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# POLICY ESSAY

## DEREGULATION AND ACCESS TO THE PAYMENT SYSTEM

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The market for financial services in the United States has long been characterized by a series of federally-imposed geographic restrictions and service-market divisions. Congress enacted these restrictions to prevent both banks and their holding companies from engaging in certain business activities and to restrict their ability to expand across state lines. Because such restrictions have substantial anti-competitive effects, and are not necessary to protect the safety and soundness of depository institutions themselves, this Policy Essay proposes the repeal of current regulations of the activities of bank holding companies. At the same time, the payment system—the various arrangements for transferring value, other than cash, between two parties—must be protected from the unacceptable risks of deregulation by prohibiting unregulated depository institution affiliates from processing payments through commonly owned depository institutions.

### I. COMPETITION AND UNIVERSAL BANKING

Eliminating all legally imposed market divisions would be appropriate if the only goal was to increase competition. We would replace our system of specialized financial institutions with a universal banking system in which all banks have unlimited powers and are regulated for safety and soundness.[1] One could even eliminate all licensing and regulation and adopt a free banking system such as that in 19th century Scotland.[2]

Adoption of a universal banking system would require the repeal of all legally imposed geographic market divisions that currently prevent full interstate and intrastate banking. This

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[1] The quintessential example of a universal banking system is that of the Federal Republic of Germany. *See* S. CROSSICK & M. LINDSEY, EUROPEAN BANKING LAW: AN ANALYSIS OF COMMUNITY AND MEMBER STATE LEGISLATION 31–34 (1983).

[2] *See generally* M. FRY, BANKING DEREGULATION: THE SCOTTISH EXAMPLE (1985).

repeal could be accomplished by a federal law (a reverse Douglas Amendment[3]) prohibiting states from erecting intrastate or interstate market barriers. In addition, product market divisions would be abolished, not only as between depository institutions—the market division between thrifts and banks[4] would disappear—but also as between depository institutions and other financial institutions such as securities firms and insurance companies. Ultimately, even the divisions between financial institutions and all other private firms would be eliminated. In sum, we would dismantle much of the Bank Holding Company Act,[5] all of the Glass-Steagall Act,[6] and remove other existing restrictions on the powers of national and state banks.[7]

## II. The Impact of Universal Banking on the Safety and Soundness of Financial Institutions

A strong competition policy would have two important consequences. First, states would be less able to structure their own state markets. Although reduced state protectionism may be desirable, we may still wish to avoid delivering such a blow to the dual banking system—the system of overlapping federal

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[3] The Douglas Amendment to the Bank Holding Company Act prevents the Federal Reserve Board from permitting the acquisition of an out-of-state bank by a bank holding company "unless the acquisition . . . is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication." 12 U.S.C. § 1842(d) (1982). In Northeast Bancorp, Inc. v. Board of Governors of the Fed. Reserve Sys., 105 S. Ct. 2545 (1985), the Supreme Court held that this provision permits states to admit into their markets, if they so desire, only the bank holding companies of some states while simultaneously excluding those of other states.

[4] Savings and loan associations, saving banks and credit unions are commonly referred to as thrifts. When subjected to federal regulation (either because of federal chartering or federal insurance) thrifts have traditionally been the object of portfolio restrictions and powers limitations that are different from those imposed on commercial banks. Nevertheless, the passage of the Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (codified in scattered sections of 12 & 15 U.S.C.), began a welcome movement toward the elimination of regulatory inconsistencies and barriers between thrifts and commercial banks. Thus, for example, thrifts may now offer noninterest-bearing demand deposit accounts to parties with whom they have certain business relationships, and may make commercial loans up to 10% of their assets and nonresidential real property loans up to 40% of their assets. Moreover, the Act allowed both thrifts and commercial banks to offer money market deposit accounts.

[5] 12 U.S.C. §§ 1841–1850 (1982).

[6] Banking Act of 1933, 12 U.S.C. §§ 24, 377–378 (1982).

[7] *See, e.g.*, 12 U.S.C. §§ 24 (Seventh), 335 (1982) (restricting banks' ability to underwrite and deal in securities).

and state regulation of banking[8]—and the values of federalism which underlie it.

More important, an unwavering commitment to competition could have significant adverse consequences for the safety and soundness of our financial institutions. A universal banking system might well entail more risky business activity. It will certainly entail more competition. Both conditions could increase bank failures and thereby raise costs to the de jure and de facto insurers, the Federal Deposit Insurance Corporation (FDIC)[9] and the Federal Reserve Board (the Fed),[10] and ultimately to the public. Deposit insurance reform[11] might impose greater

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[8] The interaction of federal and state authority in the banking regulation field is very complex, but at least two points should be emphasized. The first is that banks are regulated at two levels. The primary level of regulation is that of the state or federal chartering authority. A secondary level of exclusively federal regulation exists for Federal Deposit Insurance Corporation (FDIC) insured state-chartered banks and for state-chartered banks which are members of the Federal Reserve system. The Federal Reserve Board regulates state banks that are members of the Federal Reserve System and the FDIC regulates all other federally insured banks. The second point is that banks can *choose* the administrative structure under which they will operate, either when they seek their initial charters, or subsequently by deciding to change one charter for another or by abandoning Federal Reserve membership or FDIC insurance. This ability to choose regulatory masters sometimes has been said to produce competition in laxity among regulators. *See* K. Scott, *The Dual Banking System: A Model of Competition in Regulation*, 30 STAN. L. REV. 1, 5–13 (1977).

[9] The FDIC is an independent agency of the federal government. It insures deposits placed in qualifying depository institutions up to a maximum of $100,000 per depositor acting in the same capacity and in the same right. 12 U.S.C. §§ 1728, 1821(a), 1813(m) (1982). The FDIC is also empowered to facilitate the merger of a weak or failing bank into a sound one. By using this authority—commonly referred to as a purchase and assumption—the FDIC can acquire the bad assets of a failing bank for cash, thus enabling the acquiring bank to obtain sound assets equal to the liabilities it assumes. *See* 12 U.S.C. § 1823 (1982). When the FDIC resorts to this power to aid a failing bank, all depositors are effectively protected in *full amount* of their deposits. *See generally* C. GOLEMBE & D. HOLLAND, FEDERAL REGULATION OF BANKING, 1983–1984, at 41–59 (1983). The FDIC attempts to handle most bank failures by merging the failing institution into a healthy one. *See* FDIC, 1984 ANNUAL REPORT 6 (1985).

[10] The Federal Reserve functions in practice as the lender of last resort, extending emergency credit assistance to institutions facing liquidity crises. Federal Reserve assistance of this type is extended through the discount window and must be fully secured by United States government securities, or by collateral satisfactory to the lending Reserve Bank. *See* 12 U.S.C. §§ 347, 347(b) (1982); 12 C.F.R. § 201.4(b) (1984). *See generally* Parthemos & Varvel, *The Discount Window* in FEDERAL RESERVE BANK OF RICHMOND, INSTRUMENTS OF THE MONEY MARKET 59, 63–65 (5th ed. 1981) (discussing borrowing from the discount window).

[11] Pursuant to the Garn-St Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469, the three federal deposit insurance agencies—the FDIC, the Federal Savings and Loan Insurance Corporation (FSLIC), and the National Credit Union Insurance Corporation (FCUIC)—have completed studies of the current system of bank deposit insurance, its impact on the structure and operations of depository institutions, and the feasibility of implementing specified changes including risk-based premiums. *See* Wall, *Deposit Insurance Reform: The Insuring Agencies' Proposals*,

discipline, but the basic problem would remain significant. Completing the deregulation of bank liabilities is another potential solution. Having disposed of price controls on liabilities by phasing out Regulation Q,[12] we could go on to eliminate government guarantees of liabilities—federal deposit insurance and Federal Reserve lender of last resort facilities.

A system without government guarantees could well lead, however, to financial panics and runs on banks even in a strong economy. The recent Ohio thrift experience[13] could be replicated on a nationwide basis. The public has become dependent on government guarantees, and there is virtually no political chance of their removal. Whether they are necessary for a strong financial system in the long run is a question that deserves further study elsewhere.

Because government guarantees of liabilities will be with us for some time, we must find a way to increase competition for financial services without imposing unacceptable risks on the public guarantors; the matter cannot be left only to private shareholders and creditors. This Policy Essay proceeds to examine this issue for product markets, leaving discussion of geographic markets to another day.

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FED. RESERVE BANK ATLANTA ECON. REV., Jan. 1984, at 43, 44–46. The FDIC has recently proposed that risky banks should pay higher premiums than non-risky banks. Currently all FDIC insured banks pay a premium of one twelfth of one percent on domestic deposits. 12 U.S.C. § 1817(b)(1). The FDIC proposes an increase in this assessment of up to two twelfths of one percent for risky banks. This approach would provide a significant financial incentive for banks to avoid excessive risk taking and to correct their problems promptly. Statement of William Seidman, Chairman, FDIC, before the Senate Comm. on Banking, Housing, and Urban Affairs, 99th Congress, 2d Sess., March 13, 1986; *reprinted in* Am. Banker, March 20, 1986, at 1, col. 1, 19, col. 1.

[12] Regulation Q is issued under the authority of § 19 of the Federal Reserve Act, 12 U.S.C. § 371 (1982), and § 7 of the International Banking Act of 1978, 12 U.S.C. § 3105 (1982). It governs the payment of interest on deposits held by member banks and by United States branches and agencies of foreign banks with worldwide consolidated assets in excess of $1 billion. 12 C.F.R. pt. 217 (1984). Similar regulations govern the payment of interest by other depository institutions. *Cf.* 12 C.F.R. pt. 329 (1984) (payment of interest by insured banks); 12 C.F.R. pt. 526 (1984) (payment of interest by savings and loan associations). The Depository Institutions Deregulation Act of 1980, Pub. L. No. 96-221 tit. II, §§ 204–205, 94 Stat. 142, 143, *codified at* 12 U.S.C. §§ 3503–3504 (1982), provides for the orderly phaseout of interest rate ceilings over a six-year period, which concludes this year.

[13] *See generally One Ohio S&L Fully Resumes Its Operations*, Wall St. J., Mar. 22, 1985, at 4, col. 1; *Rescue of Ohio's Ailing S&Ls Expected to Cost State More than $200 Million*, Wall St. J., Apr. 22, 1985, at 8, col. 1; *See also Maryland Panic Subsides After Caps Imposed*, Am. Banker, May 16, 1985, at 1, col. 4.

## III. A BLUEPRINT FOR REFORM

### A. *Regulate Depository Institutions*

We need to place limits on risk-taking within banks or any other institutions that take deposits and therefore enjoy either de jure or de facto insurance. The successful operation of these limits requires effective supervision and examination of such deposit-taking institutions. Although it is wrong to assume that certain activities are inherently riskier than others[14]—underwriting IBM stock is less risky than lending to Mexico—it may be difficult for regulators to judge the riskiness of activities that are unfamiliar to them. This is particularly true given the difficulties regulatory agencies have had judging the riskiness of such traditional bank activities as commercial lending. In the immediate future, therefore, we should limit bank activities to areas approved by regulators; over time these areas may evolve and expand. These limits should also apply to state banks because federal insurers are at risk for most state bank failures.

### B. *Subsidiaries of Depository Institutions Should Be Regulated Like Their Parents*

Limitations on bank activities should also apply to activities of all direct or indirect subsidiaries[15] of banks because parent banks are directly at risk for the failure of their subsidiaries. Under present law, national bank activities are properly controlled: national banks cannot do anything more in an operating subsidiary than they can do in the bank.[16] Some states, however,

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[14] *See* Note, *Restrictions of Bank Underwriting of Corporate Securities: A Proposal For More Permissive Regulation*, 97 HARV. L. REV. 720, 727 (1984) (criticizing underwriting restrictions for "assuming that underwriting is uniquely and uncontrollably risky").

[15] As defined in Appendix A.

[16] 12 C.F.R. § 5.34(d)(2) ("Unless otherwise provided by statute or regulation, all provisions of Federal banking laws and regulations applicable to the operations of the parent bank shall be equally applicable to the operations of its operating subsidiaries."). These operating subsidiaries are creatures of the regulatory process, not of statute, and their existence is based on the common sense notion that national banks should be able to exercise their powers through a separately incorporated entity subject to the Comptroller of the Currency's supervision if they find it convenient or expedient to do so. *See* Glidden, *The Regulation of National Banks' Subsidiaries*, 40 BUS. LAW. 1299, 1303–04 (1985). In addition to these operating subsidiaries, national banks may establish statutory subsidiaries—subsidiaries established pursuant to specific authorization in some federal statute—and so-called DPC subsidiaries, or subsidiaries established to manage property acquired through foreclosure or in satisfaction of debts previously contracted. *Id.* at 1300, 1305.

allow more expansive activities in bank subsidiaries than they do in banks.[17] Although the Fed arguably has the power under existing law to stop bank subsidiaries of bank holding companies from taking advantage of this state authority,[18] this power is in fact far from clear. Further, the Fed lacks the authority to stop state non-member banks that are not in holding companies from availing themselves of these state law opportunities. In any event, the issue should be dealt with in legislation adopting the national bank standard for state banks.

### C. *Affiliates of Depository Institutions Should Not Be Regulated*

We must also decide whether to place limits on risk taking by bank affiliates. I oppose any such regulation because banks are insulated from their affiliates' risk and because it would allow for unequal treatment of firms in essentially identical situations unless the present bank definition loophole is closed.

#### 1. Banks Are Insulated from Affiliate Risk

Federal Reserve Board Chairman Volcker believes that we must control affiliate risk because the poor performance or failure of an affiliate can have a negative impact on the related bank.[19] Advocates of this view claim that this result could come about for two reasons: (1) affiliate losses could negatively affect holding company capital, thus impairing the ability of the hold-

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[17] *See, e.g.*, MASS. GEN. LAWS ANN. ch. 167F, § 3(4) (West 1984) (authorizing banks to invest up to four percent of their deposits in any corporation).

[18] The Bank Holding Company Act, 12 U.S.C. §§ 1841–1850 (1982), prohibits a bank holding company from acquiring or retaining direct or indirect ownership or control of more than five percent of the shares of a company, as defined. *Id.* § 1842(a)(3). The Federal Reserve Board has taken the position that the Act prohibits "a holding company subsidiary *bank* as well as the holding company itself from owning more than 5% of the voting shares of any company engaged in impermissible nonbank activities." 50 Fed. Reg. 4519, 4521 n.3 (1985) (emphasis in original).

[19] *See Problems, Options, and Issues Currently Facing the Financial Services Industry and the Agencies That Regulate and Supervise These Entities, Part I: Hearings on S. 1532, S. 1609, and S. 1682 Before the Senate Comm. on Banking, Housing and Urban Affairs*, 98th Cong., 1st Sess. 51, 61 (1983) (statement of Paul Volcker, Chairman, Board of Governors, Federal Reserve System); *Financial Institutions Restructuring and Services Act of 1981, Part II: Hearings on S. 1686, S. 1703, S. 1720, and S. 1721 Before the Senate Comm. on Banking, Housing and Urban Affairs*, 97th Cong., 1st Sess. 429, 432 (1981) (same).

ing company to serve as a source of strength for the bank[20] and (2) the public could lose confidence in a bank as a result of the failure of its affiliate.[21] I am not persuaded.

If the normal principle of limited liability for corporations applies, and if supervisors regulate *bank* capital,[22] bank capital will be unaffected by holding company losses.[23] If bank capital strength is desirable, it should be regulated at the bank rather than the holding company level.

The fear that the public would lose confidence in a bank because of the failure of its affiliate is based on a belief that people will act irrationally. Insured depositors have nothing to lose from a bank failure, let alone an affiliate failure. Only a loss in confidence about the adequacy of FDIC insurance would trigger panic withdrawals. As for uninsured depositors, most of whom are sophisticated banks or commercial enterprises, they presumably understand that the solvency of a bank is not affected by the failure of an affiliate. Our experience, albeit quite limited, suggests that the market can differentiate between a bank and an affiliate in difficulty.[24] Our regulatory policy should not be based on the assumption that large sophisticated depositors will behave irrationally.

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[20] *Cf. Competitive Equity in the Financial Services Industry, Part III: Hearings on S. 2181 and S. 2134 Before the Senate Comm. on Banking, Housing and Urban Affairs*, 98th Cong., 2d. Sess. 1112 (1984) (statement of Prof. Robert A. Eisenbeis).

[21] *See* Clark, *The Regulation of Financial Holding Companies*, 92 HARV. L. REV. 789, 833–34 (1979) (noting the "alleged danger . . . that the public may confuse the name and identity of a risky affiliate with that of the intermediary itself, with the result that a loss of confidence in the risky business will be transferred to the intermediary," but disputing "how serious the danger is.").

[22] Banks must presently maintain primary capital at six percent of assets. *Minimum Capital Ratios Increased to Set Uniform Capital Requirements for Commercial Banks*, [1984–1985 Transfer Binder] FED. BANKING L. REP. (CCH) ¶ 86,188 (Mar. 19, 1985) (Joint release of the Comptroller of Currency and the FDIC announcing the adoption of a uniform capital requirement of six percent for all national and FDIC-insured state nonmember banks); *FRB Adopts Revised Capital Adequacy Guidelines for BHCs and State Member Banks*, [1984–1985 Transfer Binder] FED. BANKING L. REP. (CCH) ¶ 86,221 (Apr. 24, 1985) (requiring state member banks and bank holding companies also to maintain a minimum capital requirement of six percent).

There are new regulatory proposals for risk-based capital requirements. *See, e.g., FRB Proposes Supplemental Capital Standards to Measure Bank Risk Exposure*, [Current Binder] FED. BANKING L. REP. (CCH) ¶ 86,505 (Jan. 31, 1986) (Fed's proposal would supplement existing capital standards by assigning assets and certain off-balance sheet items to one of four broad risk categories, which would then be weighted according to their relative risk.).

[23] *See* Note, *The Demise of the Bank/Nonbank Distinction: An Argument for Deregulating the Activities of Bank Holding Companies*, 98 HARV. L. REV. 650, 661–62 (1985) (discussing the unlikelihood of veil-piercing in the banking context).

[24] *See* J.P. Morgan & Co., Inc., Rethinking Glass-Steagall: The Case for Allowing Bank Holding Company Subsidiaries to Underwrite and Deal in Corporate Securities 20 n.15 (Dec. 1984) (on file at HARV. J. ON LEGIS.).

The July 1984 decision of the FDIC and the Fed to rescue Continental Illinois Corporation (the holding company) rather than Continental Illinois National Bank lends no support to those who maintain that banks and affiliates cannot be kept separate. The argument that a holding company has to be rescued to maintain confidence in the bank has already been discussed. The legal rationale for rescuing the holding company was that it was a condition of default on outstanding holding company notes for the holding company to give anyone a stock interest in a holding company subsidiary[25]—which would have occurred if FDIC had taken stock in the bank. The covenants may have entitled the note holders to claim a default against the holding company, which conceivably could have been enforced to enjoin the issuance of stock or to subordinate any issued stock.[26] If the existence of restrictive covenants will require other holding company rescues, legislation should be enacted to require the retirement of existing holding company debt with restrictive covenants or the cancellation of covenants as applied to a stock interest of the FDIC, to prohibit any new holding company debt with such covenants, and to prohibit any future holding company rescues by the regulatory agencies.[27]

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[25] *See* FDIC, 1984 ANNUAL REPORT 4 (1985) (noting that the FDIC "would have preferred placing the new capital directly in the bank rather than using the holding company as a conduit," but that the holding company "had outstanding indenture agreements which precluded this option"); *Anatomy of Failure—Continental Illinois: How Bad Judgments and Big Egos Did it In*, Wall St. J., July 30, 1984, at 1, col. 1 (describing the Treasury's opposition to the holding company rescue).

[26] The Treasury Department's legal department argued that there was no authority for a holding company rescue, Memorandum from Margery Waxman, Acting General Counsel of the Treasury to Secretary Regan (July 25, 1984) (on file at HARV. J. ON LEGIS.), but the Department of Justice, Memorandum from Theodore B. Olsen, Assistant Attorney General, Office of Legal Counsel, to Secretary Regan (July 24, 1984) (on file at HARV. J. ON LEGIS.), the Federal Reserve Board, Memorandum from Michael Bradfield, General Counsel of the Board of Governors of the Federal Reserve System (July 25, 1984) (on file at HARV. J. ON LEGIS.), and the FDIC, Memorandum from Margaret L. Eggington, Acting General Counsel of FDIC to the Board of Directors of the FDIC (July 25, 1984) (on file at HARV. J. ON LEGIS.) took an opposite position, relying on 12 U.S.C. § 1823(c)(2)(A) (1982) which provides:

> In order to facilitate a merger or consolidation of an insured bank . . . with an insured institution or the sale of assets of such insured bank and the assumption of such insured bank's liabilities by an insured institution, or the acquisition of the stock of such insured bank, the Corporation is authorized, in its sole discretion and upon such terms and conditions as the Board of Directors may prescribe—. . .
>
> (ii) to make loans or contributions to, or deposits in, *or purchase the securities of*, such insured institution or *the company which controls* or will acquire control of *such insured institution* . . . . (emphasis added).

[27] One could argue that the covenants should not have prevented the FDIC from taking a stock interest. The bondholders, upon declaring a default, should be regarded as in

## 2. The Bank Definition Loophole Will Not Be Closed

Even if we accepted the Volcker view—that we need to control affiliate risk in order to protect the bank—we apparently

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no better position than shareholders of the bank. Shareholders of a failed bank cannot object to the FDIC taking stock. 12 U.S.C. § 1823(c)(1) (1982); Zinman v. Fed. Deposit Ins. Corp., 567 F. Supp. 243, 250 (E.D.Pa. 1983).

H.R. 15, introduced by Congressman Wylie (R-Oh.), 99th Cong., 1st Sess., 1985, attempted to deal with this problem by amending the Bank Holding Company Act to provide:

> [N]o provision of any contract to which a bank holding company is a party shall be enforceable in any court (1) if that provision prohibits the bank holding company from selling shares of a subsidiary bank, or prohibits it from permitting a subsidiary bank from selling its own shares to an entity other than the holding company, when such a sale takes place in conjunction with or as part of assistance provided by the [FDIC] . . . , or (2) if compliance by any bank subsidiary of such holding company with a directive or order of the appropriate banking agency would cause such holding company to be or to become in default of such provision . . . .

Although a step in the right direction, this solution is insufficient in three respects. First, it is prospective only, and would do nothing about existing restrictive covenants. Second, it applies only to bank holding companies. It therefore leaves non-regulated holding companies free to use such covenants. This is a serious deficiency because unlike bank holding companies, whose major assets are banks, non-regulated holding companies' major assets are in the holding company. Thus, rescue of a non-regulated holding company, such as Sears or American Express, in order to rescue a captive bank would be even less supportable, and considerably more costly, than rescuing a bank holding company. Third, the proposal does not *preclude* the regulatory agencies from rescuing a holding company.

There should be limited concern with the prospect of a constitutional challenge to the requirement that existing bonds or debentures with restrictive covenants be retired, or the restrictive covenants be cancelled as applied to a FDIC stock interest. The Supreme Court has held that the government may execute laws that adversely affect recognized economic values without that action constituting a taking requiring compensation under the Fifth Amendment if the government has reasonably concluded that important public goals would be served by the law. *See* Penn Central Trans. Co. v. New York City, 438 U.S. 104, 123–28 (1977); Pension Benefit Guaranty Corp. v. R. A. Gray & Co., 104 S. Ct. 2709, 2717–18 (1984). Although there could be no valid contract clause claim under Article I, Section 10 of the U.S. Constitution, since that clause only applies to actions by a state rather than the federal government, it is instructive that this clause would be very unlikely to invalidate a covenant prohibition, if passed by a state, under the Supreme Court's case law. *See, e.g.*, Exxon Corp. v. Eagerton, 462 U.S. 176, 187–94 (1982). Indeed, in *Pension Benefit Guaranty Corp.*, 104 S. Ct. at 2720, the Court stated: "we have contrasted the limitations imposed on States by the Contract Clause with the less searching standards imposed on economic legislation by the Due Process Clause."

Finally, it is difficult to see how bondholders would be worse off as a result of a law prohibiting covenants restricting the FDIC's ability to take a stock interest in the bank of a holding company subsidiary. If the FDIC were not to inject capital in a failed bank as a result of the restrictive covenant, the failed bank could be liquidated and the holding company's stock interest in the bank would be worthless. Bondholders should not be entitled to assume that the FDIC will necessarily invest in the holding company if it is precluded from investing in the bank. *Cf. Zinman*, 567 F. Supp. at 251 (rejection of challenge by shareholders of First Pennsylvania Corp. to a FDIC rescue of its failed bank subidiary, First Pennsylvania National Bank, N. A., in which the FDIC made a $325 million term loan to the bank and took warrants in holding company stock to prevent holding company shareholders from receiving a windfall from the rescue).

lack the political will to undertake the comprehensive regulation of affiliates that is necessary to control affiliate risk. This inability is evident in our continuing failure to close the loophole in the definition of "bank" in the Bank Holding Company Act,[28] which permits *unregulated* holding companies, such as Chrysler, National Steel, and Sears,[29] to own national and state-chartered banks. Despite much congressional attention, it is extremely unlikely that this loopohole will be completely closed.

H.R. 20, as reported by the House Banking Committee[30] and now pending in the House Rules Committee, purports to close the loophole, but it permanently grandfathers a substantial number of unregulated holding companies.[31] The bill also prospectively allows unregulated holding companies to own state chartered banks that are eligible for but not insured by the FDIC.[32] Moreover, companies that own only one thrift would be regulated under more lenient standards than bank holding companies.[33]

Furthermore, the Supreme Court's recent decision in *Board of Governors of the Federal Reserve System v. Dimension Finance Corporation*[34] made it clear that the inadequacies of the Bank Holding Company Act cannot be overcome through the administrative process, however ingenious the theory underlying such an attempt may be. In *Dimension*, the Court rebuffed the Federal Reserve's attempt to expand the definition of commercial loans to cover virtually all short-term money market assets and to include NOW accounts within its definition of demand deposits.[35] "If the Bank Holding Company [Act] falls

[28] The Bank Holding Company Act defines as a bank within its coverage an institution that "(1) accepts deposits that the depositor has a legal right to withdraw on demand, *and* (2) engages in the business of making commercial loans." 12 U.S.C. § 1841(c) (1982) (emphasis added). Because the statutory coverage is only triggered when *both* prongs of the definition are met, it is possible for a holding company to own an institution (commonly referred to as a non-bank bank) which is considered a bank for most regulatory purposes and still remain unregulated. Note, *supra* note 23, at 653–55.

[29] *See, e.g., Sears Takes Step Toward National Consumer Banks*, Wall St. J., Oct. 23, 1984, at 3, col. 1; Note, *supra* note 23, at 655 n.27. *See also Cross-Industry Ownership of US Commercial Banks*, Am. Banker, Sept. 5, 1984, at 24, col. 1 (listing pending and planned acquisitions).

[30] H.R. REP. No. 175, 99th Cong., 1st Sess. 1–7 (1985).

[31] *Id.* at 3, 12 (grandfathered institutions would not be subject to section 4 of the Bank Holding Company Act unless they acquire an additional bank or changed ownership).

[32] *Id.* at 7, 16–17.

[33] *Id.* at 4–6, 14–16 (the thrift must be a qualified institution; that is, it must have 65% of its assets in residential mortgages and related investments for three out of every four calendar quarters).

[34] 106 S. Ct. 681 (1986).

[35] The Court invalidated the Fed's recent amendments to Regulation Y, 12 C.F.R. §225.2(a)(1)(A)–(B) (1985).

short of providing safeguards desirable or necessary to protect the public interest," the Court concluded, "that is a problem for Congress, and not the Board or the courts, to address."[36]

Rather than a problem, however, the non-bank bank development is a step in the right direction because the better policy is to allow any activity at the holding company level. Banks are not actually at risk for poor performance or failure by affiliates—a fact presumably well understood by large, sophisticated, and partially-uninsured investors. In light of this absence of risk, the competitive burdens imposed by holding company regulation are truly unjustifiable. Consequently, instead of lamenting the non-bank bank loophole, we should seek to extend the benefits of deregulation to bank holding companies. Under this approach, *all* firms owning banks would be unregulated holding companies in the sense that they could pursue any activities they wanted through the holding company. Chrysler could buy Citicorp or Citicorp could buy Chrysler. This change would establish an even playing field. The only firms that would object would be those that do not want one.

Even if complete holding company deregulation is not feasible, maximum activity deregulation is still desirable. At the least, Congress should give holding companies increased powers to engage in securities and insurance activities, and broaden the general authorization for holding company activities. Congress should also replace the existing standard of "closely related to banking" with a broader financial services test.[37]

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[36] *Dimension*, 106 S. Ct. at 689.

[37] *Cf. Sen. Garn's Proposed "Financial Services Competitive Equity Act" (S. 2181)*, WASH. FIN. REP. (BNA) No. 41, at 816, 818–25 (Nov. 28, 1983). In addition to permitting the establishment by the holding company of depository institution securities affiliates, *see* S. 2181, 98th Cong., 1st Sess., §§ 104(a)(2), 104(e)(3) (1983), S. 2181 would have modified the closely related to banking standard of 12 U.S.C. § 1843(a)(8) by expanding it to activities determined by the Board by regulation to be of a financial nature. *See*, S. 2181, § 104(d). Moreover, S. 2181 would have amended 12 U.S.C. § 1843(c)(8) expressly to permit bank holding company ownership of shares in companies engaged in insurance, underwriting, and brokerage and in certain real estate investments. *Id.* The main provisions of S. 2181 were subsequently incorporated in another bill, S. 2851, which was reported out of Committee on June 27, 1984. S. REP. NO. 560, 98th Cong., 2d Sess. 24 (1984). During mark-up, however, the bill was amended to eliminate the reference to activites of a financial nature and the closely related test, with an admonition to the Board to consider technological innovations in interpreting this standard. *See id.* In this form the bill passed the Senate (89 to 5) on Sept. 13, 1984. 130 CONG. REC. S11,162, S11,164 (daily ed. Sept. 13, 1984). The bill passed by the Senate did retain the orginal bill's concept creating depository institution securities affiliates that could be owned by bank holding companies. The activities of these affiliates, however, were restricted by the Senate committee mainly to the underwriting of certain governmental obligations, the rendering of investment advice to investment companies (except closed-

### D. *Banks Should Not Be Permitted to Process Payments for Unregulated Affiliates*

The success of this approach, allowing the combination of regulated banks and unregulated holding companies, depends on maintaining the separate identity of the two entities.[38] Generally, maintaining this separation will require observing the principle of arms-length dealing.[39] In some areas, however, it may be better to prevent any dealings between the two entities because of the difficulty of enforcing the principle and the risks that may arise from our failure to do so. The focus should now be on defining those areas. Payment processing is clearly one.

#### 1. Access to the Payment System

An important reason why unregulated holding companies acquire non-bank banks is to obtain direct access to the payment system through their own banks rather than through third-party banks. The payments volume of many firms is substantial enough to realize cost savings by bringing the payment function in-house.[40]

Prior to 1980, access to the payment system was restricted to members of the Federal Reserve System.[41] Since the enactment

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end companies), the underwriting of and dealing in promissory notes secured by real-estate mortgages, and the underwriting, sale, or dealing in commercial paper. *See id.* at S11,165.

[38] *See* Note, *supra* note 23, at 661–64; *cf.* Clark, *supra* note 21, at 791 (describing goals of separation regulation).

[39] Section 23A of the Federal Reserve Act, 12 U.S.C. § 371c (1982), prevents a member bank from engaging in a covered transaction—a loan or extension of credit, purchase of securities issued by an affiliate, and the issuance of guarantees, among others—with any one affiliate if the aggregate amount of covered transactions of the member bank and its subsidiaries will exceed ten percent of the member bank's capital, and any covered transaction with all affiliates if the aggregate amount exceeds twenty percent. *See also* 12 U.S.C. § 1828(j) (1982) (applying similar standards to nonmember insured banks).

[40]

> [H]eavy users of the payment system could operate more efficiently if they could directly participate in the payment system, rather than purchase collection and clearing services from banks. Retailers, finance companies, mortgage bankers, and non-bank issuers of credit and debit cards are constantly receiving payments from the public that must be collected through the payment system. Securities firms, insurance companies and mutual funds are constantly transferring funds to customers, annuitants or shareholders by check or wire.

SEARS, ROEBUCK AND CO., FINANCIAL SERVICES, CONSUMERS AND THE SEPARATION OF BANKING AND COMMERCE, at 3 (1985) (on file at HARV. J. ON LEGIS.) [hereinafter cited as SEARS].

[41] Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 105(d), 94 Stat. 132, 140, *codified at* 12 U.S.C. 248(o) (expanding access from member banks to depository institutions).

of the Depository Institutions Deregulation and Monetary Control Act of 1980,[42] all "depository institutions" such as banks have been allowed to hold clearing accounts with and to buy payment services from the Federal Reserve Banks.[43] A depository institution is defined as: (1) any bank insured by or eligible for FDIC insurance; (2) any mutual or other state savings bank; (3) any credit union insured by or eligible for insurance by the National Credit Union Insurance Board; (4) any institution which is a member of the Federal Home Loan Bank system; and (5) any institution insured by or eligible for insurance by the Federal Savings and Loan Insurance Corporation.[44]

The most important payment service offered by the Fed is FedWire,[45] an electronic communication and settlement system provided by the twelve Federal Reserve Banks. Its volume is growing at a twenty percent annual rate[46] and it currently handles over $435 billion in transactions daily, with an average transaction size of $2.4 million.[47] Private payment systems also move large dollar volumes. The largest is the Clearing House Interbank Payment System (CHIPS), a system established and maintained by the New York Clearing House Association. CHIPS handles more than $300 billion per day[48] on behalf of over 130 participant banks and provides same-day settlement through the New York Federal Reserve Bank.[49] The average transaction on CHIPS is $3.1 million.[50]

### 2. General Risk to the Payment System

The stability of our financial system depends on the ability of banks to settle their positions in both FedWire and CHIPS transactions.

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[42] Pub. L. No. 96-221, 94 Stat. 132, *codified at* various sections of 12 U.S.C.

[43] 12 U.S.C. § 248(o) (1982).

[44] 12 U.S.C. § 461(b)(1)(A) (1982).

[45] *See* Scott, *Corporate Wire Transfers and the Uniform New Payments Code*, 83 COLUM. L. REV. 1664, 1669–70 (1983).

[46] ASSOCIATION OF RESERVE CITY BANKERS, RISKS IN THE ELECTRONIC PAYMENTS SYSTEMS: REPORT OF THE RISK TASK FORCE, 11 (1983) (on file at HARV. J. ON LEGIS.)[hereinafter cited as RISKS IN THE ELECTRONICS PAYMENTS SYSTEM.].

[47] Federal Reserve Board, Reduction of Payments System Risk: A Manual for Depository Institutions, at A-3 (1985) (typescript) (on file at HARV. J. ON LEGIS.) [hereinafter cited as Depository Institutions Manual].

[48] *Id.*

[49] The figures have been updated from those supplied in the sources cited in notes 46–48, *supra*, based on a conversation with the Federal Reserve Board staff, Mar. 28, 1986 (figures not yet published).

[50] *Id.*

When using FedWire, banks commonly overdraw collected balances in their clearing accounts during the day when they transfer funds to other parties.[51] The Fed allows these daylight overdrafts because the speed of financial transactions would be greatly slowed if banks were only allowed to make transfers against collected balances. A transfer by the Fed to a receiving bank is final[52] in that the Fed cannot take the money back even if the sending bank fails to cover an overdraft. This finality allows the receiving bank to give good funds to the beneficiary of the payment immediately, which in turn allows further transactions to proceed unconditionally.

If, however, the sending bank cannot cover its Fed position, because of insolvency or lack of liquidity, the Fed is at risk and becomes a creditor of the failed bank. If the Fed responded to this situation by making an overnight secured loan at the discount window, and the institution failed at some later time, the Fed would have a prior claim to the assets securing the loan.[53] This priority would leave fewer assets and value for the FDIC which, in a liquidation, pays off the insured deposits and becomes a general creditor of the failed institution.[54]

Participants in the CHIPS system make transfers to each other during the day that are settled at the end of the day.[55] At any time during the day, a bank may be in a net debit position with any other bank. For example, if Bank *A* has sent $100 million to Bank *B* and received $60 million from Bank *B*, Bank *A* has a net debit position of $40 million with Bank *B*—on net Bank *A* owes Bank *B* $40 million. Banks may also have a net debit position with all other banks. For example, Bank *A* which has sent $500 million to and received $260 million from all other

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[51] Scott, *supra* note 45, at 1670; McDonough, *Daylight Overdrafts: One Perspective*, BANKERS MAG., Sept.-Oct. 1984, at 74, 76. Daylight overdrafts on FedWire currently are, on average, $110–$120 billion per day. Depository Institutions Manual, *supra* note 47, at A-5.

[52] 12 C.F.R. § 210.36(a) (1985) (Regulation J, pt. B).

[53] Federal Reserve lending is *secured* by "the deposit or pledge of bonds, notes, certificates of indebtedness, or Treasury bills of the United States," 12 U.S.C. § 347 (1982), or by notes "secured to the satisfaction" of the Federal Reserve Bank in question, 12 C.F.R. § 201.4(b).

[54] *See* 12 U.S.C. §§ 1821(f)–(g) (1982) (payment of insured deposits subject to subrogation). In fact, the Federal Reserve, as a *secured* creditor, assumes limited risk on its discount window loans. Rather, the FDIC is the agency most at risk and may thus be said to be the true lender of last resort. W. Isaac, *Statement on Deposit Insurance and Supervisory Reform Presented to the Senate Comm. on Banking, Housing and Urban Affairs*, July 23, 1985, at A-7 (Chairman, Federal Deposit Insurance Corp.) (on file at HARV. J. ON LEGIS.).

[55] *See* Scott, *supra* note 45, at 1672–73.

banks has a net debit position of $240 million with all other banks. At the end of the day, settlement of net debit system positions must occur through a transfer of funds to the New York Fed which in turn distributes these funds to banks with a net credit system position, i.e. banks which on net are owed money by all other banks.

An unwind occurs when the bank cannot settle its position at the end of the day.[56] A new settlement calculation is made that excludes all transactions involving the failed bank. The deleted transactions must be settled independently between the particular banks involved. Returning to our first example, if Bank *A* failed to settle, Bank *B*, which is a net creditor of Bank *A* for $40 million, would attempt to recover that amount from *A*. This task may, however, be impossible if Bank *A* has become insolvent. Because CHIPS payments are usually posted conditionally during the day (unlike FedWire) Bank *B* might also try to recover funds from the beneficiaries of the payments received from *A*. The beneficiaries, however, may have already drawn down their accounts and may be unable to make a refund. If Bank *B* is left with a $40 million loss as a result of Bank *A*'s failure to settle, it may in turn be unable to settle its own newly calculated net debit system position; a chain reaction of failures could ensue. Although the New York Fed has no obligation to cover the net debit system position of a bank unable to settle, it may nevertheless do so anyway by extending a secured loan. Such a credit extension may be necessary to avoid the chain reaction effect and the financial panic that might follow from an unwind. Again, if at some later time the bank failed, the Fed would have a prior claim to the assets securing its loan thus leaving fewer assets and less value for the FDIC.

Although there has never been a significant settlement failure, this does not mean it cannot happen. One might compare settlement failure to a nuclear power plant accident. There is a very low probability that either will occur, but each could cause catastrophic damage. In both cases the risk could result from the activities of any firm in the respective industries. The fact that we have never had a serious nuclear accident should not lead us to believe we can safely leave nuclear power unregu-

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[56] RISKS IN THE ELECTRONIC PAYMENTS SYSTEM, *supra* note 47, at 18–19; Rules Governing the Clearing House Interbank Payments System para. 13(b) (as last amended in 1981) (on file at HARV. J. ON LEGIS.).

lated. The same holds true for settlement failure and financial institutions. We should not wait for the payment system analog of Three Mile Island. Any increase in payment system risk should be forcefully resisted.

A financial safety net provided by the Federal Reserve System must be viewed as a cornerstone of the payment system. The finality of a FedWire transfer without regard to settlement by the sending bank and the expectation of Fed action to cover positions in CHIPS allow our payment system to serve the needs of commerce. Because it is the Fed—and ultimately the American public—which bears the risk of a settlement failure, it is essential that the Fed be able to ensure that all users of the system remain solvent. This goal is generally accomplished through bank regulation.

Limitation of payment system risk has been a major concern of the banking industry and the Federal Reserve Board for the last few years.[57] In fact, the Fed and the banking industry have developed a system for limiting intra-day overdrafts as between individual banks (bilateral net credit limits) and between an individual bank and all other banks, a bank's net debit position (net debit caps).[58] Beginning on March 27, 1986, all banks within a private large dollar network must establish bilateral net credit limits for their dealings with other participants in that network. At the same time, each bank must adopt a net debit cap to be applied to its aggregate position at a given moment in time on all systems combined, including FedWire. The maximum net debit cap across all systems cannot be greater than three times the bank's capital and must be approved by the bank's Board of Directors.[59]

These limits are designed to encourage banks to control and monitor the risks to which their own customers expose them. If banks allow their customers to overdraft accounts on a daily basis, in the expectation that open positions will be covered before the bank must pay on FedWire or CHIPS transactions,

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[57] *See* 49 Fed. Reg. 13,186 (1984) (Federal Reserve's request for comments on proposed risk reduction policy); ASSOCIATION OF RESERVE CITY BANKERS, THE FINAL REPORT OF THE RISK CONTROL TASK FORCE (Oct. 1984) (on file at HARV. J. ON LEGIS.); ASSOCIATION OF RESERVE CITY BANKERS, REPORT ON THE PAYMENTS SYSTEM 42–46 (1982) (on file at HARV. J. ON LEGIS.).

[58] Federal Reserve Board, Overview of the Federal Reserve System's Policy Statement Regarding Reducing Risks on Large-Dollar Electronic Funds Transfer System in DEPOSITORY INSTITUTIONS MANUAL, *supra* note 47, at C-4 to C-8.

[59] *Id.* at C-9, C-10.

and the customers fail to cover, the banks may be unable to settle with other banks. Despite their own risk for defaulted overdrafts, which should be regarded as loans subject to normal credit reviews, banks often lack the management and operational controls to control this risk. Sophisticated and expensive communication and computer systems are required to keep real-time track of customers' constantly changing account balances. Although the caps are not legally binding they will be monitored by the Fed on an ex post basis.[60] Banks that exceed their limits will be counseled by the Fed and ultimately may be restricted in their use of FedWire.[61]

### 3. Additional Risks Which Unregulated Affiliates Can Impose on the Payment System

Risk to the payment system is greatly affected by the type of institutions that have access to the system. The number and type of such institutions has greatly increased since 1980. Although all institutions with *direct* access are regulated, better controls are needed over the risks to which the payments system is exposed as a result of bank processing of affiliate transactions.

When banks process affiliate payments, the normal economic incentive of a bank to avoid risk does not operate. Holding companies maximize profit and risk at the holding company and not at the bank level. If a holding company wants an overdraft facility from its bank it will get one. This fact puts the bank and, in turn, the payment system at risk for the solvency and liquidity of holding company affiliates.[62] Regulation of overdraft credit facilities between banks and affiliates would be impossible on a case-by-case basis. Credit guidelines would be difficult to formulate and enforce and would be subject to creative avoid-

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[60] *Id.* at C-7 to C-10.

[61] *Id.* at C-9 to C-10, C-14 to C-15.

[62] Although unregulated holding companies stress the savings they could realize by bringing the payments function in-house, and assert that these savings will be passed on to their customers in the form of lower prices, these apparent gains would be more than offset by the costs to the Fed, the FDIC, and ultimately the public from a riskier payment system. Indeed, the very premise for the formation of some captive banks is the avoidance of risk restraints imposed by independent banks. *See infra* note 71; *see also* Letter from Rep. St Germain (D-RI), Chairman of the House Banking Comm. to Rep. Dingell (D-Mich.), Chairman of the House Energy and Commerce Comm. *reprinted in* X BANK LETTER 9 (Mar. 17, 1986) (Even if consumers intially benefit from lower costs, they would eventually have to pay for "the mistakes and misdeeds of owners of such banks.").

ance. The Fed's inability to distinguish between affiliate-created overdrafts from other overdrafts also prevents separate regulation of FedWire or CHIPS overdrafts created by affiliate transactions.

Although the Fed arguably has the power under the Federal Reserve Act or the Bank Holding Company Act to prevent unregulated companies from processing payments through affiliated banks, this authority is far from clear.[63] In any event, the matter should not be left to administrative discretion but should be specifically dealt with by statute.

### E. *Controls on Processing Affiliate Payments*

This Policy Essay has argued that all bank affiliate activity should be deregulated but it has also acknowledged that this outcome is unlikely. For the foreseeable future, bank holding companies will be subject to significant regulatory controls such as capital requirements,[64] supervision and examination,[65] and activity limitations.[66] Although such controls may be generally undesirable, they do serve to protect the payment system.[67]

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[63] Under the Bank Holding Company Act, for example, "[t]he Board is authorized to issue such regulations and orders as may be necessary to enable it to administer and carry out the purposes of the Act *and prevent evasions thereof*." 12 U.S.C. § 1844(b) (1982) (emphasis added). The Board could argue that it is an evasion of the Act's purpose of regulating bank holding companies for banks to process payments for their unregulated affiliates. It is doubtful, however, that this argument would have much force in light of Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 106 S. Ct. 681 (1986) (striking down the Fed's broadened definition of bank).

[64] *FRB Adopts Revised Capital Adequacy Guidelines for BHCs and State Member Banks*, [1984–1985 Transfer Binder] FED. BANKING L. REP. (CCH) ¶ 86,221 (Apr. 24, 1985).

[65] 12 U.S.C. § 1844 (1982).

[66] 12 U.S.C. §§ 1843, 1844(e) (1982).

[67] This proposed statute would prohibit unregulated holding companies from processing any payments for its affiliate, by prohibiting the holding company from having any payment transactions with its captive bank. This Policy Essay has focused on the risks in the wire transfer systems, but there are also similar risks in the check and automated clearing house (ACH) payment systems.

With respect to checks, the holding company might get withdrawable funds from its affiliate sooner than from an independent bank, *see* the Chrysler discussion in note 71, *infra*, or the bank might not return bad holding company checks to payees, who might continue to supply goods and services to the holding company unaware of the impending holding company failure.

In an ACH credit transaction, credit transfers are sent by corporations in payment of payroll, dividend, interest, and pension obligations. Increasingly, ACH transactions are also used by corporations to pay suppliers. Payroll transfers can serve as an illustration. Employers can make direct payroll deposits to the accounts of employees by providing their bank (OB) with information, by delivering a computer tape or by direct wire communication, indicating the payroll data, *e.g.*, name of employees and banks holding

Activity limitations reduce the range of risks to which a captive depository institution may be exposed by processing payments for its parent. This risk is also controlled by examination, monitoring, and control of capital adequacy, of the riskiness of particular assets and liabilities, and of holding companies' operating procedures. Transactions between holding companies and their depository institutions are also examined, monitored, and controlled.[68] The presence of such regulation, *in the short term*, means that it is unnecessary to adopt more direct controls on the ability of banks to process payments for their bank holding company affiliates.

Nonetheless, given the existence of truly unregulated holding companies that can own banks through the non-bank bank device, there will be many instances in which the risk inherent in the ability of banks to process payments for affiliates will remain largely unchecked. The answer to this problem is not to impose regulation on these companies, but to find a way to insulate the payment system.

This result can be achieved by restricting an unregulated holding company from using an affiliated depository institution to process its payments. A specific proposal to this effect is set out in the Appendix. Such unregulated holding companies, and their non-bank affiliates, would be free to access the payment system indirectly through independent depository institutions. Moreover, the unregulated holding companies' own depository institutions would be free to offer the full range of payment services to their unaffiliated customers. In addition, employees of the holding company should be free to do all of their banking, including payments, through the affiliated institution. Thus, for example, while Sears would have to make its corporate pay-

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the employees' accounts (RBs). The OB debits its customer, the employer, for the entire payroll and credits any employees with accounts at the OB. It then sends the remaining data on to the Fed. The Fed credits the various RBs.

If the OB fails to settle with the Fed for the amount of the payroll, either the Fed or the RBs may be at risk. If the OB were to fail before the Fed gave final credit to the RBs, the Fed could refuse to post the items to the RBs and return the items to the OB. If the RBs had already given their customers credits, which is typically the case since they receive information about these credits in advance of the settlement date, the RBs would be at risk. If, on the other hand, the Fed learns of OB's failure after the RBs have been given final credits, the Fed is at risk.

The general point is that a captive OB which puts ACH credits through for its failing parent could create substantial risk to other participants in the payment system.

[68] *See* Board of Governors of the Federal Reserve System, Policy for Frequency and Scope of Examinations of State Member Banks and Inspections of Bank Holding Companies, Oct. 7, 1985; *reprinted in* Am. Banker, Oct. 10, 1985, at 4, col. 1.

ments through an independent institution, its affiliated thrift institution, Sears Savings Bank, could continue to process payments for all of the bank's independent customers and all of Sears' employees. In the long term, this restriction on holding company payments through affiliated depository institutions would apply to all holding companies. The same restrictions should apply to bank holding companies when they become unregulated.

As an alternative solution to the payment risk problem, one could prohibit unregulated holding companies from incurring any overdrafts on FedWire, and perhaps in any other system to which they had access. This proposal, however, has some serious drawbacks. First, as an operational matter, Reserve Banks do not have systems that can monitor and enforce a no-overdraft policy on an on-line basis.[69] Although many unregulated companies could be trusted to observe such a policy, others could not, particularly in times of financial stress. Second, a no-overdraft policy seems overly restrictive, because there is no reason to prevent some level of overdrafts created by the activities of independent customers, *e.g.*, third party depositors of the nonbank bank.

Even if a no-overdraft policy could be enforced and companies were willing to incur the funding costs (the costs incurred in borrowing money during the day to support funds transfer), there are two other major concerns. First, there will be a potentially enormous increase in the demand for Fed accounts and ultimately the cost of making funds transfers. Currently there

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[69] Currently three Reserve banks, New York, Atlanta, and San Francisco, employ the so-called New York Monitor system which allows these Reserve Banks to monitor funds accounts on-line. It is anticipated that the remaining nine Reserve Banks will have this capability in 1987. Although the New York Monitor allows on-line monitoring, the system does not have the capability to monitor all reserve accounts simultaneously. Instead, it monitors a random sample of accounts. Further, the monitoring system only compares the amount of the requested transfer with the balance in the account. It cannot differentiate between collected and uncollected balances. Thus, if a non-regulated holding company were to deposit a $10 million check with its captive bank (Bank *A*), drawn on its account at another bank (Bank *B*), and Bank *A* deposited the check with the Fed, the Fed monitoring system would only see a $10 million deposit in the funds account. The monitoring system would allow transfers against that balance, even though the check credit was actually provisional, and could be reversed if Bank *B* later failed to pay the check. Although a system could be designed to deal with both of these problems, allowing monitoring of all accounts simultaneously and only permitting transfers against final entries, the cost of these enhancements would be substantial. This potential cost raises the issue of whether all banks should pay for the costs of system enhancements designed to protect the Fed from the risks imposed by the banks owned by unregulated holding companies.

are approximately 8,000 reserve accounts.[70] If companies and individuals could avoid the expense of dealing with an independent bank by obtaining a Fed account through the incorporation of what amounted to a paper bank, a bank whose only purpose was to obtain a Fed account, the number of Fed accounts would increase dramatically.[71] Not only would the Fed lack the processing and communication capacity to handle such a system, the vast expansion of transfer combinations might also greatly increase the cost of funds transfers in general, if the Fed's system were required to handle a transaction volume which exceeded the optimum level. The payment system is better off by operating at two levels, the Fed with banks and banks with customers.

Of course, one could argue that the Fed's limited capacity should not necessarily be allocated to banks. In theory, the law could require the Fed to auction off those accounts to the highest

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[70] Although there are over 40,000 depository institutions which are entitled to hold accounts, about 32,000 institutions are either exempt from reserve requirements because their deposits are less than $2 million, 12 U.S.C. § 461(b)(11)(A)(i) (1982), or hold reserves through pass-through accounts with correspondent banks, *id.* § 461(c)(1)(B), and thus choose not to hold reserve accounts but instead make their payments through correspondent banks.

[71] There are two noteworthy examples of paper banks. First, in 1981, Chrysler Corp., during its financial difficulties, incorporated a state chartered bank, Automotive Financial Services, Inc. (AFS), whose sole purpose was to present to the Fed dealer drafts that had been deposited with it by its parent Chrysler. Dealer drafts are drafts drawn by Chrysler on its dealers, directing the dealers' banks to pay Chrysler for cars shipped to the dealers. Given Chrysler's financial difficulties, if an independent bank would take the drafts at all, it would only do so on a collection basis, *i.e.*, only credit Chrysler after the drafts were paid, or by purchase at a substantial discount. AFS, on the other hand, offered Chrysler a means of getting immediate credit without discounting. If the Fed had given AFS immediate credit on the drafts, with no conditions, it would have absorbed the entire risk of a potential dishonor of the drafts. In fact the Fed required AFS to hold clearing balances which could be debited in the event that the dealer drafts were dishonored. Nevertheless, Chrysler, through AFS, got better terms from the Fed than it would have received from a private bank.

The second noteworthy paper bank is Custodial Trust Co. (CTC), the captive of the investment bank, Bear, Stearns & Co. Bear, Stearns is a primary dealer in United States government securities which are transferred through the Fed's book-entry account system. Only depository institutions can hold such accounts. Clearing banks buy and sell book-entry securities on behalf of non-bank dealers and they impose transaction charges for this service. The banks allow the dealers to purchase securities by overdrafting their accounts as long as the banks hold the securities to secure the overdrafts. The banks will also demand that sufficient balances be maintained to cover the banks' market risk on the securities. The banks in turn overdraft their accounts at the Fed. By operating its own bank, Bear, Stearns brought the clearing bank function in-house in order to avoid the transaction charges and balance requirements. This device would not work if the captive bank, CTC, were prohibited from overdrafting its Fed account. Bear, Stearns would then be better off clearing through a bank which had the right to overdraft during the day than incurring the intra-day financing to support CTC's book-entry activities.

bidders. This would allow commercial firms to compete with banks for accounts. The actual result, however, would resemble the current situation because banks would have more payment volume than all but a very few commercial companies or individuals. It is probably simpler to keep the situation the way it is. Furthermore, the Fed accounts are not only used for payments—they also serve as reserve accounts. Because many banks which take reservable liabilities will need to have such accounts in any event, whatever their payment volume, this serves as an additional reason for allocating the accounts to them.

Although this analysis suggests that only "real" banks[72] should be able to have Fed accounts, it would still, absent additional considerations, permit unregulated holding companies that owned real banks, such as Sears-Sears Savings Bank or American Express-Boston Safe, to use their real banks to make payments on a no-overdraft basis. Any other commercial company that is willing to acquire or start up a real bank would be able to do so as well.

The second concern, however, goes to the point that unregulated holding companies should not be allowed to make payments even through their real banks.[73] Although a no-overdraft policy can protect the Fed from the direct financial risk resulting from a bank's overdrafts, protecting the bank against failure is just as important. If an unregulated holding company can overdraft its bank account, the bank may be exposed to failure because of the holding company's activities, and the Fed or

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[72] Real banks could be defined as banks that actively seek to make loans and take deposits from independent customers.

[73] The normal 15% of capital lending limit, applicable to unsecured credit extensions to a single borrower, *see* 12 U.S.C. § 84 (1982) (lending limit provision), does not apply to daylight overdrafts of national banks. *See* 12 C.F.R. § 32.105 (1985) (Office of the Comptroller of the Currency (OCC) interpretation stating lending limits not applicable to daylight overdrafts). Although some states might apply lending limits to overdrafts on state banks, and although the OCC interpretation could be repealed, it would be exceedingly difficult to enforce the application of lending limits to overdrafts that might occur for only a matter of seconds. Indeed, this is probably the reason that such overdrafts were exempted from the lending limits by the OCC. There is no ruling from the Fed as to whether the § 23A limits on loans to affiliates (*see supra* note 39) would apply to daylight overdrafts. Furthermore, these affiliate prohibitions do not apply to thrifts or non-insured banks, both of which have payment system access. *But cf.* Reg. O, 12 C.F.R. pt. 215 (1984), regulating insider loans, including those to officers, directors, and principal shareholders such as holding companies. This regulation exempts overdrafts to principal shareholders, other than officers or directors, from otherwise applicable lending limits. *Id.* § 215.4(d) and note 4. This exemption seems to be required by 12 U.S.C. § 375(b)(4) (1982).

FDIC, which will have no knowledge or expertise about these activities, will be at risk as public guarantors. Although the Fed may be able to enforce a no-overdraft policy at the Fed/bank level through controls on its own system, it has no way to enforce the policy at the holding company/bank level.

Existing laws imposing lending limits on loans by depository institutions to affiliates cannot be relied upon to prevent an unregulated holding company from overdrafting an affiliate.[74] First, daylight overdrafts are not regarded as loans by the OCC. Second, the limitations on loans to affiliates only apply to insured banks, and are not applicable to non-insured banks or thrifts, both of which can be used to obtain payment system access. Third, lending limits would be very difficult to apply effectively to overdrafts because of the difficulty in monitoring.[75] Finally, normal lending limits are enforced on an ex post basis through the examination process. Obviously this technique would not be effective in protecting a captive bank from extending overdraft facilities to its parent when the parent is in trouble.[76]

Thus, unregulated holding companies should be prohibited from making any payments through their own banks. Instead, they should be forced to deal at arms-length with banks that will exercise their independent judgment in deciding upon the appropriate levels of overdrafts during the day.

