevant to such questions. Brandeis and Frankfurter argued that only through practical knowledge and experience could judges determine the "reasonableness" of state actions and thus the constitutionality of those actions.

Baker also writes that Brandeis and Frankfurter both felt an obligation to use their legal skills to work for the public interest (p. 45). Brandeis is considered to have been the first "public interest lawyer." His contemporaries could not understand his practices—refusing to take a fee for services provided and working for the public interest rather than for the interests of individual clients. When Frankfurter was a student at Harvard Law School, he heard advocate Brandeis speak about the need for public interest lawyers. Frankfurter later found a variety of ways to serve his vision of the public interest—working for government agencies, drafting New Deal legislation, working in political campaigns, writing editorials for the *New Republic*, as well as arguing legal cases.

Baker goes on to explain that Brandeis gave financial assistance to Frankfurter in the form of yearly cash gifts so that Frankfurter might be able to continue his public activities (p. 241). Brandeis had been a partner at a thriving law firm before he started his public interest work. Frankfurter, on the other hand, began working for the government shortly after graduating from law school and rarely had more than a professor's salary to support his extensive public activities.

Baker is at his best when he describes the activities of Brandeis and Frankfurter in political controversies. The reader gets a good sense of the strategies, the maneuvering, and the shifting alliances that were involved in such battles. Baker effectively uses short digressions to show us the social context of the controversies. He gives the reader quick introductions to Zionism, Walter Lippmann, Roosevelt's court-packing plan, the

Sacco-Vanzetti trial, and many other historical movements, incidents, and characters (pp. 159, 256, 323).

While Baker gives the reader a good description of Brandeis and Frankfurter as public figures and political actors, the reader does not gain insight into the two men's personalities. Baker gives us few hints as to the desires, dreams, and fears that caused the Justices to act in the ways that they did. Because he fails to explore the personal or pyschological sides of the Justices, Baker is unable to explain instances or episodes of apparent irrationality, such as Frankfurter's inconsistent application of his own ideas about judicial restraint and Brandeis's ambivalent attitudes towards his ethnic heritage.

Baker avoids answering some of the most basic questions about the Justices's lives: why Brandeis, in the middle of his career, suddenly turned to public interest work, and why Frankfurter became such a strong advocate of judicial restraint. He offers some possible explanatory factors, such as Brandeis's reaction to the Homestead Strike and his association with progressive individuals (p. 31), and Frankfurter's immigrant background (p. 395). But Baker's explanations are generally inadequate, as well as unsatisfying, because many lawyers have had backgrounds similar to those of Brandeis and Frankfurter but did not share their attitudes or achieve their influence.

One reason to read the biographies of great people is to learn of the qualities that allowed them to overcome their weaknesses and to achieve greatness. The reader looks for knowledge of human nature through the intensive study of a single individual. Baker offers great detail in reporting, but offers much less in conclusions that readers might draw from those details.

Brandeis and Frankfurter presents a comparison of two of this century's great legal figures. The information that the book presents may cause some to reconsider their beliefs about the proper role of lawyers within society, as well as to reconsider their evaluations of Brandeis and Frankfurter themselves. The reader gains a great deal in knowledge, but does not gain the wisdom that such books should offer.

Brian S. Bix