## IV. CONCLUSION

We are at a crossroads in the reform of our financial system. We must make basic choices. My view is that we should limit bank activities to those that regulators can understand and evaluate, but that we should deregulate the activities of bank holding company affiliates. Rather than condemn the expansion of un-

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[74] *Id.*

[75] A banker's problems in monitoring the daylight overdraft activity of its customers would be similar to the problems of the Fed in monitoring overdrafts by banks. *See supra* note 69.

[76] Sears has contended that such a credit extension "is highly unlikely to occur with any frequency in light of the severe penalties to which bank officers and employees are subject if they violate prudent banking standards . . .," citing 12 U.S.C. § 504 which provides for a civil penalty of up to $1000 per day for each day lending limits are violated. SEARS, *supra* note 40, at 8–9. With respect to an intra-day overdraft which is uncovered at the time of a bank failure this penalty could only result in a $1000 fine; hardly a sufficient deterrent.

regulated holding companies into the banking field, and try to turn back the clock, we should accept this development and try to bring bank holding companies to a parity with unregulated holding companies.

On the other hand, unregulated companies should not be able to impose the risk of their failure on affiliated banks. This concern requires us to maintain the separateness of the holding company and the bank. In particular, it requires us to prohibit unregulated companies from processing payments through affiliated banks. If, however, we do not succeed in completely deregulating holding company activity, regulated bank holding companies should be allowed, *in the short term*, to process payments through their affiliated banks.

Regulated bank holding companies, unlike unregulated holding companies, are regulated for risk through examination, monitoring, and control of capital adequacy, types of permissible activites, and operating procedures. Although it is undoubtedly true that *some* regulated holding companies are more risky than *some* unregulated holding companies, this is generally not the case.[77] Furthermore, the Fed is in the position, through information obtained from its regulation of bank holding companies to make assessments about the solvency of a particular regulated bank holding company. However, it has no such information, on a continual basis, about unregulated companies. If a regulated bank holding company is experiencing difficulties, the Fed will probably know this in advance of the holding company's failure and could prevent the holding company from making payments through its bank. Unregulated holding companies may fail suddenly, leaving the bank exposed. Finally, the overdraft

[77] In the 1981–1983 period, the general business failure rate was 86 per 10,000, as compared with the failure rate of 46 per 10,000 for a composite of FDIC insured commercial and mutual savings banks, and FSLIC insured savings and loan associations. The FDIC data include as a failing bank liquidations and any situation requiring federal assistance to a bank, whereas the FSLIC data only include liquidations and federally assisted mergers. These failure rates are based on U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1986, 521 (Table 883) (1986) and on information provided by telephone by James Moreno, Assistant Director, Div. of Research and Statistical Planning, FDIC, and Doug Green, Communications Office, Federal Home Loan Bank Board. Between 1960 and 1975 the business failure rate was an average of 47.6 per 10,000 while the failure rate of banks insured by the FDIC was 4 per 10,000. *See* Clark, *The Soundness of Financial Intermediaries*, 86 YALE L. J. 1, 13 n.48 (1976). The failure rate for depository institution holding companies should be considerably lower than the rate for depository institutions because many banks or thrifts which fail are not owned by holding companies and it is very unlikely at present that a holding company whose major asset is a depository institution will fail without such institution also failing.

risk to a bank from an unregulated company is likely to be more substantial than the risk from a regulated bank holding company because the payment volume of an unregulated holding company is likely to represent a higher percentage of its captive bank's total payment volume. This reflects the fact that the major assets of unregulated holding companies will be in the holding company rather than the bank.[78]

Deregulation of the holding company requires the maintenance of corporate separateness between the unregulated holding company and the regulated bank. Because this is exceedingly difficult in the case of payments, the best approach is to prohibit the unregulated holding company from using its captive depository institution to make its payments.

## APPENDIX

### STATUTE PROHIBITING PAYMENT ARRANGEMENTS BETWEEN UNREGULATED HOLDING COMPANIES AND THEIR SUBSIDIARY BANKS

**(1) No depository institution controlled by an unregulated holding company may hold any demand deposits or deposits that the depositor may withdraw by check or similar means for payment to third parties for, or process payments for or on behalf of, such holding company or any of such holding company's affiliates.**

**(2) For purposes of this section, the following definitions apply:**

**(a) the term 'depository institution' means any 'depository institution' as defined in Section 19(b) of the Federal Reserve Act (12 U.S.C. § 461(b));**

**(b) the term 'unregulated holding company' means any holding company which is not**

**(i) a 'bank holding company' within the meaning of Section 2(a) of the Bank Holding Company Act of 1956 (12 U.S.C. § 1841); or**

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[78] This difference also means, as discussed in note 27, *supra*, that a holding company rescue of an unregulated bank holding company, necessitated by restrictive bank covenants, would be generally more expensive than for the rescue of a regulated bank holding company.

**(ii) a savings and loan holding company engaged only in activities permissible for a multiple savings and loan holding company under Section 408(c) of the National Housing Act (12 U.S.C. § 1730a(c));**

**(c) the term 'process payments' means any use of depository institution, Federal Reserve Bank, Federal Home Loan Bank Board or other similar accounts for the purpose of receiving or sending payments from one party to another party;**

**(d) the term 'holding company' means any company that directly or indirectly controls a depository institution and the term 'affiliate' means any subsidiary of such company. The terms control, subsidiary and company have the same meaning as in Section 2 of the Bank Holding Company Act of 1956 (12 U.S.C. § 1841).**

# REPORT

# THE NATIONAL BANKRUPTCY CONFERENCE'S POSITION ON THE COURT SYSTEM UNDER THE BANKRUPTCY AMENDMENTS AND FEDERAL JUDGESHIP ACT OF 1984, AND SUGGESTIONS FOR RULES PROMULGATION

ROBERT A. GREENFIELD*

*In 1984, Congress attempted to resolve the confusion surrounding jurisdiction of bankruptcy courts by enacting the Bankruptcy Amendments and Federal Judgeship Act of 1984. But, as Professor Vern Countryman argued in* Scrambling to Define Bankruptcy Jurisdiction: The Chief Justice, the Judicial Conference, and the Legislative Process, *22* HARV. J. ON LEGIS. *1 (1985), the 1984 Amendments themselves are flawed.*

*In 1985, the National Bankruptcy Conference responded to the new Amendments from a substantive law perspective. While recognizing serious problems with the 1984 Amendments, this Report represents the Bankruptcy Conference's views on the correct interpretation of the Amendments' sometimes confusing provisions.*

## PREAMBLE

The National Bankruptcy Conference (the "Conference") is "[a] voluntary organization composed of persons interested in the improvement of the Bankruptcy Code and its administration." Members of the Conference include bankruptcy attorneys, law professors, and judges.

On October 26, 1985, the Conference, composed of approximately sixty members and associates, met in Washington, D.C. for its annual meeting. The Conference's Committee on Courts reported to the Conference on the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353 (the "1984 Amendments"), as it pertains to the court system. This Report

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is the result of that report and represents the position of the Conference on the 1984 Amendments.[1]

## INTRODUCTION

The Conference has analyzed the 1984 Amendments. The Conference's objective is not, at least at the present time, to propose further amendments to the Bankruptcy Code, even though the 1984 Amendments are in many respects unclear, ambiguous, or otherwise objectionable. The Conference does not believe that new legislation is likely to be enacted by Congress in the foreseeable future. The Conference has taken a position on the meaning of the 1984 Amendments from a substantive law perspective. To the extent that procedure is necessary either to interpret or to further the ostensible goals of the 1984 Amendments, the Conference has recommended amendments to the existing Bankruptcy Rules (the "Rules").

The "Preliminary Draft of Proposed Bankruptcy Rules (November, 1985)" (the "Preliminary Draft") proposed by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the "Rules Committee") does not contain proposed Rules to deal with most of the issues raised in this Report. It is the Conference's hope that its views will be helpful to the Rules Committee in connection with the preparation of its final draft of the proposed Rules. However, if the Rules Committee proposes no more than the Preliminary Draft suggests it is prepared to do, most of the issues raised by this Report will be left to the courts to determine. It is the Conference's hope that its position on the 1984 Amendments and the proposed Rules will be cited by the courts in their interpretation of the 1984 Amendments, and will influence the courts in their promulgation of new local rules implementing the 1984 Amendments.

In taking substantive law positions interpreting the 1984 Amendments, and in proposing Rules, the Conference has one guiding principle: proceedings should be initiated before and determined by bankruptcy judges rather than district judges.

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[1] Although this Report represents the position of the Conference, it does not necessarily represent the position of the author, of any member of the Conference, or of any member of the Conference's Committee on Courts. All members of the Conference are free to take positions contrary to the Conference's position on any issue when representing a client, in court decisions, in legal publications, or otherwise.

The Conference believes that this approach is in the best interests of bankruptcy administration and consistent with the Congressional intent. There is, of course, a statutory justification for this interpretation of the 1984 Amendments. In section 157(a), "[e]ach district court may provide that any and all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district."[2] The Conference is advised that all district courts throughout the United States have by local rule or order referred all such cases and proceedings to the bankruptcy judges for their districts. Therefore, whenever the statute refers to the "district court," it is the Conference's position that the words "bankruptcy court" should be substituted except when such a substitution would do extreme harm to some clear legislative intent (to the extent that the Conference could discern such intent from the 1984 Amendments).[3] With respect to proposed Rules, the Conference was mindful of section 2075 in that the Rules "shall not abridge, enlarge, or modify any substantive right."

A word should be said about the status of the bankruptcy court under the 1984 Amendments. Under section 151, bankruptcy judges "shall constitute a unit of the district court to be known as the bankruptcy court for that district." This Report uses the words "bankruptcy court" and "bankruptcy judge" interchangeably, as do the 1984 Amendments. The Conference has determined not to become embroiled in the esoteric dispute whether the bankruptcy court is a "court" and any implications that result from such a determination.

Finally, reference should be made to a phrase used frequently in this Report that refers to the procedures under section 157(c)(1). Section 157(c)(1) provides as follows:

> A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy 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.

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[2] All statutory references in this Report will be to 28 U.S.C.A. (West Supp. 1985), unless otherwise stated.

[3] *See infra* text accompanying notes 37 and 43 for exceptions.

This Report frequently states that it is the Conference's position that a proceeding should be heard by the bankruptcy court and not by the district court, but that the bankruptcy judge should not enter a dispositive order. Section 157(c)(1) may not, by its literal terms, apply to the proceeding. Nevertheless, it is the Conference's position that the procedures established by Congress for the determination of non-core proceedings may be appropriately adapted to other proceedings. Therefore, it is often set forth in the Report that "the entry of the order should be by the district court under the procedures provided in section 157(c)(1)," or words to that effect.

## I. The Power of the Bankruptcy Court (Section 105 of title 11)

Section 113 of the 1984 Amendments appears to repeal section 1481 of title 28.[4] The repealed section provided that "[a] bankruptcy court shall have the powers of a court of equity, law, and admiralty, but may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment."

It is the position of the Conference that following the 1984 Amendments, the bankruptcy court may still "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title [title 11]."[5] It is also the Conference's position that since the district court has the powers of a court of equity, law, and admiralty, such powers may be referred to the bankruptcy court as a unit of the district court. The Rules should so provide.[6]

Special mention should be made of the contempt power and the power of the bankruptcy court to enjoin another court. It is the Conference's position that civil contempt may be adjudicated by the bankruptcy court, without restriction, as was the case prior to the 1984 Amendments.[7] However, notwithstanding

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[4] *See* SEC v. Danning *(In re Carter)*, 759 F.2d 763, 766 (9th Cir. 1985); City National Bank of Miami v. General Coffee Corp. *(In re General Coffee Corp.)*, 758 F.2d 1406, 1408–09 (11th Cir. 1985).

[5] 11 U.S.C.A. § 105 (West Supp. 1985).

[6] *See infra* text accompanying note 12.

[7] *See* Johns-Mansville Sales Corp. v. Doan *(In re Johns-Mansville Corp.)*, 26 Bankr. 919 (Bankr. S.D.N.Y. 1983); *contra* Omega Equipment Corp. v. John C. Lewis Co. *(In re Omega Corp.)*, 51 Bankr. 569 (D.D.C. 1985).

the repeal of section 1481, it would not seem appropriate following the decision of the United States Supreme Court in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[8] (the "*Marathon* case") to assume that the bankruptcy court has or should have greater power in connection with criminal contempt than that which existed prior to the 1984 Amendments.

As a consequence, it is the Conference's position that Rule 9020, as amended to accommodate the new language of the 1984 Amendments, should apply to the criminal contempt power of the bankruptcy court following the 1984 Amendments. Criminal contempts not committed in the presence of the bankruptcy judge and criminal contempts warranting a punishment of imprisonment should be certified to the district court as provided in Rule 9020(a)(3). Rule 9020 also provides that criminal contempt committed in the presence of the bankruptcy judge and not warranting a punishment of imprisonment may be punished summarily by the bankruptcy judge. It is the Conference's position that the bankruptcy judge may enter such orders.

Although the Bankruptcy Code would not appear to prohibit any injunctive power of the bankruptcy court, it does not seem appropriate that the bankruptcy court following the *Marathon* case and the 1984 Amendments should have the power to enjoin another court, notwithstanding the repeal of section 1481.[9] Since it is the Conference's position that with few exceptions all proceedings should be initiated before bankruptcy judges, it is the Conference's position that the hearing to enjoin another court should be before the bankruptcy court. However, the entry of the order to enjoin another court should be by the district court under the procedures provided in section 157(c)(1). The Rules should so provide. An order declining to enjoin another court may be entered by the bankruptcy court, subject to appeal like any other order of a bankruptcy judge.[10]

## II. Jury Trial (Section 1411)

Section 1411(a) suggests that in proceedings to determine other than personal injury tort ("PIT") or wrongful death ("WD") claims there is no right to a jury trial unless mandated

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[8] 458 U.S. 50 (1982).
[9] *See supra* text accompanying note 4.
[10] *See* 28 U.S.C.A. § 158 (West Supp. 1985).

by the Seventh Amendment to the Constitution. The Conference takes no position on what proceedings in a bankruptcy court, if any, are entitled to a jury trial under the Seventh Amendment.

Section 1411(a) appears to apply to both PIT and WD claims (hereinafter collectively referred to as "PITWD claims") against the estate and the estate's PITWD claims against third parties, so long as the holder of the PITWD claim (or the debtor in the case of the estate's PITWD claim) is an individual.

There is no suggestion in the 1984 Amendments that a jury trial may not be conducted before the bankruptcy court. It is the Conference's position that bankruptcy judges may conduct jury trials where the right to a jury trial exists.[11]

Section 1411(b) would appear to be unnecessary. It seems to have been carried over from the former section 1480(b) without much thought given by Congress to the fact that former section 1480(a) is significantly different than the new section 1411(a). Nevertheless, based upon section 1411(b), the bankruptcy court may order the issues arising under section 303 of title 11 (involuntary cases) to be tried with or without a jury. If the former is allowed, Rule 9015(e) dealing with advisory juries and jury trial by consent should be applicable.

## III. JURISDICTION OF THE BANKRUPTCY COURT (SECTION 1334)

The jurisdictional provisions contained in section 1334(a), (b) and (d) are substantially identical to the provisions contained in former section 1471(a), (b) and (e). The bankruptcy court has been granted the broadest possible jurisdiction since section 1334 refers to all cases under title 11, all civil proceedings arising under title 11, all civil proceedings arising in or related to cases under title 11, and all property of the debtor and of the estate, wherever located.

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[11] *See* Hassett v. Weissman *(In re O.P.M. Leasing Services, Inc.)*, 48 Bankr. 824, 830 (S.D.N.Y. 1985); Lerblance v. Rodgers *(In re Rodgers & Sons, Inc.)*, 48 Bankr. 683 (Bankr. E.D. Okla. 1985); Baldwin-United Corp. v. Thompson *(In re Baldwin-United Corp.)*, 48 Bankr, 49, 56 (Bankr. S.D. Ohio 1985); Morse Electric Co. v. Logicon, Inc. *(In re Morse Electric Co.)*, 47 Bankr. 234, 238 (Bankr. N.D. Ind. 1985); *see also infra* text accompanying note 42 for a discussion of the procedure if a jury trial is demanded before the bankruptcy court in a non-core proceeding. *Contra* Cameron v. Anderson *(In re American Energy, Inc.)*, 50 Bankr. 175 (Bankr. D.N.D. 1985).

## IV. General Order of Reference (Section 157(a))

Section 157(a) provides that each district court may refer all cases and proceedings over which the district court has jurisdiction to the bankruptcy judges for the district. The Conference is advised that all district courts in the United States have by local rule or order referred all such cases and proceedings to the bankruptcy judges for their districts.

It is the Conference's position that a Rule similar to former Rule 102 ought to be promulgated. The reference should be as broad as section 1334(a), (b) and (d). The Rule should provide that unless the district court orders otherwise, all cases under title 11, and all proceedings arising under title 11 or arising in or related to cases under title 11, shall be referred to the bankruptcy judges for the district. Thereafter, except as stated hereafter, all proceedings in the case will be before the bankruptcy judge unless withdrawn as provided in section 157(d), but subject to the limitations specified in section 157(c).

The Rule should also provide for the following:

(a) Specify that the bankruptcy court has the powers of a court of equity, law, and admiralty, including the contempt power but that such powers should exclude the power to punish for criminal contempt not committed in the presence of the bankruptcy judge or warranting a punishment of imprisonment.[12]

(b) Include the power to hear a proceeding to enjoin another court. However, the entry of the order to enjoin another court should be by the district court under the procedures provided in section 157(c)(1).[13]

(c) Include the power to conduct a jury trial where the right to a jury trial exists.[14]

(d) Exclude the trial of a PITWD claim against the estate pursuant to the provisions of section 157(b)(5) unless the parties expressly consent to the trial before the bankruptcy court.[15]

(e) Include the power to enter in a non-core proceeding (i) an interlocutory order, and (ii) a dispositive order if the parties expressly consent as provided in section 157(c)(2), or the parties fail to timely object.[16]

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[12] *See supra* text accompanying note 9.
[13] *See supra* text accompanying note 10.
[14] *See supra* text accompanying note 11.
[15] *See infra* text accompanying note 37.
[16] *See infra* text accompanying notes 33 and 39.

(f) Exclude the power to hear a motion to withdraw a reference.[17]

(g) Include the power to hear a motion to abstain from hearing a case or a proceeding. However, the entry of the order should be by the district court under the procedures provided in section 157(c)(1), except that the bankruptcy court may enter an order declining to abstain from hearing a proceeding.[18]

(h) Include the power to determine a venue motion, both with respect to a case or a proceeding.[19]

(i) Include a removed action, and the power to hear a remand motion. However, the entry of the order should be by the district court under the procedures provided in section 157(c)(1).[20]

## V. CORE VS. NON-CORE (SECTION 157(b))

The 1984 Amendments distinguish between core proceedings and non-core proceedings that are otherwise related to the case. "Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review [appeal] under section 158 of this title."[21] Non-core proceedings are also heard by bankruptcy judges but dispositive orders in non-core proceedings are entered by the district court.[22]

There is a laundry list of core proceedings, but that list is expressly not exclusive. There is a special category established for the allowance or disallowance of PITWD claims against the estate for purposes of distribution.[23]

Because of the general provisions in section 157(b)(2)(A) and (O), it is the Conference's position that non-core proceedings are limited to the following:

(a) *Marathon*-type causes of action that are part of the debtor's estate pursuant to the provisions of section 541(a)(1) or (2) of title 11;

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[17] *See infra* text accompanying notes 43–44.

[18] *See infra* text accompanying notes 50–51. *See also infra* section 11 of this Report.

[19] *See infra* text accompanying notes 53–55.

[20] *See infra* text accompanying notes 56–57.

[21] 28 U.S.C.A. § 157(b)(1) (West Supp. 1985).

[22] 28 U.S.C.A. § 157(c)(1) (West Supp. 1985). *See infra* text accompanying note 39.

[23] 28 U.S.C.A. § 157(b)(2)(B) (West Supp. 1985). *See infra* text accompanying note 36.

(b) claims by third parties against other third parties if the bankruptcy court has jurisdiction over such controversies under section 1334(b) and (d);

(c) the liquidation or estimation of contingent or unliquidated PITWD claims against the estate for purposes of distribution in a case under title 11;[24] and

(d) orders approving the sale of property resulting from claims brought by the estate against persons who have not filed claims against the estate.[25]

Everything else is core.

Although not specified in section 157(b), it is the Conference's position that core proceedings include settlements and compromises, and assumption, rejection, and assignment of executory contracts.[26] Actions to invalidate transfers under section 544(a) and (b) of title 11 either because they arise under the Bankruptcy Code or involve a quantum of recovery different than under state law as a result of *Moore v. Bay*,[27] should be considered core proceedings.[28]

The Conference considered whether the reference to turnover in section 157(b)(2)(E) should include a state created cause of action on a debt that is property of the estate and that is matured, payable on demand, or payable on order, as specified in section 542(b) of title 11. Since this is so close to the *Marathon*-type cause of action which Congress seemed to have intended to be the underpinning of the core vs. non-core distinction under the 1984 Amendments, it is the Conference's position that Congress intended such collection actions to be non-core.[29] How-

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[24] 28 U.S.C.A. § 157(b)(2)(B) (West Supp. 1985).

[25] 28 U.S.C.A. § 157(b)(2)(N) (West Supp. 1985). The Conference takes no position on the meaning of this subparagraph because the language, which is identical to the language found in Model Emergency Bankruptcy Rule (d)(3)(A), defies understanding.

[26] *See In re Republic Oil Corp.*, 51 Bankr. 355, 358 (Bankr. W.D. Wisc. 1985); *In re Harry C. Partridge, Jr. & Sons, Inc.*, 43 Bankr. 669, 672 (Bankr. S.D.N.Y. 1984); Turbowind, Inc. v. Post Street Management, Inc. *(In re Turbowind, Inc.)*, 42 Bankr. 579, 583 (Bankr. S.D. Calif. 1984).

[27] Moore v. Bay, 284 U.S. 4 (1931).

[28] Carlton v. Baww, Inc., 751 F.2d 781, 788 (5th Cir. 1985); Sandersville Production Credit Ass'n v. Douthit *(In re Douthit)*, 47 Bankr. 428 (M.D. Ga. 1985).

[29] Climate Control Engineers, Inc. v. Southern Landmark, Inc. *(In re Climate Control Engineers, Inc.)*, 51 Bankr. 359 (Bankr. M.D. Fla. 1985); Maislin Ind., U.S., Inc. v. C J Van Houten E Zoon Inc. *(In re Maislin Ind., U.S., Inc.)*, 50 Bankr. 943 (Bankr. E.D. Mich. 1985); Atlas Automation, Inc. v. Jensen, Inc. *(In re Atlas Automation, Inc.)*, 42 Bankr. 246 (Bankr. E.D. Mich. 1984); *Contra* Franklin Computer Corp. v. Harry Strauss & Sons, Inc. *(In re Franklin Computer Corp.)*, 50 Bankr. 620 (Bankr. E.D. Pa. 1985); Baldwin-United Corp. v. Thompson *(In re Baldwin-United Corp.)*, 48 Bankr. 49, 53 (Bankr. S.D. Ohio 1985); *In re Harry C. Partridge, Jr. & Sons, Inc.*, 48 Bankr. at 1010.

ever, it is also the Conference's position that other turnover proceedings under sections 542 and 543 of title 11 are core.

Section 157(b)(3) provides that "[t]he bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11." It is the Conference's position that the entry of a dispositive order by the bankruptcy judge should constitute a determination that the proceeding is core whether or not there is specific language in the order to that effect. The Rules should so provide.

A determination that the proceeding is core is final unless a timely objection has been made and an appeal is timely filed.[30] If an appeal is timely taken to the district court, the district court may enter its own order if the district court determines that it is not a core proceeding, or the district court may affirm or reverse the order if it is a core proceeding. The Rules should so provide.

It is the Conference's position that if the appeal is taken to the Bankruptcy Appellate Panel (the "BAP"), this should foreclose any argument that the order that was entered was non-core. Any party could have refused to consent to an appeal before the BAP.[31] Following such refusal, the district court would have had an opportunity to affirm or reverse the order if it were core or enter its own order if it were non-core. That opportunity is not present if the appeal is before the BAP. Therefore, the order should be deemed core. The Rules should so provide.

It is the Conference's position that a determination by the bankruptcy judge, on the judge's own motion, that a proceeding is non-core may be made by the judge at any time before the entry of a dispositive order. The Rules should so provide. However, a party must object prior to or at the time of the first pleading filed by that party. Such an objection should be deemed a motion to be heard by the bankruptcy judge at an appropriate time during the trial. Except when mandatory abstention is requested pursuant to section 1334(c)(2),[32] the distinction between core and non-core only becomes of consequence at the

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[30] *See infra* text accompanying note 33.
[31] 28 U.S.C.A. § 158(b)(1) (West Supp. 1985).
[32] *See infra* text accompanying note 51.

time following the trial when the bankruptcy judge must either enter a dispositive order or recommend an order to the district court under the procedures provided in section 157(c)(1). Therefore, it does not appear essential for the bankruptcy court to consider this issue prior to the actual trial on the merits. However, the Rules should provide that although a separate motion is not necessary, such a motion to determine the issue of core vs. non-core may be filed by any objecting party and heard before trial.

It is the Conference's position that the Rules ought to provide that if the initial pleading and the first required responsive pleading do not raise the issue, it will be deemed to be a consent that the proceeding be treated as core.[33] If no responsive pleading is required, the objection to the proceeding being treated as a core proceeding should be filed within thirty days following the service of the final required pleading in the proceeding, or five days before the commencement of trial, whichever occurs first.

The Rules should also provide that if the parties actually consent that a non-core proceeding be tried as a core proceeding,[34] or if there is a failure to timely object as provided in the Rules,[35] there is an automatic reference for the determination of all non-core proceedings so that the bankruptcy judge may hear and determine them and enter appropriate orders, judgements, and decrees without the necessity of a specific order of reference from the district court.

The Rules should provide that once a party consents that a non-core proceeding be tried as a core proceeding, the consent may not be withdrawn. However, consent may come at any time until the proposed papers are submitted by the bankruptcy judge to the district court.

## VI. Personal Injury Tort and Wrongful Death Claims

Special treatment of PITWD claims against the estate is provided in section 157(b)(5). Although there may have been a general order of reference from the district court to the bankruptcy court, it is the Conference's position that it was intended

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[33] *Cf.* Lombard-Wall, Inc. v. New York City Hous. Dev. Corp. *(In re Lombard-Wall, Inc.)*, 48 Bankr. 986 (S.D.N.Y. 1984); *In re Baldwin-United Corp.*, 48 Bankr. at 49.

[34] *See* 28 U.S.C.A. § 157(c)(2) (West Supp. 1985).

[35] *See supra* text accompanying note 16.

by Congress that, in connection with the final allowance of PITWD claims for purposes of distribution in the case,[36] the actual trial should be before the district court and not before the bankruptcy court, unless the parties expressly consent to trial before the bankruptcy court.[37] Absent such consent, the pleadings should be filed in the bankruptcy court and *all* preliminary matters should be heard and determined by the bankruptcy judge. However, when the proceeding is ready for trial, the actual trial must be before the district court. The Rules should so provide.

A special rule on venue determination of PITWD claims should be promulgated. It is the Conference's position that a motion to change venue must be filed before the home bankruptcy court within thirty days after the service of any objection to a PITWD claim against the estate. That motion should be determined by the bankruptcy judge. The bankruptcy judge should also determine a motion to strike a jury trial demand and whether a PITWD claim is involved. The Rules should so provide.

Under section 157(b)(4) the district court may not, under the mandatory provisions of section 1334(c)(2), abstain from determining the final allowance of PITWD claims for purposes of distribution in the case. However, it is the Conference's position that the district court may voluntarily abstain under the provision of section 1334(c)(1).[38]

## VII. Non-core Proceedings

Section 157(c)(1) of title 28 by its terms applies to a "final" order or judgment that in a non-core proceeding must be entered by the district court. It is the Conference's position that any interlocutory order, including a temporary restraining order or preliminary injunction, may be entered by a bankruptcy judge whether it is entered in connection with an underlying core or underlying non-core proceeding without following the procedures provided in section 157(c).[39]

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[36] 28 U.S.C.A. § 157(b)(2)(B) (West Supp. 1985).

[37] *See* Newton v. Johns-Mansville Corp. *(In re Johns-Mansville Corp.)*, 45 Bankr. 827, 830 (S.D.N.Y. 1984). *See supra* text accompanying note 15.

[38] Citibank v. White Motors Corp. *(In re White Motors Credit)*, 761 F.2d 270 (6th Cir. 1985).

[39] *See* Elkins v. X-Alpha Int'l, Ltd. *(In re Kennedy)*, 48 Bankr. 621, 622 (Bankr. D. Ariz. 1985); Lesser v. A-Z Associates *(In re Lion Capital Group)*, 46 Bankr. 850, 854 (Bankr. S.D.N.Y. 1985).

Although the 1984 Amendments do not specify that bankruptcy judges should submit proposed orders, the Rules should specify that proposed findings of fact, conclusions of law, *and* a proposed order, judgment, or decree (the "proposed papers") should be submitted by the bankruptcy judge to the district court.

It is the Conference's position that the procedures under section 157(c)(1) should be patterned on the procedures that the district court would follow in non-BAP districts in connection with appeals from orders entered by bankruptcy judges, except that the standard of review would, of course, be different. Under section 157(c)(1), the standard of review would be "de novo." In connection with an appeal under section 158, the standard of appeal would be "clearly erroneous."[40]

The Conference takes no position on what constitutes "de novo" review. It may be that it would be similar to that contained in Emergency Rule (e)(2)(B), which stated that "the district court may hold a hearing and may receive such evidence as is appropriate and may accept, reject, or modify, in whole or in part, the order or judgment or proposed order or judgment of the bankruptcy judge, and need give no deference to the findings of the bankruptcy court."[41] In addition, the Conference takes no position on the standard of appeal to the courts of appeals from orders entered by the district courts under section 157(c)(1).

The Rules for review under section 157(c)(1) should parallel the Rules for appeal to the district courts under section 158. The bankruptcy judge should submit the proposed papers to the district court. The losing party should have ten days to seek review following entry of a notice of submission or transmittal to the district court on the docket of the bankruptcy court. Once the bankruptcy judge has submitted the proposed papers to the district court and ten days have expired without objection, the dispositive order may be entered by the district judge after considering the bankruptcy judge's proposed papers. Unless the district judge chooses to do otherwise, it would not be necessary to review any matter since the parties would not have filed a timely and specific objection. The Rules should so provide.

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[40] *In re X-Cel, Inc.*, 46 Bankr. 202 (N.D. Ill. 1984); Williams v. Johns-Mansville Corp. *(In re Johns-Mansville Corp.)*, 43 Bankr. 765 (S.D.N.Y. 1984).

[41] *See also* Moody v. Amoco Oil Co., 734 F.2d 1200 (7th Cir. 1984) and 28 U.S.C § 636(b)(1) (1982) (district court's review of magistrates findings).

The Rules should provide that the district court would have authority to modify the procedures in the event that circumstances necessitate an immediate entry of a dispositive order under section 157(c)(1). Since the entry of orders under section 157(c)(1) could be delayed by the review process without the benefit of stay bonds or other safeguards, the Rules should provide for expedited review in appropriate circumstances.

The Conference takes no position on whether the bankruptcy court may conduct a jury trial in a non-core proceeding. Most reported decisions to date have held that it may not.[42] It may be that if section 157(c)(1) applies to a jury's findings, the district court would review the jury's findings in the same manner as the district court would review the bankruptcy judges' findings in a non-core proceeding tried without a jury. If on "de novo" review additional findings or evidence is requested by the district judge, the jury could be re-empaneled. Such occurrence should not happen very often. However, it may also be that section 157(c)(1) applies only to the findings of a bankruptcy judge, and not to the findings of a jury.

## VIII. Withdrawal of Reference (Section 157(d))

It is the Conference's position that a motion for withdrawal of a case or proceeding should be filed in the first instance before the district court.[43] Notwithstanding the Conference's position that with few exceptions all bankruptcy proceedings should be initiated before bankruptcy judges, it would seem more appropriate for the district court to withdraw or not withdraw that which it has referred.

It is the Conference's position that the district judge may, on the judge's own motion, withdraw the reference of a proceeding at any time until a dispositive order has been entered by the bankruptcy judge. However, a party must file a timely motion. The Conference takes no position on what is timely.

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[42] *See* Mohawk Indus., Inc. v. Robinson Indus., Inc. *(In re Mohawk Indus., Inc.)*, 46 Bankr. 464, 466 (D. Mass. 1985); George Woloch Co. v. Longview Capital Plastic Pipe, Inc. *(In re George Woloch Co.)*, 49 Bankr. 68, 70 (E.D. Pa. 1985); Morse Electric Co. v. Logicon, Inc. *(In re Morse Electric Co.)*, 47 Bankr. 234 (Bankr. N.D. Ind. 1985); *In re Smith-Douglas, Inc.*, 43 Bankr. 616 (Bankr. E.D.N.Y. 1984); *see also* L.A. Clarke and Son, Inc. *(In re L.A. Clarke and Son, Inc.)*, 51 Bankr. 31 (Bankr. D.D.C. 1985) *(dictum)*.

[43] *See In re Morse Electric Co.*, 47 Bankr. at 236; *but see* Fisher v. Insurance Company of the State of Pennsylvania *(In re Pied Piper Casuals, Inc.)*, 48 BANKR. 294 (S.D.N.Y, 1985).

It is the Conference's position that permissive withdrawal under section 157(d) applies to core and non-core proceedings. Both are subject to withdrawal.[44]

The Conference takes no position as to what is "cause" with respect to ruling on a motion to withdraw the reference.[45]

The second sentence of section 157(d), which provides for mandatory withdrawal "if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce" should be very narrowly construed.[46] It is the Conference's position that mandatory withdrawal should be limited to situations where there is a significant conflict of policies between the Bankruptcy Code and another federal statute. The Conference would require more than the "substantial and material" consideration of the other federal statute.[47]

It is the Conference's position that section 1113 of title 11 preempts the National Labor Relations Act and other federal statutes when section 1113 applies. In such situations there would be no mandatory withdrawal.

## IX. Appeals (Section 158)

Part VIII of the Rules should be amended to accommodate section 158(a) of title 11. Appeals to the BAP may only be taken upon the "consent of all the parties."[48] A rule of the BAP for the Ninth Circuit provides for the appeal to the BAP unless, after a fair warning is given, timely objection is filed by a party to the appeal. It is the Conference's position that the parties must file "express" consents for the appeal to go to the BAP.

With respect to appeals of interlocutory orders, there is a question whether section 1292 applies to bankruptcy appeals

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[44] *In re White Motors Corp.*, 42 Bankr. 693, 701 (N.D. Ohio 1984); United States v, Ilco, Inc. *(In re Ilco, Inc.)*, 48 Bankr. 1018, 1028 (N.D. Ala. 1985).

[45] *See* Boatman v. C.V. Indus., 51 Bankr. 574, 578 (D. Conn. 1985)("Unless there is some *substantial reason* why the adversary proceeding should be withdrawn, the matter should be reviewed first by the bankruptcy court.")(emphasis added).

[46] 130 Cong. Rec. H1850 (daily ed. March 21, 1984).

[47] *See In re Ilco, Inc.*, 48 Bankr. at 1021; *In re White Motors Corp.*, 42 Bankr. at 704.

[48] 28 U.S.C.A. § 158(b)(1) (West Supp. 1985).

under section 158(d) to the courts of appeals.[49] The Conference takes no position on this issue.

## X. Abstention from Proceedings (Section 1334(c))

It is the Conference's position that all motions for abstention from any proceeding pending in the bankruptcy court should be filed with and heard by the bankruptcy judge.[50] Although the 1984 Amendments could have been better drafted with respect to this issue, it appears that a decision to abstain is not reviewable whether that decision is of the permissive or mandatory type. Since the second to last sentence of paragraph (2) of section 1334(c) uses the word "subsection," the sentence applies to both mandatory and permissive abstention, notwithstanding its awkward placement within paragraph (2). On the other hand, a decision *not* to abstain is reviewable in either instance.

It is the Conference's position that the 1984 Amendments should not, following the *Marathon* decision, be interpreted to allow the bankruptcy court to enter an order that is not reviewable. Therefore, it is the Conference's position that an order to abstain, since it is not reviewable, should be entered by the district court under the procedures provided in section 157(c)(1), whether the underlying proceeding is core or non-core. An order *not* to abstain, since it is reviewable, may be entered by the bankruptcy judge. The Rules should so provide.

With respect to the timeliness of a motion to abstain, it is the Conference's position that there should be no time limit with respect to permissive abstention under section 1334(c)(1) since the paragraph does not contain any time limitations applicable to a party or to the court's abstaining on its own motion. However, once a dispositive order has been entered, it should be too late for the court to abstain. The Rules should so provide.

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[49] *See* Suburban Bank of Cary Grove v. Riggsby *(In re Riggsby)*, 745 F.2d 1153, 1156 (7th Cir. 1984); Johnson v. First Nat'l Bank, 719 F.2d 270, 273 (8th Cir. 1983), *cert. denied*, 104 S. Ct. 1015 (1984); Coastal Steel Corp. v. Tilghman Wheelabrator Ltd., 709 F.2d 190, 200 (3d Cir. 1983), *cert. denied*, 464 U.S. 938 (1983); C. Wright & E. Cooper, Federal Practice and Procedure § 3920-4033 at 60–66 (Supp. 1985); *but see* Teleport Oil Co. v. Security Pacific Nat'l Bank *(In re Teleport Oil Co.)*, 759 F.2d 1376, 1378 (9th Cir. 1985).

[50] Burgess v. Liberty Savings Ass'n *(In re Burgess)*, 51 Bankr. 300, 302 (Bankr. S.D. Ohio 1985); First Landmark Dev. Corp. v. City of Pinellas Park *(In re First Landmark Dev. Corp.)*, 51 Bankr. 25 (Bankr. M.D. Fla. 1985); Shell Materials, Inc. v. First Bank *(In re Shell Materials, Inc.)*, 50 Bankr. 44, 46 (Bankr. M.D. Fla. 1985); Steinberg v. Esposito *(In re Pioneer Development Corp.)*, 47 Bankr. 624, 628 (Bankr. N.D. Ill. 1985).

With respect to mandatory abstention under section 1334(c)(2), the motion must be filed by the party seeking relief at the time of or prior to the time to file the filing of the initial pleading, or by the respondent at the time of or prior to the time to file the first responsive pleading. If no responsive pleading is required, the motion must be filed within thirty days following service of the final required pleadings, or five days before the commencement of trial, whichever occurs first. The Rules should so provide.

It is the Conference's position that the mandatory abstention provisions in section 1334(c)(2) should be narrowly construed to apply only to non-core proceedings, i.e. that "related" in this context means non-core.[51] Therefore, the last sentence of paragraph (2) is superfluous. It is the Conference's position that the clause "if an action is commenced," is intended to describe a *Marathon*-type cause of action asserted by a debtor or a trustee, and should be limited to cases where the action had been instituted prior to the filing of the bankruptcy case.[52]

## XI. Abstention from Cases (Section 305 of title 11)

It is the Conference's position that motions to abstain from the case under section 305 of title 11 should be filed with and heard by bankruptcy judges. A motion by a creditor for the bankruptcy court to abstain from the case should be made within thirty days following the title 11, section 341(a) meeting. The debtor in an involuntary case should file a motion to abstain at or prior to the filing of the first responsive pleading to the involuntary petition. Because of the nonappealability of an order to abstain or not to abstain under section 305, the entry of the order should be by the district court under the procedures provided in section 157(c)(1) of title 28. The Rules should so provide.

## XII. Venue (Sections 1408–10 and section 1412)

The statutory provisions relating to the venue of cases and proceedings (including cases ancillary to foreign proceedings)

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[51] *See supra* text accompanying notes 24–26.

[52] *See* Climate Control Engineers, Inc. v. Southern Landmark, Inc. *(In re Climate Control Engineers, Inc.)*, 51 Bankr. 359 (Bankr. M.D. Fla. 1985); *In re First Landmark Dev. Corp.*, 51 Bankr. 25; Excelite Corp. v. Custom Vanities, Inc. *(In re Excelite Corp.)*, 49 Bankr. 923 (Bankr. N.D. Ga. 1985); Cooper v. Coronet Insur. Co. *(In re Boughton)*, 49 Bankr. 312 (Bankr. N.D. Ill. 1985).

were not modified by the 1984 Amendments. Sections 1408, 1409, and 1410 are substantially identical to their predecessors, sections 1472, 1473, and 1474.

With respect to change of venue, section 1412 is substantially identical to the former section 1475 which applied to properly venued cases and proceedings. Section 1412 states that "[a] district court may transfer a case or proceeding under title 11 to a district court for another district, in the interest of justice or for the convenience of the parties." It is the Conference's position that a change of venue motion should be filed with and determined by the bankruptcy court, both as to a case and a proceeding.[53]

Former section 1477 provided that "[t]he bankruptcy court of a district in which is filed a case or proceeding laying venue in the wrong division or district may, in the interest of justice and for the convenience of the parties, retain such case or proceeding, or may transfer, under section 1475 of this title, such case or proceeding to any other district or division." Since former section 1477 was repealed by the 1984 Amendments[54] and not replaced by a similar provision, the outpost court may not be able to retain either a case or proceeding filed in an improper venue if there is a timely objection. An interesting question arises as to what an outpost court does with an improperly venued case or proceeding.

Under section 1406, a case filed in an improper venue must be dismissed or transferred to a proper venue when a timely and sufficient objection is interposed. It would appear that section 1406 does not apply to title 11 cases since the language of section 1406 is limited to civil actions or cases as opposed to bankruptcy cases or proceedings. In addition, it does not appear that section 1412 was intended to apply to the wrong venue case or proceeding since it does not provide for the alternatives of retention or dismissal. Section 1412 only allows for transfer.

Since the the 1984 Amendments are vague and ambiguous on the wrong venue issue, it is the Conference's position that a Rule similar to section 1406 should be promulgated to clarify the matter both with respect to improperly venued cases and improperly venued proceedings. With respect to cases, existing

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[53] *Contra* Armstrong v. Rainier Financial Services Co. *(In re Greiner)*, 45 Bankr. 715 (Bankr. D. N.D. 1985) (Since only the district court may transfer an improperly venued case under 28 U.S.C. § 1412, the bankruptcy court must dismiss the case).

[54] *See supra* text accompanying note 4.

Bankruptcy Rule 1014 should be amended. Cases filed in the wrong venue should be dismissed or transferred to a bankruptcy court of proper venue. With respect to improperly venued proceedings, a new rule similar to section 1406 should be promulgated to ameliorate problems caused by decisions in cases like *Coleman American* which could have an adverse effect on the efficient administration of bankruptcy cases.[55] Therefore, proceedings filed in a wrong venue should either be dismissed or transferred to a bankruptcy court of proper venue. Under section 1412, the bankruptcy court of proper venue (usually the home court) could transfer the case or proceeding to any other venue.

## XIII. REMOVAL (SECTION 1452)

It is the Conference's position that removal under section 1452 should be to the bankruptcy court, not to the district court. Remand motions should be filed with and heard by the bankruptcy court.[56] Orders of remand or determinations not to remand are not reviewable by appeal or otherwise. Therefore, it is the Conference's position that the order should be entered by the district court under the procedures provided in section 157(c)(1). The Rules should so provide.[57]

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[55] *See* Littleton Nat'l Bank v. Coleman American Cos., *(In re Coleman American Companies)*, 6 Bankr. 251 (Bankr. D. Colo. 1980) (outpost court has jurisdiction to hear and determine automatic stay proceeding); 1 COLLIER ON BANKRUPTCY ¶ 3.02 at 3-81 (15th ed. 1985).

[56] Elkins v. X-Alpha Int'l, Ltd. *(In re Kennedy)*, 48 Bankr. 621 (Bankr. D. Ariz. 1985); Wayzata Bank & Trust Co. v. A & B Farms *(In re Victoria Co.)*, 42 Bankr. 533 (Bankr. D. Minn. 1984).

[57] *See* G.S.H., Inc. v. Pemberton *(In re Nilsson)*, 42 Bankr. 587 (Bankr. C.D. Cal. 1984).

# ARTICLE

# ATTEMPTING THE IMPOSSIBLE: THE EMERGING CONSENSUS

IRA P. ROBBINS*

*Impossible attempts are situations in which an actor fails to consummate a substantive crime because he is mistaken about attendant circumstances. Professor Robbins divides mistakes regarding circumstances into three categories: mistakes of fact, mistakes of law, and mistakes of mixed fact/law. Courts and commentators disagree primarily over the identification and treatment of mixed fact/law cases.*

*Professor Robbins surveys each category of mistake. He then examines the objective, subjective, and hybrid approaches to dealing with the mixed fact/law category. The objective approach requires an objective manifestation of the actor's intent before conviction is allowed. The subjective approach permits convictions based on intent alone. Under the hybrid approach, the individual's acts must independently evince an intent to commit a specific crime before conviction is allowed. Professor Robbins concludes that the hybrid approach strikes the optimal balance between crime prevention and freedom from unwarranted interference by law-enforcement authorities. Noting the growing acceptance of the hybrid approach, he proposes a model criminal-attempt statute that codifies it.*

The exploits of Lady Eldon,[1] Mr. Fact and Mr. Law,[2] the murderous Haitian voodoo doctor,[3] the soldier who shot an enemy mistakenly believing that he was his sergeant,[4] the individual who shot a tree stump mistakenly believing that it was his enemy,[5] and the larcenous professor who mistakenly "stole" his own umbrella[6] have long baffled courts and commentators.

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[1] *See* 1 F. WHARTON, CRIMINAL LAW § 225, at 304 n.9 (12th ed. 1932).

[2] *See* S. KADISH, S. SCHULHOFER & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 608–09 (4th ed. 1983) [hereinafter cited as CRIMINAL LAW AND ITS PROCESSES]; discussed *infra* at note 87.

[3] *See* Commonwealth v. Johnson, 312 Pa. 140, 152, 167 A. 344, 348 (1933) (Maxey, J., dissenting).

[4] *See* S. Kadish, Memorandum to California Penal Code Reporters, Defense of Impossibility in Attempts 1–3 (Mar. 17, 1965) (unpublished memorandum) (on file at HARV. J. ON LEGIS.) [hereinafter cited as Kadish Memorandum].

[5] *See* Regina v. M'Pherson, 1 Dears. & B.C.C. 197, 201, 169 Eng. Rep. 975, 976, (Crim. App. 1857).

[6] *See* Regina v. Collins, 9 Cox C.C. 497, 498, 169 Eng. Rep. 1477, 1478 (Cr. Cas. Res. 1864).

Each of these instances poses the problem of the impossible attempt.

The term impossible attempt refers to a situation in which an actor fails to consummate a substantive crime because the circumstances (factual and/or legal) were different from those that he anticipated. One problem in dealing with the impossible attempt is determining whether a mistake has occurred. The easiest case is one in which the mistake is apparent from the defendant's objective acts—for example, where an individual shoots at his rival, but the gun misfires. More difficult problems arise, however, when the defendant's acts are neutral, equivocal, or innocuous. What should be done, for example, with the individual who shoots at a tree stump, mistakenly believing it to be his rival? Can he be convicted without exclusive reliance on proof of his subjective intent? If not, would such a conviction give the police and courts a dangerous amount of power? Would it make a difference if the defendant shouted out a cry of revenge as he shot at the stump?

I conclude that an "objective check" is necessary in subjective attempt statutes to prevent the state from convicting individuals who have performed ambiguous acts. The state should not convict an individual of an attempt crime unless his acts, viewed without reference to his underlying intent, at least raise the possibility that the defendant intended to commit a crime. This hybrid test does not require, however, that the defendant's actions unequivocally demonstrate his intent to commit a crime. Several federal and state courts and state legislatures have adopted a similar approach.[7] It has also received the support of several commentators on criminal law.[8] My purpose is to demonstrate that this approach is the only one that adequately balances society's interests in identifying and deterring those who have shown criminal propensities with society's need to control the discretion of its law-enforcement officials.

Part I of the Article separates the impossibility cases into three distinct groups and discusses the rationales for this clas-

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[7] *See infra* note 124 (citing cases and state statutes that have adopted an "objective check" approach).

[8] *See* CRIMINAL LAW AND ITS PROCESSES, *supra* note 2, at 608–10 (discussed *infra* at notes 150–56 and accompanying text); Hughes, *One Further Footnote on Attempting the Impossible*, 42 N.Y.U. L. REV. 1005 (1967) (discussed *infra* at notes 127–49 and accompanying text); Weigend, *Why Lady Eldon Should Be Acquitted: The Social Harm in Attempting the Impossible*, 27 DE PAUL L. REV. 231, 258–59 & n.145 (1977) (discussed *infra* at notes 157–63 and accompanying text).

sification system. Part II presents the debate between the objectivists and the subjectivists. This section includes a response to subjectivists' criticism of the hybrid approach. Part III of the Article discusses the statutory response to impossibility and proposes a model statute that is essentially subjective, but which includes an objective check.

## I. CLASSIFICATION OF IMPOSSIBILITY CASES

Courts have traditionally analyzed impossibility cases by classifying them as cases of either factual or legal impossibility.[9] If the court found the case to be one of "factual" impossibility, the defendant would generally be found guilty.[10] On the other hand, if the court determined that the crime was "legally" impossible to commit, the defendant would generally be found not guilty.[11] Although courts have expressed dissatisfaction with this system, it remains a useful mode of analysis. The legal impossibility category should, however, be subdivided to distinguish between cases involving pure legal impossibility and those involving mixed fact/law impossibility.[12]

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[9] *See, e.g.*, United States v. Hair, 356 F. Supp. 339, 342 (D.D.C. 1973); People v. Rollino, 37 Misc. 2d 14, 15, 233 N.Y.S.2d 580, 582 (Sup. Ct. 1962); Booth v. State, 398 P.2d 863, 870 (Okla. Crim. App. 1964).

[10] *See, e.g.*, State v. Mitchell, 170 Mo. 633, 71 S.W. 175 (1902) (defendant guilty of attempted murder for shooting into empty bed in which he believed victim was sleeping); People v. Moran, 123 N.Y. 254, 25 N.E. 412 (1890) (defendant guilty of attempted larceny for attempting to pick pocket he believed contained valuables); State v. Damms, 9 Wis. 2d 183, 100 N.W.2d 592 (1960) (defendant guilty of attempted murder for attempting to shoot wife with gun he believed was loaded); *see also infra* notes 16–19 (listing factual impossibility cases).

[11] *See, e.g.*, State v. Taylor, 345 Mo. 325, 133 S.W. 336 (1939) (defendant not guilty of attempted bribery for bribing individual he believed was a juror); People v. Jaffe, 185 N.Y. 497, 78 N.E. 169 (1906) (defendant not guilty of attempting to receive stolen property when property had been recovered by police before defendant received it); *see also infra* notes 91–95 (listing legal impossibility cases).

[12] There is a fourth category of cases in which inherently impossible or absurd attempts are placed. This category is commonly designated inherent impossibility. Most of the examples of inherently impossible attempts are the creations of courts and commentators, rather than actual cases. For example, in Commonwealth v. Johnson, 312 Pa. 140, 167 A. 344 (1933), a dissenting judge stated:

> Even though a "voodoo doctor" [who] just arrived here from Haiti actually believed that his malediction would surely bring death to the person on whom he was invoking it, I cannot conceive of an American court upholding a conviction of such a maledicting "doctor" for attempted murder or even attempted assault and battery.

*Id.* at 152, 167 A. at 348 (Maxey, J., dissenting). In an early English case, Attorney General v. Sillem, 2 H. & C. 431, 159 Eng. Rep. 178 (Ex. Ch. 1863), Chief Baron Pollock stated:

### A. *Factual Impossibility*

The defense of factual impossibility may be raised when the actor is unable to complete the substantive crime because of the existence of facts unknown to him.[13] Almost without exception,[14] however, this defense has not proven to be

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> If a statute simply made it a felony to kill any human being . . . , an attempt by means of witchcraft . . . would not be an offense within such a statute. The poverty of language compels one to say "an attempt to kill by means of witchcraft," but such an attempt is really no attempt at all to kill. It is true the sin or wickedness may be as great as an attempt . . . by similar means, but human laws are made, not to punish sin, but to prevent crime and mischief.

*Id.* at 525–26, 159 Eng. Rep. at 221.

Generally, commentators believe that actors in inherent impossibility cases have not demonstrated sufficient dangerousness to warrant punishment. *See, e.g.*, G. FLETCHER, RETHINKING CRIMINAL LAW § 3.3.4, at 165–66 (1978); Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821, 850 (1928); Weigend, *supra* note 8, at 270. Other commentators suggest, however, that such individuals have shown themselves to be willing to perform acts that they believe violate the law and that therefore they should be found guilty to ensure that they do not select a more effective means of accomplishing their goals in the future. *See, e.g.*, 1 P. ROBINSON, CRIMINAL LAW DEFENSES § 85(e) (1984); G. WILLIAMS, CRIMINAL LAW, THE GENERAL PART §§ 203, 207(b) (2d ed. 1961); Elkind, *Impossibility in Criminal Attempts: A Theorist's Headache*, 54 VA. L. REV. 20, 33–34 (1968). *But see* Williams, *Attempting the Impossible—A Reply*, 22 CRIM. L.Q. 49, 55 (1979–80) (suggesting use of discretion in determining whether to charge a voodooist). For a discussion of the statutory treatment of inherent impossibility, see *infra* notes 243 & 313.

[13] Courts and commentators have offered similar definitions of factual impossibility. *See, e.g.*, People v. Rollino, 37 Misc. 2d 14, 15, 233 N.Y.S.2d 580, 582 (Sup. Ct. 1962) (factual impossibility exists when the "substantive crime is impossible of completion, simply because of some physical or factual condition unknown to the defendant"); Hughes, *supra* note 8, at 1006–07 (factual impossibility is the "situation in which the objective of the accused, if achieved, would amount to an offense known to the law, but where the achievement is frustrated by some circumstance such as the inadequacy of the instrument, the intervention of some third person, or the misapprehension of some material matter by the accused"). In each definition it is assumed that, if the defendant had completed his acts and the circumstances were as he believed them to be, the result would have been illegal. The more difficult question is which causes of failure may be correctly classified as purely factual. *See generally infra* notes 90–99 and accompanying text (discussing mixed fact/law cases).

[14] For a brief period in Great Britain there could be no conviction for attempted larceny if there was no property in the pocket of the intended victim. *See* Regina v. Collins, 1 Le. & Ca. 471, 169 Eng. Rep. 1477 (Cr. Cas. Res. 1864), *overruled*, Regina v. Ring, 17 Cox C.C. 491 (Cr. Cas. Res. 1892). In *Collins*, Baron Bramwell posed the question of "whether a man, believing a block of wood to be a man who was his deadly enemy, struck it a blow intending to murder, could he be convicted of intending to murder . . . ?" *Id.* at 473, 169 Eng. Rep. at 1478. Finding this question analogous to the case of an empty pocket, the court in *Collins* held that there could be no conviction if the pocket was empty. With no explanation, *Collins* was overruled 28 years later by *Ring*. *See also* Regina v. Brown, 24 Q.B.D. 357, 359 (1889) (noting the dissatisfaction of the *Collins* judges with their decision).

In another early factual impossibility case, the court overturned the defendant's conviction because the goods that the defendant intended to steal had been removed from the house that he had broken into to commit the larceny. Regina v. M'Pherson, 1 Dears. & B.C.C. 197, 197, 169 Eng. Rep. 975, 975 (Crim. App. 1857). Chief Judge Cockburn reasoned:

successful.[15] It has been raised and rejected most commonly with respect to four substantive crimes: attempted abortions on non-pregnant women;[16] attempted rapes by impotent men;[17] at-

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> There is a difference between intending to do a thing and attempting to do it. A man goes to a place intending to commit a murder, but when he is there he does not find the man he expected to find. How can he be said to have committed the murder? He merely attempts to carry an intention into effect.

*Id.* at 201, 169 Eng. Rep. at 976.

After *Ring*, factual impossibility was not a good defense to attempt crimes through the early 1970's. In Regina v. Curbishley, 55 Crim. App. 318 (C.A. 1970), for example, the defendants were convicted of dishonestly attempting to assist in the removal or disposal of stolen goods even though the goods were not at the designated place when the defendants arrived to move them. Almost 80 years after *Collins* was overruled by *Ring*, however, the court in Partington v. Williams, 62 Crim. App. 220 (C.A. 1975), declared that *M'Pherson* and *Collins* were still good law. In *Williams*, the defendant had taken a wallet from a drawer in the office of her employers, but found that it was empty and returned it. Because the court focused on the culpability of the objective act, rather than on the belief of the defendant when she took the wallet, the defendant's conviction was overturned on the ground that she had not stolen anything. Haughton v. Smith, [1975] A.C. 476 (H.L.), was the main precedent for *Williams*. The Criminal Attempts Act of 1981, *see infra* note 320, finally abolished factual impossibility as a defense in England.

[15] Some courts differ, however, regarding which crimes are properly classified as factually impossible. *Compare* State v. Tropiano, 154 N.J. Super. 452, 459, 381 A.2d 828, 831 (1977) (receiving stolen property no longer stolen presents case of factual impossibility) *with* State v. Vitale, 23 Ariz. App. 37, 44, 530 P.2d 394, 401 (1975) (legal impossibility no bar to conviction for receiving stolen property that was no longer stolen). Before the elimination of the impossibility defense by a majority of state legislatures, these classifications could determine the outcome of the case. *See, e.g.*, United States v. Hair, 356 F. Supp. 339, 342 (D.D.C. 1973) (legal impossibility bars conviction for attempting to receive stolen property if property lost legal status as stolen); People v. Rollino, 37 Misc. 2d 14, 233 N.Y.S.2d 580 (Sup. Ct. 1962) (defendant successfully raised legal impossibility defense when property received was not actually stolen).

[16] *See, e.g.*, United States v. Woodard, 17 C.M.R. 813 (B.R. 1954) (fact that patient was not pregnant is not a defense to attempted abortion); People v. Feigin, 174 Cal. App. 2d 553, 345 P.2d 273 (1959) (need not aver pregnancy for charge of attempted abortion); People v. Cummings, 141 Cal. App. 2d 193, 296 P.2d 610 (1956) (same); People v. Raffington, 98 Cal. App. 2d 455, 220 P.2d 967 (1950) (need not aver pregnancy since statute referred to "any woman"), *cert. denied*, 340 U.S. 912 (1951); Eggart v. State, 40 Fla. 527, 25 So. 144 (1898) (need not aver pregnancy in indictment for attempted abortion); People v. Huff, 339 Ill. 328, 171 N.E. 261 (1930) (same); Dotye v. Commonwealth, 289 S.W.2d 206 (Ky. 1956) (need not aver pregnancy for charge of attempted abortion); Commonwealth v. Tibbetts, 157 Mass. 519, 32 N.E. 910 (1893)(same); State v. Moretti, 52 N.J. 182, 244 A.2d 499 (1968) (attempted abortion conviction not barred because patient was an undercover investigator who was not in fact pregnant), *cert. denied*, 393 U.S. 952 (1962); State v. Elliot, 206 Or. 82, 289 P.2d 1075 (1955) (defendant guilty of attempted abortion when, unbeknownst to him, woman was pregnant in Fallopian tubes and thus defendant's techniques could not succeed); Regina v. Brown, 63 J.P. 790 (Eng. 1899) (defendant guilty if he believed pills would induce abortion); Regina v. Goodchild, 2 Car. & K. 293, 175 Eng. Rep. 121 (1846) (woman's pregnancy immaterial); Rex v. Austin, [1905] N.Z.L.R. 983 (N.Z. Ct. App.) (woman need not be pregnant for attempted abortion conviction); Rex v. Freestone, [1913] T.P.D. 758 (S. Afr.) (same).

[17] *See, e.g.*, Hunt v. State, 114 Ark. 239, 169 S.W. 773 (1914) (impotency of 74-year-old man no defense to assault with intent to rape); Waters v. State, 2 Md. App. 216, 234 A.2d 147 (1967) (80-year-old man guilty of attempted rape despite physical incapacity to complete act); Commonwealth v. Althoff, 45 Del. Cty. 350, 16 Pa. D. & C.2d 640 (1958) (impotency caused by intoxication no defense to attempted sodomy); Preddy v. Commonwealth, 184 Va. 765, 36 S.E.2d 549 (1946) (impotency no defense to attempted

tempted larceny of empty pockets;[18] and attempted murder either by inadequate means or when the victim was not in the location in which the defendant expected he would be.[19]

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rape); Berg v. State, 41 Wis. 2d 729, 165 N.W.2d 189 (1969) (80-year-old man guilty of attempted rape despite physical inability to complete act).

Courts have also classified under factual impossibility cases in which the defendant could not complete his intended acts because of the physical characteristics of his victim. *See, e.g.*, Huggins v. State, 41 Ala. App. 548, 142 So. 2d 915 (physical impossibility of carnally knowing six-year-old girl not a defense to attempted rape), *cert. denied*, 273 Ala. 708, 142 So. 2d 918 (1962); Poston v. Commonwealth, 281 Ky. 460, 136 S.W.2d 565 (1940) (physical impossibility of completing sexual act with 76-year-old woman not a defense to attempted rape); Commonwealth v. Shaw, 134 Mass. 221 (1883) (physical impossibility of carnally knowing child under the age of 10 not a defense to attempted rape).

At common law, however, courts deemed males under the age of 14 to be presumptively incapable of committing rape. *See, e.g.*, Regina v. Williams, [1893] 1 Q.B. 320; Regina v. Waite, [1892] 2 Q.B. 600. The Virgina Supreme Court accepted this rule in 1898 when it could find no "climatic influence on our people, by reason of their locality, or difference in their habits or condition, that calls for a modification of our unwritten laws as to the age of puberty." Foster v. Commonwealth, 96 Va. 306, 310, 31 S.E. 503, 505 (1898). *But see* Williams v. State, 20 Fla. 777, 779 (1884) (presumption of physical incapacity may be rebutted); Davidson v. Commonwealth, 47 S.W. 213, 213 (Ky., 1898) (boy under 14 can be guilty of attempted rape).

Another issue that has been raised in the context of attempted rapes concerns the effect of a defendant's *chronic* impotence on a charge of attempted rape. This defense, however, is not an impossibility defense. Rather, it is simply a means of negating the mens rea that is required for an attempted rape conviction. *See, e.g.*, Waters v. State, 2 Md. App. 216, 227, 234 A.2d 147, 153 (1967) (chronic impotence may negate specific intent to achieve penetration); Berg v. State, 41 Wis. 2d 729, 736, 165 N.W.2d 189, 192 (1969) (chronic impotence highly probative of insufficient mens rea for attempted rape).

[18] *See, e.g.*, People v. Fiegelman, 33 Cal. App. 2d 100, 91 P.2d 156 (1937) (factual impossibility not a defense to attempted larceny of an empty pocket); State v. Wilson, 30 Conn. 500 (1862) (fact that defendant expected the pocket to contain money is sufficient); *In re* Appeal No. 568, 25 Md. App. 218, 333 A.2d 649 (1975) (factual impossibility not a defense to attempted larceny of empty pocket); Commonweatlh v. McDonald, 59 Mass. (5 Cush.) 365 (1850) (failure due to pocket being empty is no different from failure due to any other reason); People v. Moran, 123 N.Y. 254, 25 N.E. 412 (1890) (culpability for attempt determined solely by actor's intent); State v. Beal, 37 Ohio St. 108 (1881) (empty pocket not a defense since failure resulted from an unforeseen and unexpected circumstance); Rogers v. Commonwealth, 20 Penn. (5 Serg. & Rawle) 463 (1820) (contents irrelevant to conviction for attempted larceny of pocket); Clark v. State, 86 Tenn. 511, 8 S.W. 145 (1888) (defendant guilty of attempted larceny because his intent was evidenced by his actions); *cf.* Gargan v. State, 436 P.2d 968 (Alaska 1968) (presence of coins not a prerequisite to conviction for attempted larceny of a laundry machine); People v. Dogoda, 9 Ill. 2d 198, 137 N.E.2d 386 (1955) (presence of property not a prerequisite to conviction for attempted larceny of store); State v. Meisch, 86 N.J. Super. 279, 206 A.2d 763 (presence of valuables not a prerequisite to conviction for attempted larceny of desk), *certif. denied*, 44 N.J. 583, 210 A.2d 627 (1965).

Professor Meehan notes that "[a]lthough the analogy between an empty pocket and an empty womb is a convenient one, it is curious to note that in Scotland, the conclusion in each has gone a separate way." E. MEEHAN, THE LAW OF CRIMINAL ATTEMPT 158–59 & n.83 (1984) (noting that in Scotland one may be convicted for attempting to pick an empty pocket, whereas pregnancy is essential to a conviction for attempted abortion).

[19] *See, e.g.*, United States *ex rel.* Rangel v. Brierton, 437 F. Supp. 908 (N.D. Ill. 1977) (defendant guilty of attempted murder if he believed victim was alive at time of act); United States v. Cruz-Gerena, 49 B.R. 245 (1943) (defendant guilty of attempted murder for shooting into empty bed); State v. Mandel, 78 Ariz. 226, 278 P.2d 413 (1954) (factual impossibility not a defense when defendant hired undercover policeman to kill

The decisions regarding these four crimes are an anomaly within the impossibility area—they have almost all been decided consistently.[20] The common element among these recurring fact patterns is that the defendant's act, but for the intrusion of a purely factual misconception, would have resulted in a legislatively proscribed harm.[21] Assuming that proof of the requisite mens rea is possible,[22] the important question in factual impossibility cases is whether the acts that the defendant successfully completed had progressed beyond the stage of mere preparation and into the range of actual perpetration.[23]

Courts offer three related rationales for rejecting the factual impossibility defense: first, the actor has demonstrated his dangerousness; second, the actor has violated his proposed victim's interests; and third, the actor has violated the public's interests.

Most commonly, courts believe that the defendant has sufficiently manifested his dangerous propensities.[24] This rationale

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husband); People v. Lee Kong, 95 Cal. 666, 30 P. 800 (1892) (defendant guilty of assault with intent to kill for shooting through hole in roof while believing that policeman was observing him through that hole); People v. Van Buskirk, 113 Cal. App. 2d 789, 249 P.2d 49 (1952) (defendant guilty of attempted murder although gun misfired); People v. Grant, 105 Cal. App. 2d 347, 233 P.2d 660 (1951) (factual impossibility not a defense to attempted murder when defendant tried to destroy airplane); Kunkle v. State, 32 Ind. 220 (1869) (defendant guilty of assault with intent to kill if he believed means used were adequate); Commonwealth v. Kennedy, 170 Mass. 18, 48 N.E. 770 (1897) (defendant guilty of attempted murder although the poison administered was insufficient to kill); State v. Mitchell, 170 Mo. 633, 71 S.W. 175 (1902) (defendant guilty of attempted murder for shooting into empty bed); People v. Dlugash, 41 N.Y.2d 725, 363 N.E.2d 1155, 395 N.Y.S.2d 419 (1977) (factual impossibility not a defense if defendant believed victim was alive when shots were fired); State v. Glover, 27 S.C. 602, 4 S.E. 564 (1888) (defendant guilty of assault with intent to kill if he believed substance administered was poisonous); State v. Damms, 9 Wis. 2d 183, 100 N.W.2d 592 (1960) (factual impossibility not a defense if defendant believed gun was loaded); Rex v. White, [1910] 2 K.B. 124, 129–30 (inadequate means not a defense to attempted murder).

[20] *But see supra* note 14 (discussing brief period in Great Britain when factual impossibility was a valid defense).

[21] *See infra* notes 96–99 and accompanying text (distinguishing factual impossibility from mixed fact/law impossibility).

[22] Because the actor did not complete his intended course of conduct, inferring the requisite mens rea from his acts may be especially difficult in impossibility cases. Although many commentators discuss impossibility under the assumption that the requisite intent has been shown, at least one commentator, as well as the United States Court of Appeals for the Fifth Circuit, recognizes the significant practical problems of proof that are posed in these cases. *See* United States v. Oviedo, 525 F.2d 881, 885 (5th Cir. 1976) ("objective acts performed, without any reliance on the accompanying mens rea, [must] mark defendant's conduct as criminal in nature"); Hughes, *supra* note 8, at 1033 (defendant's conduct must match model of success in completing crime). Both the court in *Oviedo* and Professor Hughes were concerned primarily with the possibility of convictions that were based on innocent acts. In response to this concern, each suggested a test in which the defendant's actions, viewed without reference to mens rea, must clearly evince a guilty mind. *See infra* notes 127–32 (Hughes's test) and 173–79 (*Oviedo* court's test) and accompanying text.

[23] *See infra* note 254 (discussing various definitions of substantial step).

[24] *See, e.g.*, People v. Dlugash, 41 N.Y.2d 725, 735, 363 N.E.2d 1155, 1161, 395

stems from the preventative underpinnings of inchoate liability.[25] Similarly, courts note that, in instances of factual impossibility, the defendant's failure to complete the crime cannot be attributed to a change of heart or renunciation of criminal intent.[26] Rather, if not for an unexpected and fortuitous circumstance,[27] the defendant would have succeeded in committing the substantive crime.

Those courts that focus on the dangerousness of the actor in factual impossibility cases are concerned more with his potential to commit future harmful acts than with punishment for the acts that he has successfully completed.[28] Other courts and com-

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N.Y.S.2d 419, 426 (1977) (factual impossibility immaterial; actor's intent determines his dangerousness to society); People v. Moran, 123 N.Y. 254, 25 N.E. 412, 413 (1890) (punishment of an unsuccessful defendant just as essential to protection of public as punishment of one whose designs have been successful); State v. Damms, 9 Wis. 2d 183, 188, 100 N.W.2d 592, 595 (1960) (an unequivocal act accompanied by intent is sufficient to constitute a criminal attempt); HAWAII REV. STAT. § 705-500, commentary at 284 (1976) (question is whether defendant's conduct marked him as a dangerous person); MO. ANN. STAT. § 564.011 (Vernon 1979), comment to 1973 Proposed Code at 387–88 (quoting MODEL PENAL CODE, Tent. Draft No. 10 (1960), commentary at 30–31) (question is whether defendant has manifested his dangerousness).

[25] *See* People v. Dlugash, 41 N.Y.2d 725, 735, 363 N.E.2d 1155, 1161, 395 N.Y.S.2d 419, 426 (1977).

Professor Temkin also focuses on the dangerousness of actors in impossibility cases to justify their conviction, but takes a slightly different approach. Temkin, *Impossible Attempts—Another View*, 39 MOD. L. REV. 55 (1976). Because of the great danger that a defendant who attempts to commit a crime involving death or grievous bodily injury poses to society, Temkin would convict him if he went "so far in pursuit of his intention that there was, discounting any element of impossibility, some real danger of his accomplishing his criminal purpose." *Id.* at 69. Because of the serious nature of the crime, Temkin would not be influenced by the impossibility of the defendant's attempt. Although Temkin characterizes this test as "subjective" in nature, she emphasizes that there must be a "real danger" of the defendant's success. *Id.* at 69.

In instances that do not involve a threat to an individual's safety, Temkin suggests a less restrictive test: the defendant must have "been on the verge of accomplishing his criminal purpose." *Id.* at 69. This standard is less rigorous than Temkin's "real danger" standard for crimes involving the threat of personal injury. In this second class of cases, if any circumstance that is essential to the defendant's success is absent, he must be acquitted. Therefore, unlike Temkin's first category of cases, impossibility is a factor that works in favor of the defendant's acquittal. *See id.* at 69. This view lends a decidely objective nature to Temkin's analysis, because, regardless of the circumstances that the defendant believed existed, if an essential circumstance was absent, there can be no conviction. *See id.* at 69; *infra* notes 114–23 and accompanying text (discussing objective approach).

[26] *See, e.g.*, People v. Lee Kong, 95 Cal. 666, 670, 30 P. 800, 801 (1892) ("that the shot did not fulfill the mission intended was not attributable to forbearance or kindness of heart upon defendant's part"); State v. Beal, 37 Ohio St. 108, 112 (1881) (failure was wholly independent of defendant's will, and did not in the least mitigate turpitude of the offense).

[27] *See, e.g.*, State v. Lopez, 100 N.M. 291, 293, 669 P.2d 1086, 1088 (1983) (that the victim had been alerted to the crime and removed himself to a place of safety should not benefit the accused).

[28] *See supra* note 24 (listing cases that disallow a factual impossibility defense for preventive purposes).

mentators, however, take the position that the actor in a factual impossibility case, despite his inability to achieve his desired goal, nevertheless violated either the protected interests of the public in general, or of a particular individual.[29]

In an early pickpocket decision,[30] for example, the Supreme Court of Tennessee affirmed the conviction of a defendant because the "community suffers from the mere alarm of crime" and the defendant's acts "disturbed the public repose."[31] Others focus on the effect of unsuccessful attempts on the intended victim, rather than on the effect that the act had on the public in general. Professor Strahorn,[32] for example, would convict the actor who shot into an empty bed believing that his intended victim was there because he violated an individual's interest in having his habitation "free from . . . instrumentalities of violence directed against it."[33]

Strahorn's individual-based approach could lead to some unsettling results. If the defendant had placed sugar in his intended victim's coffee, for instance, erroneously believing the the sugar was arsenic, and the intended victim drank the coffee, Strahorn would convict the defendant of attempted murder.[34] The con-

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Professor Sayre, in rejecting an objective approach, suggests that proponents of the protection-of-the-public rationale would adopt an objective test to determine if convictions were warranted. Because the question is whether a protected interest was violated, only an objective analysis is necessary to determine if actual harm resulted. Professor Sayre criticizes this position as not considering sufficiently the potential dangerousness of actors who were frustrated by an unexpected factual circumstance. *See* Sayre, *supra* note 12, at 849–50. This construction of the public-interest rationale is unnecessarily narrow. Proponents of this position could reasonably argue for a subjective test that takes into consideration the actor's demonstrated potential for harm, since the protected interests of society are entitled to protection from a substantial potential threat as well as from the infliction of actual harm.

[29] *See* United States v. Woodard, 17 C.M.R. 813, 832 (B.R. 1954) (defendant guilty of attempted abortion although the patient was not actually pregnant, because of "public's right to protect the female's person, which is implicit within the basic proscription against abortion, and morals"); People v. Jones, 46 Mich. 441, 442, 9 N.W. 486, 487 (1881) (rejection of factual impossibility rule necessary for protection of individual and public safety); G. FLETCHER, *supra* note 12, § 3.3.2, at 141 (the social interest is injured when defendant's actions cause anyone to fear harm). For a detailed discussion of Fletcher's theory of impossibility, see *infra* note 132.

[30] Clark v. State, 86 Tenn. 511, 8 S.W. 145 (1888).

[31] *Id.* at 518, 8 S.W. at 147; *see also* United States v. Woodard, 17 C.M.R. 813, 832 (B.R. 1954); State v. Beal, 37 Ohio St. 108, 111 (1881) (public security was as much disturbed by the act committed as it would have been if the money had been actually found); Dutile & Moore, *Mistake and Impossibility: Arranging a Marriage Between Two Difficult Partners*, 74 NW. U.L. REV. 166, 184 (1979) (advocating punishment of an impotent rapist because he violated an interest protected by statute).

[32] Strahorn, *The Effect of Impossibility on Criminal Attempts*, 78 U. PA. L. REV. 962 (1930).

[33] *Id.* at 982.

[34] *Id.* at 977.

viction would be premised on the violation of the individual's right to be free from contact with foreign substances.[35] On the other hand, if the defendant had actually placed arsenic in the coffee, but the victim fortuitously did not drink the coffee, Strahorn would not convict the defendant, because the victim's interest in having his food free from poison is an insufficient basis on which to premise liability.[36]

Strahorn concedes that the unconsumed-poison scenario is analogous to a case of a poorly aimed bullet; yet he would convict the actor who fired a gun but missed his victim. He explains this result by suggesting that the degree of alarm that is created by a bullet that "whizzes by one's head" is significantly greater than the alarm that results from discovering arsenic in one's food.[37] Besides being empirically problematic—how close must the bullet pass for it to cause a sufficient degree of alarm?—Strahorn's focus on the individual's reaction does not adequately consider each actor's relative dangerousness. In fact, the actor who mixed arsenic in his victim's coffee may have shown himself to be more dangerous than the actor who merely put sugar—although believing that it was arsenic—in his victim's coffee, if only because he has effectively performed every act that was necessary to carry out his criminal intent.[38]

Professor Weigend rejects the individual-protected-interest approach in favor of an approach that considers whether the defendant's acts caused public alarm.[39] Weigend finds the individual-protected-interest rationale, which he terms the "objective-harm theory,"[40] inadequate because it would require acquittals in cases such as shooting into an empty bed.[41] He asserts that in these cases there is no real threat to an individual and

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[35] *Id.*

[36] *Id.* at 985.

[37] *Id.* at 985–86.

[38] *See also* Commonwealth v. Kennedy, 170 Mass. 18, 48 N.E. 770 (1897) (need not allege consumption of poison for attempted murder conviction) (Holmes, J.); Weigend, *supra* note 8, at 258–59 & n.145 (criticizing Strahorn's approach). *Compare* State v. Glover, 27 S.C. 602, 4 S.E. 564 (1888) (defendant guilty of attempted murder for mixing what he believed to be poison in food consumed by victim) *with* State v. Clarissa, 11 Ala. 57 (1847) (defendant not guilty of attempted murder for mixing what he erroneously believed to be poison in food consumed by victim).

[39] *See* Weigend, *supra* note 8, at 235–36.

[40] *See id.* at 258–59. Weigend cites Strahorn as a proponent of the individual-protected-interest or objective-harm approach. *See id.* at 258 nn.140–41.

[41] *See id.* at 258. Professor Strahorn, however, believed that an individual who shot into an empty bed could be convicted of attempted murder based on his violation of an individual's right to have his habitation free from violence. *See* Strahorn, *supra* note 32, at 982.

thus, under the objective-harm theory, there could be no conviction.[42]

Weigend also criticizes the dangerousness rationale as a basis for punishing defendants in impossibility situations. First, he notes that, if the dangerousness rationale is taken to its logical conclusion, those who perform inherently impossible acts, such as attempting to kill by voodoo,[43] would have to be punished.[44] This conclusion, however, is an overstatement of the dangerousness rationale. In such cases, proponents of the dangerousness rationale would not punish the actor, because such absurd acts demonstrate the actor's harmlessness.[45]

Weigend also asserts that the dangerousness rationale is based on the belief that society can predict who is likely to commit a crime and then, once these individuals are placed under the state's control, rehabilitate them.[46] He rejects the dangerousness rationale based on the documented failure of society either to predict who is likely to commit a future crime or to rehabilitate individuals who are likely to commit crimes.[47]

Despite society's inability to rehabilitate dangerous individuals, Weigend believes that individuals who have clearly manifested dangerous propensities should be convicted of attempt crimes.[48] He would premise these convictions on the violation of a societal interest or, in his words, the violation of "an intangible good—the public peace."[49] Under this approach, if a defendant's acts would cause an observer of those acts to fear that a crime was in the making, the public peace would be violated and an attempt conviction would be warranted.[50]

Weigend's public-interest approach is broader than Strahorn's individual-protected-interest approach because, under the former, culpability is not contingent on the response of a particular individual to the defendant's acts. Under the public-interest

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[42] *See* Weigend, *supra* note 8, at 258.

[43] *See supra* note 12 and *infra* notes 243 & 313 (discussing inherent impossibility).

[44] *See* Weigend, *supra* note 8, at 260–61.

[45] Weigend acknowledges that advocates of the dangerousness rationale would reply that practitioners of voodoo, for example, pose no danger to society. *See id.* at 261 n.159 (citing S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 366–67 (3d ed. 1975); W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 60, at 445–46 (1972)).

[46] *See* Weigend, *supra* note 8, at 261–62.

[47] *See id.*

[48] *See id.* at 264.

[49] *Id.*

[50] *See id.*; *infra* notes 157–63 and accompanying text (detailed discussion of Weigend's proposal).

approach, an actor who shoots at a tree stump believing that it is his rival may be convicted based on society's general interest in punishing those who disturb the public peace, regardless of the act's effect on a particular individual.[51]

The public-interest approach should be distinguished from the dangerousness rationale that focuses on society's general interest in segregating those who have shown themselves to be likely to violate the law.[52] Under the dangerousness rationale, courts and commentators have emphasized the potential danger that these actors pose to society.[53] Having failed to commit a substantive crime merely because of a fortuitous circumstance, it is reasonable to believe that the actor will try again.[54] On the other hand, proponents of the protected-interest rationale suggest that the acts that were committed did result in a judicially cognizable harm to society.[55] Although the acts that were completed were insufficient for conviction on the substantive crime, the interests of a particular individual and of society in general were violated.

In conclusion, courts and commentators agree that factual impossibility is not a good defense. Although the underlying rationales differ, it is widely recognized that an attempt that fails because of a mistake regarding factual circumstances is not qualitatively different from other attempts.

### B. *Legal Impossibility*

Courts state that legal impossibility occurs when the acts intended[56] by the defendant, even if they had been com-

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[51] *Compare infra* note 162 (discussing Weigend's treatment of the tree-stump case) *with supra* notes 32–38 and accompanying text (describing Strahorn's individual-protected-interest approach).

[52] *See supra* text accompanying notes 24–27 (discussing dangerousness rationale).

[53] Some commentators suggest using different approaches depending on the relative dangerousness of the crimes involved. Professor Temkin, for example, would apply a more demanding test for conviction of a defendant who was charged with a crime involving a threat to an individual's safety than she would for a crime not involving such a threat. *See supra* note 25 (discussing Temkin's approach). Similarly, Professor Fletcher distinguishes between those crimes that involve a threat to society's core interests and those that do not. *See infra* note 132 (discussing Fletcher's approach).

[54] *But see supra* notes 46–47 and accompanying text (describing Professor Weigend's rejection of dangerousness as a rationale for attempt convictions).

[55] *See supra* notes 29–33 and accompanying text.

[56] Thoughout this Article, "intent" will be used in its popular sense. For example, if *X* purchases what he believes to be stolen property, but unbeknownst to him the property has lost its status as stolen property, *X* nevertheless "intends" to receive stolen property.

pleted,[57] would not have resulted in a crime.[58] This broad definition describes two analytically distinct situations. First, the definition applies when the law does not proscribe the goal that the defendant sought to achieve. This situation will be termed "pure legal impossibility."[59] Second, the definition applies to more difficult situations in which the defendant's goal *is* proscribed, but, due to a mistake regarding legal status,[60] the sub-

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His failure to achieve his goal does not alter his intent to achieve that goal. *See* S. KADISH & M. PAULSEN, *supra* note 45, at 365.

In United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973), the court adopted Professor Keedy's distinction between intent, on the one hand, and motive, desire, and expectation, on the other hand. *Id.* at 188 n.35; Keedy, *Criminal Attempts at Common Law*, 102 U. PA. L. REV. 464, 467 (1954). In Keedy's terms, intent is defined with reference to what the actor actually achieved. If a man shoots at a tree stump, for example, mistakenly believing that it is his enemy, although his motive, desire, and expectation may be to shoot his enemy, his "intent" is to shoot the stump. *Id.* at 467.

Keedy's definition of intent has been criticized because it imputes no intent even where the defendant believed that he was committing a crime. *See* CRIMINAL LAW AND ITS PROCESSES, *supra* note 2, at 604–05; Dutile & Moore, *supra* note 31, at 184; Williams, *supra* note 12, at 49 (describing the reduction of intent from purpose to motive as a "trick with words"); *see also infra* note 120 (discussing weakness of Keedy's distinction).

[57] The characterization of legal impossibility cases as instances in which the defendant completed his intended acts yet failed to consummate the desired crime has apparently been perpetuated in section 5.01(1)(a) of the Model Penal Code. *See infra* notes 245–50 and accompanying text (discussing § 5.01(1)(a) of the Model Penal Code).

[58] *See, e.g.*, United States v. Berrigan, 482 F.2d 171, 188 (3d Cir. 1973) ("Legal impossibility . . . occur[s] where the intended acts, even if completed, would not amount to a crime."); State v. Guffey, 262 S.W.2d 152, 156 (Mo. App. 1953) ("[N]either can one be convicted of an attempt to commit a crime unless he could have been convicted if his attempt had been successful; thus, where the act, if accomplished, would not constitute the crime intended, as a matter of law, then there is no indictable attempt.") (quoting 22 C.J.S. *Criminal Law* § 74 (1936)); People v. Jaffe, 185 N.Y. 497, 501, 78 N.E. 169, 170 (1906) ("If all which an accused person intends to do would, if done, constitute no crime, it cannot be a crime to attempt to do with the same purpose a part of the thing intended.") (citing 1 J. BISHOP, COMMENTARIES ON THE CRIMINAL LAW § 747 (7th ed. 1882)).

Through the use of Keedy's definition of "to intend," the legal impossibility defense has been applied to a broader range of situations than might be expected. *See infra* notes 114–23 and accompanying text (discussing traditional objectivist approach to legal impossibility).

Commentators define legal impossibility similarly. *See, e.g.*, E. MEEHAN, *supra* note 18, at 152 ("[L]egal impossibility occurs when the defendant has done all that he intended to do which nevertheless did not amount to a crime."); Elkind, *supra* note 12, at 21 ("attemptor's intended act, if completed, would not be a crime"); Hughes, *supra* note 8, at 1006 ("objective of the accused . . . does not constitute an offense known to the law, even though the accused may mistakenly believe the law to be other than it is").

The problem with most definitions is their application, rather than their wording. In the impossibility area, the same definitions have been used to describe wholly distinct situations. *See infra* notes 90–95 and accompanying text (discussing traditional judicial definition of mixed fact/law impossibility).

[59] These terms were first used by Professors Dutile & Moore, *supra* note 31, at 181–84.

[60] *See, e.g., infra* note 99 and accompanying text (discussing definition of legal status and giving examples).

stantive crime is not committed. This category of attempts will be designated "mixed fact/law impossibility."[61]

### 1. Pure Legal Impossibility

The most obvious situation in which impossibility will bar an attempt conviction occurs when a pre-existing statute does not proscribe the result that the defendant expected, desired, and intended to achieve. For example, a defendant who attempts to sell liquor in a jurisdiction that permits the sale of liquor, believing that the sale of liquor is illegal, could not be convicted of an attempt crime.[62] This attempt would be an instance of pure legal impossibility. Unlike instances of factual or mixed fact/law impossibility, the legislature has not proscribed the end that the defendant sought to achieve.

Predictably, very few pure legal impossibility cases have been litigated. One clear example is *Wilson v. State*,[63] in which the defendant attempted to commit forgery by altering the numbers on a check.[64] He did not, however, attempt to alter the words on the check that referred to the amount of payment.[65] The Supreme Court of Mississippi reversed the defendant's conviction "because [the amount written in numbers] was an immaterial part of the paper, and because it could not possibly have injured anybody."[66] The applicable forgery statute "confine[d] the crime of forgery to instances where any person may be affected, bound, or in any way injured in his person or property."[67] Although not mistaken about the existence of a law

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[61] *See* Dutile & Moore, *supra* note 31, at 184; *infra* notes 90–108 and accompanying text (discussing mixed fact/law impossibility).

[62] *See also* Commonwealth v. Henley, 504 Pa. 408, 416, 474 A.2d 1115, 1119 (1984) ("[A]n intent to commit an act which is not characterized as a crime by the laws of the subject jurisdiction can not be the basis of a criminal charge . . . ."); State v. Davidson, 20 Wash. App. 893, 898, 584 P.2d 401, 404 (1978) (defendant not guilty for intending to do an act that he mistakenly believed was criminal); J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 595 (2d ed. 1960) (actor's intent to throw Kansas steak in garbage not punishable even if he believed that the act was illegal); Elkind, *supra* note 12, at 26 (man who mistakenly believed that dancing on Sunday was illegal should not be subject to punishment).

[63] 85 Miss. 687, 38 So. 46 (1905); *see also* Rex v. Percy Dalton, Ltd., 33 Crim. App. 102, 110 (1944) ("steps on the way to the doing of something which is thereafter done, and which is no crime, cannot be regarded as attempts to commit a crime").

[64] The defendant in *Wilson* had inserted the numeral "1" before the figure "2.50" in an attempt to increase the check's value by $10. *Wilson*, 85 Miss. at 690, 38 So. at 47.

[65] *See id.* at 691, 38 So. at 47.

[66] *Id.* at 690, 38 So. at 47.

[67] *Id.* at 691, 38 So. at 47; *cf. supra* notes 29–55 and accompanying text (discussing protected-interest approaches to disallowing a factual impossibility defense).

against forgery, the defendant was mistaken about the scope of that law and its application.[68] While this is not the typical case in which a defendant is entirely mistaken with respect to the existence of a law, it nevertheless falls within the category of pure legal impossibility. Thus, unlike the defendant in factual or mixed fact/law impossibility cases, the defendant in *Wilson* misunderstood how the law related to his conduct.[69]

*People v. Teal*[70] is also commonly considered to be an instance of pure legal impossibility. In *Teal*, the defendant had hired an individual to offer false testimony at a divorce trial. The testimony was immaterial, however, because it referred to an incident that was not described in the complaint.[71] Although the court explicitly recognized the defendant's moral guilt, it held that she could not be convicted of attempted subornation of perjury.[72] The court offered several explanations for what it acknowledged was a highly technical interpretation of the statute. Most importantly, the court stated that the defendant, although not guilty of attempting to suborn perjury, was guilty of attempting to falsify evidence, a separate but less serious offense.[73] The court did not find it necessary to adopt a more liberal reading of the statute because the defendant could have been convicted under existing law if she had been properly charged.[74]

Commentators disagree whether *Teal* represents a case of pure legal impossibility or one of mixed fact/law impossibility.[75]

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[68] *See* Dutile & Moore, *supra* note 31, at 182–83; Weigend, *supra* note 8, at 235–36.

[69] Professors LaFave and Scott distinguish *Wilson* from People v. Jaffe, 185 N.Y. 497, 78 N.E. 169 (1906) (defendant could not be convicted of attempted larceny when the goods that he attempted to steal were not in fact stolen) as follows:

> In Wilson the defendant may have thought he was committing a crime, but if he did it was not because he intended to do something that the criminal law prohibited but rather because he was ignorant of the material alteration requirement of the crime of forgery. In Jaffe, on the other hand, what the defendant intended to do was a crime, and if the facts had been as the defendant believed them to be he would have been guilty of the completed crime.

W. LAFAVE & A. SCOTT, *supra* note 45, § 60, at 443. *Jaffe* is discussed further *infra* at notes 121–23, 125–26, 133–39, 200–08, 222–24 and accompanying text.

[70] 196 N.Y. 372, 89 N.E. 1086 (1909).

[71] *Id.* at 376, 89 N.E. at 1087.

[72] *Id.* at 377-78, 89 N.E. at 1088.

[73] *See id.* at 379, 89 N.E. at 1088–89. The court in *Teal* also asserted that it must "read the statute as it finds it" and that, if the legislature determined that mere belief in the materiality of testimony was sufficient, it should amend the statute. *Id.* at 378, 89 N.E. at 1088.

[74] *Id.* at 380, 89 N.E. at 1089.

[75] *See infra* notes 90–108 and accompanying text (discussing mixed fact/law impossibility).

Professors Dutile and Moore, for example, suggest that *Teal* presents an instance of pure legal impossibility because the "transaction the defendant intended and completed was not against the criminal law. Any mistake he [sic] made was as to the statute he [sic] allegedly violated."[76] Professor Hughes also contends that *Teal* presents an instance of pure legal impossibility. He argues that, just as the defendant in *Wilson* misunderstood the scope of the forgery statute, the defendant in *Teal* misunderstood the scope of materiality under the perjury statute.[77]

Professor Williams, however, argues that the defendant in *Teal* should have been convicted because it is unlikely that she was familiar with the concept of materiality. Instead, Williams contends that the defendant intended to offer testimony that would influence the court.[78] Although Teal probably believed that the testimony offered was material, this approach places too much emphasis on what we *suspect* the defendant believed, rather than on what we can *prove* the defendant believed.

The reasons for barring conviction in cases of pure legal impossibility are well documented. Most importantly, the principle of legality forbids conviction. Legality requires the government to define illegal acts clearly before it imposes punishment.[79] Without this rule, individuals would be unable to plan their conduct so as to avoid penalty.[80] This rule also limits the

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[76] Dutile & Moore, *supra* note 31, at 183 n.59; *see also* MODEL PENAL CODE AND COMMENTARIES § 5.01, at 318 (Proposed Official Draft and Revised Comments 1985) [Revised Comments hereinafter cited as REVISED COMMENTARY]. The original official draft of the Modern Penal Code was proposed in 1962. Except for minor grammatical revisions, the 1985 version of the Code is the same. Subsequent references in this Article are to the 1985 publication.

[77] *See* Hughes, *supra* note 8, at 1023.

[78] *See* G. WILLIAMS, *supra* note 12, § 205; *see also* REVISED COMMENTARY, *supra* note 76, § 5.01, at 318 n.92.

[79] Professor Mueller identified the three essential components of the legality principle:

1. *Nullum crimen sine lege*: there must be a valid criminal law completely covering the conduct of the defendant;
2. *Nullum crimen sine poena*: conduct cannot amount to a crime unless a punishment is provided;
3. *Nulla poena sine lege*: the act must be proscribed prior to its performance.

Mueller, *Criminal Theory: An Appraisal of Jerome Hall's Studies in Jurisprudence*, 34 IND. L.J. 206, 217–18 (1959); *see also* 1 P. ROBINSON, *supra* note 12, § 85(d); G. WILLIAMS, *supra* note 12, § 184. For the purposes of impossibility, the component requiring that proscribed acts be defined in advance is most relevant.

[80] *See, e.g.*, Commonwealth v. Henley, 504 Pa. 408, 417, 474 A.2d 1115, 1120 (1984) (Nix, C.J., concurring) (cannot use the law of attempt to punish "a willingness to break the law" absent a criminal act); *see also* G. WILLIAMS, *supra* note 12, § 184, at 575; Mueller, *supra* note 79, at 218.

discretion of law-enforcement officials.[81] Our ordered system of law could not tolerate the unpredictability resulting from punishing acts that are legal when they are performed but are later deemed to be undesirable.

Closely related to the principle of legality is the maxim that guilt may not be premised on evil thoughts alone.[82] To punish an individual merely because he thought that what he was doing was illegal would violate the requirement that the defendant perform a proscribed act.[83] Professors Kadish, Schulhofer, and Paulsen, however, argue that there is no lack of an actus reus in pure legal impossibility cases.[84] Instead, they note that the defendant may have performed every act that he wished to perform to attain his goal.[85] From this perspective, the actor has progressed beyond the realm of fantasy or contemplation and performed acts that he believes violate the criminal law.[86] Acquittal, therefore, must turn on considerations other than the lack of an actus reus.[87]

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[81] *See* Enker, *Impossibility in Criminal Attempts—Legality and the Legal Process*, 53 MINN. L. REV. 665, 670 (1969). Professor Enker believes that the legality principle limits the jury's power to speculate on the defendant's intent by fixing objective requirements that must be fulfilled before the state can impose punishment. These requirements also guard against punishment that is based on the biases of law-enforcement officials. *Id.* at 670; *see also Henley*, 504 Pa. at 417–18, 474 A.2d at 1120 (Nix, C.J., concurring); Elkind, *supra* note 12, at 25 (legality prevents state from being "a perpetrator of arbitrary violence").

[82] *See, e.g.*, Booth v. State, 398 P.2d 863, 872 (Okla. Crim. App. 1964) (defendant held not guilty of attempting to receive stolen property even though he fully intended to do so, because the property had been intercepted by the police).

[83] *See supra* note 79 (listing elements of legality).

[84] *See* CRIMINAL LAW AND ITS PROCESSES, *supra* note 2, at 605.

[85] *See id.*

[86] *See id.* General statutes have been drafted that allow convictions for acts that were not proscribed when they were performed. Nazi Germany, for example, enacted a law in 1935 that allowed for punishment of an act that "according to the fundamental idea of penal law and sound popular feeling" deserved punishment. *See* G. WILLIAMS, *supra* note 12, § 184, at 577. A similar Soviet statute was repealed in 1958. *Id.* at 577 nn.6–7. Denmark also had such a statute as of 1961. This statute punished acts that were proscribed by statute and those "of a similar nature." DANISH COMMITTEE ON COMPARATIVE LAW, DANISH AND NORWEGIAN LAW 210 (1963) (citing THE DANISH CRIMINAL CODE § 1 (1930)); Mueller, *supra* note 79, at 227–28. Mueller noted that this statute has seldom been invoked. *Id.* For a detailed discussion of these statutes, see G. WILLIAMS, *supra* note 12, § 184; *see also* United States v. Berrigan, 482 F.2d 171, 189 n.39 (3d Cir. 1973).

[87] Professors Kadish, Schulhofer, and Paulsen's Mr. Fact and Mr. Law hypothetical demonstrates the equivalence of the dangerousness that is manifested by actors in factual and pure legal impossibility scenarios. In this hypothetical, hunting has been forbidden except between October 1 and November 30. Mr. Fact and Mr. Law both kill a deer on October 15. Mr. Fact claims that he believed that the date was September 15. Mr. Law, on the other hand, knew the correct date, but believed that the hunting season did not begin until November 1. The authors state: "[I]f the ultimate test is the dangerousness of the actor . . . , no distinction is warranted—Mr. Law has indicated himself

There are two explanations for not convicting defendants in pure legal impossibility cases. First, although an attempt to violate a nonexistent law may demonstrate an individual's willingness to violate the law, it may nevertheless be an insufficient manifestation of dangerousness.[88] More importantly, the constitutional provision against ex post facto laws forbids punishment in such instances even if a court believed that the actor might try again.[89]

### 2. Mixed Fact/Law Impossibility

The same definition that courts use to define pure legal impossibility has also been used to define mixed fact/law impossibility. These cases—the most problematic in the impossibility milieu—involve a factual mistake relating to a legal determination.[90] In every case, however, a pre-existing law proscribed the actor's goal, thus distinguishing this category from pure legal impossibility.

The impossibility defense to mixed fact/law situations has been accepted most commonly in two situations: (1) when the actor attempts to receive stolen property, but, unbeknownst to him, the property has lost its character as stolen;[91] and (2) when

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to be no less 'dangerous' than Mr. Fact." CRIMINAL LAW AND ITS PROCESSES, *supra* note 2, at 609. But, as they note later, considerations other than dangerousness are involved in the ultimate disposition of these cases. *See infra* notes 88–89 and accompanying text.

Professor Robinson also notes that, from an entirely subjective point of view, pure legal impossibility should not be a defense. 1 P. ROBINSON, *supra* note 12, § 85(d), at 432. Although Robinson concludes that the legality principle ultimately bars such convictions, he suggests that legislatures may find it desirable to give courts the power "to convict actors of offenses *that they (the actors) believed existed* and believed they were committing." *Id.* at 433 (emphasis in original).

[88] After arguing that mens rea simpliciter is an inadequate explanation for acquitting the actor in a pure legal impossibility situtation (*see supra* text accompanying notes 84–87), Kadish, Schulhofer, and Paulsen suggest that such actors will not be convicted because the law is unwilling to predict future violations from such harmless acts. CRIMINAL LAW AND ITS PROCESSES, *supra* note 2, at 609. They explain that the law "has not gone so far in accepting the social defense theories of the criminal positivists" as to permit convictions for imagined laws. *Id.* at 607.

[89] U.S. CONST. art. I, § 9, cl. 3; *see supra* notes 79–81 and accompanying text (discussing legality). Commentators also note that, in pure legal impossibility cases, no statute exists under which the defendant can be charged. *See* CRIMINAL LAW AND ITS PROCESSES, *supra* note 2, at 607–08; Dutile & Moore, *supra* note 31, at 183.

[90] *See infra* note 99 (Dutile and Moore's definition of mixed fact/law impossibility).

[91] *See, e.g.*, United States v. Hair, 356 F. Supp. 339 (D.D.C. 1973); Young v. Superior Court, 253 Cal. App. 2d 848, 61 Cal. Rptr. 355 (1967), *overruled*, People v. Wright, 105 Cal. App. 3d 329, 164 Cal. Rptr. 207 (1980); People v. Jaffe, 185 N.Y. 497, 78 N.E. 169 (1906); People v. Rollino, 37 Misc. 2d 14, 233 N.Y.S.2d 580 (Sup. Ct. 1962); Booth v. State, 398 P.2d 863 (Okla. Crim. App. 1964).

the actor attempts to bribe an individual whom he erroneously believes to be a juror or a government official.[92] The defense has also been allowed when an actor: offered false testimony, believing that it was material;[93] shot a stuffed deer, believing that it was alive;[94] and secretly mailed letters from prison, believing that the warden was unaware of his mailings.[95]

Mixed fact/law cases should be distinguished from factual impossibility cases. In cases of factual impossibility, the defendant's mistake is of a purely factual nature. In *People v. Lee Kong*,[96] for example, the defendant shot through a hole in a roof through which he erroneously believed a policeman was observing him.[97] He was mistaken about the *physical* location of the police officer whom he intended to shoot. Similarly, when a defendant attempts to perform an abortion on a woman who is not pregnant, he is mistaken about the *physical* condition of the woman.[98] In the mixed fact/law cases, however, the question is whether the property is properly *classified* as stolen property, or whether the individual whom the defendant attempted to bribe had the *status* of a juror at the time of the offer. These determinations, although factual in nature, involve a determination of legal status as well.[99]

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[92] *See, e.g.*, Roberts v. State, 131 Ga. App. 316, 205 S.E.2d 494 (1974) (actor believed individual was state official); State v. Taylor, 345 Mo. 325, 133 S.W.2d 336 (1939) (actor believed individual was juror); State v. Butler, 178 Mo. 272, 77 S.W. 560 (1903) (official lacked authority to perform act he had been bribed to do); State v. Porter, 125 Mont. 503, 242 P.2d 984 (1966) (actor believed individual was juror); Marley v. State, 58 N.J.L. 207, 33 A. 208 (1895) (actor bribed official to perform act he lacked authority to perform); *cf.* Nicholson v. State, 97 Ga. 672, 25 S.E. 360 (1896) (individual bribed to present false testimony but no judicial proceeding was pending).

[93] People v. Teal, 196 N.Y. 372, 89 N.E. 1086 (1909). Some commentators, however, believe that *Teal* is a case of pure legal impossibility. *See supra* notes 70–78 and accompanying text.

[94] State v. Guffey, 262 S.W.2d 152 (Mo. Ct. App. 1953).

[95] United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973).

[96] 95 Cal. 666, 30 P. 800 (1892).

[97] *See id.* at 668, 30 P. at 801.

[98] *See supra* note 16 (citing cases involving failed abortions).

[99] Professors Dutile and Moore designate this situation, and others similar to it, as instances of "mixed legal and factual impossibility." Dutile & Moore, *supra* note 31, at 184. They offer the following definition: "[T]he *transaction* which the defendant contemplates is within the statute whose violation is under consideration, but, for reasons having a legal implication, the defendant's conduct fails to meet the requirements of the statute." *Id.* at 184 (emphasis in original). Other situations that Dutile and Moore classify as mixed legal and factual impossibility include: a man raping his wife believing she is a stranger; a convict surreptitiously sending letters from prison, believing the warden was unaware of these mailings; and Lady Eldon's attempt to smuggle French lace into Great Britain. *Id.* at 170. In these cases, Dutile and Moore contend that conviction for attempt is warranted because the actor believed that he was violating an existing statute, and, having demonstrated a willingness to violate the law, is likely to attempt similar acts in the future. *See id.* at 185.

Courts that permit a legal impossibility defense in mixed fact/law situations do not offer convincing rationales for treating these actors differently from those in factual impossibility cases. Among the most common of the rationales offered is that an individual may not be convicted for evil thoughts alone.[100] In *Booth v. State*,[101] for example, the defendant purchased what he reasonably believed to be stolen goods. The police had the goods under surveillance, however, and thus they had lost their status as stolen goods when the defendant received them.[102] In acquitting the defendant, the court stated that "it is fundamental to our law that a man is not punished merely because he has a criminal mind. It must be shown that he has, with that criminal mind, done an act which is forbidden by the criminal law."[103]

This mens rea simpliciter theory is flawed. The act requirement prevents the punishment of those who have not implemented their unlawful ideas.[104] There must be clear evidence that the defendant engaged in more than fantasy.[105] Applying this concept to *Booth*, it is clear that the defendant did translate his thoughts into action. In fact, just as the actor in a pure legal impossibility case did everything in his power to violate what he believed to be the law,[106] so too the defendant in *Booth* performed every act that he believed was necessary to violate the law.[107] The crucial difference, however, is that the actor in *Booth* hoped to achieve a result that was illegal. To claim that the actor in mixed fact/law cases has not performed a sufficient act is to extend the actus reus requirement beyond its purpose.

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[100] *See, e.g.*, United States v. Berrigan, 482 F.2d 171, 186 (3d Cir. 1973); People v. Jaffe, 185 N.Y. 497, 502, 78 N.E. 169, 170 (1906); Booth v. State, 398 P.2d 863, 872 (Okla. Crim. App. 1964).

[101] 398 P.2d 863 (Okla. Crim. App. 1964).

[102] *See id.* at 870–72.

[103] *Id.* at 872.

[104] *See* G. WILLIAMS, *supra* note 12, § 1. Williams identifies two fundamental purposes of the actus reus requirement: "(1) the difficulty of distinguishing between day-dream and fixed intention in the absence of behaviour tending towards the crime intended, and (2) the undesirability of spreading the criminal law so wide as to cover a mental state that the accused might be too irresolute even to begin to translate into action." *Id.*; *see also* W. LAFAVE & A. SCOTT, *supra* note 45, § 25, at 177–78.

[105] *See* G. WILLIAMS, *supra* note 12, § 1.

[106] *See supra* notes 82–89 and accompanying text (discussing actus reus in instances of pure legal impossibility).

[107] *See supra* notes 62–89 and accompanying text (discussing pure legal impossibility); *see also* Williams, *supra* note 12, at 55 (in mixed fact/law cases, defendant "has shown himself prone to crime and may well do it again if he does not receive an effective warning").

If, as the *Booth* court stated, there can be no liability unless an unlawful act is performed, then there could never be inchoate liability, because such liability is always based on intent and on an act that need not itself be illegal.[108]

## II. Approaches to Mixed Fact/Law Impossibility

Modern courts have developed two divergent approaches in response to the conceptual difficulties that are posed by mixed fact/law impossibility. The proponents of a subjective approach with an objective check ("the hybrid approach") contend that act and intent must—at first—be viewed independently.[109] Under this approach, unless the act itself evinces an intent to commit a specific crime, no liability can result.[110] The pure subjectivists, on the other hand, focus exclusively on intent.[111]

These contrary positions stem from different concerns. Those who advocate the hybrid approach are worried about permitting courts to infer an actor's intent from equivocal acts.[112] To prevent such speculation and the use of the necessarily flexible requirements of inchoate liability to further the prejudices of law-enforcement officials, they insist that the acts alone must evoke an image of criminality before an inquiry into intent proceeds.[113] Pure subjectivists, on the other hand, believe that failure to restrain individuals who have shown themselves to be willing to violate the law poses a greater danger to society than does granting officials discretion to infer intent from facially neutral acts. They would therefore permit courts to make de-

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[108] *See* J. Hall, *supra* note 62, at 594–99. Professor Hall suggests that, in impossibility cases, once the requisite intent is shown, the only remaining question should be whether the act that was performed progressed beyond mere preparation.

[109] *See, e.g.*, Enker, *supra* note 81, at 687–88; Hughes, *supra* note 8, at 1024–27.

[110] *See infra* notes 124–92 and accompanying text (discussing hybrid approach to impossibility).

[111] *See infra* notes 193–220 and accompanying text (discussing subjective approach to impossibility).

[112] *See infra* notes 127–39, 148–49 and accompanying text (discussing Hughes's hybrid approach to impossibility).

[113] *See infra* notes 150–56 and accompanying text (discussing Kadish, Schulhofer, and Paulsen's approach to impossibility).

terminations of intent even when the acts performed appear to be innocent.

### A. *Evolution of the Hybrid Aproach*

#### 1. Traditional Objective Analysis

Although the hybrid approach bears similarity to the traditional objective approach, it is important to distinguish between the two. The hybrid approach addresses many of the same concerns as the traditional objective approach, but without reliance on artificial definitions of intent and motive.

The formula that objectivists traditionally invoke for not convicting actors in mixed fact/law situations consists of the following truism, or a variation on it: "an unsuccessful attempt to do that which is not a crime cannot be held to be an attempt to commit the crime specified."[114] By its terms, this statement applies only to instances of pure legal impossibility, but courts have used this approach to bar convictions of actors in mixed fact/law cases by defining what the actor attempted in objective terms.[115]

Professor Keedy provides one of the earliest and clearest statements of this approach.[116] He distinguishes between intent, on the one hand, and motive, expectation, or desire, on the other.[117] Intent—the only legally relevant state of mind—is determined solely from acts that the individual actually performed, without reference to what the actor believed or expected to do;[118] it is inferred from the consequence that the actor actually

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[114] United States v. Hair, 356 F. Supp. 339, 342 (D.D.C. 1973); *accord*, State v. Butler, 178 Mo. 272, 77 S.W. 560 (1903); People v. Jaffe, 185 N.Y. 497, 502, 78 N.E. 169, 170 (1906).

[115] *See, e.g.*, United States v. Berrigan, 482 F.2d 171, 185–89 (3d Cir. 1973) (defendant not guilty of attempting to send letters out of prison without consent of warden when the warden was in fact aware of the letters); United States v. Hair, 356 F. Supp. 339, 342 (D.D.C. 1973) (defendant not guilty of attempting to receive stolen property when the property was in fact not stolen); *see also* State v. Lopez, 100 N.M. 291, 296, 669 P.2d 1086, 1091 (1983) (Sosa, J., dissenting) (adopting in full lower court opinion that defendant was not guilty for attempting to traffic in a controlled substance when the substance he sold was not in fact controlled).

[116] *See* Keedy, *supra* note 56.

[117] *See id.* at 466–68. The United States Court of Appeals for the Third Circuit adopted Keedy's formulation of intent in United States v. Berrigan, 482 F.2d 171, 188 n.35 (3d Cir. 1973). *See infra* note 175 (discussing *Berrigan*).

[118] *See* Keedy, *supra* note 56, at 466–68.

achieved, rather than by reference to his desired goal.[119] For example, if an individual takes his own umbrella from a stand erroneously believing it to be the property of another, he has "intended," in a legal sense, to take his own umbrella.[120]

Perhaps the most renowned example of the objective approach involved an unsuccessful attempt to receive stolen goods. In *People v. Jaffe*,[121] the defendant believed that he was receiving stolen goods. The police had recovered the goods, however, and thus the goods had lost their status as stolen.[122] The New York Court of Appeals apparently held that the defendant could not be convicted of attempting to receive stolen goods because he lacked the necessary *intent*.[123] It was clear that the defendant received the goods with the expectation that they were stolen. Only by inferring intent directly from the actual result of the action could the court contend that intent to receive stolen goods did not exist.

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[119] *Id.*

[120] *Id.* at 467 (citing Turner, *Attempts to Commit Crimes*, 5 CAMBRIDGE L.J. 230 (1934)). Professors Kadish, Schulhofer, and Paulsen reject Keedy's definition of attempt and make an effort to demonstrate its weakness through the following dialogue:

> Keedy would reach a conclusion [regarding intent from] the premise that what a person intends to do is what he actually does, even if that was the furthest thing from the person's mind:
>
> "You're eating my salad."
>
> "Sorry, I didn't mean to; I thought it was mine."
>
> "You might have *thought* it was yours. But in fact it was mine. Therefore you intended to eat mine. You should be ashamed!"

CRIMINAL LAW AND ITS PROCESSES, *supra* note 2, at 604–05 (emphasis in original); *see also* E. MEEHAN, *supra note* 18, at 163 (rejecting distinction between intention regarding physical act and intention regarding physical consequences of act).

[121] 185 N.Y. 497, 78 N.E. 169 (1906).

[122] *See id.* at 503, 78 N.E. at 171.

[123] *Id.* at 502, 78 N.E. at 170; *see also* Keedy, *supra* note 56, at 476 n.85 (discussing *People v. Jaffe*). It is difficult to isolate precisely the rationale the *Jaffe* court employed. One possible interpretation is that the court found that the defendant lacked the requisite intent. This interpretation of the case is based on the court's reliance on the following statement from Bishop: "[I]f all which the accused person intended, would, had it been done, constitute no substantive crime, it cannot be a crime under the name attempt, to do, with the same purpose, a part of this thing." 1 J. BISHOP, *supra* note 58, § 747. An alternative interpretation of the case is possible. The statute under which the defendant was charged required *knowledge* that the goods purchased were stolen. Because the goods were not in fact stolen, the defendant could never fulfill that particular element of the crime. *See* E. MEEHAN, *supra* note 18, at 184–85. Under this interpretation, rather than accuse the court of having adopted a strained and artificial definition of the term "intent," the case can be said to have turned on no more than a strict interpretation of a particular statute. *See id.* at 147–51. Indeed, the court stated that the prosecution could prove the first two elements of the crime—the act and the intent. It was the third element, knowledge of an existing condition, that could not be shown. *See* 185 N.Y. at 501, 78 N.E. at 170.

### 2. The Subjective Approach with an Objective Check—The Hybrid Approach

Recently, several courts and commentators have adopted an approach that requires that the defendant's acts corroborate other evidence of the intent that is necessary to prove the substantive crime.[124] Under this approach, the actor's intent is not inferred solely from his acts—a subjective inquiry into his actual intent ensues only if his acts, viewed independently, appear to be suspicious.

This approach represents a compromise between traditional objective analysis and a purely subjective approach. By requir-

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[124] This approach has received support from Hughes, *infra* notes 127–39, 142, 148–49 and accompanying text; from Kadish, Schulhofer, and Paulsen, *infra* notes 150–56 and accompanying text; from Fletcher, *infra* note 132; and from Weigend, *infra* notes 157–63 and accompanying text.

The following courts have adopted the hybrid approach: 3d Circuit: United States v. Everett, 700 F.2d 900, 909 (3d Cir. 1983); 5th Circuit: United States v. Oviedo, 525 F.2d 881, 885 (5th Cir. 1976); 6th Circuit: United States v. Pennell, 737 F.2d 521, 525 (6th Cir. 1984), *cert. denied*, 105 S.Ct. 906 (1985); 9th Circuit: United States v. Brooklier, 459 F. Supp. 476, 481 (C.D. Cal. 1978), *aff'd*, 685 F.2d 1208 (9th Cir. 1982); United States v. Bagnariol, 665 F.2d 877, 895–96 (9th Cir. 1981), *cert. denied*, 456 U.S. 962 (1982); 11th Circuit: United States v. McDowell, 714 F.2d 106, 107 (11th Cir. 1983) (per curiam); United States v. Innella, 690 F.2d 834, 835 (11th Cir. 1982), *cert. denied*, 460 U.S. 1071 (1983); District of Puerto Rico: United States v. Deangelis, 430 F. Supp. 327, 331 (D.P.R. 1976); New Mexico: State v. Lopez, 100 N.M. 291, 293, 669 P.2d 1086, 1088 (1983); Pennsylvania: Commonwealth v. Henley, 504 Pa. 408, 416, 474 A.2d 1115, 1119 (1984). Furthermore, the Tenth Circuit has adopted the hybrid approach rationale to distinguish preparation and attempt in United States v. Prichard, 781 F.2d 179, 182 (10th Cir. 1986) (defendant's acts had progressed beyond mere preparation because they strongly corroborated his intent to commit a crime).

The hybrid approach has also been codified in six states: COLO. REV. STAT. § 18-2-101(1) (1973); ME. REV. STAT. ANN. tit. 17-A, § 152(1) (1983); MO. ANN. STAT. § 564.011 (Vernon 1979); N.H. REV. STAT. ANN. § 629:1 (1974); N.D. CENT. CODE § 12.1-06-01 (1985); UTAH CODE ANN. § 76-4-101 (1978). Under each of these statutes, the actor's conduct is subject to a substantial-step analysis that requires that the actor's conduct be strongly corroborative of his intent to commit the substantive crime. The actor's conduct, in all attempt situations, is subject to this substantial-step/strongly-corroborative analysis to determine if it constituted a criminal attempt. Eight additional states require that the actor's conduct constitute a substantial step toward the commission of the substantive offense for a criminal attempt to exist, but they do not define substantial step: ALASKA STAT. § 11.31.100 (1983); GA. CODE ANN. § 16-4-1 (1984); ILL. REV. STAT. ch. 38, § 8-4 (1983); IND. CODE § 35-41-5-1 (1981); MINN. STAT. § 609.17 (1982); OR. REV. STAT. § 161.405 (1985); 18 PA. CONS. STAT. ANN. § 901 (Purdon 1983); WASH. REV. CODE. § 9A.28.020 (1983). The Revised Commentary to the Model Penal Code groups Puerto Rico and Wisconsin with those states that have adopted the hybrid approach, but notes that these jurisdictions go substantially beyond the hybrid approach. Wisconsin requires that the defendant's conduct "demonstrate unequivocally, under all the circumstances, that he formed that intent . . . ." WIS. STAT. § 939.32(3) (1983-84). Similarly, Puerto Rico requires that the defendant's conduct demonstrate "unequivocally" the necessary intent. P.R. LAWS ANN. tit. 33, § 3121 (1983). Delaware and Kentucky have also adopted a more stringent actus reus requirement than that advocated in this Article. *See* DEL. CODE ANN. tit. 11, §§ 531, 532 (1979); KY. REV. STAT. § 506.010 (1985).

ing that the defendant's acts, viewed objectively, corroborate the requisite intent, this approach ensures that entirely neutral acts will not be punished. This approach also acknowledges that the defendant's dangerousness is best determined by reference to what he believed he was doing, regardless of what he actually did.

The hybrid approach is not as strict as the traditional objective approach. Under the latter, a defendant in the *Jaffe* scenario could never be convicted because he could not have "intended" to receive stolen goods. Under the hybrid approach, by contrast, a *Jaffe* defendant could be convicted if his acts appeared sufficiently suspicious to corroborate other evidence of his intent.[125] The fundamental difference between the two approaches is that under the traditional approach no attempt is made to discover the defendant's true intent, while under the hybrid approach the defendant's conduct is evaluated in terms of the circumstances that he believed existed. Requiring that the acts corroborate the intent prevents conviction for neutral acts. Once this requirement is met, the defendant can be convicted for attempt if the substantive crime would have been committed had the attendant circumstances been as he believed them to be.[126]

Perhaps the most forceful advocate of the hybrid approach is Professor Hughes.[127] Hughes is primarily concerned about the possibility that courts will convict individuals for attempt without adequate proof of intent.[128] To prevent such convictions,

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[125] *See infra* notes 136–39 and accompanying text (discussing Hughes's treatment of *Jaffe*); *infra* note 240 (discussing the Texas solution to *Jaffe*-type situations).

[126] *See infra* notes 148–49 and accompanying text (discussing Hughes's treatment of pure legal impossibility).

[127] *See* Hughes, *supra* note 8.

[128] *See id.* at 1023. Other commentators have expressed concern over the legality of attempt convictions that are based on wholly innocent acts. *See* Elkind, *supra* note 12, at 23; Enker, *supra* note 81, at 670–73. Professor Enker would go further than Professor Hughes, and would bar attempt convictions whenever the objective elements of the statute involved were not fulfilled. For example, even if Jaffe's conduct clearly demonstrated the intent to receive stolen goods, Professor Enker would not permit conviction because the statute requires knowledge that the goods are stolen. If the goods are not stolen, this element can never be fulfilled. Enker argues that these objective elements are necessary to control the discretion of law-enforcement officials and prevent speculation regarding the actor's intent. Rather than adopt a sufficiency-of-the-evidence approach to mens rea, as Hughes does, Enker would prohibit courts from testing mens rea until the objective elements of the offense are satisfied. *Id.* at 683–87. Enker adds that the legislature is, of course, free to amend particular statutes so that a belief in the existence of only certain elements is necessary. *Id.* at 687. Several provisions of the Model Penal Code incorporate Enker's suggestion by making belief an alternative to knowledge. *See* MODEL PENAL CODE § 223.6 (Proposed Official Draft 1985) (requiring belief that goods received were stolen); *id.* § 241.6 (requiring belief that proceedings were official for charge of tampering).

Hughes would establish a threshold requirement: the acts that are performed, when viewed from the perspective of an objective third party having no prior knowledge of the actor's intent,[129] must demonstrate an intent to commit a known crime.[130] Until a sufficient connection between the act and a crime is shown, there can be no inquiry into the actor's intent.[131] Simply stated, the acts that are performed must parallel a model of success for the actus reus of the intended crime.[132]

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[129] *See infra* text accompanying notes 140–42 (discussing information that will be made available to a neutral observer).

[130] *See* Hughes, *supra* note 8, at 1024; *see also infra* notes 150–56 and accompanying text (discussing approach of Kadish, Schulhofer, and Paulsen to impossibility).

[131] *See* Hughes, *supra* note 8, at 1024; *see also* HAWAII REV. STAT. § 705-500 commentary at 285 (1976) (requiring defendant's conduct to corroborate strongly the requisite intent, "so that law enforcement agencies and triers of fact will not put equivocal conduct within [the crime's] ambit"). Professor Hughes disputes Glanville Williams's contention that the actus reus must be viewed in terms of the intent with which the act was committed. Williams posed the example of a surgeon whose patient dies as a result of the surgeon's actions in the operating room. These acts, although innocent, could constitute the actus reus of a murder conviction had the surgeon performed them intentionally. Hughes accepts this formulation with respect to substantive crimes, but rejects its extension to inchoate crimes, contending that it is acceptable with respect to substantive crimes only because the act itself raises a reasonable question about the intent with which the individual performed an act. In attempt cases, however, Hughes would require some overt connection between the act and the crime. For example, the act of putting sugar in someone's coffee while believing that the sugar was arsenic is not sufficiently connected to the crime of attempted murder to justify an inquiry into the intent with which the act was committed. *Id.* at 1024–26.

The examples that Hughes cites belie the soundness of his assumptions. For some substantive offenses, the act (for example, surgery that results in a patient's death) may occur with sufficient frequency that an inquiry into the actor's intent is unjustified. If Hughes is concerned with unwarranted speculations about an actor's intent, then he may find it necessary to apply his threshold test to substantive as well as inchoate liability.

[132] Professor Fletcher also adopts an objective approach, but does not premise it on the need to control prosecutorial discretion. *See* G. FLETCHER, *supra* note 12, §§ 3.3.2–3.3.8. His explanation is far more basic, suggesting that the goal of attempt liability is to punish those whose actions create a degree of apprehension in the community. *See id.* § 3.3.2, at 141–42; *see also supra* notes 49–55 and accompanying text (discussing public-interest approach as a rationale for convictions in factual impossibility situations). Once this apprehension is felt, a social interest has been injured and punishment is warranted. *See* G. FLETCHER, *supra* note 12, § 3.3.2, at 141–42 & n.28 (citing The King v. Barker, [1924] N.Z.L.R. 865, 872 (N.Z. Ct. App.)); *see also* J. SALMOND, JURISPRUDENCE § 137, at 404 (7th ed. 1924). For an act to be punishable, therefore, it "must bespeak criminality," because only such an act can create public apprehension. G. FLETCHER, *supra* note 12, § 3.3.2, at 143. This test of manifest criminality is the same as the one that Hughes advocates, although it is based on a different set of concerns. *See supra* notes 127–31 and accompanying text (describing Hughes's test).

Fletcher suggests two tests that can be used to determine which types of impossible attempts should result in convictions. First, an act must be "aptly related to the actor's objective." G. FLETCHER, *supra* note 12, § 3.3.3, at 149. To be "apt," an act must signal the threat of impending danger to the community. Therefore, although shooting a tree stump believing that it is a man is not punishable, shooting into an empty bed constitutes behavior that will cause sufficient alarm in the community to warrant punishment. *See id.* Fletcher acknowledges that his objective-aptness approach begins to break down

The hybrid approach, as stated by Hughes, would lead to acquittals in situations in which subjectivists believe conviction is appropriate.[133] In *Jaffe*, for example, the court acquitted a defendant who had been accused of receiving stolen goods because the goods had lost their status as stolen before the defendant obtained them.[134] Hughes agrees with this outcome: because the acts that the defendant performed consisted of nothing more than receiving non-stolen goods, the insufficient nexus between the acts that had actually been performed and the

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when we move from the simple factual impossibility scenarios to the more subtle questions that are presented in the mixed fact/law category. *See id.* § 3.3.3, at 153. In the *Jaffe* situation, for example, an aptness approach could require conviction if the goods that the defendant received appeared to have been stolen. *See id.* at 154–56. Fletcher does not believe convictions in such cases are appropriate, however. He contends that the simple receipt of stolen goods is not a "harm." *Id.* at 155. Rather, the act was made criminal only to discourage thievery. *Id.* Unlike murder or theft, receiving stolen goods is not manifestly criminal and must be analyzed under a different test.

Fletcher's second test for distinguishing between exculpatory and inculpatory mistakes is a "rational motivation" test. It would apply to those offenses that do not endanger society's "core interests" in preventing rape, murder, or thievery. *Id.* § 3.3.4, at 160–63. Under this approach, only mistakes that alter an individual's behavior provide a successful defense. Jaffe, for example, would not be guilty of attempting to receive stolen goods because he would probably have purchased the goods even if he had known that they were not stolen. *Id.* Fletcher acknowledges that the rational-motivation test will be difficult to apply if the actor had an unusual incentive. Some men, for example, may want to have sexual intercourse only with women below the age of consent. To ensure that such men are not acquitted on the basis of the rational-motivation theory, Fletcher suggests that courts permit the defense only if the mistake would have affected the motivation of a reasonable man. *See id.* at 164.

Professor Fletcher concedes that the rational-motivation theory is subjective in nature. *Id.* at 163. He contends, however, that it is preferable to the subjective approach because his subjective inquiry concerns motivation rather than intent. *Id.* at 163–64. Intent, therefore, remains a distinct inquiry.

The major remaining difficulty with Fletcher's rational-motivation test is determining when it applies. He would continue to apply the aptness test to attempts to violate core interests that are protected by the law. This distinction is crucial, because the results that are reached under an aptness test differ from those that are reached under a rational-motivation test. The mistaken shooter of tree stumps, for example, would be acquitted under an aptness test because the means used were not reasonably related to his desired end. Under a rational-motivation test, however, he would be convicted because it is unlikely that he would shoot at the stump once he knew it was a stump. *Id.* at 165. Fletcher would also apply the rational-motivation test in conjunction with the aptness test to instances of pure legal impossibility. Because it is unlikely that an actor would change his course of conduct once he was told that his acts were legal, such actors would be acquitted. *See id.* at 165–66.

Although Fletcher's model produces results that are in accord with the decisions of many courts, it suffers from two basic flaws: first, it is difficult to determine when each test should be applied; and second, once it is determined that the rational-motivation test rather than the aptness test should apply, the subjective regression feared by Fletcher appears, if only under another name. *Id.* at 159.

[133] *See infra* notes 200–03 and accompanying text (discussing subjectivists' treatment of *Jaffe*).

[134] People v. Jaffe, 185 N.Y. 497, 501–02, 78 N.E. 169, 170 (1906); *see also supra* notes 121–23 and accompanying text (discussing *Jaffe*).

model actus reus for receiving stolen goods prohibits further inquiry into the defendant's intent.[135]

Hughes recognizes, however, the desirability of convicting actors such as Jaffe.[136] Rather than concede that convictions would never be proper in *Jaffe*-type situations, Hughes advocates a more flexible test in which courts must examine the totality of the circumstances.[137] If the surrounding circumstances (for example, the purchase of the goods at an excessively low price from a known fence) suggest that the actor is involved in criminal activity, Hughes would consider the threshold actus reus test satisfied.[138] But he would not permit evidence of "confessions, admissions, or any other testimony of the accused's intent" to clarify an ambiguous act until that act raised the necessary inference of criminality.[139]

Whether an objective observer would recognize that criminal activity was afoot, of course, depends largely on the amount of information that is made available to him. Professor Fletcher, for example, reasons that, if an objective observer is told that the shooter of a tree stump mistakenly believed that the tree stump was a man, he could reasonably conclude that the actor

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[135] *See* Hughes, *supra* note 8, at 1030.

[136] *Id.* Hughes notes that, if the defendant in *Jaffe* is not convicted of attempting to receive stolen goods, it is unlikely that he will be convicted of any crime at all. *Id.*; *cf. supra* text accompanying notes 70–74 (discussing the willingness of the *Teal* court to accept an impossibility defense to the charge of attempting to suborn perjury because the defendant could still be convicted of attempting to falsify evidence).

[137] *See* Hughes, *supra* note 8, at 1030.

[138] *Id.* Yet another approach—albeit an indirect one—to eliminating the impossibility defense in *Jaffe*-type situations is to redefine the substantive offense of theft. Texas, for example, treats the appropriation of property in the custody of a law-enforcement agent as unlawful if the agent explicitly represents it as stolen to the actor, and the actor appropriates the property believing that it is stolen. *See* TEX. PENAL CODE ANN. § 31.03 (Vernon Supp. 1986), discussed *infra* at note 240.

[139] Hughes, *supra* note 8, at 1030. *But cf.* United States v. Hough, 561 F.2d 594 (5th Cir. 1977) (defendant's admission that he mistakenly believed noncontrolled substance was cocaine sufficed for conviction pursuant to hybrid approach).

Professor Meehan sees the question of impossibility largely as a question of proof:

> If the only evidence available is that of a man who fired a bullet at a stump on a dark and stormy night, then he could not be convicted of an attempt because there is not enough evidence to indicate an intention to kill, not because it was impossible to kill his enemy. But if the evidence indicated that the accused was a hired assassin, that the victim was a prominent public figure, who was known regularly to take walks in that area at night, that the stump was not a recognized target and actually resembled a human being, and that the victim was standing close by when the bullet hit the stump? Surely this is attempted murder.

E. MEEHAN, *supra* note 18, at 163. This approach is, in effect, quite similar to the hybrid approach, in the sense that it requires a certain threshold of evidence before a conviction is allowed.

posed a significant danger to society.[140] On the other hand, if the observer knew nothing more than what he had observed, he would be unlikely to consider the act of shooting a tree stump to be dangerous.[141] To resolve this problem, Fletcher suggests that only facts that are "likely to be known to objective observers of the event" should be incorporated into the description of the event to the observer.[142]

An observer's perspective, as well as the information that is available to him, can result in fundamental changes in approach. Professor Elkind, for example, suggests that the defendant's conduct should be judged by a reasonable third party.[143] Elkind proposes, however, that this hypothetical observer view the defendant's conduct entirely from the defendant's perspective.[144] The observer should find the defendant guilty of attempt if, "given the sense data of the defendant and the surrounding circumstances as they appeared to [the defendant], a crime was the probable consequence of his act."[145] This approach is entirely subjective. Elkind states, in fact, that "[w]e are punishing intent, and the slim chance of success should not be found exculpatory when a criminal intent is found."[146] His approach would lead to convictions in most instances, because only rarely would the defendant's actions, viewed from his own perspective, not result in a crime.[147]

The final element in the Hughes test is that the defendant must not be mistaken about the scope of the law in question.[148] This element ensures that defendants are not convicted for acts that they erroneously believe are proscribed.[149]

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[140] *See* G. FLETCHER, *supra* note 12, § 3.3.3, at 150.

[141] *See id.*

[142] *Id.* Although Hughes would be likely to agree with Fletcher's proposal, it should be noted that Hughes and Fletcher adopted the hybrid approach for different reasons. Fletcher contends that an objective test is appropriate because the societal interest is violated only when an act reaches a certain level. *See supra* note 132. Hughes, however, is more concerned with the danger of inferring intent from innocent acts. *See supra* notes 127–32 and accompanying text (describing Hughes's approach).

[143] *See* Elkind, *supra* note 12, at 31. Much of Elkind's approach is based on the writings of Jerome Hall. *See* J. HALL, *supra* note 62.

[144] *See* Elkind, *supra* note 12, at 31.

[145] *Id.*

[146] *Id.*

[147] Elkind includes two restraints in his approach. First, if the defendant's goal was legal, then the principle of legality bars conviction. *Id.* at 23. Second, actors in the inherent impossibility category could not be punished because, from a reasonable man's perspective, such absurd acts could not result in a crime. *Id.* at 35.

[148] Hughes, *supra* note 8, at 1033–34; *see supra* text accompanying notes 63–69 (discussing *People v. Wilson*).

[149] *See* Hughes, *supra* note 8, at 1033–34; *see supra* notes 62–89 and accompanying text (discussing pure legal impossibility).

Professors Kadish, Schulhofer, and Paulsen are also troubled by the possibility of convicting individuals whose objective acts are equivocal.[150] Kadish poses the following hypothetical: "[A] soldier during wartime shoots and kills an enemy soldier, under the belief, however, that he was shooting his hated sergeant."[151] Although ideally the soldier should be convicted of attempted murder,[152] Kadish asserts that punishment of the soldier would be tantamount to punishment for thoughts alone because the act that he performed was objectively innocent.[153] To prevent convictions when acts are equivocal, Kadish, Schulhofer, and Paulsen propose an amendment to section 5.01(1)(a) of the Model Penal Code that would add an objective element to the otherwise subjective orientation of that provision.[154] The revised statute would provide:

> A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he: (a) purposely engages in conduct that *strongly corroborates the required culpability and* would constitute the crime if the attendant circumstances were as he believes them to be . . . .[155]

Unlike Hughes, Kadish does not insist that the acts that are committed evince criminal intent. He would be satisfied if the acts merely "corroborated other evidence of [the required] intent."[156]

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[150] CRIMINAL LAW AND ITS PROCESSES, *supra* note 2, at 608–10; Kadish Memorandum, *supra* note 4, at 1–3.

[151] Kadish Memorandum, *supra* note 4, at 1. Kadish also notes that an individual who intends to take another's umbrella from an umbrella stand, but who mistakenly takes his own, also raises the problem of inferring intent from neutral acts. *Id.* at 2.

[152] *Id.* at 2.

[153] *Id.*; *see also* CRIMINAL LAW AND ITS PROCESSES, *supra* note 2, at 609.

[154] *See infra notes* 245–50 and accompanying text (discussing subjective approach of Model Penal Code § 5.01(1)(a)). Professor Hughes has also offered an amendment to section 5.01 of the Model Penal Code to objectify its approach to mixed fact/law impossibility. He proposes that the language which provides that a defendant's conduct be judged "under the circumstances as he believed them to be" be deleted and replaced with the following: "An act or omission shall not be deemed to be a substantial step on the ground alone that it would have been such or that the crime would have been committed if the attendant circumstances were as the accused believed them to be." Hughes, *supra* note 8, at 1028. This provision yields a result similar to that of Kadish by imposing a minimum standard that an act must attain before a defendant may be convicted of attempt.

[155] CRIMINAL LAW AND ITS PROCESSES, *supra* note 2, at 610 (emphasis in original). This revised provision merely extends the "strongly corroborate" requirement for general attempts and factually impossible attempts to instances of mixed fact/law impossibility. *Id.* at 609–10; *see infra* notes 241–76 and accompanying text (discussing Model Penal Code).

[156] Kadish Memorandum, *supra* note 4, at 2.

Professor Weigend also recommends adoption of the hybrid approach.[157] The starting point of Weigend's analysis is whether the defendant's acts, regardless of their success or failure, create an "apprehension of crime."[158] Weigend states that "[t]he answer to [this question] does not depend on the objective existence of any danger, but solely on the appearance of dangerousness which the offender's conduct would have for a possible observer."[159] Weigend's hypothetical observer would be drawn from the local community and would be imbued with the values of that particular community.[160] Weigend's observer would also have an accurate perception of all of the objective circumstances, regardless of the actor's misconceptions concerning the circumstances under which he was acting.[161] Moreover, statements that were made by the defendant while acting would be made available to Weigend's observer;[162] confessions and other statements that were made subsequent to the act would be withheld because they do not disturb the public peace.[163]

The hybrid approach advocated by Kadish, Hughes, and Weigend is of more than only academic concern. The United States Court of Appeals for the Fifth Circuit adopted the hybrid approach in *United States v. Oviedo*.[164] In *Oviedo*, the defendant was charged with attempting to distribute heroin.[165] Oviedo had been contacted by an undercover police officer who claimed that he wanted to purchase heroin.[166] At a meeting, Oviedo gave the agent what appeared to be heroin.[167] The agent performed a field test on the substance and concluded that the substance was indeed heroin.[168] The agent arrested Oviedo, and, in a later

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[157] *See* Weigend, *supra* note 8, at 266–73.

[158] *Id.* at 266; *see also supra* notes 39–51 and accompanying text (discussing Weigend's public-interest theory).

[159] Weigend, *supra* note 8, at 266.

[160] *See id.* at 267. Weigend notes Williams's point that, under this type of analysis, "an attempt to kill by conjuration may be held criminal in a backward territory." *Id.* at 267 n.183 (citing Williams, *supra* note 12, at 652).

[161] *See* Weigend, *supra* note 8, at 267.

[162] *Id.* For example, in the case of an individual who mistook a tree stump for his enemy and shot the stump, a conviction would only be likely if the defendant made incriminating remarks while shooting the stump. *See id.* at 270–71.

[163] *See id.* at 269. Like Hughes, Weigend would not permit a conviction to be premised on a confession accompanied by a wholly innocuous act. *Id.*; *see supra* text accompanying note 139 (discussing Hughes's exclusion of confessions).

[164] 525 F.2d 881 (5th Cir. 1976).

[165] *Id.* at 882.

[166] *Id.*

[167] *Id.*

[168] *Id.*

search of the defendant's home, the police discovered two more pounds of the substance secreted in a television set.[169] The police performed a second test on the substance that Oviedo had offered to the agent, and, despite the positive field test that the agent had performed earlier, the substance was determined to be procaine hydrochloride, an uncontrolled substance.[170]

The trial court convicted Oviedo of attempting to distribute heroin.[171] Although Oviedo claimed that he knew that the substance was not heroin and that he was merely trying to defraud the agent, the jury concluded that Oviedo's statement to the agent that the substance was heroin and his hiding of the substance inside his television set proved that Oviedo actually believed that the substance was heroin.[172]

The Fifth Circuit reversed, holding that, although the jury's finding of intent was correct, an independent determination of the actus reus was required.[173] Noting "the inconsistency of

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[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] *Id.*

[173] *Id.* at 882–83 n.4. The court in *Oviedo* accepted the jury's conclusion that the defendant intended to distribute heroin. *Id.* The court also found, however, that Oviedo's conduct was not strongly corroborative of the intent that was required for conviction of attempt to distribute heroin. *Id.* at 886. How the court could have found the jury's inference of intent proper, yet also have found that the acts that had been performed did not corroborate the requisite intent is difficult to understand. *See* Fletcher, *Manifest Criminality, Criminal Intent, and the Metamorphosis of Lloyd Weinreb*, 90 YALE L.J. 319, 341 (1980). Professor Fletcher, however, finds this "paradox . . . easily resolved." *Id.* He suggests that the court found, as a matter of law, that the acts that the defendant performed were not within that class of acts from which the requisite intent could be inferred *beyond a reasonable doubt*. *Id.* at 341–42. Therefore, although the jury could find that Oviedo intended to distribute heroin, the court was empowered to take the question from the jury if the court found that the acts could not legally support a finding of intent beyond a reasonable doubt. *Id.* at 342. In this scheme, the judge acts as the critical check against jury speculation regarding the intent with which an act was performed.

Fletcher's analysis assumes, however, that the jury's finding of Oviedo's mens rea was based on a lesser evidentiary standard than "proof beyond a reasonable doubt." This assumption is dubious, because each element of a crime, including mens rea, must be proven beyond a reasonable doubt. *See* 525 F.2d at 882 n.3 (quoting charge to jury). If the jury did find the requisite intent beyond a reasonable doubt, then the court in *Oviedo*, by holding that the acts did not strongly corroborate the jury's findings, went well beyond the appropriate role of an appellate court in reviewing the factual findings of a jury. Furthermore, if we assume that the jury did indeed find beyond a reasonable doubt that Oviedo believed he was distributing heroin, then the court's finding that the acts did not strongly corroborate the intent stands directly opposed to the jury's finding. The court cannot logically state that, although the jury correctly inferred intent from the acts, the acts did not corroborate the intent.

A more plausible explanation of this decision than Fletcher's assumption that the jury made a finding on an incorrect evidentiary standard is that the court framed its decision in terms of the actus reus because it was reluctant to overturn the jury's factual determinations.

approach which plagues this area of legal theory,"[174] the court held that, "in order for a defendant to be guilty of a criminal attempt, the objective acts performed, without any reliance on the accompanying mens rea, [must] mark the defendant's conduct as criminal in nature."[175] Like Hughes[176] and Kadish, Schulhofer, and Paulsen,[177] the court was concerned with the danger of inferring intent from "acts . . . consistent with a noncriminal enterprise."[178] Applying its test, the court found that the defendant's statement to the agent that the substance was heroin, taken with his hiding of the substance in a television set, were too equivocal to permit a conviction of attempted distribution of heroin.[179]

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[174] 525 F.2d at 883 n.7.

[175] *Id.* at 885. The court rejected both the subjective approach that was adopted by the United States Court of Appeals for the Second Circuit in United States v. Heng Awkak Roman, 356 F. Supp. 434 (S.D.N.Y.), *aff'd*, 484 F.2d 1271 (2d Cir. 1973), and the traditional objective approach that was adopted by the United States Court of Appeals for the Third Circuit in United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973). In *Roman*, the court convicted the defendants of attempted possession of heroin, although the substance that they possessed was actually soap powder. *Roman*, 356 F. Supp. at 438. The court reasoned that, if the defendant's objective was criminal, impossibility was no defense. *Id.* The court in *Oviedo* rejected the *Roman* approach to prevent convictions in instances in which the defendant's acts are ambiguous. *Oviedo*, 525 F.2d at 884. The *Oviedo* court condemned the decision in *Roman* because of the danger that it would encourage speculative inferences of intent from innocuous acts, rather than because of the actual sufficiency of the evidence in *Roman*. *Id.*

The court in *Berrigan* acquitted a federal prisoner of attempting to mail a letter from prison without the consent of the warden. The court held that, because the warden actually knew of the defendant's actions, the defendant could not be found to have "intended" to mail letters without the warden's consent. *Berrigan*, 482 F.2d at 188 n.35. The court inferred intent solely from the acts that the defendant successfully performed, without reference to the acts or results that the defendant hoped to achieve. *Id.* The *Oviedo* court rejected the *Berrigan* approach because it believed that this methodology would permit a successful impossibility defense in every instance in which the defendant had failed to achieve his objective. *Oviedo*, 525 F.2d at 884. The court reasoned that, if intent is to be based solely on the acts that were actually performed, the requisite intent would never be found because, by definition, an attempt fails to achieve the desired criminal goal. *Id.*; *see also* United States v. Brooklier, 459 F. Supp. 476, 481 (C.D. Cal.) (adopting analysis of *Oviedo*), *aff'd*, 685 F.2d 1208 (9th Cir. 1978). For a discussion of *Berrigan*'s limits, see United States v. Everett, 700 F.2d 900, 903 (3d Cir. 1983) (*Berrigan* not controlling because federal drug-abuse statute in case at bar was "intended to punish attempts even when completion of the attempted crime was impossible").

[176] *See supra* notes 127–39 and accompanying text (discussing Hughes's approach to impossibility).

[177] *See supra* notes 150–56 and accompanying text (discussing Kadish, Schulhofer, and Paulsen's approach to impossibility).

[178] *Oviedo*, 525 F.2d at 886.

[179] *Id.* Weigend suggests that the court in *Oviedo* may have misapplied its own test. *See* Weigend, *supra* note 8, at 254–55.

Dutile and Moore argue that the hybrid approach is unnecessary and would revive the impossibility defense in cases involving mixed fact/law situations. They contend that standard preparation/perpetration analysis protects against the danger that individuals would be convicted based solely on innocuous acts. *See* Dutile & Moore, *supra*

Later courts applying the *Oviedo* standard have not been as stringent in finding the requisite act as was the Fifth Circuit panel in *Oviedo*. In *United States v. Korn*,[180] for example, another panel of the Fifth Circuit[181] found that negotiations and the payment of $20,000 strongly corroborated the intent to purchase a controlled substance, although the substance that was actually received was not controlled.[182] Similarly, the threat and use of force against the "owners" of a business that the police had established has been found to be sufficiently corroborative of the intent that is necessary for attempted extortion under the Hobbs Act.[183]

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note 31, at 191–93. *See generally infra* note 254. In response to Hughes's example of a possible conviction of an individual who poured water into his intended victim's glass, mistakenly thinking that it was poison, Dutile and Moore state:

> If evidence is unavailable to permit characterization of the behavior *as an attempt*, then no conviction for attempt is conceivably proper. On the other hand, if there is such evidence available, then there is no particular problem with respect to the actus reus element of attempt, and if the actus reus elements coincide with the requisite mens rea, then a conviction for attempt is unobjectionable.

Dutile & Moore, *supra* note 31, at 192 (emphasis in original). Dutile and Moore prefer this approach to dealing with innocuous acts, because they fear that the Hughes or *Oviedo* approach would result in a "wholesale revival" of the impossibility defense. *Id.* at 191 n.84. Dutile and Moore's apprehensions, however, appear to have been unfounded. *See infra* note 183 (listing cases basing conviction on *Oviedo* approach).

[180] 557 F.2d 1089 (5th Cir. 1977).

[181] Judge Godbold sat on both panels, and wrote the opinion in *Korn*.

[182] 557 F.2d at 1091. The court distinguished the acts that the defendant performed in *Korn* from those that the defendant performed in *Oviedo* on two grounds. First, the defendant in *Korn*, unlike the defendant in *Oviedo*, paid the agent $20,000 for the substance. *Id.* Furthermore, in each case the ambiguous fact was the defendant's misconception regarding the nature of the substance. In *Korn*, however, it was the police who performed the equivocal act by supplying the uncontrolled substance. The acts in *Oviedo* were rendered ambiguous because the defendant supplied the substance to the police. *Id.*; *see also* United States v. Pennell, 737 F.2d 521, 525–26 (6th Cir. 1984) (distinguishing *Oviedo* and convicting defendant although the substance was not controlled), *cert. denied*, 105 S. Ct. 906 (1985).

[183] United States v. Brooklier, 459 F. Supp. 476, 479–82 (C.D. Cal.), *aff'd*, 685 F.2d 1208 (9th Cir. 1978). The Hobbs Act makes it a federal offense to obstruct commerce through robbery or extortion. 18 U.S.C. § 1951 (1982). Other courts have also convicted defendants under the *Oviedo* test. *See, e.g.*, United States v. Johnson, 767 F.2d 673, 675–76 (10th Cir. 1985) (defendant's use of alias, request that substance be mislabeled, and payment of inflated price were found sufficient to corroborate his intent to receive controlled substance, even though substance actually received was not controlled); *Pennell*, 737 F.2d at 525 (defendant's insistence on obtaining a sample of drug to test and payment of $43,000 proved requisite intent although substance purchased was powder); United States v. McDowell, 714 F.2d 106, 107 (11th Cir. 1983) (per curiam) (although defendant received noncontrolled substance and had small amount of cash, acts were strongly corroborative of intent to purchase illegal drugs); United States v. Innella, 690 F.2d 834, 835 (11th Cir. 1982) (objective acts held sufficient for attempt conviction), *cert. denied*, 460 U.S. 1071 (1985); United States v. Williams, 603 F.2d 1168, 1174 (5th Cir. 1979) (presence of PCP formula at defendant's home, evasive driving after purchase of chemicals while under surveillance, false explanation of need for chemicals, and post-arrest statements held strongly corroborative of intent to manufac-

Section 5.01(1)(c) of the Model Penal Code also incorporates the hybrid approach.[184] The drafters of the Model Penal Code explicitly rejected the traditional objective approach because of its requirement that the actor's conduct unequivocally demonstrate the requisite intent.[185] Instead, they adopted a less stringent version of the objective approach by requiring that the defendant's actions *strongly corroborate* the actor's criminal intent.[186] Under this approach, the defendant's conduct must corroborate other evidence of the requisite intent.[187] The Model Penal Code, however, does not extend this approach to all attempts. Rather, it applies a subjective approach to instances of mixed fact/law impossibility.[188]

The hybrid approach has also been extended to the impossibility defense when the defense is raised in a conspiracy case.[189]

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ture illegal drug); United States v. Hough, 561 F.2d 594, 595, (5th Cir. 1977) (defendant's in-court admission, under oath, that he believed substance was cocaine held sufficient for conviction although substance was actually noncontrolled).

[184] *See infra* notes 241–76 and accompanying text (discussing Model Penal Code).

[185] *See* REVISED COMMENTARY, *supra* note 76, § 5.01, at 329–31 (discussing §§ 5.01(1)(c), (2)).

[186] *Id.* § 5.01, at 330; *see also* MODEL PENAL CODE § 5.01(2) (Proposed Official Draft 1985).

[187] *See supra* notes 127–39, 142, 148–49 and accompanying text (discussing Hughes's approach).

[188] *See infra* notes 244–50 and accompanying text (discussing § 5.01(1)(a) of Model Penal Code).

[189] Courts are less receptive to an impossibility defense when the charge is conspiracy rather than attempt. Among the most common instances of impossibility in the context of conspiracy occurs when an undercover police agent or informer feigns an agreement with the defendant. The outcome of these cases has turned largely on whether the particular jurisdiction has adopted a bilateral or a unilateral approach to conspiracy. Under a bilateral approach, there must be a "meeting of the minds," *see* State v. Marian, 62 Ohio St. 2d 250, 252, 405 N.E.2d 267, 269 (1980); Burgman, *Unilateral Conspiracy: Three Critical Perspectives*, 29 DE PAUL L. REV. 75, 78–79 & n.16 (1979) (medieval British conspiracy statute defined conspiracy in terms of "combination" and "confederacies"); *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 926 (1959) (conspiracy is a "group act" requiring each conspirator to commune "with a mind and will outside himself"), or at least a tacit understanding, *see* W. LAFAVE & A. SCOTT, *supra* note 45, § 62, at 477. Thus, if one of the conspirators was merely pretending to enter into an agreement, there can be no agreement and therefore no conviction. *See, e.g.*, United States v. Pennell, 737 F.2d 521, 536 (6th Cir. 1984) (must be actual agreement), *cert. denied*, 105 S. Ct. 906 (1985); United States v. Chase, 372 F.2d 453, 459 (4th Cir.) (conspiracy charge dismissed because no evidence that defendant conspired with anyone other than government agent was introduced), *cert. denied*, 387 U.S. 907 (1967); Sears v. United States, 343 F.2d 139, 142 (5th Cir. 1965) ("no indictable conspiracy with a government informer who secretly intends to frustrate the conspiracy"); State v. Mazur, 158 N.J. Super. 89, 385 A.2d 878, 884–85 (1978) (no conviction for conspiracy when other conspirator was a government informer).

Numerous jurisdictions, however, have adopted a unilateral approach to conspiracy. *See, e.g.*, DEL. CODE ANN. tit. 11 §§ 511–513 (1974); IND. CODE ANN. § 35-41-5-2 (West 1979); MINN. STAT. § 609.175, subd. 2 (1963); N.Y. PENAL LAW § 105 (McKinney 1975); *see also* MODEL PENAL CODE § 5.03 (Proposed Official Draft 1985). Under this

In *United States v. Everett*,[190] the United States Court of Appeals for the Ninth Circuit held that there must be "significant objective acts to corroborate unequivocally the criminal intent in a conspiracy."[191] Although this conspiracy case appears to be the only one that explicitly adopts the hybrid approach, other courts have emphasized the importance of there being significant evidence of the requisite intent.[192]

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approach, a person may be found criminally liable for agreeing to commit an unlawful act regardless of whether any of his conspirators is also indictable for the conspiracy. Under the unilateral approach, therefore, it will be no defense that the individual with whom the defendant believed he had made an agreement was actually a police officer; the goal of the approach is to prosecute each defendant for his own participation in the consiracy. *See, e.g.*, Saienni v. State, 346 A.2d 152, 154 (Del. 1975) (meeting of minds unnecessary under unilateral-conspiracy statute); Garcia v. State, 71 Ind. 366, 394 N.E.2d 106 (1979) (under unilateral-conspiracy statute, defendant convicted of conspiracy even though co-conspirator only feigned agreement); State v. Christopher, 305 Minn. 226, 227–29, 232 N.W.2d 798, 799–802 (1975) (no need for actual agreement under unilateral approach to conspiracy); State v. John, 213 Neb. 76, 85, 328 N.W.2d 181, 191 (1982) (adopting reasoning of *Christopher*); State v. Marian, 62 Ohio St. 2d 250, 252, 405 N.E.2d 267, 270 (1980) (meeting of minds unnecessary under unilateral-conspiracy statute).

The impossibility defense has also been raised when the conspirators' goal was rendered impossible to achieve because of a circumstance that was unbeknownst to them. Under the bilateral approach to conspiracy, this defense generally fails because the focus is on the danger that the illicit agreement itself poses to society; the substantive crime is complete with the making of the agreement and a subsequent overt act. *See, e.g.*, United States v. Giordano, 693 F.2d 245, 250 (2d Cir. 1982) (misapprehension regarding facts does not make conspiracy less culpable); United States v. Thompson, 493 F.2d 305, 310 (9th Cir. 1974) (crime of conspiracy is not dependent on ultimate success or failure of planned scheme); Beddow v. United States, 70 F.2d 674, 676 (8th Cir. 1934) ("neither the success nor failure of criminal conspiracy is determinative of the guilt or innocence of the conspirators"); United States v. Senatore, 509 F. Supp. 1108, 1110 (E.D. Pa. 1981) (defendant guilty of conspiracy to distribute controlled substance although substance was not actually controlled); State v. Moretti, 52 N.J. 182, 244 A.2d 499 (1966) (rejecting impossibility as defense to conspiracy). *But see* United States v. McInnis, 601 F.2d 1319, 1326 (5th Cir. 1979) (no conspiracy conviction when object of conspiracy is not unlawful); Ventimiglia v. United States, 242 F.2d 620, 625 (4th Cir. 1957) ("[A]n attack on a wooden Indian cannot be an assault and battery . . . , and hence a combination and agreement to do so cannot be a conspiracy to commit assault and battery, although the defendants, before acting, thought the 'victim' a living person.").

The defense of impossibility of committing the substantive crime cannot be analyzed from the same perspective under the unilateral approach as under the bilateral approach. Because unilateral theory focuses on the intent of the individual conspirator, a conviction cannot be premised on the increased danger of "group" activity. To support a conviction despite the impossiblity of the underlying crime, courts in unilateral-conspiracy jurisdictions have drawn analogies to impossible attempts. *See* State v. Bird, 285 N.W.2d 481, 482 (Minn. 1979) (unlike attempt context, drafters of Minnesota Criminal Code felt no need to reject explicitly an impossibility defense in context of conspiracy); Commonwealth v. Reed, 276 Pa. Super. 467, 472, 419 A.2d 552, 555 (1980) ("agreement necessary to create a conspiracy may involve an attempt to commit a crime, and impossibility of completion is not a defense to an attempt").

[190] 692 F.2d 596 (9th Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983).

[191] *Id.* at 600.

[192] *See* United States v. Shively, 715 F.2d 260, 266 (7th Cir. 1983) (court stressed that there was "strong" evidence to show that defendant had requisite intent); United States

### B. *The Subjective Approach*

Subjective theory focuses primarily on the intent with which an individual acted.[193] Unlike proponents of the objective and hybrid approaches, subjectivists do not evaluate the sufficiency of an act apart from the actor's state of mind at the time that he performed the act.[194] Instead, they believe that a particular act cannot be interpreted accurately without reference to the intent underlying the act.[195]

To illustrate the difficulty that is involved with evaluating an act without reference to the underlying intent, Professor Williams poses the example of an individual who lights his pipe while standing next to a haystack.[196] This act, viewed without

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v. Booty, 621 F.2d 1291, 1298 (5th Cir. 1980) ("[T]his is not a case in which the defendant's criminal intent is likely to have been inferred solely from acts consistent with a noncriminal enterprise, a practice condemned by this circuit in prosecutions for criminal attempt.") (citing, *inter alia*, United States v. Oviedo, 525 F.2d 881 (5th Cir. 1976)); *cf.* Richardson v. State, 700 S.W.2d 591, 594 (Tex. Crim. App. 1985) (defendant convicted of criminal solicitation to commit capital murder under state statute requiring that evidence corroborate both solicitation and solicitor's intent).

[193] In discussing the subjective theory, I am merely labeling and making explicit the approach that courts take when they rely heavily on the defendant's intent. *See, e.g.*, People v. Rojas, 55 Cal.2d 252, 257, 358 P.2d 921, 924, 10 Cal. Rptr. 465, 468 (1961) ("The fact that defendant was mistaken regarding the external realities did not alter his intention, but simply made it impossible to effectuate it.") (quoting J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 127 (1947)); Darr v. People, 193 Colo. 445, 449, 568 P.2d 32, 35 (1977) ("intent and acts of defendant, not surrounding circumstances, are the crucial elements of the attempt offense"); Darnell v. State, 92 Nev. 680, 681–82, 558 P.2d 624, 625 (1977) (focus should be on specific intent to commit substantive offense); State v. Davidson, 20 Wash. App. 893, 898, 584 P.2d 401, 404 (1978) (proper focus is on criminal intent of actor). For further discussion on the centrality of intent, see G. WILLIAMS, *supra* note 12, § 207(b) (question of whether there is an attempt may depend exclusively on the actor's intent); Wechsler, Jones & Korn, *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 571, 585 (1961) ("liability of the actor turns on his purpose"). The article by Professors Wechsler, Jones, and Korn was substantially adopted as the Official Commentary to the Model Penal Code. Citations in this Article are made to Wechsler, Jones & Korn rather than to the original draft of the Commentary to the Model Penal Code during discussions of the drafters' intent.

[194] *See, e.g.*, Weinreb, *Manifest Criminality, Criminal Intent, and the "Metamorphosis of Larceny"*, 90 YALE L.J. 294, 317 (1980). Professor Weinreb, in rejecting Fletcher's version of the objective approach, argues that our jurisprudence relies "too much on the reasons why a person acts as he does" and "the purposes that motivate him" to limit attempt liability to conduct that unequivocally displays criminal intent. *Id.* Weinreb further states: "To subordinate the emphasis on intent in favor of manifest criminality would to that extent deprive criminal law of the element that makes it most distinctively applicable to human behavior. It would blunt the law's capacity to take account of distinctions that we feel deeply to be important." *Id.*

[195] *See, e.g.*, Wechsler, Jones & Korn, *supra* note 193, at 578; Hughes, *supra* note 8, at 1020, 1024 (discussing orthodox—*i.e.*, subjectivist—view); Weinreb, *supra* note 194, at 310–18 (criticizing reliance on acts and stressing need to consider intent).

[196] *See* G. WILLIAMS, *supra* note 12, § 202, at 630.

reference to the underlying intent, can be interpreted as being entirely innocent: the individual may merely be lighting his pipe.[197] Possibly, however, the pipe is a diversion and the man is actually about to ignite the haystack.[198] Williams implies that, unless the intent with which the individual acted is considered, it is impossible to interpret the individual's actions accurately.[199]

Subjectivists, therefore, would permit courts to consider extrinsic evidence regarding intent in determining the sufficiency of an act.[200] In a *Jaffe* situation, for example, a court employing the subjective approach would be allowed to consider statements by the actor that are relevant to his intent, statements by witnesses and other third parties bearing on the actor's intent, and circumstantial evidence from which the court could infer the defendant's intent.[201] The ultimate goal of this subjective inquiry is to determine the dangerousness of the actor in light of the situation that he *believed* existed.[202] The relationship between the acts that he performed and the situation that he *believed* existed, rather than the situation that *actually* existed, provides the surest indication of an individual's willingness to violate the law.[203]

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[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] *See id.* § 199; Wechsler, Jones & Korn, *supra* note 193, at 594.

[201] In People v. Rojas, 55 Cal. 2d 252, 358 P.2d 921, 10 Cal. Rptr. 465 (1961), for example, the defendant was charged with attempting to receive stolen goods. The evidence against him consisted of police testimony recounting his statement that he "knew" the goods were stolen. *Id.* at 256, 358 P.2d at 923, 10 Cal. Rptr. at 467. The court found that, in light of his actions and statements, he had the intent required for the substantive crime. *See id.* at 258, 358 P.2d at 924, 10 Cal. Rptr. at 468.

Both Hughes and Fletcher, proponents of the hybrid approach, recognize that some extrinsic evidence should be given to the factfinder to aid him in determining the nature of the defendant's acts. *See supra* notes 136–39 and accompanying text (Hughes); *supra* note 132, note 142 and accompanying text (Fletcher). Weinreb notes that, as more information is given to the factfinder, we move further away from a theory of "manifest criminality." Weinreb, *supra* note 194, at 310–11.

[202] *See* Wechsler, Jones & Korn, *supra* note 193, at 579 ("the actor's mind is the best proving ground of his dangerousness"); Williams, *supra* note 12, at 55 (the subjective approach is concerned with the individual who "has shown himself prone to crime and may well do it again if he does not receive an effective warning"); *see also* State v. Rios, 409 So. 2d 241, 244 (Fla. Dist. Ct. App. 1982); People v. Dlugash, 41 N.Y.2d 725, 734, 363 N.E.2d 1155, 1161, 395 N.Y.S.2d 419, 426 (1977).

[203] *See* Wechsler, Jones & Korn, *supra* note 193, at 592–95. The Model Penal Code rejected the adoption of the objective approach (termed the "res ipsa loquitur" approach) not only regarding impossibility, but with respect to all crimes of attempt. The Commentary specifically rejected defining a "substantial step" as conduct that *unequivocally* demonstrates criminality. *Id.* at 592. Instead, the Code evaluates the sufficiency of the act in terms of the circumstances that the actor believed existed and requires that the conduct "strongly corroborate" the actor's criminal purpose. *Id.* While the drafters of the Model Penal Code recognized that "there is . . . [a] relationship between the actor's

Subjective theory is based on the belief that individuals whose actions are ambiguous may nevertheless present a threat to society.[204] Again, the *Jaffe* situation demonstrates this concept. The acts that are necessary to receive stolen goods may be entirely neutral. The defendant need not have paid an excessively reduced price for the contraband and the seller need not have been a known fence.[205] But, absent these or other similarly incriminating circumstances, the hybrid approach would not permit a conviction for attempt, regardless of the strength of other extrinsic evidence concerning mens rea.[206] Courts have repeatedly determined, however, that such actors should be found guilty of attempting to receive stolen goods.[207] Subjective theory would allow the conviction of these individuals if the requisite intent could be shown and if the act, under the circumstances that the defendant believed existed, constituted a substantial step toward the completion of the substantive crime.[208]

Subjectivists claim that the principal shortcoming of the traditional objective and the hybrid approaches is that acts that

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state of mind and the external appearance of his acts," *id.*, they believed that implementing this rationale in terms of a res ipsa loquitur approach rather than a corroboration approach would too "narrowly circumscribe the scope of attempt liability." *Id.* at 594.

The Model Penal Code also rejected the traditional objective approach because of the limitations that it places on the use of confessions. *See id.* at 594. Although the Model Penal Code Commentary acknowledges the problem of reliability that is inherent in confessions, it states that they nevertheless may be used if "the actor's conduct, considered in the light of all the circumstances, add[s] significant evidential force to any proof of criminal purpose based solely on the actor's statements." *Id.*

[204] *See* G. WILLIAMS, *supra* note 12, § 207(b), at 645; Wechsler, Jones & Korn, *supra* note 193, at 578.

[205] *Cf. supra* text accompanying note 138 (discussing kinds of conduct that suggest that *Jaffe*-type defendant *was* engaged in criminal activity).

[206] *See supra* note 139 and accompanying text (discussing Hughes's position on admissibility of confessions). *But see* United States v. Hough, 561 F.2d 594, 595 (5th Cir. 1977) (in *Oviedo* jurisdiction, in-court admission by defendant, under oath, that he believed substance was cocaine held sufficient for liability, although substance was actually noncontrolled).

[207] *See, e.g.*, People v. Rojas, 55 Cal.2d 252, 258, 358 P.2d 921, 924, 10 Cal. Rptr. 465, 468 (1961) ("the criminality of the attempt is not destroyed by the fact that the goods . . . had, unknown to defendants, lost their 'stolen' status"); Darr v. People, 193 Colo. 445, 449, 568 P.2d 32, 35 (1977) (defendant's mistaken belief that property was stolen establishes the requisite criminal mental state); State v. Rios, 409 So. 2d 241, 244 (Fla. Dist. Ct. App. 1982) ("a person who with requisite criminal intent traffics in property represented to him as stolen, although not in fact stolen, is engaging in criminal-type conduct"); Darnell v. State, 92 Nev. 680, 681–82, 558 P.2d 624, 625 (1977) ("[t]he fact that the firearms had lost their 'stolen' status was an extrinsic fact unknown to appellant and does not vitiate the criminality of the attempt"); State v. Davidson, 20 Wash. App. 893, 898, 584 P.2d 401, 404 (1978) ("[defendant] has no defense that the property turned out not to be stolen").

[208] *See infra* notes 241–76 and accompanying text (discussing the subjective approach to attempt liability of MODEL PENAL CODE § 5.01(1)).

society has previously determined to merit punishment would no longer be within the ambit of the criminal law.[209] Professor Weinreb contends that "[t]he assumption that criminality can generally be perceived as an observable characteristic of the events that properly constitute crime is wrong."[210] Instead, Weinreb, like Williams,[211] finds that an act may or may not be worthy of punishment, depending on the intent behind the act.[212] Weinreb believes that society might not accept the increased risk of crime that would result if we could not intervene until "every possibility other than an intended crime was eliminated."[213]

In contrast, proponents of the hybrid approach believe that the risk of erroneous convictions resulting from the subjective approach presents an even greater danger to society than does requiring a clear manifestation of intent.[214] Weinreb asserts that this fear is empirically unsound and that the recent trend toward subjectivism has not resulted in the punishing of "dangerous persons" rather than persons who have committed dangerous acts.[215] Furthermore, he contends that adoption of the objective approach could actually result in erroneous convictions of individuals who have innocently committed apparently dangerous acts.[216] If courts mistakenly equate manifest criminality with criminal intent, then objectivists will have created a new danger,

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[209] *See, e.g.*, Weinreb, *supra* note 194, at 315. *But see supra* note 183 (citing convictions based on *Oviedo* approach). Weinreb also notes that the objective approach cuts both ways, *i.e.*, that acts that are considered neutral under current law might constitute an attempt under a pure objective approach. *Id.*

[210] Weinreb, *supra* note 194, at 310.

[211] *See* G. WILLIAMS, *supra* note 12, § 207(b), at 643. Williams poses the problem of *X* shooting in the direction of *Y*. The act of shooting may or may not constitute a crime. If *X* shot at *Y*, believing that *Y* was in range of the gun, then *X* will have attempted to murder *Y*. If, however, *X* knew that *Y* was out of range and *X* was merely testing his gun, then *X* will have committed no crime. *Id.* Williams offers this example to illustrate his belief that appearances alone are an insufficient means to determine criminal liability. *Id.*; *see also* Williams, *supra* note 12, at 49 (advocating subjective approach); *supra* notes 196–99 and accompanying text (additional example of application of Williams's subjective approach).

[212] *See* Weinreb, *supra* note 194, at 317.

[213] *Id.* at 315. Weinreb also notes, however, that if the objective approach were adopted courts might declare acts that previously had been thought to be innocuous to be manifestly criminal. He stresses the indeterminacy of the objective approach. *See id.* Although only a few cases have been decided under the *Oviedo* standard, in later cases applying *Oviedo* the courts found the acts at issue to be sufficient to support a finding of intent. *See supra* note 183 (citing such cases).

[214] *See supra* text accompanying notes 124–39 (discussing concerns of hybrid approach's proponents, particularly the views of Professor Hughes).

[215] Weinreb, *supra* note 194, at 295.

[216] *Id.* at 296.

one that is perhaps equal to the danger of speculation into intent based on ambiguous acts.[217]

Weinreb also finds that the hybrid approach is of no value in the specific area of impossibility.[218] When an individual commits an act believing that a particular set of circumstances exists, when in fact a different set of circumstances exists, the problem is not solved "by looking at appearances."[219] He reasons that the issue in such instances is the potential dangerousness of the actor, despite his mistake, and he would therefore focus on whether the actor came dangerously close to achieving his goal.[220]

### C. *The Response of Proponents of the Hybrid Approach*

Supporters of the hybrid approach do not dispute the subjectivists' contention that the dangerousness of an act cannot be accurately gauged without considering the intent with which it was performed. If identifying, without fail, all potentially dangerous individuals was our only goal, then this would be a strong argument. Other considerations come into play, however. In order to control the discretion of law-enforcement officials, certain safeguards must be built into the system.[221] The safeguard that the hybrid approach imposes is to require that the defendant's act, viewed independently of extrinsic evidence of intent, must corroborate the intent that is necessary for the substantive crime.

Under the hybrid approach, the defendant's act is not viewed in a vacuum. Instead, the hybrid approach considers the act with reference to other circumstantial evidence.[222] For example,

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[217] *Id.*

[218] *See id.* at 314.

[219] *Id.*

[220] *Id.*

[221] *See supra* notes 81 and 128 (discussing Enker's approach to impossibility).

[222] *See supra* notes 136–39 and accompanying text (discussing Hughes's approach to impossibility). Professor Hughes was careful to distinguish his approach to impossibility from that which had been adopted by a New Zealand court in Campbell & Bradley v. Ward, [1955] 1 N.Z.L.R. 471 (N.Z.S.C.). In *Ward*, three men were charged with attempting to steal a battery from a parked car. One of the accused had been seen entering the car, and one of his accomplices later stated that the first accused had entered the car to steal a radio and the car's battery. According to Hughes, the appellate court reversed the conviction because the defendant's act "did not on its face show an intent to steal a battery as opposed to an intent to steal something else." Hughes, *supra* note 8, at 1027. Hughes goes on to state:

the requisite act could be found in a *Jaffe*-type situation if the defendant received the goods at a very low price from a known fence.[223] Weinreb's contention that the hybrid approach moves away from an objective approach as the "objective viewer" is given more and more information[224]—thereby moving toward the subjective approach—is obviously correct. The hybrid approach stops short of giving courts free rein, however, even when such circumstantial evidence is lacking.

It is important to note that the hybrid approach does not exclude the use of confessions or other statements by the defendant. Rather, it requires that the defendant's actions, viewed at first without reference to such often unreliable evidence,[225] at least raise the possibility of criminal acts. Once this threshold test has been met, all other available evidence can be used to confirm that the defendant indeed intended to violate an existing law.

Finally, in response to the subjectivists' contentions that the hybrid approach would preclude convictions in many cases in which convictions are presently obtained, the hybrid approach merely makes explicit what is already implicit in the law: every element of a crime must be proven beyond a reasonable doubt.[226] Absent a confession, the requisite intent must be inferred from the defendant's actions and other circumstantial evidence. If an act is entirely neutral and little circumstantial evidence regarding the defendant's intent exists, it will be impossible to prove the elements of the crime under either the hybrid or the subjective approach. On the other hand, when there is sufficient evidence

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> Nothing that is being advocated here should be taken to justify such a result. Under the position now being urged, once a substantial nexus has been shown between the act of the accused and the actus reus of the complete crime, it would be perfectly proper to admit evidence of confessions, admissions, or any other testimony of the accused's intent to clarify the particular offense out of perhaps several possibilities at which he was aiming.

*Id.*; *see also* REVISED COMMENTARY, *supra* note 76, § 5.01, at 330–31 (criticizing decision in *Ward*).

[223] *See supra* notes 136–49 and accompanying text (discussing *Jaffe* and the hybrid approach).

[224] *See supra* note 201.

[225] *See supra* text accompanying notes 214–17 (discussing unreliability of ostensibly criminal acts).

[226] *Cf.* Hughes, *supra* note 8, at 1023 (subjective theory's virtue lies in protection that it provides for defendants by "stressing the necessity for a strict proof of mens rea by the prosecution"). *But see* Weinreb, *supra* note 194, at 310 (arguing that Fletcher's "manifest criminality" theory—a type of hybrid approach—"should not be confused with a strong, even a very strong, requirement that guilt be proved with certainty"). *See also supra* note 132 (discussing Fletcher's approach); *supra* notes 136–39 and accompanying text (discussing Hughes's approach).

from which the necessary intent can be inferred, in all but the rarest of cases the defendant's actions would meet the threshold test that the hybrid approach imposes.

## III. THE STATUTORY SOLUTION

Recently, many legislatures have enacted statutes that address the impossibility problem. Almost two-thirds of the states have adopted provisions that are aimed at eliminating the impossibility defense,[227] modeled after either section 5.01(1) of the Model Penal Code[228] or section 110 of the New York Penal Code.[229] Although these various state statutes have successfully eliminated the impossibility defense,[230] not all states have enacted

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[227] ALA. CODE § 13A-4-2 (1975); ALASKA STAT. § 11.31.100 (1983); ARIZ. REV. STAT. ANN. § 13-1001 (1978); ARK. STAT. ANN. § 41-701 (1977); COLO. REV. STAT. § 18-2-101 (1973); CONN. GEN. STAT. ANN. § 53a-49 (West 1985); DEL. CODE ANN. tit. 11, § 531 (1979); GA. CODE ANN. § 16-4-4 (1984); HAWAII REV. STAT. § 705-500 (1976); ILL. REV. STAT. ch. 38, § 8-4 (1983); IND. CODE § 35-41-5-1 (1981); KAN. STAT. ANN. § 21-3301 (1981); KY. REV. STAT. § 506.010 (1975); LA. REV. STAT. ANN. § 14.27 (West 1974) (rejecting impossibility defense in commentary accompanying statute); ME. REV. STAT. ANN. tit. 17A, § 152 (1983); MINN. STAT. § 609.17 (1982); MO. ANN. STAT. § 564.011 (Vernon 1979); MONT. CODE ANN. § 45-4-103 (1983); NEB. REV. STAT. § 28-201 (1979); N.H. REV. STAT. ANN. § 629.1 (1974); N.J. STAT. ANN. § 2C:5-1 (West 1982); N.Y. PENAL LAW § 110.10 (McKinney 1975); N.D. CENT. CODE § 12.1-06-01 (1985); OHIO REV. CODE ANN. § 2923.02 (Page 1982); OKLA. STAT. tit. 21, § 44 (1981); OR. REV. STAT. § 161.425 (1985); 18 PA. CONS. STAT. ANN. § 901 (Purdon 1983); UTAH CODE ANN. § 76-4-101 (1978); WASH. REV. CODE § 9A.28.020 (1983); WYO. STAT. § 6-1-301 (1985).

Both California and Michigan have proposed legislation that would eliminate the impossibility defense. Section 705 of California's Proposed Criminal Code provides: "In a prosecution for an attempt to commit a crime, it is no defense that it was impossible to commit the crime." JOINT LEGISLATIVE COMM'N FOR REVISION OF THE PENAL CODE, STATE OF CALIFORNIA, THE CRIMINAL CODE § 705 (Staff Draft 1971) [hereinafter cited as PROPOSED CAL. CRIM. CODE]. This legislation was never adopted. For further discussion, see generally Comment, *Attempt, Solicitation, and Conspiracy Under the Proposed California Criminal Code*, 19 UCLA L. REV. 603, 604–14 (1972). Section 1001(2) of Michigan's Second Revised Criminal Code, which was also not adopted, includes a similar provision: "It is no defense to a prosecution under this section that under the actual attendant circumstances the offense charged to have been attempted was factually or legally impossible of commission, if it could have been committed had the attendant circumstances been as the actor believed them to be." MICH. SECOND REV. CRIM. CODE § 1001(2) (Proposed Final Draft 1979).

[228] MODEL PENAL CODE § 5.01 (Proposed Official Draft 1985); *see infra* text accompanying note 243 (text of Model Penal Code § 5.01(1)).

[229] N.Y. PENAL LAW § 110.10 (McKinney 1975); *see infra* text accompanying note 300 (text of Pennsylvania's New York-type attempt statute). Although the drafters of the New York statute used the Model Penal Code as a guide for the New York Code, there are nevertheless sufficient differences between the two formulations to merit separate discussion.

[230] Research revealed no cases in which the defendant successfully raised an impossibility defense in a jurisdiction that had a statute eliminating the impossibility defense.

provisions dealing with impossibility,[231] and impossibility remains a defense under some interpretations of federal law.[232] In *United States v. Hair*,[233] for example, the United States District Court for the District of Columbia stated that, until Congress adopts a general federal attempt statute, the federal courts cannot abolish the impossibility defense.[234] Some state courts have been similarly reluctant to abolish the impossibility defense without explicit legislative action.[235]

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[231] *See infra* note 239 (listing states that have not enacted or proposed legislation specifically addressing the impossibility defense).

[232] Some federal statutes include provisions concerning attempts to commit particular substantive crimes. In United States v. Everett, 700 F.2d 900 (3d Cir. 1983), for example, the defendant was convicted of attempting to distribute a controlled substance although the substance that he sold was not controlled. *See id.* at 907–09. The defendant's act, however, constituted an attempt under section 846 of the Drug Abuse Prevention Act. *See id.* at 909. The court refused to recognize an impossibility defense because it would have narrowed the scope of the statute, which the court believed Congress intended to have as broad a reach as possible. *Id.* For a discussion of *Everett*, see Casenote, *Criminal Law—The Distribution of a Non-Controlled Substance Believed To Be a Controlled Substance Constitutes an Attempt Under the Comprehensive Drug Abuse Prevention and Control Act of 1979.* United States v. Everett, 700 F.2d 900 (3d Cir. 1983), 61 U. DET. J. URB. L. 625 (1984).

Other federal courts have recognized a legal impossibility defense under federal common law. *See* United States v. Berrigan, 482 F.2d 171, 190 (3d Cir. 1973) (recognizing legal impossibility defense because no federal statute had eliminated it).

[233] 356 F. Supp. 339 (D.D.C. 1973).

[234] *Id.* at 342–43. Section 1001 of the Final Report of the National Commission on Reform of Federal Criminal Laws advocated the elimination of the impossibility defense. It provided:

> A person is guilty of criminal attempt if, acting with the kind of culpability otherwise required for commission of a crime, he intentionally engages in conduct which, in fact, constitutes a substantial step toward commission of the crime. A substantial step is any conduct which is strongly corroborative of the firmness of the actor's intent to complete the commission of the crime. Factual or legal impossibility of committing the crime is not a defense if the crime could have been committed had the attendant circumstances been as the actor believed them to be.

NATIONAL COMM'N ON REFORM OF FED. CRIMINAL LAWS, FINAL REPORT § 1001(1) (1971) [hereinafter cited as NATIONAL COMM'N REPORT]. This approach is intended to follow New York's approach. *See infra* text accompanying notes 277–319 (discussing New York's statute).

[235] *See, e.g.*, People v. Rollino, 37 Misc. 2d 14, 22, 233 N.Y.S.2d 580, 588 (Sup. Ct. 1962) (calling for modification of attempt law); Booth v. State, 398 P.2d 863, 872 (Okla. Crim. App. 1964) ("statute needs to be changed so as to be less favorable to the criminal"). In State v. Lopez, 100 N.M. 291, 669 P.2d 1086 (1983), the dissent disagreed with the majority's subjective interpretation of the New Mexico attempt statute. The dissent contended that only the legislature could determine whether an objective or subjective approach to criminality should be used. *See id.* at 1091 (Sosa, J., dissenting) (adopting lower court opinion in full). The court in *Rollino* presaged these sentiments:

> The defendant's moral guilt is unquestionable . . . . That he cannot be adjudged legally guilty is due entirely to the existing state of the decisional and statutory law on the subject. Clearly a modification of the law in this regard, to make it less favorable to criminal elements, is called for but this court may only adjudicate; it may not legislate.

The criminal code provisions that address impossibility abolish the defense in one of two ways. First, statutes that are based on section 5.01(1) of the Model Penal Code implicitly abolish the defense in mixed fact/law situations by focusing on whether the actor would have committed a crime had the attendant circumstances been as he believed them to be when he acted.[236] Section 110.10 of the New York Penal Code and those statutes that are similarly constructed[237] simply state that factual and legal impossibility are not recognized defenses to attempt crimes. In short, neither approach allows the defendant an impossibility defense to a criminal attempt charge, although a legality or pure legal impossibility argument remains a defense in these jurisdictions.[238] Courts in eight additional states have rejected the impossibility defense.[239] Eleven jurisdictions have

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37 Misc. 2d at 22, 233 N.Y.S.2d at 588. The court in *Rollino* was not the first court to request legislative assistance in dealing with impossibility. As early as 1849, courts asked for guidance. *See, e.g.*, State v. Cooper, 22 N.J.L. 52, 58 (1849) (courts cannot "extend the penal code or multiply the objects of criminal punishment"). *But see* State v. Latraverse, 443 A.2d 890 (R.I. 1982) (adopting Model Penal Code by judicial fiat).

[236] The following states have based their attempt provisions on the Model Penal Code: ARIZ. REV. STAT. ANN. § 13-1001 (1978); ARK. STAT. ANN. § 41-701 (1977); CONN. GEN. STAT. § 53a-49 (1985); DEL. CODE ANN. tit. 11, § 531 (1979); HAWAII REV. STAT. § 705-500 (1976); KY. REV. STAT. § 5.06.010 (1975); NEB. REV. STAT. § 28-201 (1979); N.H. REV. STAT. ANN. § 629.1 (1974); N.J. STAT. ANN. § 2C:5-1 (West 1982); OKLA. STAT. ANN. tit. 21, § 44 (1981); WYO. STAT. § 6-1-301 (1977); *Latraverse*, 443 A.2d 890 (adopting Model Penal Code by judicial fiat); *see also* Young v. State, 303 Md. 298, 493 A.2d 352 (1985) (adopting "substantial step" test of Model Penal Code, but without subjective considerations on part of actor).

[237] The following states have enacted attempt provisions analogous to New York's provision: ALA. CODE. § 13A-4-2 (1975); ALASKA STAT. § 11.31.100 (1983); COLO. REV. STAT. § 18-2-101 (1973); GA. CODE ANN. § 16-4-4 (1984); ILL. REV. STAT. ch. 38, § 8-4 (1983); IND. CODE §.35-41-5-1 (1981). KAN. STAT. ANN. § 21-3301 (1981); LA. REV. STAT. ANN. § 14-27 (West 1974); ME. REV. STAT. ANN. tit. 17A, § 152 (1983); MINN. STAT. § 609.17 (1982); MO. ANN. STAT. § 564.011 (Vernon 1979); MONT. CODE ANN. § 45-4-103 (1983); N.D. CENT. CODE § 12.1-0601 (1985); OHIO REV. CODE ANN. § 2923.02 (Page 1982); OR. REV. STAT. § 161.425 (1985); 18 PA. CONS. STAT. ANN. § 901 (Purdon 1983); UTAH CODE ANN. § 76-4-101 (1978); WASH. REV. CODE § 9A.28.020 (1983); *see also* NATIONAL COMM'N REPORT, *supra* note 234, at § 1001; PROPOSED CAL. CRIM. CODE, *supra* note 227, at § 705 n.7; MICH. SECOND REV. CRIM. CODE *supra* note 227, at § 1001(2) (proposed amendments); CAN. REV. STAT. ch. C-34, § 24 (1970).

[238] *See supra* notes 62–89 and accompanying text (discussing pure legal impossibility).

[239] *See* State v. Rios, 409 So. 2d 241, 243 (Fla. Dist. Ct. App. 1982) ("[w]e further reject any suggestion that the defense of legal impossibility should bar any criminal attempt prosecution"); Duke v. State, 340 So. 2d 727, 730 (Miss. 1976) ("when impossibility grows out of extraneous facts not within control of the party, impossibility is no defense"); Darnell v. State, 92 Nev. 680, 681, 558 P.2d 624, 625 (1976) ("better rule" is that impossibility is no defense); State v. Lopez, 100 N.M. 291, 293, 669 P.2d 1086, 1088 (1983) ("when the objective is clearly criminal, impossibility is not a proper defense"); State v. Hageman, 307 N.C. 1, 13, 296 S.E.2d 433, 441 (1982) (impossibility cannot be used as a "shield"); State v. Ferreira, 463 A.2d 129, 132 (R.I. 1983) ("any type of impossibility argument, legal or factual, is not a defense"); Bandy v. State, 575

yet to determine whether mixed fact/law impossibility is a defense.[240]

### A. *Section 5.01(1) of the Model Penal Code*

The drafters of the Model Penal Code intended to abolish the impossibility defense by adopting a generally subjective approach to criminality.[241] Under the model statute, the defen-

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S.W.2d 278, 280 (Tenn. 1979) (rejecting legal impossibility); State v. Damms, 9 Wis. 2d 183, 190, 100 N.W.2d 592, 596 (1960) ("[s]ound public policy would seem to support the majority view that impossibility not apparent to the actor should not absolve him from the offense of attempt"); *see also* United States v. Thomas, 13 C.M.A. 278, 286, 32 C.M.R. 278, 286 (1962) (no impossibility defense available when soldiers attempted to rape a dead woman mistakenly believing her to be alive); State v. Glover, 27 S.C. 602, 4 S.E. 564 (1888) (apparently rejecting factual impossibility defense).

[240] *See* IDAHO CODE § 18-306 (1979); MASS. GEN. LAWS ANN. ch. 274, § 6 (West 1970); MICH. COMP. LAWS § 750.92 (1979); S.D. CODIFIED LAWS ANN. § 22-4-1 (1979); TEX. PENAL CODE ANN. § 15.01 (Vernon 1974); VT. STAT. ANN. tit. 13, § 9 (1974); W. VA. CODE § 61-11-8 (1984). The Texas legislature acknowledged that its provision, applicable to a defendant who "'tends but fails to effect the commission of the offense intended[,]' appears to exclude from attempt many impossibility situtations." TEX. PENAL CODE ANN. § 15.01 practice commentary (Vernon 1978).

Texas has recently added an interesting twist to impossibility law. The legislature revised its definition of theft to include instances in which law-enforcement officers are involved in a transaction regarding property that has been represented as stolen or property that has been stolen but is later recovered by law-enforcement officers. Act of June 14, 1985, ch. 599, 1985 TEX. SESS. LAW SERV. 4568 (Vernon) (codified as amended at TEX. PENAL CODE ANN. § 31.03 (Vernon Supp. 1986)). The Act expands the definition of unlawful appropriation, an element required for theft in Texas, to include appropriation of property in the custody of a law-enforcement agent that is represented by the agent as being stolen if the actor who appropriates the property believes that it is stolen. TEX. PENAL CODE ANN. § 31.03(b)(3). The Act further provides that stolen property does not lose its "stolen" character when it is recovered by law-enforcement agents. *Id.* § 31.03(c)(5). Thus, the Act deals with the impossibility defense in this one instance by redefining the substantive crime of theft; it is unclear why the legislature did not go further and eliminate impossibility as a defense entirely.

The following jurisdictions have no general attempt statutes that are intended to address impossibility questions, and research revealed no cases dealing with such attempts: Iowa, Virginia, and the District of Columbia. One state court, however, stated in dicta that legal impossibility may be a valid defense. Waters v. State, 2 Md. App. 216, 226–28, 234 A.2d 147, 153 (1967) (dicta); *see also In re* Appeal No. 568, 25 Md. App. 218, 220–23, 333 A.2d 649, 651–52 (1975). Recently, Maryland adopted the substantial-step language of the Model Penal Code, but "delete[d] the subjective considerations on the part of the actor." Young v. State, 303 Md. 298, 311, 493 A.2d 352, 359 (1985).

[241] *See* 1 P. ROBINSON, *supra* note 12, § 85(a), at 423 n.4 (Model Penal Code takes subjective view and relies primarily on actor's dangerousness); Wechsler, Jones & Korn, *supra* note 193, at 578 (evaluating defendant's conduct in terms of circumstances that actually existed is "unsound in that it seeks to evaluate a mental attitude . . . by looking to . . . a situation wholly at variance with the actor's beliefs").

dant's actions are evaluated in light of the circumstances[242] that he believed existed at the time he acted. Section 5.01(1) of the Model Penal Code provides:

> *Definition of attempt.* A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the commission of the crime, he:
>
> (a) purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be; or
>
> (b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or
>
> (c) purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.[243]

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[242] According to the Revised Commentary to the Model Penal Code, "[t]he 'circumstances' of the offense refer to the objective situation that the law requires to exist, in addition to the defendant's act or any results that the act may cause." REVISED COMMENTARY, *supra* note 76, § 5.01, at 301 n.9. For example, in order for there to be a theft, the object of the actor's intentions must be the property of another. *See id.*; *see also infra* note 261 (discussing difference between circumstances and attendant circumstances).

[243] MODEL PENAL CODE § 5.01(1) (Proposed Official Draft 1985). Inherent impossibility is addressed by section 5.05(2) of the Model Penal Code:

> If the particular conduct charged to constitute a criminal attempt, solicitation or conspiracy is so inherently unlikely to result or culminate in the commission of a crime that neither such conduct nor the actor presents a public danger warranting the grading of such offense under this Section, the Court shall exercise its power under Section 6.12 to enter judgment and impose sentence for a crime of lower grade or degree or, in extreme cases, may dismiss the prosecution.

*Id.* § 5.05(2). Professor Elkind notes that this section indicates that "the drafters of the Model Penal Code . . . agree with the view that society should be more tolerant of an attempt which involves little or none of the danger protected against by the criminal statute." Elkind, *supra* note 12, at 34. Elkind believes that the statute should "permit the court to balance retributive values with the values of deterrence and neutralization." *Id.* He suggests a revision of section 5.05(2) that would "separate the question of the likelihood that the attemptor would succeed from the question of whether he presents a public danger." *Id.* Elkind's revised statute would provide as follows: "Where the particular conduct charged to constitute a criminal attempt is inherently unlikely to culminate in the commission of a crime, the court, in setting a penalty, shall consider the extent to which the actor presents a public danger." *Id.*

Wechsler, Jones, and Korn warn against using impossibility as an indicator of an individual's dangerousness of personality. The nature of the means that are employed can negate the dangerousness of character, particularly if the means were so absurd that they create substantial doubt that the actor actually intended to commit a crime. On the other hand, the actor who fails to consummate his intended crime due to inadequate means could try more efficacious means at a later time. *See* Wechsler, Jones & Korn, *supra* note 193, at 584–85; *see also* REVISED COMMENTARY, *supra* note 76, § 5.01, at 316 n.88 (discussing difficulties in using impossibility as a guide to gauging dangerousness of personality).

Professor Robinson explains the situations to which these provisions are intended to apply:

> Subsection (a) contemplates the case where, from the defendant's mistaken view, he has satisfied the objective elements of the substantive offense; subsection (b), applicable to offenses with a result element, punishes where, from the defendant's view, he has done everything he need do to cause the prohibited result; and subsection (c) imposes liability where, from the defendant's view, he has taken a substantial step toward commission of the offense.[244]

According to the drafters of the Model Penal Code, cases of mixed fact/law impossibility should be evaluated under subsection (a) of section 5.01(1) of the Code.[245] This subsection rejects the impossibility defense by focusing on the attendant circumstances that the defendant believed existed, rather than on those that actually existed.[246] If the defendant was charged with at-

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According to the National Commission on Reform of Federal Criminal Laws, section 5.05(2) of the Model Penal Code has not been well-received. *See* NATIONAL COMM'N ON REFORM OF FED. CRIMINAL LAWS, 1 WORKING PAPERS 361 (1970). New Jersey, which has adopted section 5.01 virtually verbatim, addresses inherent impossibility in part as follows:

> A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for the commission of the crime, he:
> (1) Purposely engages in conduct which would constitute the crime if the attendant circumstances were as a *reasonable person would believe them to be*; . . . .

N.J. STAT. ANN. § 2C:5-1(a) (West 1982) (emphasis added); *see also* MINN. STAT. § 609.17 (1982) ("clearly evident to a person of normal understanding"). Model Penal Code section 2.12 (De Minimis Infractions) provides in relevant part:

> The Court shall dismiss a prosecution if, having regard to the nature of the conduct charged to constitute an offense and the nature of the attendant circumstances, it finds that the defendant's conduct: . . .
> (2) did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction . . . .

MODEL PENAL CODE § 2.12(2) (Proposed Official Draft 1985).

[244] 1 P. ROBINSON, *supra* note 12, § 85(c), at 430. The drafters of the Model Penal Code noted that, for there to be an attempted crime, the goal that the defendant sought to achieve must constitute a crime. They stated that, "[i]f, according to his beliefs as to facts and legal relationships, the result desired or intended is not a crime, the actor will not be guilty of an attempt even though he firmly believes that his goal is criminal." Wechsler, Jones & Korn, *supra* note 193, at 579; *see also* Commonwealth v. Henley, 504 Pa. 408, 416, 474 A.2d 1115, 1119 (1984) (Pennsylvania statute eliminating impossibility defense does not allow conviction when act that defendant intended to perform is not illegal); *see also supra* notes 62–89 and accompanying text (discussing pure legal impossibility).

[245] *See* Wechsler, Jones & Korn, *supra* note 193, at 578 ("purpose of paragraph 1(a) is to eliminate legal impossibility as a defense to an attempt charge"). *But see* REVISED COMMENTARY, *supra* note 76, § 5.01, at 317 (applying subsection (a) to *Jaffe*-type case). Wechsler, Jones, and Korn use the term legal impossibility to refer to those situations that I have labeled mixed fact/law impossibility. *See supra* notes 90–108 and accompanying text (discussion of mixed fact/law impossibility).

[246] *See* Wechsler, Jones & Korn, *supra* note 193, at 578–79.

tempting to receive stolen property, for example, and the property had not in fact been stolen, an impossibility defense would fail because the conduct would have constituted a crime had the circumstances been as the defendant believed them to be.[247] In this context, the 1985 Revised Commentary to the Model Penal Code states that, "[s]ince the defendant *believed* the property to be stolen, he could be convicted even though at the time the property was technically classified as non-stolen."[248] The drafters of the Model Penal Code intended mixed fact/law problems to be addressed primarily under subsection (a) rather than under subsection (c).[249] Unlike subsection (c), subsection (a) does not require that the defendant's conduct constitute a substantial step in furtherance of the crime. Without this constraint, the Model Penal Code applies a subjective test to mixed fact/law impossibility.[250]

Although Wechsler, Jones, and Korn state that mixed fact/law impossibility comes within subsection (a) of the Code, a fair reading of the Revised Commentary suggests that subsections (a) and (c) may apply to both factual and mixed fact/law impossibility defenses.[251] The Commentary uses examples of

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[247] *See* REVISED COMMENTARY, *supra* note 76, § 5.01, at 317; ARK. STAT. ANN. § 41-701 commentary at 93 (1977) (statute intended to abolish defense of impossibility); KY. REV. STAT. ANN. § 506.010 commentary (Baldwin 1974) (hypothetical defendant guilty under § 506.010(a) when he bribed *X* under the mistaken belief that *X* was a juror).

[248] REVISED COMMENTARY, *supra* note 76, § 5.01, at 317 (emphasis added).

[249] *See* Wechsler, Jones & Korn, *supra* note 193, at 578 (subsection (a) designed to "eliminate legal impossibility defense"); *see also supra* note 245 (Wechsler, Jones & Korn use legal impossibility to refer to mixed fact/law impossibility).

[250] *See* Wechsler, Jones & Korn, *supra* note 193, at 578. The drafters of the Code believed that in mixed fact/law situations the defendant manifests his dangerousness when he has done as much as "he could in implementing [the criminal] purpose [of his act]." *Id.* Under subsection (a), the defendant's mental frame of reference should be conclusive regarding his guilt as long as the intended result constitutes a crime. *See id.* at 578–79.

Professors Kadish, Schulhofer, and Paulsen criticize the Model Penal Code for not including an objective element in the impossibility provision. *See* CRIMINAL LAW AND ITS PROCESSES, *supra* note 2, at 609–10. They recommend amending section 5.01(1)(a) as follows:

> A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he: (a) purposely engages in conduct that *strongly corroborates the required culpability and* would constitute the crime if the attendant circumstances were as he believes them to be . . . .

*Id.* at 610 (emphasis in original). This proposal incorporates into subsection (a) the objective element that is already included in subsection (c). *See supra* notes 150–56 and accompanying text (discussing Kadish proposal).

[251] *See* REVISED COMMENTARY, *supra* note 76, § 5.01, at 317–18. Although Wechsler, Jones, and Korn never explicitly state which provision of the Code applies to factual impossibility, *see* Wechsler, Jones & Korn, *supra* note 193, at 578–85, Professor Enker determined that subsection (a) covered factual impossibility and that subsection (b) dealt

factual impossibility and mixed fact/law impossibility to illustrate the application of these two subsections. It states, for example, that subsection (a) can be applied to convict a defendant in the empty-pocket cases *and* in the stolen-property cases.[252] The Revised Commentary uses the same examples to illustrate how subsection (c) will apply.[253] As stated above, determining which subsection applies to which situation is crucial, because only subsection (c) includes the objective requirement that the defendant's conduct must corroborate his intent.[254] In

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with legal (my mixed fact/law) impossibility cases. He also suggested that subsection (c) is the general attempt statute that deals with the preparation-perpetration cases. *See* Enker, *supra* note 81, at 682 n.40; *see also infra* note 254 (discussing preparation-perpetration approaches).

[252] *See* REVISED COMMENTARY, *supra* note 76, § 5.01, at 317.

[253] *Id.* at 318.

[254] Section 5.01(2) provides:

> (2) *Conduct That May Be Held Substantial Step Under Subsection (1)(c).* Conduct shall not be held to constitute a substantial step under Subsection (1)(c) of this Section *unless it is strongly corroborative of the actor's criminal purpose.* Without negativing the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law:
>
> (a) lying in wait, searching for or following the contemplated victim of the crime;
>
> (b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;
>
> (c) reconnoitering the place contemplated for the commission of the crime;
>
> (d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;
>
> (e) possession of materials to be employed in the commission of the crime, that are specially designed for such unlawful use or that can serve no lawful purpose of the actor under the circumstances;
>
> (f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, if such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;
>
> (g) soliciting an innocent agent to engage in conduct constituting an element of the crime.

MODEL PENAL CODE § 5.01(2) (Proposed Official Draft 1985) (emphasis added). The drafters of the Model Penal Code considered several possible definitions of when conduct should be considered a substantial step before adopting this definition in section 5.01(2). First, the drafters considered the "physical proximity doctrine." *See* Wechsler, Jones & Korn, *supra* note 193, at 586. This doctrine requires that the conduct be "proximate to" or "directly tending" toward the completion of the crime. *Id.* The drafters rejected this test because of its vagueness and because it emphasizes only one aspect of the actor's behavior. *See id.* at 586–87.

Second, the drafters considered the "dangerous proximity doctrine." This doctrine provides that the following factors be considered: "the gravity of the offense intended, the nearness of the act to completion of the crime, and the probability that the conduct will result in the offense intended." *Id.* at 587. This approach was rejected because it focuses on deterring dangerous acts rather than on "neutraliz[ing] dangerous individuals." *Id.*

The third approach to defining substantial step that the drafters of the Model Penal Code considered was the "indispensable element approach." This approach precludes an attempt conviction if the defendant failed to acquire control of an indispensable

the typical empty-pocket case, for example, a defendant would be found guilty under subsection (a) upon proof that he believed that the pocket contained something. Under subsection (c), however, the prosecution would also have to prove that the defendant's actions were not equivocal—in other words, that his conduct, on its face, demonstrated the intent that is necessary for the underlying substantive crime.[255] This thorny legal question could be avoided under subsection (a).

The relationship of subsection (b) to cases of impossibility is similarly unclear. With respect to attempts in general, subsection (b) applies to those crimes that require causing a particular result as an element of the substantive crime.[256] The Revised Commentary to the Model Penal Code states, for example, that "a belief that death will ensue from the actor's conduct, or that property will be obtained, will suffice" for liability.[257] This subsection is intended to extend criminality to cases in which the defendant merely *believed* that certain results would occur; the

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aspect of the criminal endeavor, either because he could not secure the assent or action of a necessary third party or because "he lack[ed] a means essential to completion of the offense." *Id.* at 587–88. The drafters did not adopt this approach because it was found too vague to be functional, and because it focuses on the defendant's acts rather than on his intent. *See id.* at 588.

The "probable desistance test" was also considered. This approach allows a conviction only "if, in the ordinary and natural course of events, without interruption from an outside source, [the defendant's conduct] will result in the crime intended." *Id.* This approach was rejected because it places too much emphasis on the conduct itself, rather than on the personality of the particular defendant. *See* id. at 588–89.

The penultimate approach that the drafters of the Model Penal Code considered was the "abnormal step approach." This approach "defines an attempt as a step toward crime that goes beyond the point where the normal citizen would think better of his conduct and desist." *Id.* at 589. Although the drafters were sympathetic to this approach's focus on the personality of the defendant, they rejected it largely because of the difficulty of judging when a normal person would break off a course of conduct tending toward a crime. *See id.* at 589–90.

The final approach that the drafters of the Code considered and rejected was the "res ipsa loquitur test." Under this approach, the defendant's conduct must "unequivocally [manifest] an intent to commit a crime" without consideration of any statements concerning his intent. *Id.* at 590. The drafters acknowledged the value of this approach in preventing convictions based on innocuous acts, *see id.* at 590–91, but rejected it because they believed that, at the same time, too many otherwise culpable defendants would escape liability. *See id.* at 594. The prosecution would often be unable to meet the burden of proof that the res ipsa loquitur test demands. *See id.* at 593–94. Under section 5.01(2) of the Code, the concerns of proponents of the res ipsa loquitur test about both firmness of purpose and problems of proof are accounted for by the requirement that the actor's conduct strongly corroborate his intent. *See id.* at 595.

[255] *See* MODEL PENAL CODE § 5.01(2) (Proposed Official Draft 1985) (defining conduct that will satisfy substantial-step requirement).

[256] *See id.* § 5.01(1)(b).

[257] REVISED COMMENTARY, *supra* note 76, § 5.01, at 304.

defendant's *purpose* need not have been to cause a particular result.[258]

With respect to impossibility, the Revised Commentary states that subsection (b) would lead to a conviction when "the result that the defendant seeks to cause or believes will be caused by his conduct does not occur because of some fortuity."[259] For example, when "the defendant shoots at an empty bed, believing that his intended victim is in the bed, he engages in conduct with the purpose of causing the death of his victim without further conduct on his part, and thus is guilty of an attempted homicide under Subsection (1)(b)."[260] It is uncertain why this situation could not be addressed under subsection (c), pursuant to which the missing victim would be treated as a "circumstance."[261] If subsection (c) were applied, an attempt conviction would result as long as the defendant's conduct corroborated the requisite intent.

If subsection (b) is adopted in the form in which it appears in the Model Penal Code, however, there will be no objective check on convictions under that provision as well as under subsection (a).[262] Subsection (b), like subsection (a), does not

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[258] *See id.* at 304–05. Therefore, if a defendant intends to destroy a building and he knows that people would be inside the building, he could be convicted of attempted murder even though it was not his purpose to kill these people. *See id.* at 318.

[259] *Id.*

[260] *Id.*

[261] Professor Robinson notes that in subsection (a) the Model Penal Code uses the term attendant circumstances, 1 P. ROBINSON, *supra* note 12, § 85(c), at 429. Subsection (c), on the other hand, employs the term circumstances. Robinson explains that "'attendant circumstances' is a term of art used . . . to distinguish circumstance elements from conduct and result elements of an offense definition." *Id.* Under this definition, property losing its character as stolen would be considered an attendant circumstance, while an intended victim missing from his bed would not. Instead, this mistake relates to the result element of the crime, *id.*, and would come under either subsection (b) or (c). Robinson rejects this confusing distinction among attendant circumstances, result elements of substantive crimes, and ordinary circumstances, *see id.*, and proposes a single provision in which all of the defendant's misapprehensions would simply be treated as "circumstances" and the defendant would be judged as if the circumstances that he believed or hoped existed actually did exist. *Id.* at 430–31.

[262] The only two states that have adopted subsection (b) substantially as it appears in the Model Penal Code are New Jersey and Oklahoma. *See* N.J. STAT. ANN. § 2C:5-1(a)(2) (West 1982); OKLA. STAT. tit. 21, § 44 (1981).

The following jurisdictions have omitted subsection (b) entirely: CONN. GEN. STAT. § 53a-49 (1985); DEL. CODE ANN. tit. 11, § 531 (1979); KY. REV. STAT. § 506.010 (1985); W. VA. CODE § 61-11-8 (1984). For the Model Penal Code's breakdown of state statutes in comparison to the Model Penal Code, see REVISED COMMENTARY, *supra* note 76, § 5.01, at 320 n.95. Arkansas, which adopted all three provisions of the Model Penal Code, noted that the three provisions "have overlapping coverage and are not set out in alternative form solely to pick up distinct kinds of conduct." ARK. STAT. ANN. § 41-701 commentary at 93 (1977). The commentary noted, as one illustration, that a defendant who shot at a tree believing that it was his enemy could be convicted under each

require that the defendant's conduct corroborate the requisite intent for the substantive offense. Arkansas, Hawaii, and Nebraska have recognized this problem, and have added to subsection (b) the requirement that the defendant's conduct meet the substantial-step requirement that the Model Penal Code includes only in subsection (c).[263]

Supporters of the hybrid approach contend that the Model Penal Code gives "insufficient protection to conduct that is externally equivocal" by omitting the corroboration requirement in subsections (a) and (b).[264] The Revised Commentary states that an individual is unlikely to be prosecuted based on admissions alone if he acted in an entirely innocuous manner.[265] The Commentary also notes that, under section 5.05(2) of the Code, judges have discretion to charge the defendant with a lesser included crime or to dismiss the prosecution entirely.[266] The Revised Commentary suggests that this section may be applied in those instances in which there has been no apparent threat to society.[267]

The Revised Commentary further states that, in certain circumstances, the defendant will have completed his conduct, and the only remaining issue is what the actor believed the attendant circumstances were at the time he acted.[268] The Commentary contends that the "strongly corroborative" requirement might not allow for prosecuting "persons whose contemporaneous statements plus their behavior are strongly suggestive of criminal purpose but whose behavior alone arguably would not be strongly corroborative of that purpose."[269] Proponents of the hybrid approach, however, would allow the "objective observer" to consider such contemporaneous statements and would judge the defendant's conduct in light of those statements.[270]

The approach of the Model Penal Code is flawed. There should be no attempt conviction at all in factual and mixed fact/

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subsection. *Id.* Arkansas, however, modified subsection (b). *See infra* text accompanying note 263.

[263] ARK. STAT. ANN. § 41-701(2) (1977); HAWAII REV. STAT. § 705-500(2) (1976); NEB. REV. STAT. § 28-201(2) (1979).

[264] *See* REVISED COMMENTARY, *supra* note 76, § 5.01, at 319.

[265] *Id.* at 319–20.

[266] *Id.* at 316.

[267] *Id.*

[268] *Id.* at 320.

[269] *Id.*

[270] *See supra* note 162 and accompanying text (discussing information that Weigend would allow an objective observer to consider).

law impossibility cases, which could be prosecuted under subsection (a) of section 5.01(1), unless the act itself provides some verification of the requisite intent. This approach will not revive the impossibility defense in mixed fact/law situations. In cases of attempts to receive stolen property, for example, there will often be sufficient circumstantial evidence from which the defendant's intent can be inferred.[271] If such evidence is lacking, conviction may be both impermissible[272] and undesirable.[273]

The drafters of the Model Penal Code may have intended to apply a purely subjective approach to impossibility.[274] There does not appear to be any acceptable reason, however, for treating impossibility cases—particularly mixed fact/law cases—under a purely subjective approach while applying a more objective test to other attempts.[275] In fact, the drafters of the Code otherwise seemed intent on not adopting a *purely* subjective approach to criminality.[276]

### B. *Statutes That Explicitly Abolish the Impossibility Defense*

Much of the confusion surrounding the prosecution of impossible attempts in New York was resolved when New York enacted section 110.10 of the New York Penal Law.[277] Mixed fact/law cases had posed the most difficulty for New York courts because judges often believed that defendants in such cases

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[271] *See supra* notes 164–92 and accompanying text (discussing use of circumstantial evidence in *Oviedo*-type situation).

[272] *See* Wechsler, Jones & Korn, *supra* note 193, at 584 (preventing punishment of innocuous acts was among the purposes of courts that recognized the impossibility defense).

[273] *See supra* notes 221–26 and accompanying text (discussing problems with the subjective approach).

[274] Professor Fletcher notes that, "[s]ince the late nineteenth century, the principle of subjective criminality has been almost unceasingly ascendant." G. FLETCHER, *supra* note 12, § 3.3.5, at 167. Reflecting this trend, the drafters of the Model Penal Code wanted to "overcome all objective impediments to attempt convictions." *Id.* The corroboration requirement represents the translation of objectivist concerns into problems "in the technique of proving intent." *Id.* at 168.

[275] OKLA. STAT. tit. 21, § 44 (1981) adopted Model Penal Code sections 5.01(1)(a) and 5.01(1)(b). The problem with this approach is twofold: first, a purely subjective standard would be in effect for those attempts that are covered by subsection (a); second, and more importantly, the drafters of the Oklahoma statute ignored the fact that the general attempt provision of the Model Penal Code is Model Penal Code section 5.01(1)(c) and that factual impossibility cases were meant to be treated under that provision.

[276] *See generally* Wechsler, Jones & Korn, *supra* note 193, at 593–607 (discussing corroboration requirement).

[277] Act of July 20, 1965, ch. 1030, § 110.10, 1965 N.Y. LAWS 1529, 1578 (codified at N.Y. PENAL LAW § 110.10 (McKinney 1975)).

should be punished, but they also believed that defendants could not be convicted of attempt crimes under the statutes as they were then written.[278] The New York impossibility provision corrected this problem by explicitly rejecting the impossibility defense in both legal and factual cases.[279] The New York statute provides: "[I]t is no defense . . . that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission . . . ."[280] Eight other state statutes explicitly reject factual and legal impossibility defenses and are similar to the New York provision.[281]

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[278] *See* People v. Rollino, 37 Misc. 2d 14, 233 N.Y.S.2d 580 (Sup. Ct. 1962). In *Rollino*, the defendant was charged with attempted larceny. The court acquitted him because the property was not actually stolen. *See supra* note 235 (court calls for modification of attempt law).

Before *Rollino*, the decisions of the New York courts were in disarray. In People v. Jaffe, 185 N.Y. 497, 78 N.E. 169 (1906), the court held that a defendant could not be convicted of attempted larcency when the goods that he attempted to steal were not in fact stolen. *Id.* at 501, 78 N.E. at 170. Three years later, the court in People v. Teal, 196 N.Y. 372, 89 N.E. 1086 (1909), held that it was no crime to testify falsely if the testimony that was offered was immaterial, even if the defendant believed that the testimony was material. *Id.* at 377; *see supra* notes 75–78 and accompanying text (discussing debate over whether *Teal* represents case of pure legal or mixed fact/law impossibility). In both *Jaffe* and *Teal*, the court stated that "an unsuccessful attempt to do that which is not a crime, when effectuated, cannot be held to be an attempt to commit the crime specified." *Teal*, 196 N.Y. at 377, 89 N.E. at 1088; *Jaffe*, 185 N.Y. at 501, 78 N.E. at 170.

Later New York decisions sought to limit *Jaffe* and *Teal*. In People v. Moore, 142 A.D. 402, 127 N.Y.S. 98, *aff'd mem.*, 801 N.Y. 570, 95 N.E. 1136 (1911), the defendant was charged with knowingly receiving money on account of placing a woman in the custody of another person for immoral purposes. 142 A.D. at 403, 127 N.Y.S. at 99. The defendant argued that, because the police had lain a trap, she could not have completed the substantive crime even if she had completed the act. *Id.* The court rejected this defense and held that it was sufficient that the defendant knowingly received the money even if it was impossible for her to commit the substantive crime. *Id.* at 405, 127 N.Y.S. at 100.

In People v. Boord, 260 A.D. 681, 23 N.Y.S.2d 792 (1940), the defendant was charged with attempting to divert a traveler to a hotel through false statements. Because the traveler was actually an undercover policewoman, the defendant contended that the completed act could not have resulted in an actual diversion. Without reference to *Jaffe*, the court convicted the defendant because his conduct, regardless of its actual effect, was the evil at which the statute was aimed. *Id.* at 684, 23 N.Y.S.2d at 796.

[279] *See* People v. Reap, 68 A.D.2d 964, 965, 414 N.Y.S.2d 775, 776 (1979) ("impossibility is not a defense to an attempt to crime [sic]"); People v. Leichtweiss, 59 A.D.2d 383, 388, 399 N.Y.S.2d 439, 441 (1977) (1967 revision of statute intended to eliminate both factual and legal impossibility defense).

[280] N.Y. PENAL LAW § 110.10 (McKinney 1975).

[281] ALA. CODE § 13A-4-2 (1975); ALASKA STAT. § 11.31.100 (1983); COLO. REV. STAT. § 18-2-101 (1973); GA. CODE ANN. § 16-4-4 (1982); MO. ANN. STAT. § 564.011 (Vernon 1979); N.D. CENT. CODE § 12.1-06-01 (1976); UTAH CODE ANN. § 76-4-10 (1978); WASH. REV. CODE § 9A.28.020 (1983).

Unlike in the states that have adopted the Model Penal Code attempt statute, several cases have been decided under the New York type of impossibility provision. *See, e.g.*, People v. Hrapski, 658 P.2d 1367 (Colo. 1983) (defendant guilty of possession of firearms although bullet was defective); Darr v. People, 193 Colo. 445, 568 P.2d 32 (1977)

The New York Court of Appeals first interpreted section 110.10 in *People v. Dlugash*.[282] Melvin Dlugash was convicted of attempted murder even though his "victim" might already have been dead[283] when Dlugash "fired approximately five shots in the victim's head and face."[284] The court decided that Dlugash's actions constituted "conduct which tend[ed] to effect the commission of [the murder],"[285] thereby fulfilling the requirements for a conviction under New York's general attempt statute.[286] The court acknowledged that reasonable doubt existed concerning whether the victim was still alive when Dlugash fired the shots, but said that the presence of such doubt was no defense to attempted murder under section 110.10. Because the jury found that Dlugash *believed* that his victim was alive, he could be convicted of attempted murder regardless of whether the victim was *actually* alive.[287] With respect to the New York statute in general, the court stated:

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(defendant guilty of attempting to receive stolen goods although goods were actually part of a police operation and were not stolen); People v. Rosencrants, 89 Misc. 2d 721, 392 N.Y.S.2d 808 (Sup. Ct. 1977) (defendant guilty of attempting to possess controlled substance although substance was not actually controlled); State v. James, 26 Wash. App. 522, 614 P.2d 207 (1980) (defendant guilty of attempted burglary although it was impossible to pick lock with wire); State v. Davidson, 20 Wash. App. 893, 584 P.2d 401 (1978) (defendant guilty of attempting to receive stolen goods although goods were not actually stolen).

The New York-type statute withstood a constitutional challenge in State v. Sommers, 569 P.2d 1110 (Utah 1977). The defendant in *Sommers* contended that the Utah attempt provision was facially void under the due process clause of the fourteenth amendment. *See id.* at 1111. The court held that the statute did not violate the defendant's right of "fundamental fairness" and that a legal impossibility defense was not a "fundamental right essential to an Anglo-American regime of ordered liberty." *Id.* The court found the defendant guilty of attempting to receive stolen property although the property was not actually stolen. *Id.* at 1112.

[282] 41 N.Y.2d 725, 363 N.E.2d 1155, 395 N.Y.S.2d 419 (1977). For a detailed discussion of *Dlugash*, see A. DERSHOWITZ, THE BEST DEFENSE 85–116 (1982).

[283] Two years before *Dlugash*, in Haughton v. Smith, [1975] A.C. 476 (H.L.), Lord Reid addressed the same issue and apparently would have disagreed with the New York Court of Appeals:

> I would not, however, decide the matter entirely on logical argument. The life blood of the law is not logic but common sense. So I would see where this theory takes us. A man lies dead. His enemy comes along and thinks he is asleep, so he stabs the corpse. The theory inevitably requires us to hold that the enemy has attempted to murder the dead man. The law may sometimes be an ass but it cannot be so asinine as that.

*Id.* at 500.

[284] 41 N.Y.2d at 728, 363 N.E.2d at 1156, 395 N.Y.S.2d at 422.

[285] *Id.* at 732, 363 N.E.2d at 1161, 395 N.Y.S.2d at 426.

[286] N.Y. PENAL LAW § 110.00 (McKinney 1975): "A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime."

[287] 41 N.Y.2d at 737, 363 N.E.2d at 1162–63, 395 N.Y.S.2d at 427–28. The United States District Court for the Eastern District of New York later granted Dlugash a new trial on a writ of habeas corpus. Dlugash v. New York, 476 F. Supp. 921 (E.D.N.Y.

> In the belief that neither of the two branches of the traditional impossibility arguments detracts from the offender's moral culpability . . . , the Legislature substantially carried the [Model Penal Code's] treatment of impossibility into the 1967 revision of the Penal Law . . . . Thus, a person is guilty of an attempt when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime . . . . It is no defense that, under the attendant circumstances, the crime was factually or legally impossible of commission, "if such crime could have been committed

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1979). The Court found that Dlugash had been denied due process when the New York Court of Appeals modified his conviction from murder to attempted murder. The appellate division had refused to modify the judgment into a conviction for attempted murder. Instead, it overturned the murder conviction and dismissed the indictment, saying that the evidence was insufficient for the jury to have found beyond a reasonable doubt that the victim was alive when Dlugash shot him. *See* People v. Dlugash, 51 A.D.2d 974, 975, 380 N.Y.S.2d 315, 316 (1976). The New York Court of Appeals, however, found that there was sufficient evidence to convict Dlugash of attempted murder and reinstated the conviction with that modification. People v. Dlugash, 41 N.Y.2d 725, 735, 363 N.E.2d 1155, 1161, 395 N.Y.S.2d 419, 426 (1977). That court explained that when the jury found Dlugash guilty of murder it necessarily found that Dlugash *believed* that the victim was alive when he shot him. *Id.* at 737, 363 N.E.2d at 1162, 395 N.Y.S.2d at 427.

The federal district court ruled that Dlugash was entitled to a new trial for attempted murder because the conviction for murder was based on an instruction that the defendant intended the natural and probable consequences of his actions. *See* 476 F. Supp. at 923. Accordingly, once the jury found that the victim was alive at the time of the shooting, it was entitled to presume that Dlugash actually *believed* that the victim was alive. Therefore, a finding that Dlugash intended to murder the victim did not necessarily subsume a finding that Dlugash believed the victim was alive at the time of the shooting. *Id.*

After the federal district court granted Dlugash a new trial, his attorney, Harvard Law School professor Alan Dershowitz, entered into plea negotiations with the district attorney. Dershowitz, wanting to assure that Dlugash remained out of prison (he had been out on bail), wrote to the district attorney:

> What conceivable purpose would be served by sending him back to prison . . . ? The man who would go to prison would be a different person from the one who is alleged to have participated in the tragic events [many years earlier]. It would truly be a triumph of form over substance, of technicality over justice.

A. DERSHOWITZ, *supra* note 282, at 115. The district attorney agreed to bargain, but insisted that Dlugash plead guilty to manslaughter, the most serious crime that would not require a prison term. *See id.* Dlugash refused to plead guilty to that crime, however, because he would have been admitting that he had actually killed the victim. *Id.* After additional bargaining, which included the possibility of pleading guilty to the crime of desecrating a corpse, the attorneys invented a crime—attempted manslaughter. As the judge who accepted the plea bargain explained, Dlugash pleaded guilty to the crime of attempting to recklessly cause the death of the victim. *Id.* Dlugash was sentenced to five years' probation.

In contrast to *Dlugash*, compare the Canadian approach in Regina v. Ladue, 51 W.W.R. 175 (Can. Y.T.C.A. 1965). In *Ladue*, the defendant attempted to have sex with a dead woman whom he believed was alive. The defendant was charged with "indecently interfering with a dead human body." *Id.* at 176. The defendant claimed that he could not be guilty of the crime because he did not know that the victim was dead. *Id.* The court held, however, that knowledge of the death was not an element of the offense. *Id.* at 178. The court further noted that, if the defendant *had* believed that the woman was alive, he would have been guilty of attempted rape. *Id.*

> had the attendant circumstances been as such person believed them to be." . . . Thus, if defendant believed the victim to be alive at the time of the shooting, it is no defense to the charge of *attempted* murder that the victim may have been dead.[288]

Washington's statute provides a typical example of the mechanics of the New York statutory model:

> (1) A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he does any act which is a substantial step toward the commission of that crime.
> (2) If the conduct in which a person engages otherwise constitutes an attempt to commit a crime, it is no defense to prosecution of such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission.[289]

Section (2) of the Washington attempt statute effectively precludes an impossibility defense and assesses the defendant's conduct under section (1), the general attempt provision. In *State v. Davidson*,[290] for example, the defendant was charged with attempting to receive stolen property.[291] Because the property was not actually stolen, the defendant raised a legal impossibility defense.[292] The court held that the Washington statute eliminated such a defense and said that the defendant would be guilty if "his conduct satisfied the elements of attempt: (1) intent to commit a specific crime; [and] (2) an act which is a substantial step toward the commission of that crime."[293] The effect of the New York statutory model, therefore, is quite different from that of the Model Penal Code. Unlike the Model Penal Code, which appears to treat different categories of attempt crimes differently,[294] the New York model subjects all attempts to the same regimen. Rather than devise a special test with which to treat impossible attempts, those legislatures adopting the New

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[288] 41 N.Y.2d at 735, 363 N.E.2d at 1161, 395 N.Y.S.2d at 426 (quoting N.Y. PENAL LAW § 110.10 (McKinney 1975)) (emphasis added) (citations omitted).

[289] WASH. REV. CODE § 9A.28.020 (1983).

[290] 20 Wash. App. 893, 584 P.2d 401 (1978).

[291] *Id.* at 894, 584 P.2d at 402.

[292] The property that the defendant believed was stolen had actually been planted by the police. *Id.*

[293] *Id.* at 895, 584 P.2d at 404. The court in *Davidson* noted that the purpose of both the Model Penal Code and those legislatures that adopted the New York form of attempt statute was "to focus on the criminal intent of the actor, rather than the impossibility of convicting him of a completed crime." *Id.* (citing W. LAFAVE & A. SCOTT, *supra* note 45, § 60, at 438–46).

[294] *See supra* notes 241–55 and accompanying text (discussing differences between §§ 5.01(1)(a) and 5.01(1)(c) of the Model Penal Code).

York model have determined that all attempts should be similarly treated.[295]

Several states have also explicitly abolished the impossibility defense but, unlike New York, did not use the terms "factual" or "legal" impossibility. For example, the attempt statutes of Illinois, Indiana, Montana, and Pennsylvania provide, in essentially the same words, that "[i]t shall not be a defense to a charge of attempt that, because of a misapprehension of the circumstances, it would have been *impossible* to commit the offense attempted."[296] These statutes draw from the language of both section 5.01 of the Model Penal Code and section 110.10 of the New York Penal Law and bar reliance on the impossibility defense if the defendant would have committed a crime had the circumstances been as he believed them to be.

In a recent case, *Commonwealth v. Henley*,[297] the Pennsylvania Supreme Court held that this type of impossibility statute was intended to abrogate both factual and legal impossibility

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[295] Different states that have adopted the New York model could end up with strikingly different approaches to criminality. These differences will depend on how each state defines substantial step or on what degree of conduct the state requires in its general attempt provision. *See supra* note 254 (discussing various definitions of substantial step).

In Colorado, for example, the general attempt statute defines substantial step—as does section 5.01(1)(c) of the Model Penal Code—in terms of conduct that is strongly corroborative of the actor's intent:

> *Criminal attempt.* (1) A person commits criminal attempt if, acting with the kind of culpability otherwise required for commission of an offense, he engages in conduct constituting a substantial step toward the commission of the offense. A substantial step is any conduct, whether act, omission, or possession, which is strongly corroborative of the firmness of the actor's purpose to complete the commission of the offense. Factual or legal impossibility of committing the offense is not a defense if the offense could have been committed had the attendant circumstances been as the actor believed them to be, nor is it a defense that the crime attempted was actually perpetrated by the accused.

COLO. REV. STAT. § 18-2-101 (1973). The result of this definition is that all attempts in Colorado, regardless of the category in which they might otherwise be classified, are subjected to a Model Penal Code section 5.01(1)(c) or *Oviedo*-type analysis. *See supra* notes 164–83 and accompanying text (discussing *Oviedo* approach).

In People v. Hrapski, 658 P.2d 1367 (Colo. 1983), for example, the defendant was charged with attempting to possess a dangerous instrument while in a detention facility. *See id.* at 1368. The defendant, who had concealed a .22 caliber bullet in his rectum, contended that he could not be convicted of the offense because the bullet was defective. *See id.* at 1368–69. The court rejected the defendant's assertion of an impossibility defense and found that, for purposes of a preliminary hearing, the act of hiding the bullet was sufficient corroboration of the defendant's intent to commit the substantive crime. *Id.* at 1369.

[296] ILL. REV. STAT. ch. 38, § 8-4 (1983) (emphasis added); *accord*, IND. CODE § 35-41-5-1 (1981); MONT. CODE ANN. § 45-4-10-3 (1983); 18 PA. CONS. STAT. ANN. §901 (Purdon 1983).

[297] 504 Pa. 408, 474 A.2d 1115 (1984).

defenses.[298] When Pennsylvania proposed amending its penal code to eliminate the impossibility defense, a government commission recommended adoption of the Model Penal Code provision.[299] The legislature decided not to adopt that provision, however, and instead enacted the following one:

> (a) Definition of attempt—a person commits an attempt when, with intent to commit a specific crime, he does any act which constitutes a substantial step toward commission of that crime.
> (b) Impossibility—it shall not be a defense to a charge of attempt that because of a misapprehension of the circumstances it would have been impossible for the accused to commit the crime attempted.[300]

The most important difference between this provision and the Model Penal Code attempt sections is the use of the explicit statement that impossibility is no defense. The defendant in *Henley* invoked this difference and argued that it indicated that the Pennsylvania legislature intended to retain the legal impossibility defense.[301] The court rejected this claim and held that Henley would be guilty of attempt "if the completed offense could have occurred had the circumstances been as the defendant believed them to be."[302] Therefore, this form of attempt statute operates like the New York statute by treating impossible attempts under the state's general attempt provisions.[303]

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[298] *Id.* at 415, 474 A.2d at 1117.

[299] *See* JOINT STATE GOVERNMENT COMM'N, PROPOSED CRIMES CODE FOR PENNSYLVANIA § 501 commentary at 77 (1967) (§ 501 of proposed Pennsylvania statute based on § 5.01 of Model Penal Code).

[300] 18 PA. CONS. STAT. ANN. § 901 (Purdon 1983).

[301] *See* 504 Pa. at 413, 474 A.2d at 1117–18. The defendant in *Henley* was charged with attempted theft. Because the goods were not actually stolen, the defendant raised an impossibility defense. *Id.*.

[302] *Id.* at 413–14, 474 A.2d at 1118. The court stated that "the mere fact that our Legislature improved upon the language in its Criminal Attempt Section over that found in the Model Penal Code cannot by itself support the conclusion that the Legislature intended to reject the provisions of the Model Penal Code and thus, to retain the legal impossibility defense." *Id.* The court did not, however, explain how the change in language represented an improvement over the Model Penal Code provisions.

The *Henley* court also discussed Pennsylvania's use of the word "misapprehension" in place of the Model Penal Code's provision that refers to what the defendant "believed." The court found the difference to be inconsequential because each provision requires that the defendant's conduct be evaluated in terms of the circumstances that the defendant thought existed rather than those that actually existed. *See id.* at 415, 474 A.2d at 1118.

[303] Other cases decided under the Pennsylvania form of statute have also found that the statute was intended to eliminate the impossibility defense. *See* People v. Elmore, 128 Ill. App. 2d 312, 314, 261 N.E.2d 736, 737 (1970) (statute codifies rule that factual or legal impossibility is no defense), *aff'd*, 50 Ill. 2d 10, 276 N.E.2d 325 (1971); People v. Steward, 74 Ill. App. 2d 407, 412, 221 N.E.2d 80, 84–85 (1966) (defendant guilty of

As with the New York form of attempt statute, it is unclear whether courts will apply an objective, subjective, or hybrid approach under this statute.[304] Two recent Indiana decisions demonstrate this ambiguity. In *Zickefoose v. State*,[305] the Supreme Court of Indiana held that a defendant tried under the Indiana attempt provision could only be convicted of an attempt if his "conduct strongly corroborated the firmness" of his intent.[306] This standard has the same effect as the corroboration requirement of subsection 5.01(1)(c) of the Model Penal Code[307] or of the standard that was adopted in *United States v. Oviedo*.[308] Only two years later, however, the Court of Appeals of Indiana held in *State v. Gillespie*[309] that the Indiana attempt statute "pointedly intended to include *Oviedo*-type conduct within the proscription of the attempt statute" and that the "basic premise [of *Oviedo*] has been rejected by our legislature in the general attempt statute."[310]

Kansas[311] and Minnesota[312] have also enacted statutes that explicitly abolish the impossibility defense. The Kansas statute provides: "It shall not be a defense to a charge of attempt that the circumstances under which the act was performed . . . were such that the commission of the crime was *not possible*."[313]

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attempted rape although he was impotent); Armstrong v. State, 429 N.E.2d 647, 653 (Ind. 1982) (subdivision "does away" with impossibility defense); *see also* ILL. REV. STAT. ch. 38, § 8-4(b) (1983) ("phrase 'misapprehension of the circumstances' is intended to include both factual and legal circumstances").

[304] *See supra* note 295 and accompanying text.

[305] 270 Ind. 618, 388 N.E.2d 507 (1979).

[306] *Id.* at 623, 388 N.E.2d at 509–10. Although *Zickefoose* did not involve an impossibility problem, in discussing the Indiana attempt provision the court stated that in impossibility cases "[t]he liability of the defendant turns on his purpose as manifested through his conduct." *Id.*, 388 N.E.2d at 510 (dictum).

[307] *See supra* notes 244–55 and accompanying text (discussing application of MODEL PENAL CODE §§ 5.01(1)(a), (c)).

[308] *See supra* notes 164–83 and accompanying text (discussing *Oviedo* and its application of the corroboration requirement).

[309] 428 N.E.2d 1338 (Ind. Ct. App. 1981).

[310] *Id.* at 1339–40. In *Gillespie*, the defendant sold crushed aspirin, apparently believing that it was a controlled substance. *Id.* at 1338.

[311] *See* KAN. STAT. ANN. § 21-3301 (1981).

[312] *See* MINN. STAT. § 609.17 (1982).

[313] KAN. STAT. ANN. § 21-3301(2) (1981) (emphasis added). Most statutes that abolish impossibility explicitly do not address the question of inherent impossibility. Minnesota, however, added a provision to its attempt statute to deal with this category of impossible attempts:

> An act may be an attempt notwithstanding the circumstances under which it was performed or the means employed to commit the crime intended or the act itself were such that the commission of the crime was not possible, *unless*

Unlike the New York type of statute, the Kansas statute does not mention *legal and factual* impossibility. Instead, like the Pennsylvania statute, it states that the impossibility of commission of the substantive crime is no defense. This wording has led to some problems as defendants sought to limit application of the statute to factual impossibility. In *State v. Logan*,[314] for example, the Supreme Court of Kansas rejected this argument and held that the defendant could be convicted of attempted theft although the property that was taken had not actually been stolen.[315] The lower court, however, had concluded that legal impossibility remained a viable defense even after passage of the Kansas statute.[316] Once it is clear that this type of statute was intended to eliminate both legal and factual impossibility, it functions in the same manner as the New York and Pennsylvania statutes by analyzing the defendant's conduct under the statute's general attempt provision.[317]

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*such impossibility would have been clearly evident to a person of normal understanding.*

MINN. STAT. § 609.17.2 (1982) (emphasis added); *see* State v. Bird, 285 N.W.2d 481, 482 (Minn. 1979) (Minnesota statute was not designed to eliminate inherent impossibility defense). Although the Kansas statute was based on the Minnesota statute, the Kansas legislature unlike the Minnesota legislature did not include a specific phrase addressing inherent impossibility. *See* State v. Logan, 232 Kan. 646, 648–49, 656 P.2d 777, 779 (1983). *See generally supra* note 12 (discussing inherent impossibility).

[314] 232 Kan. 646, 656 P.2d 777 (1983).

[315] *Id.* at 650, 656 P.2d at 780. The court noted that the Kansas statute was patterned after the Minnesota statute and relied on the decision of the Supreme Court of Minnesota in *Bird*, 285 N.W.2d 481. In *Bird*, the court acknowledged the modern trend toward abolishing the legal impossibility defense, *id.* at 482, and held that a defendant could be convicted of attempted theft although the property had not actually been stolen. *Id.* at 483. The court in *Logan* also relied on a decision of a Florida appellate court that included the Kansas statute in a list of 32 state statutes that entirely eliminated the impossibility defense. *Logan*, 232 Kan. at 650, 656 P.2d at 780 (citing State v. Rios, 409 So. 2d 241, 244–45 (Fla. Ct. App. 1982)).

[316] *See Logan*, 232 Kan. at 647, 656 P.2d at 778.

[317] The Minnesota and Kansas statutes, like the New York and Pennsylvania statutes, are unclear whether an objective or subjective analysis will be applied under the general attempt provision. The general attempt provision of the Minnesota statute requires that the defendant perform an act that is a "substantial step." MINN. STAT. § 609.17.1 (1982). Reference would have to be made to the Minnesota case law to determine whether the state applies an objective, subjective, or hybrid approach to criminality. The court in *Bird*, 285 N.W.2d 481, did acknowledge the particular problem of proving intent in legal impossibility cases and stated that it would "carefully scrutinize the evidence of intent in any appeal challenging the conviction of attempt in which the defense of legal impossibility traditionally would have applied." *Id.* at 482 n.1 (citing Enker, *supra* note 81).

Oregon has also enacted an attempt provision that precludes the impossibility defense when it is "impossible" to commit the crime. OR. REV. STAT. § 161.425 (1981). Unlike the Kansas and Minnesota statutes, however, the Oregon statute includes the phrase "if the circumstances were as the actor believed them to be." *Id.* In this respect, the Oregon statute is similar both to subsection 5.01(1)(a) of the Model Penal Code and to the New York statute. *See supra* notes 244–50, 282–88 and accompanying text (discussing analogous phrasing in Model Penal Code and New York statute). The cases

Although the New York, Pennsylvania, and Kansas statutes represent important steps toward eliminating the impossibility defense, they address the problem incompletely. Courts, legislatures, and commentators agree, almost without exception, that factual and legal impossibility should not be a defense. The more difficult question, however, is how these attempts should be analyzed. The drafters of the Model Penal Code, perhaps unknowingly, devised a system in which legal impossibility cases could be analyzed under a purely subjective approach while factual impossibility cases (as well as all other attempts) are subject to a hybrid test.[318] Under the New York, Pennsylvania, and Kansas statutes, the approach is equally haphazard. Once the statute returns the defendant to the general attempt provision, his conduct may be analyzed under either a subjective or a hybrid approach.[319] Which approach is ultimately adopted has little to do with impossibility. It is instead a function of whether the legislature defined substantial step and the extent to which the courts have permitted the inference of intent. In most cases, this determination is made without reference to the particular problems that impossible attempts—especially those that are characterized as mixed fact/law cases—raise.

### C. *Recommendations*

Each of the approaches to abolishing the impossibility defense through legislation has resulted in problems.[320] As discussed

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decided under the Oregon statute have found that the Oregon legislature intended to eliminate both the legal and factual impossibility defenses. *See* State v. Korelis, 21 Or. App. 813, 819, 537 P.2d 136, 139 (impossibility defense to the crime of attempted theft eliminated), *aff'd*, 273 Or. 427, 541 P.2d 468 (1975); State v. Niehuser, 21 Or. App. 33, 38, 533 P.2d 834, 837 (1975) (actor liable in all impossibility situations).

[318] *See supra* notes 241–76 and accompanying text (discussing Model Penal Code).

[319] *See supra* notes 277–95 and accompanying text (describing mechanics of New York type of attempt statute).

[320] Legislation outside of the United States abolishing the impossibility defense has also been found to be imperfect. In England, for example, the Criminal Attempts Act of 1981 was adopted in response to the decision in Haughton v. Smith, [1975] A.C. 476 (H.L.). The defendant in *Haughton* had been found not guilty of attempting to handle stolen property (cartons of corned beef) that the police had recovered by the time the defendant obtained the goods. To reverse the result in *Haughton*, Parliament passed the Criminal Attempts Act of 1981, adopting the subjective approach to attempt. The statute provides:

> (1) If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence.

above, the Model Penal Code provision seems to treat mixed fact/law cases differently from other attempts without explaining

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(2) A person may be guilty of attempting to commit an offence to which this section applies even though the facts are such that the commission of the offence is impossible.
(3) In any case where
(a) apart from this subsection a person's intention would not be regarded as having amounted to an intent to commit an offence; but
(b) if the facts of the case had been as he believed them to be, his intention would be so regarded, then . . . he shall be regarded as having had an intent to commit that offence.

Criminal Attempts Act, 1981, §§ 1(1)–(3). One commentator criticizes the Act's provision that the person "may be" guilty of an attempt, because this ambiguity would allow counsel to manipulate his argument accordingly, *see* Dennis, *The Criminal Attempts Act of 1981*, 1982 CRIM. L. REV. 5, 10, thereby suggesting that there is still some room for discretion by judges to circumvent the Act.

The statute was most recently applied in Anderton v. Ryan, [1985] 2 All E.R. 355 (H.L.), which presents a predicament that is analogous to that of Lady Eldon and her lace, *see* 1 F. WHARTON, *supra* note 1, § 225, at 304 n.9. Defendant Bernadette Ryan bought a video recorder that she believed was stolen. Although the recorder was not in fact stolen, Ryan was convicted under section 1(1) of the Act, *supra*, of dishonestly attempting to handle goods believed to be stolen. 2 All E.R. at 359–60. The House of Lords reversed the conviction. Lord Roskill reasoned that section 1(3), *supra*, and not section 1(1) provided the applicable law. *Id.* at 363–64, 365. He concluded that, "if the action is innocent and the defendant does everything he intends to do, [section 1(3)] does not compel the conclusion that erroneous belief in the existence of facts, which, if true, would have made his completed act a crime makes him guilty of an attempt to commit that crime." *Id.* at 364. Even though the Act was intended to alter the state of attempt law that was reflected in *Haughton v. Smith*, it was not "necessarily designed to reverse the decision in [*Haughton*'s] case on its own facts." *Id.* at 366 (Lord Bridge). Absent explicit statutory language, such "manifestly absurd results" could not have been intended. *Id.* at 363 (Lord Roskill). For the most recent literature in the debate on the Criminal Attempts Act of 1981 and a critique of the result in *Anderton*, compare Hogan, *The Criminal Attempts Act and Attempting the Impossible*, 1984 CRIM. L. REV. 584 and Hogan, *Attempting the Impossible and the Principle of Legality*, 135 NEW L.J. 454 (1985) with Williams, *Attempting the Impossible—The Last Round?*, 135 NEW L.J. 337 (1985) and Williams, *The Lords Achieve the Logically Impossible*, 135 NEW L.J. 502 (1985).

The Act has sparked debate in other Commonwealth countries as well. One commentator notes that the New Zealand Court of Appeals, in Regina v. Donnelly, [1970] 1 N.Z.L.R. 980 (N.Z. Ct. App.), a case on which the *Haughton* court relied, interpreted section 72(1) of the New Zealand Crimes Act of 1961 as applying to those situations in which there is some factual obstruction to success. Section 72(1) of the Crimes Act of 1961 provides that:

Every one who, having an intent to commit an offence, does or omits an act for the purpose of accomplishing his object, is guilty of an attempt to commit the offence intended, whether in the circumstances it was possible to commit the offence or not.

Crimes Act of 1961, § 72(1), 1 N.Z. REPR. STAT. 671 (1979). The commentator notes that, under this interpretation of section 72(1), legal (mixed fact/law) impossibility is not rejected as a defense to an attempt charge. This result, the commentator warns, could be reached with a similar interpretation of England's Criminal Attempts Act of 1981, which would "certainly frustate the Law Commission's aim to overrule [*Haughton*]." Case and Comment, *The Criminal Attempts Act of 1981*, 41 CAMBRIDGE L.J. 21, 26 (1982). It has also been suggested that *Haughton* and *Donnelly* might have been decided differently had they both not involved statutes that decriminalized the receiving of recovered stolen goods. *See* Police v. Jay, [1974] 2 N.Z.L.R. 204, 212 (N.Z.S.C.);

why such different treatment is necessary. The New York statute avoids any ambiguity concerning whether legal or factual impossibility remains a defense, but it fails to take the next step and decide how these attempts should be dealt with.[321] Those statutes that do not specifically provide that "legal and factual impossibility are no defense" and simply state that "impossibility is no defense" could be confined to factual impossibility.[322] Although this problem, when it has arisen, has been easily remedied by the courts,[323] a statutory solution would ensure predictability—and therefore fairness to the defendant—in criminal prosecutions of attempt crimes.

The ideal statute that eliminates the impossibility defense will specifically state that neither legal nor factual impossibility is a defense. Then, in the manner of the New York statute, it will require that all attempts be analyzed under the general attempt statute.[324] Unlike the New York statute, however, the ideal statute would not end with the application of a general attempt analysis. Assuming that the *Oviedo* approach is correct and that the defendant's conduct must manifest his intent, the general attempt provision should define substantial step as conduct that strongly corroborates the requisite intent.

The following suggested statute would result in the adoption of the hybrid approach:

**ATTEMPT**

**(1) (a) A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he purposely does or omits to do anything that, under the circumstances as a reasonable person would believe them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.**

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Orchard, *Impossibility and the Inchoate Crimes*, 1978 N.Z.L.J. 403, 409–10.

Section 4 of the Queensland Criminal Code, 3 QUEENSL. STAT. 221–22 (1964), has not been amended since 1964; it thus continues to rely on the rationale behind the holding in *Haughton*, despite the fact that the case has been superseded by the Criminal Attempts Act of 1981. *See* Criminal Attempts Act, 1981, § 1 general note.

[321] *See supra* notes 277–95 (describing mechanics of New York type of attempt statute).

[322] *See supra* notes 296–319 and accompanying text (discussing statutes that abolish impossibility).

[323] *See id.*

[324] *See supra* notes 282–95 and accompanying text (discussing application and mechanics of New York's general attempt statute).

**(b) In a prosecution under this section, it is not a defense that it was factually or legally impossible to commit the crime that was the object of the attempt.**

**(2) Conduct shall not be held to constitute a substantial step under this section unless it is strongly corroborative of the actor's criminal purpose.**

**(3) Without negativing the sufficiency of other conduct, the following, if strongly corroborative of the actor's criminal purpose, shall not be held insufficient as a matter of law:**
**(a) lying in wait, searching for or following the contemplated victim of the crime;**
**(b) enticing or seeking to entice the contemplated victim of the crime to go to the place contemplated for its commission;**
**(c) reconnoitering the place contemplated for the commission of the crime;**
**(d) unlawful entry of a structure, vehicle or enclosure in which it is contemplated that the crime will be committed;**
**(e) possession of materials to be employed in the commission of the crime, that are specially designed for such unlawful use or that can serve no lawful purpose of the actor under the circumstances;**
**(f) possession, collection or fabrication of materials to be employed in the commission of the crime, at or near the place contemplated for its commission, if such possession, collection or fabrication serves no lawful purpose of the actor under the circumstances;**
**(g) soliciting an innocent agent to engage in conduct constituting an element of the crime.**

This proposal, although it is similar to other statutes,[325] makes three significant changes in existing codifications. First, it eliminates the confusion in Model Penal Code jurisdictions by ensuring that all impossibility cases are analyzed under the hybrid approach. Second, unlike those states that have adopted the New York attempt statute, this proposal, through its definition of substantial step, prohibits convictions that are based on entirely neutral acts. Third, drawing on the language of the Minnesota and New Jersey attempt statutes,[326] this proposal prevents convictions of actors who unreasonably believed that their actions could result in the intended crime.

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[325] Subsections (2) and (3) of this proposed statute are based on section 5.01(2) of the Model Penal Code, set forth at *supra* note 254; *see also supra* note 124 (citing statutes).

[326] *See* MINN. STAT. § 609.17.2 (1982) ("unless such impossiblilty would have been clearly evident to a person of normal understanding"); N.J. STAT. ANN. § 2C:5-1a(1) (West 1982) ("if the attendant circumstances were as a reasonable person would believe them to be"); *see also supra* notes 243 and 313 (discussing inherent impossibility).

## IV. CONCLUSION

A great deal has been written about the impossibility defense and numerous solutions have been offered to the problems that it engenders. One court has written that the defense is "so fraught with intricacies and artificial distinctions that [it] has little value as an analytical method for reaching substantial justice."[327] Finally, however, the law appears to be moving toward a clear and defensible approach. This approach endeavors to accommodate two valid and competing interests: the need to evaluate conduct based on the intent with which it was performed and the danger of inferring too much from neutral acts. The hybrid approach, by requiring that the conduct attain a certain threshold before other extrinsic evidence can be considered, seeks to balance these concerns.

That the hybrid approach strikes the appropriate balance is demonstrated by the growing trend among legislatures, courts, and commentators to adopt this approach. There remains a need, however, to recognize that a consensus is in fact building. Several states continue to be mired in what is no more than a random approach to attempt. Much of the uncertainty in the application of many state statutes was fostered by the imprecision of the Model Penal Code. Until these statutes are clarified and the hybrid approach codified, it will be impossible to deal with the impossibility defense without substantial confusion.

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[327] State v. Moretti, 52 N.J. 182, 189, 244 A.2d 499, 503 (1968); *see also* United States v. Thomas, 13 C.M.A. 278, 286–87, 32 C.M.R. 278, 286–87 (1962) (impossibility doctrine has become "a source of utter frustration," plunging the state courts into a "morass of confusion"). In another area of criminal justice in which designating an issue one of fact, one of law, or one of both fact and law can have important consequences, Justice O'Connor recently wrote: "Perhaps much of the difficulty . . . stems from the practical truth that the decision to label an issue a 'question of law,' a 'question of fact,' or a 'mixed question of law and fact,' is sometimes as much a matter of allocation as it is of analysis." Miller v. Fenton, 106 S. Ct. 445, 451–52 (1985) (habeas corpus case concerning deference to state-court findings of fact but not to conclusions of law or applications of law to facts) (citing Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 237 (1985)).

# ARTICLE

# THE "PROGRAM OR ACTIVITY" RULE IN ANTIDISCRIMINATION LAW: A COMMENT ON S. 272, H.R. 700, AND S. 431

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*In 1984 the Supreme Court determined in* Grove City College v. Bell *that the antidiscrimination provisions of Title IX of the Education Amendments of 1972 were program-specific rather than institution-wide in application. In response, several legislative proposals designed to mitigate or reverse the* Grove City *decision have been introduced in Congress. These proposals include the Civil Rights Restoration Act of 1985 (H.R. 700 and S. 431) and the Civil Rights Amendments Act of 1985 (S. 272).*

*In this Article, Professor Garvey argues that institution-wide application of Title IX and similar antidiscrimination statutes would in many instances lead to results inconsistent with statutory language and the public interest. By examining and analyzing the current statutes' language and by reviewing and applying various theories of nondiscrimination law, Professor Garvey concludes that most of the current proposals addressing* Grove City *involve misconceptions of the statutes they would amend and fail to conform to any of the numerous underlying theories of antidiscrimination law.*

Since the Supreme Court's decision in *Grove City College v. Bell*[1] a number of bills have been introduced in Congress[2] to amend the "program or activity" requirement currently found in Title VI of the Civil Rights Act of 1964 (Title VI),[3] Title IX

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[1] 465 U.S. 555 (1984).

[2] The principal proposals have been the Civil Rights Restoration Act of 1985, H.R. 700, 99th Cong., 1st Sess. (1985), and S. 431, 99th Cong., 1st Sess., 131 CONG. REC. S1303 (daily ed. Feb. 7, 1985); the Civil Rights Amendments Act of 1985, S. 272, 99th Cong., 1st Sess., 131 CONG. REC. S637 (daily ed. Jan. 24, 1985); and the Civil Rights Act of 1984, H.R. 5490, 98th Cong., 2d Sess. (1984); S. 2568, 98th Cong., 2d Sess., 130 CONG. REC. S4588 (daily ed. Apr. 12, 1984). For a general discussion of these proposals by one of the participants in the debate see Hatch, *The Myths and Realities of the Proposed Civil Rights Act*, 9 HARV. J. ON LAW & PUB. POL'Y 1 (1986).

[3] 42 U.S.C. §§ 2000d–2000d-6 (1982). Section 601 of Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any *program or activity* receiving Federal financial assistance." 42 U.S.C. § 2000d (1982) (emphasis added).

of the Education Amendments of 1972 (Title IX),[4] Section 504 of the Rehabilitation Act of 1973 (Section 504),[5] and the Age Discrimination Act of 1975 (ADA).[6] *Grove City* held that the words "program or activity" limited, to some degree, the federal government's ability to control discriminatory behavior occurring within institutions that receive federal financial assistance. For example, if the government provides student financial aid (Pell grants),[7] as it did at Grove City College,[8] Title IX's prohibition against sex discrimination can be enforced against the college's financial aid program, but not elsewhere in the institution. A similar conclusion would follow for Title VI, Section 504, and the ADA, whose language is virtually identical to that of Title IX.[9]

The bills before the 99th Congress would amend the "program or activity" restriction in different ways. To put the matter briefly, S. 272 would require that in the case of educational institutions (but not in other cases), the phrase "program or activity" shall mean the entire "institution."[10] H.R. 700[11] (S. 431 is its companion bill) proposes more substantial changes. Though described as a bill "[t]o *restore* the broad scope of

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[4] 20 U.S.C. §§ 1681–1686 (1982). Section 901 of Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under *any education program or activity* receiving Federal financial assistance . . . ." 20 U.S.C. § 1681(a) (1982) (emphasis added).

[5] 29 U.S.C. § 794 (1982). Section 504 provides:

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under *any program or activity* receiving Federal financial assistance or under *any program or activity* conducted by any Executive agency or by the United States Postal Service.

*Id.* (emphasis added).

[6] 42 U.S.C. §§ 6101–6107 (1982) [hereinafter cited as ADA]. 42 U.S.C. § 6102 (1982) provides that "no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, *any program or activity* receiving Federal financial assistance" (emphasis added).

[7] Pell grants (Basic Educational Opportunity Grants) provide eligible undergraduate students with up to 70% of the cost of attendance at an institution of higher education. The grants are designed to supplement family and student contributions to educational expenses. *See* 20 U.S.C. § 1070a (1982).

[8] *See id.* The Court found that Pell grants count not just as aid to students, but also as assistance to the college they attend. *Grove City*, 465 U.S. at 563–70. This is obvious from the legislative history of Title IX. *See* 117 CONG. REC. 30,408 (1971) (statement of Sen. Bayh (D-Ind.)).

[9] *See supra* notes 3, 5, and 6.

[10] Hereinafter references to S. 272 will be by section number, without supporting citations.

[11] Hereinafter references to H.R. 700 will be by section number, without supporting citations.

coverage" to the antidiscrimination laws,[12] it actually envisions radical reform rather than restoration. H.R. 700 would require institution-wide coverage not just for schools, but for all recipients of federal aid: state and local government agencies, corporations and other private organizations, and so on.

This Article will discuss three points relevant to these bills. Part I concludes that the present language of the antidiscrimination laws—despite what the proponents of H.R. 700 have said—plainly requires program-specific rather than institution-wide coverage. Part II reviews the reasons underlying the "program or activity" rule. Part III evaluates the proposed legislation. I hope to show that the current limited degree of coverage decreed by *Grove City* sufficiently advances Congress's concern to keep federal dollars separated from discrimination, and that abolition of the "program or activity" rule would entail costs that have not been sufficiently appreciated by the bills' supporters.

## I. The Statutory Language

In large part the impetus behind the various bills designed to overturn the *Grove City* decision stems from the idea that the Supreme Court "unduly narrowed,"[13] cut back, restricted, or limited the well understood meaning of Title IX, and paid insufficient heed to the intent of Congress in enacting that law and its cognate statutes. If one subscribes to this notion it becomes easy to represent amending legislation as nothing more than a return to the *status quo ante*—a state of affairs with which recipients were already accustomed to living, and to which they could readjust with a minimum of bother. This is a myth, composed in equal parts of wishful thinking and tactical exaggeration. If amendment is desirable, it would be wise for reformers to acknowledge that Congress has refused to impose institution-wide coverage in the past, and that requiring such coverage now would substantially change the law even as it stood before *Grove City*.

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[12] H.R. 700, enacting clause (emphasis added).
[13] H.R. 700, sec. 2(1); S. 431, sec. 2(1).

### A. *"Program or Activity," "Recipient," "Institution," and "Political Entity"*

There is a kind of doublethink involved in H.R. 700 and its predecessor in the last Congress, H.R. 5490.[14] After proclaiming that the Supreme Court has "unduly narrowed . . . the broad application" of the antidiscrimination laws (section 2(1)) and that "legislative action is necessary to restore the prior consistent and long-standing" interpretation (section 2(2)), H.R. 700 goes on to state that "the term 'program or activity'" does not mean "program or activity," but instead means "all of the operations of" a recipient institution.[15] H.R. 5490 would have gone one better, wiping out all references to "program or activity" and replacing the phrase (as though it never existed) with "recipient."[16]

It is clear from the current language of Title VI, Title IX, Section 504, and the ADA that the obligations they now impose are not institution-wide. Each begins with a prohibition against discrimination in any "*program or activity* receiving Federal financial assistance."[17] The statutes go on to make clear that the phrase "program or activity" means something less than "recipient," "educational institution," or "political entity."

As to the term "recipient," Title IX says: "No person . . . shall, on the ground of blindness . . . , be denied admission in any course of study by a recipient . . . for any education program or activity . . . ."[18] It also says that compliance may be effected "by the termination of . . . assistance under such program or activity to any recipient . . . , but such termination . . . shall be limited in its effect to the particular program, or part thereof, in which . . . noncompliance has been . . . found."[19] So Title IX presumes that a "recipient" (a university, for example) may conduct any number of "programs or activities" (a financial aid program, a physics program, an athletics program, and so on). And it generally forbids discrimination within any program

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[14] H.R. 5490, *supra* note 2.
[15] *See* H.R. 700, secs. 3(a), 4(2)(b), 5(a)(3), 6(a).
[16] *See* H.R. 5490, secs. 2(a)(3), 2(a)(3)(B), 3(a)(4), 4(a)(1)–(2), 5(a)(3).
[17] 20 U.S.C. § 1681(a) (1982); 29 U.S.C. § 794 (1982); 42 U.S.C. § 2000d (1982); 42 U.S.C. § 6102 (1982) (emphasis added).
[18] 20 U.S.C. § 1684 (1982).
[19] 20 U.S.C. § 1682 (1982).

only if that program receives federal money.[20] Blindness is an exception: there "any" of a recipient's programs are covered.

Title VI speaks of effecting compliance in terms identical to those used by Title IX.[21] The ADA is even clearer. After stating that "[a]ny termination . . . shall be limited to the particular . . . recipient,"[22] it goes on to declare that "[n]o such termination . . . shall be based . . . on any finding with respect to any program or activity which does not receive Federal financial assistance."[23]

The term "educational institution" is defined in Title IX to mean

> any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.[24]

But Title IX elsewhere speaks of "any program or activity of any secondary school or educational institution."[25] Thus an "educational institution" might be something narrower than a "recipient," but still broader than a "program or activity." If University *X* is a "recipient," it may comprise several "educational institutions" if it has separate admissions requirements for its law school, business school, and college of arts and sciences; but within the college of arts and sciences there may also be a number of "programs or activities."

The term "political entity" is used in the enforcement sections of Title VI, Title IX, and the ADA, and is intended to refer to something that conducts various programs and activities, not as something that is itself a program or activity. Thus Title VI, using language common to all the statutes, speaks of "termination . . . limited to the particular political entity . . . and . . . limited in its effect to the particular program . . . in which . . . noncompliance has been . . . found."[26] Section 504, speaking

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[20] 20 U.S.C. § 1684 (1982). *See supra* text accompanying note 18.
[21] 42 U.S.C. § 2000d-1 (1982).
[22] 42 U.S.C. § 6104(b) (1982).
[23] *Id.*
[24] 20 U.S.C. § 1681(c) (1982).
[25] *Id.* at § 1681(a)(7)(B).
[26] 42 U.S.C. § 2000d-1 (1982).

not of state but of federal political entities, addresses its prohibition of discrimination to "any program or activity conducted by any Executive agency or by the United States Postal Service."[27]

Debate on this matter has tended to obscure rather than clarify this obvious point. There is a difference between "program"-specific coverage and "institution"-wide (or "recipient"-wide) coverage. It is impossible to read these statutes as they are currently written and conclude that they intend the latter type of coverage.

### B. *Coverage and Enforcement Are Coextensive*

A number of witnesses have suggested a different way of parsing the current language. What the laws do now, they have argued, is to distinguish between *coverage* (which is institution-wide) and *fund termination* as a means of enforcement (which is program-specific).[28] This interpretation is plainly wrong. To begin with the most obvious point, both the prohibitions against discrimination[29] *and* the authorizations for funds termination[30] speak of "programs," not of "recipients."

Moreover, the fund termination provisions follow right after the directions to federal agencies to issue regulations. Title IX's section 902, for example, says that each agency granting assistance must carry out the provisions of section 901 by issuing

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[27] 29 U.S.C. § 794 (1982).

[28] *See Civil Rights Act of 1984: Hearings on S. 2568 before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2d Sess. 17 (1984) [hereinafter cited as *S. 2568 Hearings*] (statement of Clarence M. Pendleton, Jr., Chairman, U.S. Comm'n on Civil Rights); *id.* at 170 (statement of David S. Tatel, former Director of the Office for Civil Rights in the U.S. Dep't of Health, Educ., and Welfare); *id.* at 292–93 (statement of Judith Lichtman, executive director of the Women's Legal Defense Fund); *Civil Rights Act of 1984: Joint Hearings on H.R. 5490 before the House Comm. on Educ. and Labor and the Subcomm on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. 176 (1984) (statement of John B. Rhinelander, former General Counsel, U.S. Dep't of Health, Educ. and Welfare); *id.* at 257 (statement of J. Stanley Pottinger, former Assistant Attorney General for Civil Rights); H.R. REP. No. 829, pt. 2, 98th Cong., 2d Sess. 2 (1984) ("[b]y enacting H.R. 5480, Congress will reaffirm its intent with respect to these provisions that they be applied broadly and that fund termination continue to be more tailored in scope"); *id.* at 11–12, 14–16.

[29] *See supra* notes 3–6 and accompanying text.

[30] *See* § 602 of Title VI, 42 U.S.C. § 2000d-1 (1982); § 902 of Title IX, 20 U.S.C. § 1682 (1982).

regulations.[31] It then says that "[c]ompliance with any [regulation] may be effected" by cutting off funds "to the particular program, or part thereof"[32] in which noncompliance is found. But if coverage (section 901) is really broader than the funds termination provision (section 902), agencies would be required to issue regulations that they could not enforce. As the Supreme Court said in *North Haven Board of Education v. Bell*,[33] it would be bizarre to suppose that Congress had ordered them to do that.

One cannot avoid this problem by saying that broader statutory coverage and broader regulations could be enforced, not by funds termination, but by the "other means authorized by law" mentioned in section 602 of Title VI,[34] section 902 of Title IX,[35] and section 305(a) of the ADA.[36] If the "other means" are supposed to include private actions, we would have a situation—unique in administrative law—where private individuals could enforce an agency's regulations but the agency itself could not.[37]

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[31] 20 U.S.C. § 1682 (1982). Section 902 states in part:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law. . . .

[32] *Id.*

[33] 456 U.S. 512, 537 (1982) ("it makes little sense to interpret the statute . . . to authorize an agency to promulgate rules that it cannot enforce").

[34] 42 U.S.C. § 2000d-1 (1982).

[35] 20 U.S.C. § 1682 (1982).

[36] 42 U.S.C. § 6104(a) (1982).

[37] I might add that there is an anachronism involved in relying on the possibility of private actions to read the statutory coverage provisions more broadly than the enforcement provisions. After all, it was not until 1979 that the Supreme Court found private actions to be a permissible means of enforcing Title IX. Cannon v. University of Chicago, 441 U.S. 677 (1979). Not until 1983 did a majority of the Court explicitly acknowledge the possibility of private actions under Title VI—and even then only against "a state or local agency." Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 595 (1983) (opinion of White, J.); *id.* at 625 (opinion of Marshall, J., dissenting); *id.* at 635–36 (opinion of Stevens, J., dissenting). And as late as 1984, the Court suggested that it was still an open question whether there was a private right of action under

The more obvious "other means" are injunctive actions to enforce contractual conditions (assurances of compliance) signed by recipients at the time of the grant,[38] and actions to enforce legal obligations imposed by the Constitution or other statutes.[39] But an agency cannot make institution-wide coverage a contractual condition that recipients must agree to before getting assistance, since not only termination but also "refusal to grant or to continue assistance" must be "limited in its effect to the particular program, or part thereof, in which . . . non-compliance has been . . . found . . . ."[40] And even if recipients do have legal obligations under other laws, those laws do not in any way enlarge the coverage of Title VI, Title IX, Section 504, and the ADA.

### C. *Conclusion*

The point made thus far has been a limited one: that these statutes as currently written cover a narrower range of behavior than many of those who favor amendment have asserted. This is not an argument against amendment, for I have said nothing about the reasons for covering a narrow (program-specific) rather than a broad (institution-wide) range of behavior. It is a reason, however, for exercising more caution than H.R. 700

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Section 504. Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 630 n.7 (1984). I think that private suits are an appropriate means of enforcing each of these laws. Given the uncertainty that may still exist about whether such actions are even permitted, however, it is fanciful to point to them as evidence of what Congress was thinking 20 years ago.

[38] *See* United States v. Marion County School Dist., 625 F.2d 607 (5th Cir. 1980); 110 CONG. REC. 7066 (1964)(statement of Sen. Ribicoff (D-Conn.)); 28 C.F.R. § 50.3 (1984) (federal agencies may sue for specific enforcement of assurances of compliance).

[39] *See, e.g.*, 42 U.S.C. § 2000c-6 (1982) (civil action by Attorney General to challenge school segregation); 45 C.F.R § 80.8(a)(1) (1984) ("a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act)").

Senator Pastore (D-R.I.) explained the purpose of the "other means" alternative thus:

> This alternative is designed to permit the agency to avoid a fund cutoff if some other means of ending discrimination is available. This will enable the agency to achieve compliance without jeopardizing, even in limited fashion, its basic program objective by terminating or refusing aid. Perhaps the best example of this relates to school lunches or other assistance to segregated schools. Cutoff of the lunches or other assistance will obviously impose a severe hardship upon students who are intended to be benefited. The way to avoid such a hardship will be for the Attorney General to institute a desegregation suit under title IV [42 U.S.C. § 2000c-6], rather than to terminate the assistance.

110 CONG. REC. 7060 (1964).

[40] 20 U.S.C. § 1682(1) (1982); 42 U.S.C. § 2000d-1 (1982); 42 U.S.C. § 6104(b) (1982).

shows. That bill does not just "restore" or "clarify" statutory meaning that the Supreme Court somehow missed. It changes the theory underlying the obligations these laws impose.

The next Part turns to the reasons why the federal government forbids people who get federal money to discriminate on the basis of race, sex, handicap, and age. That discussion has two objectives. The first is to show that the purposes Congress, the courts, and federal agencies have historically given for these rules are best accomplished by coverage of "programs and activities," not "institutions." The second is to demonstrate that to justify extending coverage as H.R. 700 would, one must resort to a new theory, and be willing to accept costs to which little attention has been devoted.

## II. The Theories Supporting Nondiscrimination Conditions on Federal Spending

One can find in congressional deliberations, judicial decisions, and executive action seven different kinds of explanations for why Congress must, or should, or may attach nondiscrimination conditions to grants of federal money.[41] I shall discuss these various explanations by beginning with the most compelling (those that are obligatory under the Constitution) and proceeding more or less in sequence to the least compelling (those that are sensible, desirable, or if nothing else, permissible). The scope of coverage increases along this ranking: obligatory conditions entail the narrowest coverage, merely permissible ones the broadest.

### A. *The Intent Theory*

The most obvious reason why Congress should insist on nondiscrimination by recipients of federal funds, at least on the basis of race or sex, is that the Fifth Amendment forbids the federal government to advance discriminatory ends in an intentional fashion.[42] The prohibition against intentional discrimina-

[41] For an earlier and briefer statement of this thesis, see Garvey, *Another Way of Looking At School Aid*, 1985 Sup. Ct. Rev. 61. I argue there that the same kinds of explanations underlie the Establishment Clause rules the Supreme Court has designed to limit aid to parochial schools.

[42] Bolling v. Sharpe, 347 U.S. 497 (1953) (racial segregation in District of Columbia public schools denied black children Fifth Amendment due process rights).

tion of course forbids laws that expressly discriminate. It also forbids Congress to give money in an apparently neutral fashion to recipients who will spend it all on white males, for example, if that result is one that Congress anticipates and desires.

This theory played an important role in the enactment of Title VI. Representative Celler (D-N.Y.), Chairman of the House Judiciary Committee and sponsor of the bill passed by the House,[43] introduced at the outset of debate a statement indicating that "as to many of the Federal assistance programs to which title VI would apply, the Constitution may impose on the United States an affirmative duty to preclude racial segregation or discrimination by the recipient of Federal aid."[44] To the same effect, Senator Pastore (D-R.I.), who was responsible for managing Title VI in the Senate, opened the debate by declaring that "so long as we spend that money to support a 'separate but equal' system which has been denounced by the Supreme Court of the United States, we are committing an unconstitutional act . . . ."[45] As both Celler and Pastore were aware, there were at the time several federal aid programs—among them the Hill-Burton Act,[46] the Second Morrill Act,[47] and impact aid for school construction[48]—that expressly or implicitly authorized recipients to spend assistance under a "separate but equal" formula.[49] And frequent mention was made of the Fourth Circuit decision in *Simkins v. Moses H. Cone Memorial Hospital*,[50] which held the "separate but equal" provision governing Hill-Burton grants unconstitutional.[51]

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[43] H.R. 7152, 88th Cong., 2d Sess., 110 CONG. REC. 1511 (1964).

[44] 110 CONG. REC. 1528 (1964).

[45] 110 CONG. REC. 7057 (1964).

[46] 42 U.S.C. § 291e(f) (1958) (repealed 1964) said that state plans should provide for hospital facilities without discrimination, "but an exception shall be made in cases where separate hospital facilities are provided for separate population groups, if the plan makes equitable provision on the basis of need for facilities and services of like quality for each such group . . . ."

[47] 7 U.S.C. § 323 (1958) provided that "the establishment and maintenance of [land grant] colleges separately for [w]hite and colored students shall be held to be a compliance with the provisions of said sections if the funds received in such State or Territory be equitably divided as hereinafter set forth . . . ."

[48] 20 U.S.C. § 636(b)(1)(F) (1958) provided that each application for a grant should include

> assurance that the school facilities of such agency will be available to the children for whose education contributions are provided in this chapter on the same terms, in accordance with the laws of the State in which the school district of such agency is situated, as they are available to other children in such school district.

[49] *See* 110 CONG. REC. 7062 (1964) (statement of Sen. Pastore).

[50] 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964).

[51] *Id.* at 969. *See, e.g.*, 110 CONG. REC. 1527 (statement of Rep. Celler); *id.* at 6544

The intent theory is a limited one, however. It requires that Congress not only must foresee that its money will be spent in a discriminatory fashion, but also must *want* that to happen. There must be a showing that it "selected . . . a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[52]

That limitation on the theory entails several restrictions on the scope of a recipient's activities controlled by the constitutional principle. The first is that, at least as a practical matter, the recipient as well as Congress must be engaged in intentional discrimination, not merely discrimination in effect. Second, it may not be enough that Congress provides substantial funding to the recipient, or even to the particular project in which the recipient has acted improperly. There might also have to be a showing that Congress "is responsible for the *specific conduct* of which the plaintiff complains."[53] Finally, it must be remembered that while the Constitution quite strictly enjoins government discrimination on the basis of race, and to a less exacting degree gender, it does not afford very impressive protection against discrimination on the basis of age[54] or handicap.[55]

### B. *The Opportunity Theory*

Quite apart from what the Constitution requires, it is objectionable to have recipients spending federal money in a discriminatory fashion even without Congress's approval or awareness. This is not a matter of moral responsibility on the part of the federal government, since we are accustomed to think that people are blameworthy only for what they purposefully do. But

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(statement of Sen. Humphrey (D-Minn.)); *id.* at 7054, 7062 (statement of Sen. Pastore) (1964).

[52] Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979).

[53] Blum v. Yaretsky, 457 U.S. 991, 1004 (1982) (emphasis added and original emphasis omitted) (the fact that the state regulates and funds private nursing homes does not render it responsible for decisions of homes to discharge patients); *see also* Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (a private school's receipt of public funds does not make its decision to discharge teachers state action). Though state action law is unclear on the subject, I have some reservations about whether this requirement would be enforced in a case of intentional discrimination—a problem not presented in *Blum* and *Rendell-Baker*. The Court might be more willing to hold the government responsible in a case of wrongful intent, much as we do "in blaming a defendant for remote damages caused by intentional torts, or in finding complicity in someone else's criminal conduct." Garvey, *supra* note 41, at 73.

[54] *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307 (1976).

[55] *See* Cleburne v. Cleburne Living Center, 105 S. Ct. 3269 (1985).

citizens and taxpayers are entitled to insist that their representatives exercise sufficient foresight to preclude even unwitting discrimination from occurring (by providing opportunities for recipients to misbehave).

This theory was the primary concern voiced during the debates on Title VI, which are replete with references to the use of federal dollars to "support"[56] or "subsidize"[57] discrimination. As Senator Pastore put it, "Title VI is necessary, first of all, because the Federal Government simply cannot be expected to continue to pay out tax dollars contributed by all the people to just some of them and to exclude others because of the color of their skin."[58]

A similar concern prompted Congress to attach Title IX restrictions to Pell grants. As Representative May (R-Wash.) stated in the first hearings to be held on the subject:

> Here we have this scholarship money—much of it . . . federal—going to students. Which students receive this scholarship money is decided upon by the individual colleges and universities—where there are often quota restrictions on women recipients. Thus, we find ourselves faced with a situation wherein federal funds are subsidizing discriminatory opportunities—and there is no way to get it back![59]

The principle supporting the Opportunity Theory is that the government should not increase the resources recipients have

[56] *See, e.g.*, 110 CONG. REC. 6544 (statement of Sen. Humphrey); *id.* at 7057 (statement of Sen. Pastore) (1964).

[57] *Id.* at 7055 (statement of Sen. Pastore).

[58] *Id.* at 7061–62. *See also id.* at 7058 (statement of Sen. Pastore); *id.* at 7061 (statement of Sen. Pastore); *id.* at 7063 (statement of Sen. Pastore); *id.* at 7064 (statement of Sen. Ribicoff) ("That principle is [that] taxpayers' money, which is collected without discrimination, shall be spent without discrimination."); *id.* at 7065 (statement of Sen. Keating (R-N.Y.)) ("the principle that Federal money should be fairly distributed when the tax collector comes along and takes money from the pocket or the pay envelope of everyone.").

*See also* H.R. REP. NO. 914, pt. 2, 88th Cong., 1st Sess. 25 (serial set 12544), *reprinted in* 1964 U.S. CODE CONG. & AD. NEWS 2391, 2512 (Additional views of Reps. McCulloch (R-Ohio), Lindsay (R-N.Y.), Cahill (R-N.J.), Shriver (R-Kan.), MacGregor (R-Minn.), Mathias (R-Md.), and Bromwell (R-Iowa): "In every essential of life, American citizens are affected by programs of Federal financial assistance. . . . For the Government, then, to permit the extension of such assistance to be carried on in a racially discriminatory manner is to violate the precepts of democracy and undermine the foundations of Government.")

[59] *Discrimination Against Women: Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Educ. of the House Comm. on Educ. and Labor*, 91st Cong., 2d Sess., pt. 1, at 235 (1970). *See also id.* at 306 (statement of Dr. Bernice Sandler, Chairman, Action Comm. for Fed. Contract Compliance in Educ., Women's Equity Action League); *id.*, pt. 2, at 739–40 (statement of Rep. Griffiths (D-Mich.)); *id.*, pt. 2, at 801–04 (*Women in the Univ. of Chicago, Report of the Comm. on Univ. Women*); 118 CONG. REC. 5656 (statement of Sen. Bayh) (1972) (indicating that women receive a disproportionately small share of NDEA Title IV and Title VI awards).

available to engage in discrimination. Whatever evil a recipient could work within the limits of its pre-grant budget, Congress should not enable it to do more evil with federal assistance. To safeguard that principle, it suffices to trace the federal dollars and insist that they be spent for proper purposes. To return to Representative May's example, it would satisfy the Opportunity principle if Congress insisted that federal scholarship money be given evenhandedly to men and women alike, even if the school continued to restrict its own scholarship money to men.

If one reads the "program or activity" language of the anti-discrimination statutes with this theory in mind, it appears that the most sensible construction would limit that phrase to the *federal grant program* (Pell grants), rather than to the *recipient's program* (a college financial aid program, including the school's own scholarship funds) that receives federal aid. That is the interpretation adopted by several early cases. In *Board of Public Instruction v. Finch*,[60] for example, the court—discussing the legislative history of Title VI—noted:

> In the Senate where the program limitation was initiated, reference was frequently made to the school lunch program, to the agricultural extension program for home economics teachers, to the farm-to-market road program, to aid for vocational agriculture teaching, and to aid to impacted school districts. Senator Eastland went so far as to introduce in the Congressional Record a long list of the federal programs to which the cutoff provision was applicable, as did Congressmen Poff and Cramer in the House. HEW in issuing regulations to implement the cutoff provision has followed a similar procedure. All of these lists refer to particular grant statutes such as those before us, not to a collective concept known as a school program or a road program.[61]

As I will indicate below,[62] the Supreme Court adopted a more expansive theory of coverage in *Grove City*.[63] For the moment, I wish only to observe that this fairly narrow Opportunity Theory has played a central role both in Congress's deliberations and the courts' interpretations.[64]

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[60] 414 F.2d 1068 (5th Cir. 1969).

[61] *Id.* at 1077 (citations omitted).

[62] *See infra* text accompanying notes 68–69.

[63] 465 U.S. at 571 n.21.

[64] Cases besides *Finch* that rely on the Opportunity Theory include Lau v. Nichols, 414 U.S. 563, 569 (1974) ("Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination"); Gautreaux v. Romney, 457

### C. *The Joint Venture Theory*

Even if it can be shown that federal money has not been spent in a discriminatory fashion, there often arises a legitimate concern with the appearance of impropriety. In cases where the federal government undertakes a joint project, and its partner engages in discrimination in the very same project, one may rightly feel that the government is condoning, if not supporting, wrongful behavior. As Representative Mink (D-Hawaii) stated in 1975:

> For example, the slide projector in one classroom might be purchased with title I ESEA money, while the slide projector in the adjacent room was not. It surely is not the intent of Congress to prohibit sex—or race or national origin—discrimination in the room with the title I projector, while allowing it in the adjacent room.[65]

This Joint Venture Theory is the most appropriate justification for the "program or activity" rule in each of these statutes and the regulations that carry them out.[66] It is illustrated by the Department of Health and Human Services' (HHS) Title VI regulation defining "program": "The services . . . provided un-

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F.2d 124, 128 (7th Cir. 1972) ("schools and programs are not condemned *en masse* by Section 602 . . . where racial discrimination and segregation are found in isolated activities, but only if such activities utilize federal money for unconstitutional ends"); and Bossier Parish School Board v. Lemon, 370 F.2d 847 (5th Cir. 1967) (school district receiving impact aid to pay for the education of children at an air force base is obligated to spend it in a nondiscriminatory fashion).

The Opportunity Theory, with its emphasis on the use of *federal program* monies, provides the most natural interpretation for much of the statutory language in Title VI and Title IX. For example, section 602 of Title VI speaks of termination of "assistance *under* such program or activity to any recipient" (emphasis added), and says that termination reports have to be filed "with the committees of the House and Senate having legislative jurisdiction over the program or activity involved . . . ." 42 U.S.C. § 2000d-1 (1982). Section 605 also speaks of "any program or activity *under* which Federal financial assistance is extended by way of a contract of insurance or guaranty" (emphasis added). 42 U.S.C. § 2000d-4 (1982). *See also* 20 U.S.C. §§ 1682, 1685 (1982). This "federal program" interpretation of the "program or activity" language is urged in 3 R. CAPPALLI, FEDERAL GRANTS AND COOPERATIVE AGREEMENTS §§ 19.33, 19.52 (1982).

[65] *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Educ. of the House Comm. on Educ. and Labor*, 94th Cong., 2d Sess. 166 (1975) (Title IX) [hereinafter cited as *1975 Hearings*].

[66] While there is language in each of the statutes that is best read as referring to *federal programs* and adopting Theory B (Opportunity), *see supra* note 64, there is also language suggesting an intent to control some things a recipient does with its *own* money. The prohibition section of each act speaks of a "program or activity *receiving* federal financial assistance" (emphasis added). 20 U.S.C. § 1681(a) (1982) (Title IX); 29 U.S.C. § 794 (1982) (§ 504); 42 U.S.C. § 2000d (1982) (Title VI); 42 U.S.C. § 6102 (1982) (ADA).

der a program receiving Federal financial assistance shall be deemed to include any services . . . provided . . . with the aid of any non-Federal funds . . . required to be expended or made available for the program to meet matching requirements . . . ."[67]

This is also the theory relied on by the Supreme Court in *Grove City* and *North Haven*. In *Grove City* the college argued that, if Pell grants were financial assistance to the school, it should be subject to Title IX only in its administration of the Pell grant program.[68] The government contended, on the contrary, that it would be just as incongruous to cover federal scholarships and exempt the school's own as it would be to cover one slide projector but not another. The Court upheld the government's contention, saying:

> Just as employees who "work in an education program that receive[s] federal assistance," *North Haven Board of Education v. Bell*, [456 U.S.] at 540, are protected under Title IX even if their salaries are "not funded by federal money," *ibid.*, so also are students who participate in the College's federally assisted financial aid program but who do not themselves receive federal funds protected against discrimination on the basis of sex.[69]

This Joint Venture Theory is not, however, equivalent to a general principle of guilt by association.[70] It distinguishes—as do Title VI, Title IX, Section 504, and the ADA—between a "recipient" and the various "programs or activities" that a recipient might conduct, and forbids government participation in the latter if they involve discrimination. The Supreme Court recognized this distinction in *Grove City* by declining to apply Title IX to the entire college. Its holding only confirmed what the lower courts had been saying for a long time.[71]

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[67] 45 C.F.R. § 80.13(g) (1984). *Cf.* 34 C.F.R. § 106.37 (1984) (Department of Education's Title IX regulation on student financial aid).

[68] 465 U.S. at 571 n.21.

[69] *Id.*

[70] "Congress did not intend that such a program suffer for the sins of others. HEW was denied the right to condemn programs by association." *Finch*, 414 F.2d at 1078.

[71] For a sampling of the numerous cases applying the nondiscrimination statutes in a program-specific fashion, see Hillsdale College v. United States Dep't of Health, Educ. and Welfare, 696 F.2d 418 (6th Cir. 1982)(Title IX), *vacated and remanded*, 466 U.S. 901 (1984); Doyle v. University of Ala., 680 F.2d 1323, 1326–27 (11th Cir. 1982) (§ 504); Rice v. President & Fellows of Harvard College, 663 F.2d 336, 338–39 (1st Cir. 1981) (Title IX), *cert. denied*, 456 U.S. 928 (1982); Dougherty County School Sys. v. Harris, 622 F.2d 735, 736–38 (5th Cir. 1980) (Title IX), *vacated and remanded on other grounds*, 456 U.S. 986 (1982); Romeo Community Schools v. United States Dep't of Health, Educ. and Welfare, 600 F.2d 581, 584 (6th Cir. 1979) (Title IX), *cert. denied*, 444 U.S.

HHS's Title VI regulations respect the same distinction. They give the following example to "illustrate the programs aided by Federal financial assistance of the Department": "In a training grant to a hospital or other nonacademic institution, discrimination is prohibited in the selection of individuals to be trained and in their treatment by the grantee during their training."[72] The regulation does not say that the entire hospital—the "recipient"[73]—is subject to Title VI by virtue of the training grant.[74]

The distinction between "recipients" and "programs" is intended to protect the public interest in a government project

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972 (1979); Gautreaux v. Romney, 457 F.2d 124, 126–28 (7th Cir. 1972) (Title VI); *Finch*, 414 F.2d at 1078 (Title VI); Bachman v. American Soc'y of Clinical Pathologists, 577 F. Supp. 1257, 1262–63 (D.N.J. 1983) (§ 504); University of Richmond v. Bell, 543 F. Supp. 321 (E.D. Va. 1982) (Title IX); Othen v. Ann Arbor School Bd., 507 F. Supp. 1376 (E.D. Mich. 1981) (Title IX), *aff'd on other grounds*, 699 F.2d 309 (6th Cir. 1983); Dodson v. Arkansas Activities Ass'n, 468 F. Supp. 394, 396 n.1 (E.D. Ark. 1979) (Title IX); Simon v. St. Louis County Police Dep't, 14 Fair Empl. Prac. Cas. (BNA) 1363, 1364 (E.D. Mo. 1977) (§ 504); Stewart v. New York Univ., 430 F. Supp. 1305, 1313–14 (S.D.N.Y. 1976) (Title VI); Hupart v. Board of Higher Educ., 420 F. Supp. 1087, 1104 (S.D.N.Y. 1976) (Title VI); Mandel v. United States Dep't. of Health, Educ. and Welfare, 411 F. Supp. 542, 556–59 (D. Md. 1976)(Title VI), *aff'd*, 571 F.2d 1273 (4th Cir.), *cert. denied*, 439 U.S. 862 (1978); McLeod v. College of Artesia, 312 F. Supp. 498, 502 (D.N.M. 1970) (Title VI); Cameron Parish Police Jury v. Hickel, 302 F. Supp. 689 (W.D. La. 1969) (Title VI).

[72] 45 C.F.R. § 80.5(d) (1984).

[73] *See* 45 C.F.R. § 80.13(i) (1984).

[74] This distinction between a narrower "program or activity" (covered by nondiscrimination rules) and a wider "recipient" institution (which may conduct a number of programs or activities) permeates the Title VI, Title IX, Section 504, and ADA regulations.

As to Title VI, see HHS's regulations at 45 C.F.R. §§ 80.2 ("Application of this regulation"), 80.3 ("Discrimination prohibited"), 80.8(c) ("Procedure for effecting compliance: termination of or refusal to grant or to continue Federal financial assistance"), 80.13(g),(i) (definitions of the terms "program" and "recipient") (1984).

As to Title IX, see the Department of Education's (ED) regulations at 34 C.F.R. §§ 106.11 ("Application"), 106.31(a) ("Education programs and activities"), 106.51(a) ("Employment") (1984). These provisions, particularly the latter two, are slightly ambiguous. The employment regulation, for example, prohibits gender discrimination "under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance . . . ." 34 C.F.R. § 106.51(a) (1984). The "which" clause may modify either "recipient" or "program or activity." But since a "recipient" by definition gets federal financial assistance, 34 C.F.R. § 106.2(h) (1984), while a "program or activity" may not, the clause is redundant if it does not refer to the latter. *See North Haven*, 456 U.S. at 539 n.30. The explanation given when the regulations were promulgated makes clear that this reading is the correct one. *See* 40 Fed. Reg. 24,128 (1975).

As to Section 504, see the Department of Justice's (DOJ) regulations at 28 C.F.R. §§ 41.5(8) ("Enforcement"), 41.51 ("General prohibitions against discrimination") (1984); and HHS's regulations at 45 C.F.R. § 84.5 ("Assurances required") (1984); *id.*, Pt. 84, App. A, para. 7 ("Assurances of compliance")(1984).

As to the ADA, see HHS's regulations at 45 C.F.R. § 90.3(2) (1984) ("What programs and activities does the Age Discrimination Act of 1975 cover?").

(training nurses or promoting the study of chemistry, let us say), which would be frustrated if an unrelated but discriminatory program brought the federally funded project to a halt. As the Fifth Circuit stated in *Finch*, the program-specific limitation is "not for the protection of the political entity whose funds might be cut off, but for the protection of the innocent beneficiaries of programs *not* tainted by discriminatory practices."[75]

### D. *The Infection Theory*

Infection is not an independent theory, but a means of expanding the reach of Theories B (Opportunity) and C (Joint Venture). The Infection Theory rests on the notion that a recipient may, by discriminating in a project closely related to one receiving federal funds, either cause the federal money to be used in a discriminatory fashion (B), or at least cause discrimination to occur in the funded project (C). For example, if the federal government gave financial aid to some students at Law School *X*, *Grove City* holds that the Law School's financial aid office would be covered by Title IX. But if the Law School discriminated against women in its admission process, some qualified women (denied admission) would never reach the financial aid office. One could thus say that discrimination in the admissions program "infected" the financial aid program, and that both should therefore be covered by Title IX.[76]

In fact it is fair to say that "[o]ne who is discriminated against in seeking admission is denied access to all educational programs and activities within an institution, and the entire body of programs within the school is tainted."[77] For this reason the regulations under Title VI, Title IX, and Section 504 all forbid

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[75] 414 F.2d at 1075 (emphasis in original).

[76] Title IX applies generally to the admissions policies of professional, vocational, and graduate schools, and public undergraduate schools. 20 U.S.C. § 1681(a)(1) (1982). *See also* 20 U.S.C. § 1681(a)(2) (1982), 34 C.F.R. §§ 106.16, 106.17 (1984) (delayed application of nondiscrimination requirements for "educational institutions commencing planned change in admission [policy]"); 20 U.S.C. § 1681(a)(5) (1982), 34 C.F.R. § 106.15(e) (1984) (nondiscrimination requirements are not applicable to public undergraduate schools that "traditionally and continually from [their] establishment [have] had a policy of admitting only students of one sex"). *But see* Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982) (admissions policy excluding males from nursing school of traditionally all-female university violated Equal Protection Clause of the Fourteenth Amendment notwithstanding the Title IX exception in 20 U.S.C. § 1681(a)).

[77] *Rice*, 663 F.2d at 339 n.2; *Othen*, 507 F. Supp. at 1387.

recipients to discriminate in admissions, no matter what part of their operations might receive federal aid.[78]

In other contexts the infection could be harder to trace. If the federal government funds a college physics lab, and women are permitted to take physics but not math, it seems obvious that the federal project (training physicists) is significantly undermined. Excluding women from math classes would effectively preclude aspiring female physicists from taking full advantage of the government's program. Hence the school's math department should also be covered by nondiscrimination requirements.[79] More tenuous is the Eleventh Circuit's conclusion that discrimination in selection for a private honor society (assisted in various ways by the University of Miami) necessarily infected all federally funded programs at the school.[80] If the question were whether the Department of Education should cut off aid to Miami's physics department, I think it should be resolved under the Infection Theory by asking whether ineligibility for election to the honor society would deprive women of the benefits that Congress intended to confer, in the same way that

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[78] *See* 34 C.F.R. § 106.15(c) (1984) (ED Title IX regulations) (prohibition against discrimination on basis of sex in admission and recruitment "applies to each recipient," except as provided in § 106.15(e) (*see supra* note 76)); 45 C.F.R. § 80.4(d)(1), (2) (1984) (HHS Title VI regulations) (nondiscrimination requirements apply to "admission or recruitment" practices of a recipient). Of course when an institution has separate admissions policies for different programs, it may not make sense to presume that discrimination in admissions to program A will infect program B. *See, e.g.*, 45 C.F.R. § 80.5(c) (1984):

> In a research, training, demonstration, or other grant to a university for activities to be conducted in a graduate school, discrimination in the admission and treatment of students *in the graduate school* is prohibited, and the prohibition extends to the entire university unless it satisfies the responsible Department official that practices with respect to other parts or programs of the university will not interfere, directly or indirectly, with fulfillment of the assurance required with respect to the graduate school. (Emphasis added).

[79] Consider another problem that arises with some frequency. Title VI does not apply to claims for employment discrimination, except where a primary objective of the federal financial assistance is to provide employment. 42 U.S.C. § 2000d-3 (1982); Valentine v. Smith, 654 F.2d 503, 511–12 (11th Cir.), *cert. denied*, 454 U.S. 1124 (1981). But in some circumstances discrimination in employment will infect the product the federal government is paying to deliver to the program beneficiaries. For example, discrimination in the selection of faculty to deliver Title I services (now chapter 1 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. §§ 3801–3808 (1982 & Supp. I 1983)) to disadvantaged children in grade schools and high schools would be forbidden because of its effect on the children, even if individual teachers had no Title VI claim. *See, e.g.*, United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 882–86 (5th Cir. 1966), *cert. denied*, 389 U.S. 840 (1967); United States v. El Camino Community College Dist., 454 F. Supp. 825, 830–31 (C.D. Cal. 1978), *aff'd*, 600 F.2d 1258 (9th Cir. 1979), *cert. denied*, 444 U.S. 1013 (1980).

[80] Iron Arrow Honor Soc'y v. Heckler, 702 F.2d 549 (5th Cir. Unit B), *vacated as moot*, 464 U.S. 67 (1983).

discriminating in admissions or closing the math department to them would. I would be surprised it it did.

This is not to say that sex discrimination in selection for honor societies is morally neutral conduct, or even that Congress should not undertake to combat it. In fact S. 272 and H.R. 700 would do just that. The Infection Theory, however, properly understood as a qualification of Theories B (Opportunity) and C (Joint Venture), does not provide a reason for doing so. Infection is not an independent justification for rooting out discrimination wherever it occurs, but simply a way of protecting federal programs from corruption—originating elsewhere—that is certain to affect their intended beneficiaries in a discriminatory fashion.

### E. *The Benefits Theory*

The Infection Theory rests on the idea that discrimination *upstream* from the federal program can sometimes flow into and corrupt it. The Benefits Theory holds that federal aid to an innocent program may provide a benefit to discrimination that occurs *downstream*. The objections to this phenomenon are not new: the federal government should not assist, even unwittingly, in providing opportunities for discrimination to occur (Theory B), or the federal government should not appear to condone discrimination by participating in a project where it occurs (Theory C). The Benefits Theory augments these theories by following the principles of opportunity and participation beyond the boundaries of the federally assisted program or activity.

This theory is a relatively recent concoction. It has no current statutory foundation,[81] and does not appear in the Title VI regulations. The Benefits Theory first arose in limited form in the Title IX regulations promulgated in 1975. Those regulations apply the theory to different programs within the same recipient institution: "[T]his Part . . . applies to every recipient and to each education program or activity operated by such recipient which receives *or benefits* from Federal financial assistance."[82]

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[81] The statutes speak of being "excluded from participation *in*, . . . denied the benefits of, or . . . subjected to discrimination *under* any program or activity receiving Federal financial assistance" (emphasis added). 42 U.S.C. § 2000d (1982) (Title VI); 20 U.S.C. § 1681(a) (1982) (Title IX); 29 U.S.C. § 794 (1982) (§ 504); 42 U.S.C. § 6102 (1982) (ADA).

[82] 45 C.F.R. § 86.11 (1984); 34 C.F.R. § 106.11 (1984) (emphasis added).

Pell grants, for example, which *Grove City* held are "received" by a college's financial aid program, may "benefit" the physics department if that is where the tuition money is ultimately applied.[83] Or suppose that a university receives a grant to buy land for a law school, including space for a parking lot. To the extent that the law school's lot relieves congestion around the physics department and the business school, those programs may be said to "benefit" from the federal assistance.

The Section 504 regulations promulgated in 1977 take the theory one step further. They suggest that program *x* (and maybe even institution *X*, which runs it) is subject to the regulations if it benefits in some way from federal aid to program *y* (run by institution *Y*): "Subpart F applies to health, welfare, and other social service programs and activities that receive or benefit from Federal financial assistance and to recipients that operate, or that receive or benefit from Federal financial assistance for the operation of, such programs or activities."[84] This version of the theory could mean that a trucking company, which "benefits" from highways built by the state with federal assistance, would for that reason alone be subject to Section 504 in its hiring of drivers.

As I said, both versions of the Benefits Theory stretch the current statutory language; the response of the courts and commentators has not been favorable to it.[85] One difficulty, apart from the statutory language problem, is that it

> requires grant administrators to perform an analytical task which has baffled philosophers for centuries. No human or

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[83] 465 U.S. at 571, 573–74.

[84] 45 C.F.R. § 84.51 (1984); *see also* 45 C.F.R. §§ 84.31, 84.41 (1984) (similar provisions for preschool, elementary, secondary, and postsecondary education programs).

[85] The Supreme Court in *Grove City* rejected the Title IX version, holding that "Congress [did not] intend[] that the Department's regulatory authority [should] follow federally aided students from classroom to classroom, building to building, or activity to activity." 465 U.S. at 573. The Section 504 theory was rejected in Disabled in Action v. Mayor of Baltimore, 685 F.2d 881, 884 (4th Cir. 1982) (where city had received federal funds for stadium improvements, baseball club using stadium was not a "recipient" subject to the requirements of Section 504), and Angel v. Pan Am. World Airways, 519 F. Supp. 1173, 1178 (D.D.C. 1981) (receipt of federal funds by airport does not thereby subject commercial airline to the requirements of Section 504). *See also* Jacobson v. Delta Airlines, 742 F.2d 1202, 1213–15 (9th Cir. 1984) (federal airport grants do not subject air carriers to the proscriptions of Section 504), *cert. dismissed*, 105 S. Ct. 2129 (1985). *But see* Paralyzed Veterans of America v. Civil Aeronautics Bd., 752 F.2d 694, 713–16 (D.C. Cir.), *cert. granted*, 106 S. Ct. 244 (1985). The D.C. Circuit, overruling *Angel*, held that Section 504 regulations apply to all commercial air carriers based on federal funding of airports and "airways," their integration with all commercial air carriers, and the clear intent of Congress. *See also* 3 R. CAPPALLI, *supra* note 64, at § 20.10 (1982).

> machine mind can trace all the cause-effect relationships generated by a social program or activity. One will always be able to construct, but never be able to verify, a logical chain in which a federal dollar entering Point A in an organization is shown to have had beneficial effects at Point B (the area of discrimination).[86]

The Section 504 version of the theory is also inconsistent with an enforcement scheme keyed to the federal spending power. Where a recipient of federal funds is innocent, but its federal funds are thought to aid discrimination occurring in another institution downstream, it would be perverse to cut off funding to the innocent party in order to reform someone else's behavior.[87]

### F. *Accounting Problem #1: The Tracing Theory*

The difficulties of accounting for federal money once it reaches a recipient affect the question of coverage for nondiscrimination conditions in several ways. First, it is often hard to tell exactly where federal money is spent. Second, it may be that aid to one of a recipient's programs could free up portions of the pre-grant budget to be spent elsewhere. Both of those possibilities are reasons for enlarging coverage to some degree. This section will deal with the first problem (the Tracing Theory); the next section will deal with the second (the Freed-Up Funds Theory).

The Tracing Theory is a method of rounding off the area in which Theory B (Opportunity) applies. The theory's underlying principle is a narrow one: federal dollars should not be put to

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[86] 3 R. CAPPALLI, *supra* note 64, at § 20.10.

[87] I should clarify this point by making two qualifications. First, there is a difference between institutions (or programs) that merely "benefit" from federal aid in the sense used in the text, and those that might be called "subrecipients"—*i.e.* those "to whom Federal financial assistance is extended . . . through another recipient." 34 C.F.R. § 106.2(h) (1984). For example, the federal government gives money for the school lunch program to state educational agencies, which in turn give the money to schools. 42 U.S.C. §§ 1753, 1756, and 1757 (1982). Congress plainly intended that the schools themselves should be covered by Title VI, *see* 110 CONG. REC. 8978–80 (1964) (statement of Sen. Humphrey), because they do not merely "benefit" from, but actually "receive" the federal money; they are the last stop before the program beneficiary. And cutting off funds to a discriminating school applies pressure in the right place.

Second, colleges whose students receive Pell grants, though they are not "subrecipients" in the sense used above, should also be considered as "receiving" rather than merely "benefiting" from federal aid because that is where Congress intended the money to go. *See Grove City*, 465 U.S. at 563–70.

discriminatory use. To enforce that principle it is necessary to find out precisely how a recipient spends its federal money. However, as Representative Mink said about Title IX: "It is difficult to trace the Federal dollars precisely. A narrow interpretation of Title IX would render the law meaningless and virtually impossible either to enforce or to administer."[88]

One possible solution to the tracing problem is for Congress to require physical segregation of federal funds, separate line-item accounts, and federal audits so that each dollar can be followed until it leaves the recipient's hands. That solution is unpalatable for two reasons. First, it complicates potential enforcement actions by the granting agency and by private plaintiffs, since they must follow a tortuous paper trail to prove the path of the federal dollar before even reaching the merits of any discrimination question. Second, such accounting requirements place a heavy burden on the recipient, which must keep its books and funds in the prescribed fashion, and periodically entertain squads of federal overseers.

A second solution to the tracing problem, easier to enforce and on balance less burdensome for the recipient, is to extend the nondiscrimination conditions to its smallest administrative unit within which the money will be spent. Where a college and the government share the cost of constructing a building, one cannot assume that the school paid for one portion of the building and the government for another,[89] or that the government paid for the first half of its useful life and the school for the second half.[90] But if one can be sure that the government's

[88] *1975 Hearings*, *supra* note 65, at 166.

[89] *See* 45 C.F.R. § 80.5(3) (1984) (HHS's Title VI regulations for construction grants):

> In case of hospital construction grants the assurance . . . will apply to the entire facility for which, or for a part of which, the grant is made, and to facilities operated in connection therewith. In other construction grants the assurances required will similarly be adapted to the nature of the activities to be conducted in the facilities for construction of which the grants have been authorized by Congress.

For an example of the application of this regulation, see Flanagan v. President & Directors of Georgetown College, 417 F. Supp. 377, 382–84 (D.D.C. 1976) (receipt of federal funds for construction of law school subjected law school's scholarship and financial aid programs to Title VI requirements). *See also* 45 C.F.R. § 80.4(d)(2) (1984).

[90] *See* 45 C.F.R. § 84.5(b)(1) (1984) (HHS's Section 504 regulation):

> In the case of Federal financial assistance extended in the form of real property or to provide real property or structures on the property, the assurance will obligate the recipient . . . for the period during which the real property or structures are used for the purpose for which Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits.

*See also* 45 C.F.R. § 80.4(2)(1) (1984) (HHS Title VI regulations), and 34 C.F.R. § 106.4(b)(1) (1984) (ED Title IX regulations).

money was spent *somewhere* on the building, then Theories B and F (Opportunity and Tracing) would be satisfied by imposing nondiscrimination restrictions on the entire building, and it is unnecessary to extend them to the entire college.[91]

The Tracing Theory would, however, require institution-wide coverage in the case of unrestricted grants. If a local educational agency receives impact aid[92] or a college gets aid for developing institutions,[93] the money can be used for almost any programs or activities the recipient conducts. Rather than require plaintiffs to prove where the assistance actually was spent, the Tracing Theory would permit the assumption that it flowed throughout the institution.[94]

The results one reaches applying this theory are similar to those dictated by Theory C (Joint Venture). The concern of this theory is to follow federal dollars to ensure that they are not misspent. Theory C is concerned with the federal government appearing to condone discrimination by sharing in a project with a partner that misuses its *own* money. But the difficulties of fund accounting will often require the tracing of federal money to stop at the project—a building, a college financial aid program, a park, a sewer system—for which it was appropriated. Like the Joint Venture Theory, then, the Tracing Theory pro-

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[91] *Compare Flanagan*, 417 F. Supp. at 382–84, *with* Stewart v. New York Univ., 430 F. Supp. 1305, 1313–14 (S.D.N.Y. 1976) (law school receiving HUD money to build a private school dormitory was not therefore obligated to comply with Title VI in law school admissions). In *Stewart*, admissions "activity" presumably was conducted on premises other than those of the federally funded dormitory. 430 F. Supp. at 1314.

[92] 20 U.S.C. §§ 236–241-1 (1982 & Supp. I 1983).

[93] 20 U.S.C. §§ 1051–1069c (1982 & Supp. I 1983).

[94] 45 C.F.R. § 80.5(b) (1984). This provides an alternative explanation for Bossier Parish School Bd. v. Lemon, 370 F.2d 847 (5th Cir. 1967), in which the "school system . . . [received] nearly two million dollars between 1951 and 1964 under the provisions of 20 U.S.C. [1964 ed.] §§ 631–645 [impact aid]." 370 F.2d at 850.

The Revenue Sharing Act, 31 U.S.C. § 6716(c)(1) (1982 & Supp. I 1983), has adopted a variation on this approach. It relieves plaintiffs of the obligation of tracing funds by adopting a presumption of institution-wide coverage, but permits the recipient state or local government to prove, "by clear and convincing evidence, that a payment received under this chapter is not used to pay for any part of the program or activity with respect to which the allegation of discrimination is made." *Id.*

That variation can also be found in the HHS Title VI regulation discussing the assurance of compliance form required of colleges and hospitals. The regulation states that the assurance shall, in certain instances,

> be applicable to the entire institution unless the applicant establishes, to the satisfaction of the responsible Department official, that the institution's practices in designated parts or programs of the institution will in no way affect its practices in the program of the institution for which Federal financial assistance is sought . . . .

45 C.F.R. § 80.4(d)(2) (1984).

vides a justification for forbidding discrimination in any "program or activity" receiving federal financial assistance—the rule adopted by Title VI, Title IX, Section 504, and the ADA as currently written.

### G. *Accounting Problem #2: The Freed-Up Funds Theory*

This theory underlay the Third Circuit's decisions in *Grove City*[95] and *Haffer v. Temple University*,[96] and an earlier district court decision in *Bob Jones University v. Johnson*.[97] The idea is that when the federal government gives a college $500,000 to spend on teaching physics, the college can then take $500,000 of its own money out of the physics budget and spend it on men's athletics. Furthermore, the theory continues, just as it is wrong for a recipient to spend the government's money in a discriminatory fashion, so it is also wrong to spend funds which the government's money has "freed up" in such a fashion. This approach makes tracing federal monies irrelevant, since the precise source of the funds spent on discrimination is unimportant. What counts is the ripple effect caused by the federal splash.

There are circumstances in which this makes practical as well as economic sense. Suppose that my law school got a grant to develop a clinical training program.[98] Some of the money would go toward paying my salary, if I were the one chosen to run the program. In actual practice the university central administration would not reduce my dean's budget by that sum, since he would need it to hire a visitor to teach my courses. If my dean then

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[95] 687 F.2d 684 (1982).

[96] 688 F.2d 14 (1982).

[97] 396 F. Supp. 597, 602 (D.S.C. 1974), *aff'd*, 529 F.2d 514 (4th Cir. 1974). *See also* Wright v. Columbia Univ., 520 F. Supp. 789, 792 (E.D. Pa. 1981) (to the extent that a university receives federal funding, component entities benefit indirectly through reallocation of funds); Poole v. South Plainfield Bd. of Educ., 490 F. Supp. 948, 951 (D. N.J. 1980) (Section 504 applicable to all the activities engaged in by school system receiving federal funds, even if no federal funds spent on a particular activity).

The decision in *Bob Jones* can be more easily explained, however, by Theory D (Infection). Bob Jones University discriminated on the basis of race in admissions, and the court upheld an administrative order terminating student financial aid in the form of veterans' benefits. 396 F. Supp. at 589–600. Since under *Grove City* the University's entire financial aid program was covered, and since the discrimination in admissions prevented unmarried nonwhite applicants from getting financial aid (or anything else) from the University, the same result would follow even if one rejected Theory G (Freed-Up Funds).

[98] 20 U.S.C. § 1134n (1982) (authorizes federal grants to law schools for expansion of clinical experience programs).

discriminated on the basis of race or sex in hiring a visitor, there would be a fairly direct connection between the federal aid and his act: not only was the money freed up by a federal grant, but the university left the money in the law school's budget, and the need to spend it on a visitor arose only because I had gone to work on the clinical training program.

On the other hand, there are situations in which this theory makes little sense. Suppose that my school has traditionally given scholarships from an endowed fund to one hundred students, and that the federal government then gives it money in the form of Supplemental Educational Opportunity Grants[99] for another twenty-five scholarships. Since those students used to pay their own way anyway, the school is financially no better off. And the law,[100] as well as the terms of the endowment, would prevent the university from reducing its own scholarship contribution and spending that money on something else. Similar statutory provisions often forbid recipients to reduce their level of support to federally assisted programs.[101]

Thus it is often not true that the recipient's own money is freed up by a federal contribution—or at least it is not freed up for expenditure outside the federally assisted program or activity. But even when money is freed up it is often impossible to determine where such funds are spent. One might suppose that a federal grant to my law school frees up money which the university can then spend on athletics. But one could also envision the state legislature reducing the university's budget by that amount, and spending the money on roads. The point is that if the justification for imposing restrictions on a recipient is that federal aid has *caused* discrimination by freeing up funds, that assumption becomes more unlikely the further one travels in the budgetary process away from the program assisted by a federal grant. This accounting difficulty is like the problem of following chains of causation under Theory E (Benefits). The Supreme Court reached this very same conclusion in *Grove City*.[102]

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[99] 20 U.S.C. § 1070b (1982).

[100] 20 U.S.C. § 1094(a)(2) (1982) (institution receiving federal funds must agree not to diminish its own contributions to its scholarship and student aid programs).

[101] *See, e.g.*, 20 U.S.C. §§ 1143(b)(3), 2736 (1982); Bennett v. Kentucky Dep't of Educ., 105 S. Ct. 1544 (1985) (Secretary of Education may recover federal funds granted to a state if funds are used to supplant, rather than supplement, state expenditures).

[102] 465 U.S. at 571–74.

### H. *The Theory of Unrelated Conditions*

I said above that there are seven different kinds of explanations in current law for why Congress might attach nondiscrimination conditions to grants of federal money. In fact, there is an eighth possibility, not embodied in current law, which underlies H.R. 700, and to a much more limited extent S. 272. The idea here is not that the federal government is in any way at fault (Theory A), that it unwittingly contributes to discrimination (Theories B, E, and G), that it may be perceived as contributing to discrimination even if it is not actually doing so (Theory C), that its purposes are frustrated by discrimination for which it is not responsible (Theory D), or that it is hard to tell where federal money is going (Theory F). As a general rule those theories do not warrant imposing conditions on all of a recipient's activities simply because it receives federal aid for one portion of them. There are exceptions to that general rule. Most significant are the cases where: (i) pervasive discrimination, such as in admissions to school, necessarily infects all of the recipient's operations, or (ii) aid is given in unrestricted form, and can be used anywhere in the recipient's operations. But those cases are sufficiently unusual that they cannot support a broad rule of institution-wide coverage.

#### 1. The Theory

Even where none of the seven theories I have discussed applies, one might look on the federal grant as an occasion for buying as much nondiscrimination as possible from the recipient. Congress might say, for example, "We'll give you money to build a park provided: (i) it's open to everyone, and (ii) you eliminate any discrimination in your city government." Congress might go on to add any number of similar conditions: "provided (iii) your municipal buildings conform to the following federal fire code: . . . ; (iv) your city high schools require all students to take four years of mathematics; (v) you forbid possession of handguns within the city limits;" etc. Notice that conditions (ii)–(v), unlike condition (i), have nothing to do with how the federal money will be spent.

These expansive restrictions are an unusual use of the spending power. In fact it is an interesting constitutional question whether the spending power alone gives Congress authority to

impose such conditions.[103] Bear in mind that the Constitution limits the federal government to certain enumerated powers, augmented by the Necessary and Proper Clause. One of those powers is the power to spend money for the "general Welfare of the United States."[104] That allows the money itself to be put to most any use—*e.g.*, building parks. And conditions on how a recipient uses the government's money are necessary and proper means of making the spending power effective—*e.g.*, requiring that the parks be open to everyone. But there is no functional connection between the government's money and conditions (ii)–(v). The only relation between spending and the antidiscrimination rule (ii), or the handgun rule (v), is that the grants serve to identify the class subject to the rule.[105]

I raise this point more as a scruple than as an argument against any of these bills. The Supreme Court has frequently suggested that "[t]here are limits on the power of Congress to impose conditions . . . pursuant to its spending power,"[106] but it has been a long time since it has actually identified one.[107] Moreover, it may be that authority for these rules can be found elsewhere

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[103] *Cf.* Fullilove v. Klutznick, 448 U.S. 448, 474–75 (1980) (opinion of Burger, C.J.) (the reach of the spending power, within its sphere, is a least as broad as the regulatory powers of Congress).

[104] U.S. CONST. art. I, § 8, cl. 1.

[105] There could be another connection between the rule and the grants: the threat of revocation might also serve as a means of enforcing the rules. But oddly enough, under the original version of H.R. 700 (sec. 3(b)), revocation would be limited to cases where there was a causal nexus between the grant and the discrimination, *i.e.*, to cases where the condition was relevant to the use of the money.

There is now a moderately large body of academic literature suggesting that there is, or ought to be, a limit on cross-over conditions attached to federal grants. Some examples are: 2 R. CAPPALLI, *supra* note 64, at ch. 11 (1982 & 1985 Cum. Supp.); Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847 (1979); Lacovara, *How Far Can The Federal Camel Slip Under The Academic Tent?*, 4 J. COLL. & U.L. 223 (1977); Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196 (1977); Note, *Taking Federalism Seriously: Limiting State Acceptance of National Grants*, 90 YALE L.J. 1694 (1981); Note, *Using Federal Funds to Dictate Local Policies: Student Religious Meetings Under the Equal Access Act*, 3 YALE L. & POL'Y REV. 187 (1984); Comment, *The Federal Conditional Spending Power: A Search for Limits*, 70 NW. U.L. REV. 293 (1975). Many of these arguments rely on federalism limitations, however, and have been overtaken by Garcia v. San Antonio Metropolitan Transit Auth., 105 S. Ct. 1005 (1985).

[106] Pennhurst State School v. Halderman, 451 U.S. 1, 17 n.13 (1981) (states must have the benefit of a clearly expressed congressional intent to impose conditions on federal grants when determining whether or not to accept such funds).

[107] *See* United States v. Butler, 297 U.S. 1 (1936) (federal government right to appropriate and spend money under contracts for reasonable governmental purposes cannot justify contracts not within federal power).

in the Constitution: section five of the Fourteenth Amendment and the Commerce Clause.[108]

Still, if the most convincing justifications for institution-wide coverage are the Fourteenth Amendment and the Commerce Clause, and not the spending power, one wonders why the nondiscrimination rules are not extended to everyone rather than limited to grant recipients. The obvious reason is that the rules impose real costs, and the rules' sponsors believe that the benefits from attacking discrimination absolutely everywhere, taken alone, do not justify those costs. They think instead that the costs imposed on any institution should be outweighed by the private benefit that federal dollars confer on the institution plus the public benefit from eliminating discrimination.

To reiterate, we should be cautious about imposing a general rule of institution-wide coverage for two reasons. First, no one who supports these bills assigns an absolute value to eliminating all forms of discrimination; everyone instead believes that that is a good (maybe even the highest good, but still not an absolute) to be weighed against harms in considering legislation.[109] Second, everyone believes that the cost of implementing thoroughgoing nondiscrimination rules should be related somehow to the benefits that federal aid confers.

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[108] *See* Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) (Title II of the Civil Rights Act is a valid exercise of power under the Commerce Clause as applied to a place of public accommodation); Katzenbach v. McClung, 379 U.S. 294 (1964) (Congress was within its power when it protected commerce by extending coverage of Title II to a restaurant involved in interstate commerce in food).

[109] The process of weighing benefits (from eliminating discrimination) and costs (from implementing the rules) is undoubtedly affected by the fact that these statutes or the regulations implementing them have been held to forbid disparate-impact, as well as intentional, discrimination by recipients. In Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582 (1983), for example, a majority of the Court held that actions having an unjustifiable disparate impact on minorities could be redressed by agency regulations designed to implement the purposes of Title VI. *Id.* at 584 (White, J., announcing the judgment of the Court); *id.* at 623 n.15 (opinion of Marshall, J.); *id.* at 644 (opinion of Stevens, J., in which Brennan and Blackmun, JJ., joined). Moreover, in Alexander v. Choate, 105 S. Ct. 712 (1985), the Court "assume[d] without deciding that Section 504 reaches at least some conduct that has an unjustifiable disparate impact upon the handicapped." *Id.* at 720.

The inclusion of disparate-impact discrimination affects the cost/benefit analysis in two ways. First, it greatly increases the number of cases where a recipient's conduct is subject to federal control, and at the same time increases the possible gains for those protected by Title VI, Title IX, Section 504, and the ADA. Whether these costs and gains cancel each other out is not immediately apparent. Second, it subjects to coverage recipient conduct that is not morally blameworthy—since it is by definition unintended—and that therefore demands a more impressive showing of benefit to justify regulation.

### 2. The Costs

I think that everyone involved agrees on the benefits that would flow from a rule of institution-wide coverage. For that reason I will focus on the countervailing costs, which seem more controversial. I will begin not with the cost of compliance—the one most frequently stressed—but with the cost to federal program objectives when institutions refuse to participate. Suppose, for example, that federal money is offered to fund a burn treatment center at Hospital *X*, part of a large university complex. Suppose too that the hospital would decline the funds if the whole university would thereby be subjected to regulation, but would take them if coverage were restricted to the burn treatment center, or perhaps to the hospital itself.[110] In those circumstances the federal government cannot get everything it wants. It would be nice (i) if the hospital would take the money to provide treatment for people with severe burns, and (ii) if at the same time the government could look into charges of age discrimination at the university's performing arts center. But the choice the federal government has here is between option (i) and nothing at all. In such a case it would be completely irrational to deny federal funding, particularly when funding *would* result in the elimination of discrimination at the *hospital*, if not elsewhere in the university system.

I stress that this cost to federal program objectives is unique to Theory H (Unrelated Conditions). If the hospital threatened to discriminate on the basis of race in admitting people to the burn treatment center there would be nothing irrational about denying funding, since the hospital would be misusing the government's money (Theory B), or at least creating the false impression that the government found the hospital's discriminatory practices worthy of support (Theory C). Only when the

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[110] The example is not purely hypothetical. Both Grove City College and Hillsdale College have announced that they would refuse to admit students with Pell grants in order to avoid the costs of coverage just in their financial aid programs. *Hearings on S. 2568 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 98th Cong., 2nd Sess. 35 (1984) (statement of Charles S. MacKenzie, President of Grove City College); *id.* at 107–08 (statement of George Roche, President of Hillsdale College). To the extent that such a response deprives needy students of the opportunity to attend the college of their choice, it frustrates a central purpose of the Pell grant program.

For another illustration of the problem discussed in the text—recipients turning down federal money when the conditions attached become too onerous—see *id.* at 554–55 (corporations may refuse to participate in on-the-job training programs if their entire operations thereby become covered).

strings attached to funding have no relation to the funded program is there a risk of losing an unmitigated good (option (i) above) by trying, like Aesop's greedy dog, to get too much (options (i) and (ii)).

Now the choice between option (i) and nothing at all is not exactly the choice Congress faces at this point. There will be some institutions in the same class as Hospital *X*, but Congress might gamble that there won't be too many. It could hope that the rest—faced with the choice between institution-wide coverage and loss of a grant—would cave in, and the federal government could then have options (i) and (ii). How many institutions would fall into each group depends on the costs of compliance and enforcement. But extending coverage beyond a funded program to the entire recipient institution will increase some of those costs exponentially. The obligations to undertake self-evaluation,[111] to take remedial action,[112] to publicize to protected groups one's obligations under the law,[113] to file compliance reports,[114] to submit to periodic compliance reviews,[115] to keep records,[116] to entertain federal officials responding to complaints,[117] to keep abreast of new regulations, and so on, will be multiplied not only by the number of newly covered programs, but also by the number of federal agencies which—by granting money to some activity within the institution—would now be able to assert jurisdiction over every aspect of the institution's affairs.

Imposing unrelated conditions has still a third cost, more difficult to quantify, apart from the cost to federal program objectives and the cost of compliance. If H.R. 700 is accepted as a proper exercise of Congress's spending power then there is almost no theoretical limit to the kinds of demands Congress can make of those who get federal money. If a local grade school participates in the school lunch program, Congress could dictate to the state educational agency (which hands out the money) what math and science courses must be included in the high school curriculum. If a law school gets money to develop a clinical training program, or if an undergraduate English major

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[111] *See, e.g.*, 34 C.F.R. § 106.3(c) (1984) (ED Title IX regulations).
[112] *See, e.g., id.* § 106.3(a).
[113] *See, e.g., id.* § 106.9.
[114] *See, e.g.*, 45 C.F.R. § 80.6(b) (1984) (HHS Title VI regulations).
[115] *See, e.g., id.* § 80.7.
[116] 34 C.F.R. § 106.3(d) (1984).
[117] 45 C.F.R. §§ 80.6(c), 80.7 (1984).

gets a Pell grant, then Congress might insist that the university hospital not perform abortions.[118] If the state police get some money to buy new cars, Congress could order the state attorney general to focus his prosecution efforts on organized crime and drug offenses. In short, the Theory of Unrelated Conditions threatens to work a major reallocation of decision-making authority from local government and institutions to the national level.

## III. The Proposed Legislation

### A. *S. 272*

The choice presented by these competing bills is a substantial one. S. 272 is designed to "overrule" the Supreme Court's decisions in *Grove City* and *North Haven*, which held that Title IX covered educational institutions in a program-specific fashion.[119] It would accomplish that result by adding to Title IX a new section:

> Sec. 908. (a) Notwithstanding the decisions of the Supreme Court in [*Grove City*], and in [*North Haven*], the phrase "program or activity" as used in this title shall, as applied to educational institutions which are extended Federal financial assistance, mean the educational institution.
>
> (b) In any other application of the provisions of this title, nothing in subsection (a) shall be construed to expand or narrow the meaning of the phrase "program or activity" and that phrase shall be construed without reference to or consideration of the Supreme Court decisions in *Grove City* and *North Haven*.[120]

S. 272 would add identical provisions to Title VI, Section 504, and the ADA, so that their coverage of educational institutions would be coextensive with Title IX's.[121]

These amendments do not necessarily mean that aid to a university hospital would result in coverage of the university's

[118] That is not a practice that the government has any authority to forbid outright, Roe v. Wade, 410 U.S. 113 (1973), but it is one that the government can refuse to fund, Harris v. McRae, 448 U.S. 297 (1980). And if one takes seriously the implications of Theory E (Benefits) or G (Freed-Up Funds), Congress would be doing nothing more than refusing to fund abortions by refusing to contribute money to an institution (the university) that conducted a program (at the hospital) where abortions were performed.

[119] *Grove City*, 465 U.S. at 570–71; *North Haven*, 456 U.S. at 538.

[120] S. 272, sec. 2(a).

[121] S. 272, sec. 2(b)–(d).

performing arts center. The reason is that the definition of "educational institution" currently found in Title IX includes the following qualification: "[I]n the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department."[122] The amendments would mean, however, that aid in the form of Pell grants to undergraduate students would result in coverage of the entire college of arts and sciences, and the athletics department,[123] not just the college's financial aid office.[124]

Though I have misgivings, on the whole I think there is good reason to enact S. 272. First of all, as the public reaction to *Grove City* has indicated, there is significant public support for wider coverage within universities despite the attendant costs. Second, Pell grants and other forms of student aid—if followed beyond the financial aid office—provide assistance to a fairly broad range of activities within the institution. Although the 92d Congress in enacting Title IX was mainly concerned with discrimination in the *awarding* of student aid,[125] it would be proper for this Congress to acknowledge that the money is *returned* as aid to the school in fairly unrestricted form. Once the grant is returned to the school as payment for tuition, the money can be applied toward any of the numerous activities supported in the school's general operating budget. And because it would be so difficult to follow the federal dollars along that trail, Theory F (Tracing) justifies a statutory presumption that they may be spent for any activity supported by tuition and fees. Pell grants then begin to look like impact aid and similar kinds of unrestricted grants. As to those forms of assistance, the rule has always been that antidiscrimination rules apply to the entire educational institution.

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[122] 20 U.S.C. § 1681(c) (1982). ED's Title IX regulations define an "administratively separate unit" to mean "a school, department or college of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution." 34 C.F.R. § 106.2(o) (1984).

[123] *See supra* note 122.

[124] Enacting and codifying S. 272 in its present form would cause this glitch: the term "educational institution" is not defined in Title VI, Section 504, and the ADA, although it is in Title IX. One reading 42 U.S.C. §§ 2000d to 2000d-6, where the Title VI amendment would be codified, would thus be unaware that "educational institution" was intended to mean "administratively separate unit." The problem could be easily solved by saying that "program or activitiy" shall "mean the educational institution, as that term is defined in 20 U.S.C. § 1681(c)."

[125] *See* 118 CONG. REC. 5805 (1972) (statement of Sen. Bayh); *see also id.* at 5808–09.

Moreover, several peculiarities of the current law suggest that S. 272 will not work changes for which people are unprepared. In the context of elementary and secondary education, much of what Section 504 would do if applied institution-wide is now already done better by the Education for All Handicapped Children Act.[126] Moreover, Title VI has long applied in a nearly institution-wide fashion to grade schools and high schools (and school districts) with segregated admissions practices. School segregation was one of the chief evils at which Title VI was aimed, and as I explained above, under Theory D (Infection) the pervasive discrimination that results from segregated admissions justifies institution-wide coverage. The reason is that "[o]ne who is discriminated against in seeking admission is denied access to all educational programs and activities within [the] institution."[127] Given this inevitable effect, it is entirely appropriate to attack the evil even though it occurs upstream from any federally assisted program.

In the context of higher education, one of the chief concerns under Title IX has been sex discrimination in athletics—a subject the Department of Health and Human Services (and the Department of Education) has addressed with regulations now a decade old.[128] While I doubt that those regulations, read literally, are currently authorized by Title IX,[129] the agencies nonetheless enforced them with some vigor for at least five years (1975–1980) and schools as a result have largely conformed their behavior.[130]

My major criticism of S. 272 concerns the curious drafting of subsection (b) of section 908. That provision has two clauses.

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[126] 20 U.S.C. §§ 1400–1461 (1982); *see* Smith v. Robinson, 104 S. Ct. 3457, 3471–74 (1984); Irving Independent School District v. Tatro, 104 S. Ct. 3371, 3379 (1984).

[127] Rice v. President & Fellows of Harvard College, 663 F.2d 336, 339 n.2 (1st Cir. 1981).

[128] 45 C.F.R. § 86.41 (1984) (HHS); 34 C.F.R. § 106.41 (1984) (ED).

[129] The regulations state that:

> No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered *by a recipient*, and *no recipient* shall provide any such athletics separately on such basis.

34 C.F.R. § 106.41(a) (1984); 45 C.F.R. § 86.41(a) (1984) (emphasis added).

If the regulations are really meant to apply to all recipient institutions, they ignore the program-specific language of Title IX. Since the federal government does not generally provide categorical aid for athletics, the regulations can properly only apply, under Theory F (Tracing), to schools that get unrestricted assistance.

[130] *See* Directive on the Application of Title IX to Intercollegiate Athletics, 43 Fed. Reg. 18,772 (1978); *see also* Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (1979).

The first says that "nothing in subsection (a) shall be construed to expand or narrow the meaning of the phrase 'program or activity.'" The second says that "that phrase shall be construed without reference to or consideration of the Supreme Court decisions in *Grove City* and *North Haven*."[131]

I think it is wise to include the first clause, and I will explain why by way of an analogy. In *General Electric Co. v. Gilbert*[132] the Supreme Court held that an employer did not violate Title VII of the Civil Rights Act of 1964 when its disability plan provided all employees with sickness and accident benefits, but excluded disabilities arising from pregnancy. Congress then enacted the Pregnancy Discrimination Act of 1978 [133] for the express purpose of overruling *Gilbert*. It did so by adding to Title VII a new definition of the phrase interpreted in *Gilbert*, just as S. 272 adds a new definition of the phrase interpreted in *Grove City*. But it was not clear from the new language whether Congress intended simply to overturn the specific holding of *Gilbert*, or also to reject the test of discrimination which the Court used in that case. In *Newport News Shipbuilding & Dry Dock v. EEOC*[134] the Court imputed the latter, broader, purpose to Congress, and held that an employer who provided full coverage, including pregnancy, for all its employees still violated Title VII by providing inadequate pregnancy benefits for the wives of male employees.

Likewise, it may be wise to overrule the specific holding of *Grove City* in the context of education, but it would be a mistake to reject entirely the larger principle on which the case rested: that "program or activity" means something less than the entire recipient institution. Lest the courts construe the bill in the latter way, as *Newport News* did, it is prudent to say that the bill has no effect on any other application of the program or activity rule.

The second clause, by contrast, is simply confusing. It could lead to any of three very different results. First, and most likely, the courts may reach, outside the context of education, conclusions consistent with what the Supreme Court did in *Grove City* and *North Haven*. It will just take them more time to get there, since they will have to do over again what the Court did in

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[131] *See supra* text accompanying note 120.
[132] 429 U.S. 125 (1976).
[133] 42 U.S.C. § 2000e(k) (1982).
[134] 462 U.S. 669 (1983).

those cases. If that is what Congress wants, it should not make their job more difficult.

On the other hand the courts might reason that this clause was meant to tell them something about the issue of coverage that the first clause did not. By barring consideration of *Grove City* and *North Haven*, a judge might conclude, Congress was suggesting disapproval of the principles announced in those cases. One such principle was Theory C (Joint Venture): the idea that Title IX is meant to control some things a recipient does with its own money. Grove City College was forbidden to discriminate not only in handing out Pell grants, but also in handing out its own scholarships. If Congress meant to signal disapproval of that principle, then the courts should turn to a narrower rule of coverage, like Theory B (Causation). They might therefore say that the statutory term "program" means "federal program," and thus the government's partners can do what they like with their own money so long as they do not put federal dollars to discriminatory use.

*Grove City* also rejected several principles broader than Theory C. It held that Theory G (Freed-Up Funds) was "inconsistent with the program-specific nature of [Title IX],"[135] and suggested the same thing about Theory E (Benefits).[136] So a third possible result of subsection (b) is that some courts will turn to a broader rule of coverage. None of these three results is desirable. All of them could be avoided simply by ending section 908(b) after the first clause.[137]

## B. *H.R. 700*

Like S. 272, H.R. 700 would amend Title IX by adding a new section 908:

> Sec. 908. For the purposes of this title, the term "program or activity" means all of the operations of—

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[135] 465 U.S. at 572.

[136] The Court said: "Most federal educational assistance has economic ripple effects throughout the aided institution, and it would be difficult, if not impossible, to determine which programs or activities derive such indirect benefits." 465 U.S. at 572.

[137] It would then read:

> (b) In any other application of the provisions of this title, nothing in subsection (a) shall be construed to expand or narrow the meaning of the phrase "program or activity."

I would of course change the parallel provisions for each of the other statutes as well.

> (1)(A) a department or agency of a State or of a local government; or
>
> (B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other entity) to which the assistance is extended, in the case of assistance to a State or local government;
>
> (2)(A) a university or a system of higher education; or
>
> (B) a local educational agency (as defined in section 198(a)(10) of the Elementary and Secondary Education Act of 1965) or other school system;
>
> (3)(A) a corporation, partnership, or other private organization; or
>
> (4) any other entity determined in a manner consistent with the coverage provided with respect to entities described in paragraph (1), (2), or (3); any part of which is extended Federal financial assistance.[138]

Essentially identical amendments would be made to Title VI, Section 504, and the ADA.[139]

It is obvious that these changes are more radical than those proposed by S. 272. Subsection (1) broadens the coverage of state and local government agencies. Subsection (2) does the same for educational institutions, though it goes further than S. 272 would. Subsection (3) tries to define the coverage of corporations and other private (noneducational) organizations. The effort to be specific about what "program or activity" means in various practical contexts is commendable. The proposed definitions warrant rather less praise.

Consider subsection (1), which deals with state and local government agencies. One difficulty with the proposed definition

[138] H.R. 700, sec. 3. Amendments to H.R. 700 proposed May 23, 1985 (on file at HARV. J. ON LEGIS.) and currently being considered in the Judiciary and Education and Labor Committees are slightly more specific. Subsections (1) and (2) of the amendments have a slightly broader scope than the parallel provisions of H.R. 700. Subsection (3) would read thus:

> (3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship—
>
> (i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or
>
> (ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or
>
> (B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization or sole proprietorship[.]

The amendments also exempt "any operation of an entity which is controlled by a religious organization [ . . . ] if the application of section 901 to such operation would not be consistent with the religious tenets of such organization" (subsection (4)).

[139] H.R. 700, secs. 4–6. Sections 4–6 of the May 23, 1985 amendments, *see supra* note 138, omit the religious exemption included for Title IX. Section 4 of the amendments (dealing with Section 504) includes an exemption for "small providers" from the duty to make "significant structural alterations" to accommodate the handicapped.

arises when a city or a state is itself the technical grantee of categorical assistance.[140] In that event the nondiscrimination rules apply to "all of the operations of" the city or state government. Suppose that City *X* has received federal aid to build an airport, and is charged with discrimination against the handicapped in hiring at its sewage treatment plant, or in designing a city park. The federal government is not, even unwittingly, contributing to discrimination in either of the latter programs. One could easily show that its airport money was not spent there (Theories B (Opportunity) and F (Tracing)). And it is hard to imagine what indirect benefit the federal grant might provide to the City's other programs (Theories E (Benefits) and G (Freed-Up Funds)). No one would suppose that the airport grant signified approval of discrimination in the park or sewage treatment plant (Theory C (Joint Venture)). Finally, the federal purposes in sponsoring airport improvements—such as increasing the volume and speed of interstate travel—would not be affected at all by the city's discriminatory action (Theory D (Infection)). Thus the only supportable argument for coverage in these circumstances is Theory H: the Theory of Unrelated Conditions.

As I explained in Part II, however, that theory entails costs that may outweigh any resulting benefits. One such cost is the possibility that City *X* will simply decline various kinds of categorical aid rather than subject itself to coverage in its parks, sewage treatment plant, and elsewhere. The federal government then loses (i) the primary benefits of its airport development (or other categorical aid) program, and (ii) the chance to eliminate discrimination at airports (or other places where its categorical aid goes). Nor would it be irrational for the city to decline federal aid. It might already spend a lot of time and money keeping the Environmental Protection Agency satisfied with its sewage treatment operation. Giving the Federal Aviation Administration jurisdiction over the same operation (and over the city parks, police department, garbage department, hospital, etc.) for pur-

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[140] *See, e.g.*, Walker Field, Colo., Pub. Airport v. Adams, 606 F.2d 290 (10th Cir. 1979) (county and city must join as sponsors of airport improvement project to be funded from the Airport and Airway Development and Revenue Act of 1970, 49 U.S.C. §§ 1701–1742 (1976), *repealed by* Pub. L. 97-248, tit. V, § 523(a), 96 Stat. 695 (1982)). In such a case the city, county, or state would be "the entity of . . . State or local government that distributes [or 'is extended'] such assistance." H.R. 700, sec. 3 (new § 908(1)(B)).

poses of Title VI, Title IX, Section 504, and the ADA could entail considerable additional cost.[141]

The same kinds of problems afflict subsections (2) and (3). Since a "system of higher education" is defined as one "program or activity," receipt of federal aid for a university hospital at UCLA would result in coverage of a performing arts center at Berkeley. A research grant received at an Exxon subsidiary in Texas could subject Exxon's worldwide operations to Title VI, Section 504, and the ADA.[142]

In short, H.R. 700 would greatly change existing law and expectations, and would entail the costs discussed in Part II. In the debates on that bill to date, there appears to be no evidence that existing law is so unsatisfactory as to warrant such drastic change. As best I can discern, many of those supporting the bill have acted under the mistaken impression that it would simply restore the law to some happy state that it enjoyed before *Grove City*. I hope I have at least succeeded in dispelling that impression.

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[141] A second difficulty concerns the "trickle-down" provision in subsection (1)(B): "program or activity" includes "the entity of : . . . State . . . government that distributes . . . assistance and each [entity] to which the assistance is extended . . . ." For example, if highway or education money is given in the first instance to a state highway or education agency, *see, e.g.*, Federal-Aid Highway Act, 23 U.S.C. §§ 101–157 (1982 & Supp. II); Education for All Handicapped Children Act, 20 U.S.C. § 1413 (1982 & Supp. II); and then redistributed to local entities, both levels are covered. But consider what happens to the local entity in Ashland, Kentucky when the local entity in Paducah is charged with discrimination. Section 902 now provides that discrimination may be punished by cutting off funds to "the particular program, or part thereof, in which . . . noncompliance has been . . . found." 20 U.S.C. 1682 (1982). But since "program" has been redefined to include all local subrecipients, it is possible that Ashland could have its funds cut off for what happened in Paducah.

One could avoid this unsavory result by stressing the "part thereof" language of section 902. The difficulty is that section 902 may leave the funding agency discretion to choose between "program" and "part" in cutting off funds. Another problem is that by expanding the meaning of "program" one also may expand the meaning of "part."

H.R. 700 would solve this problem by amending section 902 to limit funds cutoff to "the particular assistance which supports such noncompliance." H.R. 700, sec. 3(b). The May 23, 1985 amendments unfortunately delete this provision.

[142] The May 23, 1985 amendments would deal with this by breaking some kinds of corporations up into geographically separate units. *See supra* note 138.

# NOTE

# CONGRESSIONAL NUCLEAR FREEZE PROPOSALS: CONSTITUTIONALITY AND ENFORCEMENT

MICHAEL D. KARPELES*

*In recent years advocates of a nuclear freeze have had a significant impact on the national political scene. As a result of their efforts a number of freeze proposals have been debated in Congress. While none of these have become law, their introduction represents an attempt to assert legislative authority over nuclear arms policy. Such assertions are contrary to presidential claims to exclusivity in this area. The resulting tension is likely to continue as Congress presses for a greater voice in the formulation of arms control policy.*

*In this Note, Mr. Karpeles analyzes the constitutionality and enforceability of nuclear freeze statutes. He begins by examining various constitutional doctrines relevant to the executive-legislative dispute in the context of freeze statutes. He then analyzes three specific nuclear freeze proposals and litigation scenarios that might ensue if they became law. From this he draws conclusions as to both the viability of freeze proposals in general and the desirability of congressional attempts to make arms control policy.*

Before the atomic age, American military and foreign policy judgments were based upon the availability of conventional weapons of limited destructive potential and geographic range. Those judgments assumed (1) the survivability of conventional war and (2) "a military economy of scarcity, where possible targets always outnumber available weapons."[1] The advent of nuclear weapons, however, has radically changed the validity of these assumptions. Today, global destruction within a few short days is conceivable. Furthermore, the need for nuclear weaponry may already have been satisfied, particularly since there are now more warheads than possible targets.[2] Hence, an unlimited nuclear arms race is irrational because it endangers peace while adding nothing to military security once a certain destructive capability has been achieved.

The sense that the United States possesses nuclear weapons in excess of its "maximum military potential,"[3] as well as the

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[1] H. MORGENTHAU, POLITICS AMONG NATIONS 414 (5th ed. rev. 1978).

[2] *Id.*

[3] *Id.*

fear that human error or malevolence will trigger a nuclear decimation of mankind, has prompted calls for disarmament in the face of a growing nuclear arms race.

The public response to the nuclear arms race has varied in its scope and intensity over the past several years. In the United States and Europe, many have protested the testing, production, and/or deployment of nuclear weapons.[4] Many organizations have been formed for the purpose of influencing politicians either to freeze or reduce nuclear arms levels both in the United States and abroad.[5] Although some advocate unilateral action by the United States, most only approve of bilateral reductions.[6] Some want to preclude any new production of nuclear weapons; others would accept limited modernization. Despite these differences, it would not be unfair to suggest that all of these views are representative of one nuclear freeze movement, a movement which has gained the attention of both federal and state politicians.[7]

The Reagan Administration, while cognizant of the nuclear freeze movement and its political ramifications,[8] has pursued a policy of arms build-up to induce the Soviets to come to the bargaining table and reduce their own nuclear arsenals.[9] President Reagan believes that the United States has a "window of vulnerability" to Soviet attack because present United States nuclear capabilities are inferior in several important respects to

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[4] Lowenthal, *Nuclear Freeze: Arms Control Proposals*, Congressional Research Service, Issue Brief IB82059, May 16, 1984, at 6; Clancy, *Nuke Freeze Spreads Its Grass Roots*, USA Today, Nov. 15, 1983, at 1, col. 3; Richardson, *On the March—U.S. Version of Peace Crusade*, U.S. NEWS & WORLD REP., March 22, 1982, at 24, 25–26.

[5] Clancy, *supra* note 4; Kelly, *Thinking About the Unthinkable*, TIME, March 29, 1982, at 10.

[6] *See* Mann & Bosc, *Impact of Bishops' Call for Nuclear Freeze*, U.S. NEWS & WORLD REP., May 16, 1983, at 33; *A Freeze on Nuclear Weapons?*, U.S. NEWS & WORLD REP., April 5, 1982, at 56; Kelly, *supra* note 5, at 12–14.

[7] *'82: The Freeze*, THE NATION, Nov. 13, 1982, at 484; Isaacson, *A Blast From the Bishops*, TIME, Nov. 8, 1982, at 16, 17; Kelly, *supra* note 5, at 10; Richardson, *supra* note 4, at 24; Knickerbocker, *Nuclear Freeze Advocates Build Clout to Sway November Vote*, The Christian Science Monitor, April 27, 1984, at 5, col. 1; Clancy, *supra* note 4.

[8] *A Freeze on Nuclear Weapons?*, *supra* note 6, at 55; Kelly, *supra* note 5, at 12; Gwertzman, *President Rejects A Nuclear Freeze But Calls For Cuts*, N.Y. Times, April 1, 1982, at A1, col. 6.

[9] Morganthau, *A Battle Over Defense*, NEWSWEEK, Feb. 11, 1985, at 9; *A Freeze on Nuclear Weapons?*, *supra* note 6, at 55. Even at the height of nuclear freeze activism in Congress, the closest that the administration ever got to a freeze was its advocacy of the concept of a "build-down," whereby the U.S. and Soviets would dismantle two missiles for every one put into service. Gelb, *Arms and the Man*, N.Y. Times, Oct. 9, 1983, § 6, at 1, col. 1; Weisman, *Reagan Promotes New Arms Offer*, N.Y. Times, Oct. 5, 1983, at A10, col. 1; *see* Shribman, *Republicans Bar Panel's Bid to Vote on A Nuclear Freeze*, N.Y. Times, Aug. 3, 1983, at A8, col. 4.

Soviet nuclear capabilities.[10] Thus, Reagan reasons, the United States and Soviet Union must reduce to equal levels *and then* freeze.[11] Reagan's view differs from the position of most freeze proponents who want to freeze *first* and then reduce.[12]

The freeze movement does not seem to have significantly affected the Reagan Administration's negotiating priorities. Nonetheless, the Administration's use of less hostile rhetoric towards the Soviets, immediately before and after the Reagan-Gorbachev summit, may represent an effort to defuse the freeze movement and its congressional supporters.[13]

Unlike the Reagan Administration, Congress has not uniformly rejected the freeze-first approach. Over the past few years, several freeze-first proposals have floated through each session of Congress.[14] None have yet passed both Houses.

Congressional proposals usually have called for a bilateral rather than a unilateral freeze. These proposals have attempted to prohibit testing, production, and/or deployment, either by regulating these activities[15] or by simply cutting off funding for them.[16] Although some cover all nuclear weapons,[17] others cover only specific systems.[18]

The differences among the various freeze first proposals have not shattered the solidarity of the nuclear freeze movement. They have precluded a congressional consensus, however, because of the enormous military and foreign policy ramifications

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[10] Lowenthal, *supra* note 4, at 6–7.

[11] *Id.*

[12] *Id.* at 3; *A Freeze on Nuclear Weapons?*, *supra* note 6, at 55–56.

[13] *See, e.g., Acceptance of a Stable Balance: An Interview with Paul Warnke*, 7 FLETCHER FORUM 239 (1983) (past nuclear arms talks intended to placate freeze movement). Rather than a freeze, the dominant arms control issue today seems to be the Strategic Defense Initiative (SDI), popularly known as Star Wars. President Reagan, who has said he could foresee a day when a President would share SDI technology with the Soviets as a means of eliminating all offensive nuclear weapons, Gwertzman, *Reagan Sees Hope of Soviet Sharing in Missile Defense*, N.Y. Times, March 30, 1983, at A1, col. 6, has declared his intention to keep SDI even if all nuclear arms were eliminated. Weinrub, *Reagan Adamant on Space Defense Even After Talks*, N.Y. Times, Feb. 12, 1985, at A1, col. 6. Reagan has maintained this position despite the contention of some that SDI works to prevent achieving arms control agreements. Bundy, Kennan, McNamara & Smith, *The President's Choice: Star Wars or Arms Control*, 2 FOREIGN AFF. 264 (Winter, 1984–85).

[14] *See* Lowenthal, *supra* note 4, at Appendix; Kelly, *supra* note 5, at 14.

[15] Lowenthal, *supra* note 4, at Appendix.

[16] *See id.*; *see also infra* text accompanying notes 296–393.

[17] *See* Lowenthal, *supra* note 4, at 3–14; *see also infra* text accompanying notes 295–387.

[18] *See* Lowenthal, *supra* note 4, at 11, 12; *see also infra* text accompanying notes 296–393.

of even the smallest of the differences.[19] Coupled with this lack of consensus is the Senate's current support of the President in his opposition to a freeze.[20] These two factors therefore make the concurrence of both Houses on freeze legislation unlikely, even if the legislation is constitutionally sound.

The purpose of this Note is to analyze the constitutionality and enforceability of three congressional nuclear freeze proposals introduced over the past three years. I have selected proposals that are sufficiently varied in their approach so that new ground will be broken as each is considered. Although no freeze proposal (bill) has even reached the President's desk,[21] it is possible that failed arms negotiations, coupled with renewed grassroots freeze activism, could lead to a new consensus in Congress. This may be especially true if the political composition of the Senate changes in 1986.

Any assessment of the constitutionality and enforceability of nuclear freeze proposals will itself have an effect on whether a freeze bill passes. Before embarking upon an assessment of specific freeze proposals, however, it is necessary first to survey the basic constitutional doctrines that will underlie such an assessment.

## I. Relevant Doctrinal Background

### A. *Standing*[22]

The federal courts are generally wary of policing the allocation and exercise of governmental powers when individual rights are

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[19] *See* Lowenthal, *supra* note 4.

[20] *See, e.g.*, Shribman, *Republicans Bar Panel's Bid to Vote on A Nuclear Freeze*, N.Y. Times, Aug 3, 1983, at A8, col. 4.

[21] *See, e.g.*, Lowenthal, *supra* note 4, at 5.

[22] Analytically, standing and political question doctrines are both facets of the broader concept of justiciability. "[E]ither the absence of standing or the presence of a political question suffices to prevent the power of the federal judiciary from being invoked by the complaining party." Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 215 (1974). In *Reservists Committee*, the Supreme Court held that there is no fixed rule as to the proper sequence of analysis when both standing and political question issues are raised, *id.* at 215 n.5, although the Court noted that "[t]he more sensitive and complex task of determining whether a particular issue presents a political question causes courts . . . to turn initially, although not invariably, to the question of standing to sue." *Id.* at 215. Here I have heeded the Court's advice and begun with standing. *See* Harrington v. Bush, 553 F.2d 190, 194 n.6 (D.C. Cir. 1977). For the opposite approach, *see* DaCosta v. Laird, 471 F.2d 1146, 1152 (2d Cir. 1973).

not implicated.[23] Consequently, the standing doctrine is very important when assessing the constitutionality of any nuclear freeze proposal.[24] A brief synopsis of this doctrine is therefore necessary.

### 1. Individual/Class Standing

Recent Supreme Court cases have clarified and consolidated much of the standing doctrine that has appeared in myriad forms in federal court cases over the past twenty years. These Supreme Court decisions limit federal judicial power "to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought to be capable of resolution through the judicial process."[25] Consequently, in order to have standing a party must have personally suffered an actual or threatened injury from the defendant's putatively illegal conduct in a way that a court is likely to be able to redress.[26]

Moreover, as a prudential matter, courts will not adjudicate "abstract questions of wide public significance" which are best considered by the representative branches,[27] or disputes falling outside of "the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."[28]

### 2. Citizen Standing

The Supreme Court has refused to extend standing to a citizen with "only the generalized interest of all citizens in constitutional governance . . . ."[29] According to this view, a citizen *qua* citizen does not have standing simply because the Legislative Branch is intruding into the executive sphere or vice versa:

> All citizens, of course, share equally an interest in the independence of each branch of Government. In some fashion, every provision of the Constitution was meant to serve the

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[23] Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 474 (1982). *See also* Allen v. Wright, 104 S.Ct. 3315, 3325 (1984).

[24] *See infra* text accompanying notes 233–42, 306–21.

[25] Flast v. Cohen, 392 U.S. 83, 97 (1968).

[26] *Valley Forge*, 454 U.S. at 471–72, 474–75. *See also Allen*, 104 S.Ct. at 3324–25.

[27] Warth v. Seldin, 422 U.S. 490, 499 (1975).

[28] Association of Data Processing Service Orgs. v. Camp, 397 U.S. 150, 153 (1970).

[29] *Reservists Committee*, 418 U.S. at 217.

> interests of all. Such a generalized interest, however, is too abstract to constitute a "case or controversy" appropriate for judicial resolution. The proposition that all constitutional provisions are enforceable by any citizen simply because citizens are the ultimate beneficiaries of those provisions has no boundaries.[30]

Thus it appears that, absent a particular, specialized interest, citizens may not have standing to challenge interbranch encroachments.

### 3. Taxpayer Standing

In *Flast v. Cohen*,[31] the Supreme Court enunciated the two-prong test for determining whether "status as a taxpayer can . . . supply the personal stake essential to standing."[32] First, "a taxpayer will be a proper party to allege the unconstitutionality only of exercises of congressional power under the Taxing and Spending Clause of Art. 1, § 8, of the Constitution."[33] Second, the taxpayer must "show that the challenged enactment exceeds specific constitutional limitations upon the exercise of the taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. 1, § 8."[34] On the basis of this test, it appears that taxpayers *qua*

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[30] *Id.* at 226–27.

[31] 392 U.S. 83 (1968).

[32] *Reservists Committee*, 418 U.S. at 227.

[33] *Flast*, 392 U.S. at 102.

[34] *Id.* at 102–03. In both *Valley Forge*, 454 U.S. 464, and *Schlesinger*, 418 U.S. 208, the Supreme Court denied taxpayer standing under the *Flast* test because the plaintiffs challenged executive, not congressional action. In *Valley Forge*, plaintiffs challenged the transfer of surplus government property to a religious school by the Secretary of Health, Education, and Welfare (now the Secretary of Education) pursuant to an authorization arguably found in the Federal Property and Administrative Services Act. 454 U.S. at 466–67, 479 n.15. The Court denied taxpayer standing to the plaintiffs because "the source of their complaint is not a congressional action, but a decision by HEW to transfer a parcel of property. *Flast* limited taxpayer standing to challenges directed 'only [at] exercises of congressional power.'" *Id.* at 479.

*Valley Forge* is perhaps distinguishable from an appropriations rider flouted by the President in that the case involved executive action "arguably authorized" by a congressional act, *id.* at n.15; nevertheless *Schlesinger* would appear to deny taxpayer standing to challenge executive action *prohibited* by Congress. In *Schlesinger*, plaintiffs challenged the reserve membership of various Congressmen as violating the Incompatability Clause. 418 U.S. at 210–11. To justify taxpayer standing, plaintiffs sought to compel the Secretary of Defense to reclaim reserve pay paid to reservist Members of Congress. *Id.* at 228 n.17. The Supreme Court denied taxpayer standing because plaintiffs "did not challenge an enactment under Art. I, § 8, but rather the action of the Executive Branch in permitting Members of Congress to maintain their Reserve Status." *Id.* at 228. The Court explained that taxpayer standing was unavailable even though the challenged executive action may have been contrary to congressional will: "[the relief

taxpayers cannot raise a constitutional challenge to an executive expenditure of funds, even if a congressional statute makes such an expenditure unlawful.

### 4. Congressional Standing

Although an exhaustive survey of congressional standing is beyond the scope of this Note,[35] an understanding of case law involving congressional plaintiffs is important, particularly since private plaintiff standing is unlikely in the event that a President disregards a congressionally-enacted freeze statute.[36]

The issue of congressional standing arises when Congress or some of its members brings suit against another party. If, for example, a President were to spend money on a congressionally prohibited program, Congress, or some of its Members, might bring a lawsuit to declare the President's action illegal and to enjoin further spending. The greatest amount of litigation concerning congressional standing has involved Members of Congress suing in their individual capacities as Congressmen, rather than on behalf of particular congressional committees, the House, or the Senate.[37] When Congressmen sue in their individual capacities, injury in fact has been found where a Congressman's past vote has been completely nullified, i.e., given no legal effect, by the complained-of executive action.[38] Although the courts have also found injury in fact when executive action has completely preempted a Congressman's future vote,[39] some

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sought] would follow from the invalidity of executive action in paying persons who could not lawfully have been reservists, not from the invalidity of the statutes authorizing pay to those who lawfully were Reservists." *Id.* at n.17. Under *Schlesinger*, a presidential expenditure made despite a congressional prohibition would appear to violate Art. I, § 9, cl.7, which states that "[n]o money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ." Nonetheless, the courts would not find taxpayer standing to challenge this expenditure.

[35] *See generally* McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241 (1981); Note, *The Justiciability of Congressional-Plaintiff Suits*, 82 COLUM. L. REV. 526 (1982); Note, *Congressional Access to the Federal Courts*, 90 HARV. L. REV. 1632 (1977); Comment, *Standing Versus Justiciability: Recent Developments in Participatory Suits Brought By Congressional Plaintiffs*, 1982 B.Y.U. L. REV. 371 (1982).

[36] *See supra* text accompanying notes 22–34.

[37] *See infra* text accompanying notes 38–49.

[38] Synar v. United States, No. 85-3945, slip op. at 11–13 (D.D.C. Feb. 7, 1986); Kennedy v. Sampson, 511 F.2d 430 (1974). *Cf.* Coleman v. Miller, 307 U.S. 433 (1939) (state legislators had federal standing to challenge allegedly illegal state executive action nullifying legislators' vote on a bill).

[39] *See* Goldwater v. Carter, 617 F.2d 697 (D.C. Cir. 1979), *vacated on other grounds*, 444 U.S. 996 (1979).

judges would find standing based on prospective vote nullification only when the prospective vote bears "a unique nexus to [a] nullified past vote."[40] Finally, injury in fact has been found where a Congressman's voting power has been diluted, although not nullified.[41]

The courts have not found injury in fact where a determination of executive illegality would merely "bear upon," or be relevant to, a Congressman's future decisions about impeachment, appropriations, and general lawmaking.[42] In this context, injury in fact has been found lacking where the only wrong done by the Executive Branch was action contrary to a statute voted on by the plaintiff:

> . . . a claim of nullification of past vote alone—based, for instance, on the Executive's failure to obey a validly enacted statute—gives a legislator no better grounds for standing than any other citizen. Courts have properly denied standing to legislators in such situations. "Once a bill has become law . . . their [the legislators'] interest is indistinguishable from that of any other citizen."[43]

For example, in *Harrington v. Bush*, a congressional plaintiff alleged that the CIA was acting contrary to appropriations statutes, voted for by plaintiff, which delimited CIA functions.[44] In finding against the plaintiff, Judge Wilkey noted that the CIA's activity had neither nullified nor diminished the Congressman's vote even though it occurred after the enactment of the statutes. Because the CIA's alleged abuse of delegated authority did not affect the legal status of the statutes, and because Congress was not prevented from responding through such traditional means as the "power of the purse," the Court held that the plaintiff was not objectively hurt in his capacity as a lawmaker.[45]

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[40] *Goldwater*, 617 F.2d at 712 n.5. (Wright, C.J. concurring).

[41] *See* Vander Jagt v. O'Neill, 699 F.2d 1166, 1168–69 (D.C. Cir. 1983), *cert. denied* 454 U.S. 815 (1983). *Cf.* Baker v. Carr, 369 U.S. 186 (1962) (citizen voters had standing to challenge state apportionment scheme that diluted their voting power vis-a-vis other state voters).

[42] *See Harrington*, 553 F.2d at 207–10 (D.C. Cir. 1977); *see also* Holzman v. Schlesinger, 484 F.2d 1307, 1315 (2d Cir. 1973) (impeachment).

[43] *Goldwater*, 617 F.2d at 702 n.12 (quoting Harrington v. Schlesinger, 528 F.2d 455, 459 (4th Cir. 1975)).

[44] 553 F.2d at 196 and n.19.

[45] *Id.* at 213. Additionally, the D.C. Circuit has developed a doctrine of "remedial discretion" which mandates the dismissal of congressional plaintiff actions, even if the plaintiff Congressman has standing, when the plaintiff could get legislative redress from his or her colleagues and a similar action could be brought by a private plaintiff. Riegle v. Federal Open Market Committee, 656 F.2d 873, 882 (D.C. Cir. 1981). The reasoning underlying the remedial discretion doctrine has been strongly criticized as unsound and

In addition to suits brought by individual members of Congress, Congress itself can challenge executive action in other ways: (1) the House or Senate or both can authorize one or more of its Members to sue on its behalf,[46] or (2) the House or Senate or both can sue as a body.[47] Although it is clear in both of these situations that Congress becomes a party to the lawsuit, the courts will apply the same standing rules developed for individual congressional plaintiffs.[48] Consequently, even Congress or the Senate or the House may be without standing to challenge executive action contrary to a federal statute since, as noted in *Harrington v. Bush*, "[t]he abuse of delegated authority does not invade the lawmaking power of *Congress* . . . ."[49]

### 5. Creation of "Standing" by Statute

While "Congress may not confer jurisdiction on Art. III federal courts to render advisory opinions,"[50] it "may enact statutes

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contrary to Supreme Court precedent. *Vander Jagt*, 699 F.2d at 1177–85 (Bork, J., concurring). At any rate, the remedial discretion doctrine is another possible hurdle for congressional plaintiffs challenging executive action, and specific application of the doctrine to particular freeze proposals is discussed below.

The remedial discretion doctrine is in many respects similar to a ripeness requirement. For example, in *Goldwater*, Justice Powell would have dismissed the suit as not ripe for review because "[t]he Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse." 444 U.S. at 997. In *Goldwater*, Powell noted that only a few Senators brought suit to challenge the President's termination of a treaty without Senate consent. Congress had "taken no official action," and therefore the Court could not say "whether there will ever be an actual confrontation between the Legislative and Executive Branches." *Id.* at 998–99. According to Justice Powell, therefore, before individual Congressmen can sue to enjoin executive action allegedly contrary to statute, the Congress as a whole must pass a resolution declaring the action unlawful. The congressional declaration presumably would have to go beyond a mere sense resolution. *See* Henkin, *Litigating The President's Power to Terminate Treaties*, 73 AM. J. INT'L L. 647, 650–51 (1979). And even then, although the suit may be ripe, standing would not lie under the current disenfranchisement doctrine. *Id.* at 649.

[46] *See, e.g.*, United States v. American Telephone and Telegraph Co., 551 F.2d 384, 391 (D.C. Cir. 1976).

[47] *Cf.* INS v. Chadha, 462 U.S. 919, 930 n.5 (1983) (House and Senate intervention as defendants).

[48] The executive nullification or dilution of votes as found in *Kennedy*, 511 F.2d 430, *Goldwater*, 617 F.2d 697, and *Vander Jagt*, 699 F.2d 1166, was actually injury in fact to the Congress, the Senate, and Republican Representatives respectively. Congressmen suing in their individual capacities in those cases were essentially arguing derivative injury in fact: because the bodies of which they were members were injured, they as members of those bodies were derivatively injured. *See* Harrington v. Bush, 553 F.2d at 199 n.41.

[49] Harrington v. Bush, 553 F.2d at 213 (emphasis added).

[50] Sierra Club v. Morton, 405 U.S. 727, 732 n.3 (1972).

creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute."[51] Essentially, then, Congress has the power to create by statute new types of legally cognizable interests, but "such statutes do not purport to bestow the right to sue in the absence of any indication that invasion of the statutory rights has occurred or is likely to occur."[52] Although Congress may broaden the "categories of judicially cognizable injury . . . , the broadening of *categories* 'is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.'"[53]

As a way of circumventing existing standing doctrines, Congress could create by statute a legal interest, psychological or otherwise, in executive compliance with nuclear freeze legislation. This standing statute could be drawn narrowly enough to allow suit only by executive branch personnel who are required by the President to carry out any activities prohibited by the freeze legislation.[54] Or the "standing" statute might allow suit by individuals or groups with a "stake" in separation of powers concerns, or simply congressional plaintiffs.[55] Although case law may appear to rule out psychological injury as sufficient for standing,[56] closer analaysis reveals that psychological injury may perhaps be redressable if it amounts to an independent legal interest.[57] If Congress, for example, were to enact a statute

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[51] Linda R.S. v. Richard D., 410 U.S. 614, 617 n.3 (1973).

[52] O'Shea v. Littleton, 414 U.S. 488, 493–94 n.2 (1974).

[53] *Reservists Committee*, 418 U.S. at 218 (quoting *Sierra Club*, 405 U.S. at 738). *See Reservists Committee*, 418 U.S. at 224 n.14; *Valley Forge*, 454 U.S. at 487–88 n.24.

[54] In an analagous context, soldiers in Vietnam were in several cases held to have standing to challenge the legality of presidential continuation of the Vietnam War. In those cases, however, plaintiffs' legal interest arose from their right to liberty under the Fifth Amendment. *See* Massachusetts v. Laird, 451 F.2d 28, 29 (1st Cir. 1971); DaCosta v. Laird, 471 F.2d 1146, 1151–52 (2d Cir. 1973). Here, on the other hand, there is no source of law creating for executive branch personnel a legal interest in employment free from the psychological distress of carrying out an allegedly invalid presidential order. Executive personnel that carry out such orders do not thereby suffer deprivation of their nongeneralized interests in life, liberty, or property. A legal interest in enjoining such orders must therefore be created. *See infra* notes 58 and 239 and text accompanying notes 235–242.

[55] *See, e.g.*, Synar v. United States, No. 85-3945, slip op. at 4–5, 13 (D.D.C. Feb. 7, 1986).

[56] *See Valley Forge*, 454 U.S. at 485 (rejecting arguments involving psychological peace about the appropriate relationship between church and state in the context of the gift of government property to a religious group).

[57] *Id.* at 486–87 n.22. *Valley Forge* did not rule that psychological injury may never be redressed, but rather that the plaintiffs in that case had no legal right to peace of mind. *Id.*

creating a right to peace of mind, such a statute, while perhaps unwise, might nonetheless be valid.[58]

### B. *Political Question Doctrine*

Litigation in federal court over the constitutionality of any nuclear freeze proposal will undoubtedly involve the political question doctrine. Even if a federal court grants standing to the plaintiffs, the court will dismiss the action if the case turns on a political question. Unlike an adverse ruling on standing which bars only the specific plaintiffs before the court, a political question ruling attaches to the *issue* and precludes further litigation of it by anyone.[59]

The political question doctrine is "primarily a function of the separation of powers."[60] As the Supreme Court noted in *Baker v. Carr*, the doctrine involves the refusal of the federal judiciary to involve itself in political policy decisions and issues which are the exclusive constitutional territory of other government branches.[61] Although the Supreme Court and other federal courts have faithfully cited *Baker* in subsequent cases involving political question issues,[62] even *Baker* itself noted "the necessity

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[58] A congressional statute would obviate any prudential concerns that otherwise would prevent standing to plaintiffs litigating "abstract questions of wide public significance." Warth v. Seldin, 422 U.S. 490, 499–501 (1975). *See Synar*, slip. op. at 13 (statutory cause of action eliminates all but Article III standing requirements). On the other hand, Congress may have to be quite explicit in creating a new legal interest because the Supreme Court has been reluctant to imply statutory causes of action. *See* Cannon v. University of Chicago, 441 U.S. 677 (1979).

[59] *See* DaCosta v. Laird, 471 F.2d 1146, 1152 & n.10 (2d Cir. 1973).

[60] Baker v. Carr, 369 U.S. 186, 210 (1962). Political questions involve "the relationship between the judiciary and the coordinate branches of the Federal Government, and not the federal judiciary's relationship to the States . . . ." *Id.*

[61] *Id.* at 217. In the *Baker* Court's view, in order for a political question to exist one of the following factors must be present:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made or the potentiality of embarassment from multifarious pronouncements by various departments on one question.

*Id.* For an argument that the *Baker* factors incorporate strands of the classical, prudential, and functional theories of the role of the Court with regard to the other branches of the government, see L. TRIBE, AMERICAN CONSTITUTIONAL LAW 71 n.1 (1978).

[62] *See, e.g.*, INS v. Chadha, 462 U.S. 919, 941 (1983); Powell v. McCormack, 395 U.S. 486, 518–19 (1969); *DaCosta*, 471 F.2d at 1153; Atlee v. Laird, 347 F. Supp. 689, 699 (E.D. Pa. 1972) (three-judge court), *aff'd summarily*, 411 U.S. 911 (1973).

for discriminating inquiry into the precise facts and posture of the particular case, and the impossibility of resolution by any semantic cataloguing."[63]

In the foreign relations area, the federal courts have hesitated to intrude on the prerogatives of the political branches.[64] This hesitancy is particularly apparent when Congress and the President have acted together, because the courts view the conduct of foreign affairs as constitutionally committed to those branches.[65] On the other hand, one might think that a dispute between the Executive and Congress over which has constitutional authority to exercise a particular foreign affairs power would not be a political question because a federal court would then be asked simply to interpret the constitutional allocation of powers. Despite some earlier support for just such a position,[66] the Supreme Court in *Goldwater v. Carter*,[67] a four justice plurality decision, found a political question in precisely these circumstances.

The *Goldwater* case concerned President Carter's termination of a treaty with Taiwan without Senate consent. Several Senators sued the President for unconstitutionally usurping the Senate's alleged power to approve of the termination.[68] Despite Justice Powell's contention that judicial resolution of the case was not "incompatible with this Court's willingness on previous occasions to decide whether one branch of our Government has impinged upon the power of another,"[69] the plurality believed that:

> the basic question presented by the [Senators] in this case is "political" and therefore nonjusticiable because it involves the authority of the President in the conduct of our country's foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President.[70]

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[63] *Baker*, 369 U.S. at 217.

[64] *See* First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 765–68 (1972); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 412, 427–28, 431–33 (1964); *see also* L. TRIBE, *supra* note 61, at 76–78 n.35. For a summary of federal court cases applying the political question doctrine to issues arising out of the Vietnam War, see Massachusetts v. Laird, 451 F.2d 26, 29 n.2 (1st Cir. 1971).

[65] *See, e.g.*, C. & S. Air Lines v. Waterman Corp., 333 U.S. 103, 111 (1948); Oetjen v. Central Leather Co., 246 U.S. 297, 302 (1918).

[66] *See* Powell v. McCormack, 395 U.S. 486, 548 (1969) ("Such a determination falls within the traditional role accorded courts to interpret the law. . . .").

[67] 444 U.S. 996 (1979).

[68] *See* Goldwater v. Carter, 617 F.2d at 701.

[69] *Goldwater*, 444 U.S. at 1001.

[70] *Id.* at 1003.

The plurality noted three specific reasons for its decision. First, the Court believed that because (a) the Constitution is silent as to the appropriate method of treaty termination and (b) "different termination procedures may be appropriate for different treaties,"[71] the case must be "controlled by political standards."[72] Second, the Court held that the President's action was "'entirely external to the United States, and [falls] within the category of foreign affairs.'"[73] Finally, the Court refused "to settle a dispute between coequal branches of our Government, each of which has resources available to protect and assert its interests, resources not available to private litigants outside the judicial forum."[74] Whether any of these factors alone would suffice to find a political question in other cases of executive-congressional conflict is unknown. *Goldwater* is discussed below in considering the interbranch conflicts which arise in the nuclear freeze context.[75]

Although *Goldwater* may improve our capacity to predict the results of nuclear freeze litigation, the case perhaps oversimplifies the fundamental conflicts in values that a court must assess and weigh before finding a nonjusticiable political question. Why is constitutional silence grounds for judicial silence in the context of treaty termination but not in the context of abortion? Why should Congress be limited to controlling (by legislation) only the *second* attempt by the Executive to exercise unconstitutional power? Why the knee-jerk reaction to the phrase foreign affairs?[76]

In analyzing any case involving foreign affairs, including nuclear freeze proposals, it is important to remember not only the formulae but the purposes that underlie the political question doctrine. As *Baker* so aptly cautioned:

> There are sweeping statements to the effect that all questions touching foreign relations are political questions. Not only

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[71] *Id.*

[72] *Id.* (quoting Dyer v. Blair, 390 F. Supp. 1291, 1302 (N.D. Ill. 1975)).

[73] *Goldwater*, 444 U.S. at 1005 (quoting United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936)). The Court distinguished the treaty termination from President Truman's unconstitutional seizure of steel mills in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), which it called "an action of profound and demonstrable domestic impact." 444 U.S. at 1004.

[74] *Id.* at 1004.

[75] *See infra* text accompanying notes 243–50.

[76] One answer to this question is that the courts treat political questions differently. *See Baker*, 369 U.S. at 217. *See also* Note, *Whether the President May Terminate A Mutual Defense Treaty is a Non-Justiciable Political Question*, 29 DRAKE L. REV. 659, 670 (1980).

> does resolution of such issues frequently turn on standards that defy judicial application or involve the exercise of a discretion demonstrably committed to the executive or legislature; but many such questions uniquely demand single-voiced statement of the Government's views. Yet it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance.[77]

Nonetheless, in cases not involving private plaintiffs, the federal courts will probably be unwilling to hear arguments concerning the allocation of foreign affairs powers:[78] Even in cases involving private plaintiffs, if issues better resolved by the political branches logically arise *prior* to issues of constitutional interpretation or scope of executive authority, courts will likely dismiss.[79] How the Supreme Court might view its institutional role with respect to specific nuclear freeze proposals is discussed below.[80]

### C. *State Court Litigation*

Even if standing and/or political question doctrines preclude litigation of a statute in federal court, state courts may nevertheless be open to litigation of federal constitutional questions relating to separation of powers. In *Doremus v. Board of Education*,[81] the Supreme Court remarked:

> We do not undertake to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory. But, because our own jurisdiction is cast in terms of "case or controversy," we cannot accept as the basis for review, nor as the basis for conclusive disposition of an issue

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[77] 369 U.S. at 211–12.

[78] *Cf.* Note, *The Supreme Court as Arbitrator in the Conflict Between Presidential and Congressional War-Making Powers*, 50 B.U.L. REV. (Special Issue) 78 (1970) (political question principles do not prohibit the Supreme Court from determining the power of Congress to limit presidential power in foreign military affairs, but the Court's unique power in relation to other branches may militate against such a determination).

[79] *See, e.g.*, Sanchez-Espinoza v. Reagan, 568 F. Supp. 596, 599–600 (D.D.C. 1983) (no judicially manageable standards to question presidential assertion that funds were not being spent to overthrow Nicaragua in violation of the Boland Amendment); Crockett v. Reagan, 558 F. Supp. 893, 898–99 (D.D.C. 1982) (no judicially manageable standards for court to evaluate executive assertion that troops had not been "introduced into hostilities" under War Powers Resolution, and thus issue of whether Executive violated that law does not arise), *aff'd*, 720 F.2d 1355 (1983).

[80] *See infra* text accompanying notes 243–66, 322–335.

[81] 342 U.S. 429 (1952).

> of federal law without review, any procedure which does not constitute such.[82]

Thus it is possible that the constitutionality of a freeze statute could be litigated in state courts on the merits,[83] but the Supreme Court would not review any of the state cases. A state court decision on federal law would not be binding on federal courts or courts from other states. Of course, the spectre of such piecemeal litigation involving an issue which is traditionally federal may persuade a federal court to "find" justiciability.

### D. *Theories about the Allocation of Foreign Affairs Powers*

Although foreign affairs powers are exclusively federal, their allocation within the national government is itself an important issue. This issue applies to the express powers over foreign affairs described in Articles I and II of the Constitution,[84] to the nature and extent of powers implied from these express grants, and to the scope of any powers inherently belonging to the federal government as a matter of its sovereignty.[85]

According to James Madison, all powers not expressly allocated in Article II remained with Congress.[86] In his view, prior to adoption of the Constitution, Congress held all national powers, including any inherent "sovereignty powers."[87] Article II in effect then carved out executive powers from these background powers. Therefore, the scope of executive authority was limited to the express grants in Article II. Power implied from them was strictly construed to permit only those actions necessary for effectuating the express grants. Presumably this meant that

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[82] *Id.* at 434. *See also Goldwater*, 444 U.S. at 1005 n.2.

[83] Note, however, that there is a split of authority as to whether state courts may issue injunctions against federal officials. *See* P. BATOR, P. MISHKIN, D. SHAPIRO, & H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 429–30 (1973). To the extent that a declaratory judgment accomplishes the same results as an injunction, the authority of a state court to issue a declaratory judgment against a federal official is equally in doubt.

[84] *See infra* text accompanying notes 100–81.

[85] The concept of sovereignty powers, both inherent and constitutionally recognized, was discussed by Justice Sutherland in *Curtiss-Wright*, 299 U.S. at 315–18. In Sutherland's view, "the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution." *Id.* at 318.

[86] *See* Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 22–23 & n.127 (1972); *see also* THE FEDERALIST No. 48, at 344 (J. Madison) (Belknap Press ed. 1961) (the power of the Executive is limited and carefully defined).

[87] Berger, *supra* note 86 at 22–23 & n. 127. *See also* THE FEDERALIST No. 48, *supra* note 86, at 344.

the scope of implication under Article II powers was narrower than that under Article I, or that any other power besides that exercised under Article II express grants or necessarily implied therefrom was legislative in character. If inherent sovereignty power existed in the realm of foreign affairs,[88] it of course was lodged in Congress since it was not expressly given to the Executive in Article II.

Two interpretive problems arise with Madison's view in determining the loci of implied and inherent powers. First, the Framers' view of foreign affairs was quite limited, involving not much more than wars, treaties, and foreign trade.[89] That the Framers placed much of the responsibility for these functions in the President (Commander-in-Chief and Treaty powers)[90] may indicate their preference for the locus of foreign affairs powers in general. Thus, as the scope of foreign relations expands with weapons technology advances and increases in global interdependence, thereby demanding actions not traditionally associated with the war and treaty powers, it may be more consistent with the intent of the Framers to lodge such new power with the President rather than with Congress. Second, Madison's theory appears contrary to Article I, section 1, which gives Congress "all legislative powers *herein granted.*"[91]

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[88] In *Curtiss-Wright*, 299 U.S. 304, Justice Sutherland said that the federal government must have inherent sovereignty powers in order for the United States to be a full member of the family of nations and completely sovereign:

> The power to acquire territory by discovery and occupation, the power to expel undesirable aliens, the power to make such international agreements as do not constitute treaties in the constitutional sense, none of which is expressly affirmed by the Constitution, nevertheless exist as inherently inseparable from the conception of nationality. This the court recognized, and in each of the cases cited found the warrant for its conclusions not in the provisions of the Constitution, but in the law of nations.

*Id.* at 318 (citations omitted). Justice Sutherland's argument therefore amounts to a doctrine of supraconstitutional powers in the realm of foreign affairs. The notion of delegated powers applies only to internal affairs. In practical application, the doctrine of "inherent sovereignty power" gives the federal government virtually unlimited power in the foreign affairs area, though this power is of course qualified by the Bill of Rights. *See generally* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 252–66 (1972). Justice Sutherland's theory has been the subject of intense scholarly debate. *See id.* at 15–28; Berger, *supra* note 86; Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946); McDougal & Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy* (pts. 1–2), 54 YALE L.J. 181 (1945). The theory has been vigorously attacked by scholars such as Raoul Berger who contend that *all* powers exercised by the federal government are, and should be, limited by the Constitution. Berger, *supra* note 86, at 27–33.

[89] L. HENKIN, *supra* note 88, at 34, 67–69.

[90] Even foreign trade can be regulated under the President's Treatymaking Power. *Id.* at 149.

[91] U.S. CONST. art. I, § 1 (emphasis added).

The words "herein granted" were central to Alexander Hamilton's theory of the allocation of foreign affairs powers. Hamilton believed that the "Executive Power" in Article II originally encompassed those powers possessed by European monarchs, including all foreign affairs powers. From the Executive Power, the Framers then carved out the congressional powers to declare war and regulate foreign commerce, and the Senate power to approve treaties. Otherwise, the President had a free rein to do anything else necessary to conduct the nation's foreign relations, which would presumably include inherent sovereignty powers.[92]

A third view theoretically accepts the notion of inherent sovereignty powers but allocates them to both the President and the Congress depending on whether the exercise of the power in question is "naturally" executive or legislative.[93] In some cases, an inherent sovereignty power can be exercised by either branch. For example, "[t]he exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation."[94]

In *United States v. Curtiss-Wright Export Corp.*, the Supreme Court allocated the bulk of inherent sovereignty powers to the President.[95] In his opinion, Justice Sutherland noted that the Court was not only examining presidential authority vested by an exertion of legislative power,

> but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.[96]

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[92] *See* THE FEDERALIST No. 70, at 454 (A. Hamilton) (E. Earle ed.) (citing need for a strong Executive). *See also* Berger, *supra* note 86, at 17–19, 24.

[93] See L. HENKIN, *supra* note 88, at 31–35, for an excellent discussion and critique of this approach.

[94] Knauf v. Shaughnessy, 338 U.S. 537, 542 (1950).

[95] 299 U.S. 304 (1936) Although *Curtiss-Wright* may appear to allocate all inherent sovereignty power to the President, the opinion does refer to sovereignty power exercised by Congress, including the enactment of statutes authorizing (1) the acquisition of territory by discovery and occupation, and (2) the expulsion of undesirable aliens. *See id.* at 318. Nevertheless, it is fair to say that *Curtiss-Wright* allocated most of the foreign affairs powers not expressly given to Congress to the President. *Id.*

[96] *See id.* at 319–20.

Several Supreme Court cases have affirmed the view that the President is the "sole organ" of the nation in foreign affairs,[97] although the Court has been reluctant to delineate the scope of that power beyond negotiation with foreign governments.[98]

Finally, it is important to note that the three theories of allocation discussed above are just that: theories. Very little case analysis of the theories exists, and academic commentary, to borrow from Justice Jackson, "yields no net result but only supplies more or less apt quotations from respected sources on each side of any question."[99] Prediction of Supreme Court response to questions concerning the origin and allocation of foreign affairs powers may well be futile. Of course, the selection of an origin theory and an allocation theory will necessarily determine the existence and scope of specific congressional and executive foreign affairs powers. Those specific powers thus deserve closer scrutiny.

### E. *Congressional Powers Relating to Nuclear Freeze Proposals*

The congressional powers discussed below are those that provide potential sources of constitutional power for enacting various nuclear freeze proposals. Other powers relating to foreign affairs but not to nuclear freeze proposals may exist,[100] but they are not discussed here. Further, this section only briefly delineates the broad contours of various congressional powers. A more detailed analysis of some of these powers arises in connection with the specific freeze proposals discussed below.[101]

#### 1. Raise and Support Armies/Provide and Maintain a Navy

Article I, section 8, clause 12, makes an affirmative grant to Congress of power "[t]o raise and support armies . . . ." Article

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[97] *Agee*, 453 U.S. 280, 291 (1981); United States v. Pink, 315 U.S. 203, 229–30 (1942); United States v. Belmont, 301 U.S. 324, 330 (1937).

[98] *See* Dames & Moore v. Reagan, 453 U.S. 654, 661–62 (1981); Haig v. Agee, 453 U.S. at 289 n.17.

[99] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634–35 (1952) (Jackson, J., concurring).

[100] Congress has power "[t]o define and Punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations," U.S. CONST. art. I, § 8, cl.10; "[t]o grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," *id.* at cl.11; and "[t]o establish an uniform Rule of Naturalization . . . ." *id.* at cl.4.

[101] *See infra* text accompanying notes 267–89, 339–78.

I, section 8, clause 13, gives Congress affirmative power "[t]o provide and maintain a Navy." Essentially, Congress is given power to determine the level and composition of United States military forces.[102] Irrespective of the appropriations power, discussed below,[103] Congress may expand or contract levels of manpower and weaponry as it sees fit.[104] In addition, clauses 12 and 13 in tandem with the power of the purse give Congress the power to determine *which* weapons the United States shall include in its defense arsenal.[105] A recent example of Congress exercising its power in these areas is its consideration of whether to fund further production of the MX missile.

Most nuclear freeze proposals involve the testing, production, and/or deployment of various nuclear weapons.[106] Although Congress undoubtedly has power under clauses 12 and 13 unilaterally to regulate production and probably testing (as an incident to production), it is arguable that the authority to control the unilateral deployment of those nuclear weapons already in the United States military arsenal lies with the President alone pursuant to his or her Commander-in-Chief powers (subject to other constitutional restrictions such as Congress's power to declare war).[107] Moreover, under some circumstances congressional control of production and testing might infringe on presidential powers.[108] These issues are further discussed below in the context of specific freeze proposals.[109]

### 2. Declare War

Article I, section 8, clause 11, gives Congress the power "to declare war." On its face clause 11 might not appear as a source

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[102] *See* Rostker v. Goldberg, 453 U.S. 57, 64–66 (1981).

[103] *See infra* text accompanying notes 114–33.

[104] *See Rostker*, 453 U.S. at 65; *cf.* Gilligan v. Morgan, 413 U.S. 1, 6–10 (1973) (congressional power to regulate weaponry of the National Guard).

[105] As Justice Jackson explained in his concurring opinion in *Youngstown*:

> The Constitution expressly places in Congress power "to raise and *support* Armies" and "to *provide* and *maintain* a Navy" . . . . This certainly lays upon Congress primary responsibility for supplying the armed forces. Congress alone controls the raising of revenues and their appropriation and may determine in what manner and by what means they shall be spent for military and naval procurement. I suppose no one would doubt that Congress can take over war supply as a Government enterprise.

343 U.S. at 643 (emphasis in original).

[106] *See* Lowenthal, *supra* note 4, at Appendix.

[107] *See infra* text accompanying notes 110–13, 171–81.

[108] *See infra* text accompanying notes 159–70.

[109] *See infra* text accompanying notes 339–71.

of power to enact nuclear freeze legislation. Under this clause, Congress has power to authorize only "a limited, partial war,"[110] and presumably it can decide whether the United States and another country are still at war or not. If Congress can decide to declare war, however, it may arguably so decide *not* to declare war, namely, to preserve peace. In other words, Congress may have the power to secure and maintain peace[111] and perhaps thereby adopt a nuclear freeze resolution. Coupled with the Necessary and Proper Clause, discussed below,[112] this clause may give Congress the power to control deployment of nuclear weapons, in addition to their production and testing.[113]

### 3. Power of the Purse

Article I, section 8, clause 1, gives Congress "[p]ower to lay and collect Taxes, Duties, Imports and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." This clause has been construed to read out the comma after the word "Excises" so that Congress has only the power to spend, not to regulate, for the common defense and general welfare.[114]

There is no question that Congress wields enormous influence in setting policy, including foreign policy, through its exercise of the power of the purse.[115] On the other hand, there are limits on the degree to which Congress can indirectly control policy through the appropriations power. If Congress has power to regulate an area directly, certainly it can regulate that area indirectly by conditional appropriations.[116] But if Congress does not have power to regulate an area, it cannot coercively purchase compliance with its will by withholding funds.[117] In *United States v. Butler*,[118] the Supreme Court tried to distinguish such

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[110] Berk v. Laird, 317 F. Supp. 715, 721–22 (E.D.N.Y. 1970) (quoting Bas v. Tingy, 4 U.S. (4 Dall.) 37, 43 (1800) (J. Chase)), *aff'd sub nom.* Orlando v. Laird, 443 F.2d 1039 (2d Cir. 1971).

[111] *Cf.* L. HENKIN, *supra* note 88, at 71–72 (Congress has power to prevent war).

[112] *See infra* text accompanying notes 134–39.

[113] In fact, many freeze proposals have a preamble or purpose section articulating Congress's desire to maintain world peace.

[114] United States v. Butler, 297 U.S. 1, 64 (1936). *See* L. TRIBE, *supra* note 61, at 248.

[115] *See generally* L. HENKIN, *supra* note 88, at 76–77, 108–10, 113–16.

[116] *See generally* L. TRIBE, *supra* note 61, at 247–50.

[117] *Butler*, 297 U.S. at 70–74.

[118] 297 U.S. 1 (1936).

"coercion" from an "appropriation of funds conditioned on the undertaking of certain acts" not within the power of Congress to regulate.[119] As Professor Tribe points out, this distinction may be unworkable, and it has not been applied to invalidate congressional power inducing, by conditional appropriations, actions typically thought of as within the domain of the states.[120]

The *Butler* distinction may be alive and well, however, with respect to congressional appropriations conditioning the prerogatives of a coequal branch. First, when Congress has authority under the Constitution to directly regulate state functions concurrently with the states, the Supremacy Clause[121] prohibits any constitutional claim by the states against such regulation. However, no similar preemption principle exists with respect to congressional and executive powers.[122] When executive powers are at stake, constitutional analysis only *begins* with an analysis of concurrent congressional powers; when Congress exercises its concurrent power to directly regulate state functions, constitutional inquiry ends.

Second, courts have not invalidated conditional appropriations to states, even where Congress has no power to regulate state action directly, because it is virtually impossible for a state to be "coerced" within the meaning of *Butler*.[123] *Butler* involved conditions requiring the state to bind itself by contract to congressional will, whereas the overwhelming majority of conditional appropriations to states leave the states with the freedom to back out of the "federal deal" at any time.[124] Moreover, if a state chooses not to follow a congressional directive, it may still be able to effectuate its own policies.[125] In this situation,

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[119] L. TRIBE, *supra* note 61, at 249.

[120] *Id. See, e.g.*, Steward Machine Co. v. Davis, 301 U.S. 548 (1937) (Title IX of Social Security Act of August 14, 1935 held not to be an unconstitutional attempt to coerce states to adopt unemployment compensation legislation approved by the federal government).

[121] U.S. CONST. Article VI.

[122] Congressional power and executive power can, at least theoretically, overlap. *See* L. HENKIN, *supra* note 88, at 104–08. *See also Youngstown*, 343 U.S. at 637 (Jackson, J. concurring).

[123] The Court, in Steward Machine Co. v. Davis, 301 U.S. 548 (1937), noted that the concept of "coercion" may not be applicable to federal-state relations: "Nothing in the case suggests the exertion of a power akin to undue influence, if we assume that such a concept can ever be applied with fitness to the relations between state and nation." *Id.* at 590.

[124] *Id.* at 592–93.

[125] For example, in North Carolina *ex rel.* Morrow v. Califano, 445 F. Supp. 532 (E.D.N.C. 1977), *aff'd* 435 U.S. 962 (1978), a federal statute granted federal dollars to states that would establish a State Health Planning and Development Agency. According

noncompliance with Congress only means that a state will have to forego federal funds and use its own resources to further its policies.

Conditions on executive expenditures, on the other hand, may completely thwart the exercise of a legitimate executive power because the Executive has no independent source of funding as do the states.[126] The President would face the difficult choice of doing it Congress's way or no way at all. Thus the death of the coercion doctrine as applied to the states should not apply in the separation of powers context. The President truly can be coerced by Congress.[127]

Thus, while Congress's power of the purse is formidable, it is not unlimited. Conditional appropriations should be scrutinized when independent presidential powers are at stake. Some nuclear freeze proposals include conditions upon appropriations, and the constitutionality of one such rider is discussed below.[128]

### 4. Inherent Sovereignty Powers

As noted earlier,[129] Congress may possess unenumerated foreign affairs power under the theory of *Curtiss-Wright*. This

to the statute, these agencies "should 'administer a State certificate of need program . . . which applies to new institutional health services proposed to be offered or developed within the State' and under which 'only those services, facilities, and organizations found to be needed shall be offered or developed in the State.'" *Id.* at 533. The North Carolina Supreme Court had ruled that a state certificate of need statute was unconstitutional under the North Carolina Constitution. *Id.* at 535 & n.8. To receive the federal money, North Carolina would therefore have to amend its Constitution. Yet noncompliance with congressional will did not mean that North Carolina could not pursue its own policy as declared by its Supreme Court; noncompliance only meant that North Carolina would have to use its own funds. In short, noncompliance with congressional will did not remove North Carolina's power to act at all.

[126] For example, Congress has power to create and fund executive offices, and the President has the power to appoint officeholders. But Congress could not constitutionally pass a statute denying funds to pay the salary of any Environmental Protection Agency officials who intended to work for greater industrial development. *See* L. HENKIN, *supra* note 88, at 113. The President's discretionary power of appointment would be completely thwarted because the Executive depends solely on Congress for support in carrying out his or her constitutionally assigned functions.

[127] Furthermore, one noted scholar has indicated that constitutional doctrine may accord greater respect to presidential spending prerogatives in the foreign policy area. *Id.* at 112–16. Professor Henkin has suggested that there may be appropriations that Congress is *obliged* to pay, such as the salary of an ambassador or the expenses of maintaining an embassy in a foreign country. No conditions could be placed on these appropriations. *Id.* at 113, 115. All other appropriations in the foreign relations area Henkin would consider voluntary, and therefore Congress could attach conditions unless they invade presidential prerogatives to which spending is incidental, such as conditioning our national contribution to the United Nations upon the President's vote (through the Ambassador) on a particular issue before the United Nations. *See id.*

[128] *See infra* text accompanying notes 296–393.

[129] *See* L. HENKIN, *supra* note 88, at 68.

power stems from the notion of national sovereignty,[130] and has been approved by the Supreme Court in at least one other case besides *Curtiss-Wright*.[131] However, the scope of inherent congressional foreign affairs power, if such power does exist, remains unclear. Professor Henkin suggests that inherent powers might be allocated in accordance with the executive or legislative character of the sovereignty power in question; naturally legislative functions are allocated to Congress, and naturally executive functions are allocated to the President.[132]

Nonetheless, any attempt to characterize an exercise of power as naturally legislative or naturally executive will probably lead to semantic bickering rather than to sensible policy. The line between executive and legislative functions is often unclear.[133] In the context of a bilateral nuclear freeze proposal, it may be just as easy for the President to argue that striking a deal with another country involves the naturally executive function of single-voiced communication to the outside world as it is for the Congress to argue that the proposal involves the naturally legislative function of major policy decisionmaking integrally related to the fate of the nation as a whole.

### 5. Necessary and Proper Clause

Article I, section 8, clause 18, gives Congress power "[t]o make all laws which shall be necessary and proper for carrying into Execution the foregoing [congressional] Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer Thereof." The Necessary and Proper Clause therefore gives Congress broad authority to facilitate by legislation the execution of its constitutional powers and those of the President.[134] A nuclear freeze statute might be viewed as an appropriate means of carrying out the foreign affairs powers of Congress.[135]

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[130] *Id.*

[131] In Knauf v. Shaughnessy, 338 U.S. 537 (1950), the Court held that congressional exclusion of aliens was a "fundamental act of sovereignty." *Id.* at 542. However, *Knauf* did not necessarily adopt the notion of supraconstitutional power. *Id.* at 542.

[132] L. HENKIN, *supra* note 88, at 31–32. Professor Henkin goes on to say that while the division of functions may allow "natural" separation of powers in domestic situations, "the foreign relations powers appear not so much 'separated' as fissured, along jagged lines indifferent to classical categories of governmental power." *Id.* at 32.

[133] *See* Nagel, *Separation of Powers and the Scope of Federal Equitable Remedies*, 30 STAN. L. REV. 661, 681–706 (1978).

[134] *See generally*, L. TRIBE, *supra* note 61, at 227–31.

[135] *See supra* text accompanying notes 100–34.

Even if Congress has substantive foreign affairs powers, external constitutional constraints may nevertheless invalidate an otherwise valid exercise of these powers under the Necessary and Proper Clause. For example, in *I.N.S. v. Chadha*,[136] the Supreme Court noted that when executive branch powers are arguably infringed upon, the internal limitations of the Necessary and Proper Clause inform only the *beginning* of constitutional inquiry: "The plenary authority of Congress over aliens under Art. I, § 8, cl.4 is not open to question, but what is challenged here is *whether Congress has chosen a constitutionally permissible means of implementing that power.*"[137] Thus, although a nuclear freeze statute may stem from a plenary authority of Congress to regulate nuclear arms,[138] the specific provisions of the freeze proposals discussed below must be scrutinized to ensure that presidential powers are not thereby infringed.[139]

### F. *Presidential Powers Relating to Nuclear Freeze Proposals*

The presidential powers discussed below are those which I believe might be infringed upon by congressional nuclear freeze proposals. As with the congressional powers discussed above,[140] the purpose here is only to sketch the broad contours of presi-

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[136] 462 U.S. 919 (1983).

[137] *Id.* at 940–41 (emphasis added). Likewise in Buckley v. Valeo, 424 U.S. 1 (1976), the Court asserted that separation of powers principles operate as an external limitation upon the legislative power of Congress to exercise authority over federal election practices under the Necessary and Proper Clause. *Id.* at 132.

[138] In addition to the aforementioned congressional powers, the Commerce Clause, Article I, § 8, cl.3, may be relevant. Article I, § 8, cl.3 gives Congress power "[t]o regulate Commerce with foreign Nations, and among the several states." Although not appearing on its face to provide a source of power for a nuclear freeze proposal, the Commerce Clause may give Congress power to regulate incidental matters bearing upon a freeze, including defense contracts, weapons transport, and weapon sales to other countries. *See, e.g.*, Nuclear Non-Proliferation Act of 1978, 22 U.S.C. §§ 3201–3282 (1979); Stoiber, *Current United States Nuclear Non-Proliferation Policy*, 4 N.Y.L. SCH. J. INT'L & COMP. L. 367, 369 (1983). *See generally* L. HENKIN, *supra* note 88, at 69–71. The Supreme Court has given the Commerce Clause a very expansive reading lately. *See*, for example, the recent overruling of National League of Cities v. Usery, 426 U.S. 833 (1976), in Garcia v. San Antonio Metropolitan Transit Authority, 105 S. Ct. 1005 (1985).

[139] *See infra* text accompanying notes 182–216.

[140] *See supra* text accompanying notes 100 -39.

dential powers;[141] how those powers relate specifically to nuclear freeze proposals is discussed later.[142]

1. Executive Power/Sole Organ of Foreign Relations

Article II, section 1, clause 1, states that "[t]he Executive Power shall be vested in a President of the United States of America." Article II, section 3, states that the President "shall take Care that the Laws be faithfully executed." As noted earlier, Hamilton believed that the "Executive Power" included all foreign affairs powers except those expressly given to the House of Representatives or the Senate.[143] In *Myers v. United States*,[144] the Supreme Court adopted Hamilton's view: "The general doctrine of our Constitution then is, that the executive power of the nation is vested in the President; subject only to the exceptions and qualifications, which are expressed in the instrument."[145]

Other than the "specific terms where emphasis was regarded as appropriate" in Article II,[146] the content of executive power remains somewhat uncertain. Two strands of case law, however, have helped to clarify what power is executive. The first group of cases has construed the Executive power as a grant to the President of the right to act as the "sole organ of the federal government in the field of international relations."[147] As affirmed and elucidated further in cases like *United States v. Belmont*[148] and *United States v. Pink*,[149] the "sole organ" power gives the

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[141] Indeed, sketching the broad contours of presidential power is all that one can do in trying to relate those powers to specific grants in the Constitution. As Professor Henkin notes:

> In law as in politics what matters is the total of Presidential power rather than the shape and size of its individual components. Constitutionally, every Presidential act stands on all his powers together (as well as those delegated to him by Congress). Presidents need not and do not plead their powers with precision, or match particular act to particular power, and the lawyer is often hard-put to determine even the President's own view as to the reach of his various resources of constitutional authority. But the constitutional sum of Presidential power depends on its parts, and however imprecisely, analysis measures them singularly.

L. HENKIN, *supra* note 88, at 45.

[142] *See infra* text accompanying notes 267–89, 339–78.

[143] *See supra* text accompanying notes 89–94.

[144] 272 U.S. 52 (1926).

[145] *Id.* at 138–39.

[146] *Id.* at 110 (quoting 7 J.C. HAMILTON, WORKS OF HAMILTON 80–81 (1851)).

[147] *Curtiss-Wright*, 299 U.S. at 320.

[148] 301 U.S. 324 (1936).

[149] 315 U.S. 203 (1942).

President unilateral power to initiate and cut off communication between the United States and other countries.[150] The President, in addition, controls the content of any communications made, including negotiations.[151]

The second strand of cases is exemplified by *Youngstown Sheet & Tube Co. v. Sawyer*.[152] There Justice Black asserted: "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."[153] In *Youngstown*, President Truman seized domestic steel mills to avert a work stoppage that allegedly would have shut down the Korean War effort. Congress had on numerous occasions in the past considered giving the President such power, but ultimately provided by statute for less drastic procedures in the event of a strike.[154] Emphasizing that Congress had exclusive power to determine domestic labor policies, Justice Black wrote:

> The President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President . . . . The power of Congress to adopt such public policies as those proclaimed by the order is beyond question . . . . The Constitution does not subject this lawmaking power of Congress to presidential or military supervision or control.[155]

Thus, at the very least, the Executive power does not include power to set domestic labor policy in the face of contrary congressional will. In addition, *Youngstown* appears to stand for the general proposition that the Executive power does not extend to making policy where Congress has been given policy-making power by the Constitution.[156]

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[150] *See Pink*, 315 U.S. at 229–30; *Belmont*, 301 U.S. at 330; *see also* L. HENKIN, *supra* note 88, at 47: "As 'sole organ,' the President determines . . . how, when, where and by whom the United States should make or receive communications, and there is nothing to suggest that he is limited as to time, place, form, or forum."

[151] *See Pink*, 315 U.S. at 229–30; *Belmont*, 301 U.S. at 330; *see also* L. HENKIN, *supra* note 88, at 130–31 & n.7.

[152] 343 U.S. 579 (1952).

[153] *Id.* at 587.

[154] *Id.* at 586.

[155] *Id.* at 588.

[156] In this case the power to determine the methods of preventing a domestic labor strike was given to Congress under the Interstate Commerce Clause. *Id.* at 656 & n.1 (Burton, J., concurring). *See infra* text accompanying notes 182–216 for further discussion of the separation of powers aspects of *Youngstown*.

Only a few sources of congressional power exist to check the executive power to make *foreign* policy.[157] If an Article I grant is construed as giving Congress foreign policy-making power over an area, however, the Executive power could not then be relied upon to give the President policy-making power as well. Of course, the President may derive foreign policy-making power from other Article II grants.[158] In that situation, we confront the possibility of concurrent foreign policy-making powers in the President and Congress.

### 2. Treatymaking Power

Article II, section 2, clause 2, gives the President "Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur." This power gives the President broad discretion to make arms control treaties with other nations.[159]

In the case of nuclear freeze proposals, there is the possibility that Congress might circumvent these constitutional procedures and, in effect, strike an arms control agreement with the Soviets without presidential involvement. The President could of course veto the agreement, but a two-thirds override would lead to its enactment. The arguments for either side will depend on specific bill provisions and will be discussed in that context below.[160] In general, though, the President would have three strong arguments to invalidate Congress's actions: (1) there is no constitutional procedure for Congress to make agreements with other nations, (2) the President alone has been given constitutional power to initiate international agreements, and (3) even if Congress had some type of power, it could only be utilized in such a way as not to interfere with the President's admitted treaty-making powers.

*Curtiss-Wright* supports the first two arguments as the Court in that case asserted that "the President alone has the power to

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[157] For example, the congressional powers relating to nuclear freeze proposals, discussed *supra* text accompanying notes 100–39, represent a very small proportion of all the powers delegated to Congress in Article I. Indeed, without congressional objection or reference to any other Article II power, the Executive has historically made a myriad of foreign policy decisions in the day-to-day oversight of our foreign affairs apparatus. *See* L. HENKIN, *supra* note 88, at 47–49.

[158] *See infra* text accompanying notes 159–81.

[159] SALT I and the ABM treaties are good examples of the operation of the treaty-making power in the area of arms control.

[160] *See infra* text accompanying notes 295–393.

speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."[161]

As to the third argument, the President would rely on separation of powers principles. Even if Congress has power to enact a bilateral freeze, the President would argue that it has no such power when the President is in the midst of negotiating with the Soviets over the very same issues. If Congress could pass a statute every time it disagreed with the terms of contemporaneous presidential negotiations, the President's treaty-making powers would effectively be nullified. Surely the Framers did not intend such a result.

Congress, on the other hand, would respond that it has express, implied, and inherent foreign affairs powers coextensive with the treatymaking power of the President. Anything the President could agree to by treaty, Congress could achieve through reciprocal or parallel legislation.[162]

Another possible defense of a freeze statute would rely on an interpretation of *Curtiss-Wright* as simply precluding Congress from *negotiating* with another country and from prohibiting presidential negotiations. A freeze statute arguably does neither. First, parallel nuclear freeze legislation does not involve oral or written communications between Congress and the Soviet Union. The freeze statute is not internationally binding,[163] and Congress could repeal the statute at any time, irrespective of Soviet actions. Second, a freeze statute does not prevent the

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[161] 299 U.S. at 319 (emphasis in original).

[162] *See* Henkin, *The Treaty Makers and the Law Makers: The Law of the Land and Foreign Relations*, 107 U. PA. L. REV. 903 (1959). Professor Henkin argues that:

> the foreign affairs powers of Congress, of itself or, surely, with other powers we have mentioned, can support enactment of virtually any provision contained in any treaty in the history of the United States: in agreements conferring diplomatic and other rights on foreign governments and foreign officials; in disarmament agreements; in treaties of friendship, commerce and navigation; in extradition treaties, even as applied to American citizens; in reciprocal taxation and trade treaties; in status-of-forces and other military agreements which became law in the United States. Congress could without a treaty make such legislation applicable to nationals of other nations or to Americans on a reciprocal or parallel basis.

*Id.* at 921. Henkin goes on to give many examples of reciprocal and parallel legislation, most of which emanate from Congress's foreign commerce power, although Henkin believes it is also sustained as an exercise of the inherent sovereign power of Congress to deal with foreign relations. *Id.* at 918–22. In this respect, Henkin accepts the *Curtiss-Wright* theory of unenumerated sovereignty powers over foreign affairs.

[163] *See* L. HENKIN, *supra* note 88, at 94.

President from continuing to attempt to negotiate a treaty with the Soviets.[164]

The United States statute would go into effect only if the President is unable to come to terms with the Soviets and the Soviets also enact parallel legislation.[165] Thus, a bilateral freeze statute only serves as a last resort arrangement in the event of presidential failure to sign a treaty.[166] Under these circumstances it can hardly be argued that Congress violates separation of powers principles by "butting in line" in front of the President to make a deal with the Soviets.[167]

Even if Congress has power to enact parallel legislation, however, one may question whether the legislation would achieve any lasting results. Parallel legislation is not internationally binding like a treaty,[168] and though a treaty, like parallel legislation, may be voided by subsequent legislation,[169] the Soviets may simply feel more secure dealing with the President through the traditional treatymaking process. Moreover, a broken treaty by the United States would give the Soviets much more international leverage and sympathy than congressional repeal of a domestic statute. Finally, some freeze proposals may be worded in such a way as to require the Soviets to make the first disarmament moves[170]—a risk they probably would not want to take.

### 3. Commander-in-Chief

Article II, section 2, clause 1, states that "[t]he President shall be Commander in Chief of the Army and Navy of the United States . . . ." Few cases have construed the Commander-in-Chief Clause, and those that have only provide us with a glimpse of how the power may be exercised. In *Fleming v. Page*,[171] for example, the Supreme Court held that the President did not possess legislative power to determine the United States-Mex-

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[164] If the Soviets do reach an agreement with the President, they presumably will not enact parallel legislation triggering enforcement of the United States freeze statute.

[165] *See supra* text accompanying notes 161–64. *See also infra* 166–68.

[166] This scenario assumes, as Henkin believes, that Congress has *power* to enact parallel legislation.

[167] *See infra* text accompanying notes 362–70.

[168] L. HENKIN, *supra* note 88, at 94.

[169] *See id.* at 64.

[170] *See infra* text accompanying notes 295–305.

[171] 50 U.S. (9 How.) 602 (1850).

ican border[172] even though military forces had conquered and taken control of Mexican territory:

> [The President's] duty and his power are purely military. As commander-in-chief, he is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual . . . . But his conquests do not enlarge the boundaries of this Union, nor extend the operation of our institutions and laws beyond the limits before assigned to them by the legislative power.[173]

This statement would appear to give the President plenary control of the military forces "placed by law at his command" by Congress. Consequently, one may argue that even if Congress has power to regulate the production and testing of nuclear arms, the power to deploy them belongs to the President, who "directs the movements" of forces (including weapons) already a part of the U.S. military arsenal.[174] Although *Fleming* may be distinguishable in that the President's power there only arose during actual conflict, strong arguments nevertheless exist to support the President's exclusive command function in peacetime.[175]

Even if the President has power to "command" forces at his or her disposal, may Congress nevertheless have some concurrent power to "direct the movements" of the forces pursuant to its war-declaring and Army supporting powers? Concurring with three other Justices in *Ex Parte Milligan*,[176] Chief Justice Chase answered that question in the negative:

> Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war [through] . . . legislation *except such as interferes with the command of*

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[172] Note, however, that the President has exclusive power to "recognize" the extent of foreign boundaries not affecting United States territory. L. HENKIN, *supra* note 88, at 47–48.

[173] *Fleming*, 50 U.S. at 614–15.

[174] Justice Jackson underscores this distinction between presidential and congressional power in his opinion in *Youngstown*: "While Congress cannot deprive the President of the command of the Army and Navy, only Congress can provide him an army or navy to command. . . . I should indulge the widest latitude of interpretation to sustain [the President's] exclusive function to command the instruments of national force, at least when turned against the outside world for the security of our society." 343 U.S. at 644–45.

[175] *See infra* text accompanying notes 346–51.

[176] 71 U.S. (4 Wall.) 2 (1866).

> *the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief.*[177]

The President therefore appears to have exclusive power to command and control the forces at his or her disposal.[178]

The Commander-in-Chief power, however, is not unlimited. The Supreme Court will not uphold exercises of power too unrelated to traditional notions of what it means to command the forces. Thus, although the Court in *Youngstown* noted the expanding nature of the "theater of war" concept, it still refused to sustain the President's seizure order.[179]

Deployment of nuclear arms may fall within the "theater of war" even during peacetime. On the other hand, nuclear weapons production and testing, even during war, has so many domestic ramifications as to fall squarely under congressional power to "raise and support" the armed forces. These ramifications may preclude even concurrent presidential power over weapons procurement and testing,[180] even though such activity is much closer to "commanding the forces" than seizing steel mills. Although weapons procurement and testing are functions regularly exercised by the Executive Branch, such an exercise is usually done pursuant to a statutory delegation.[181]

### G. *Separation of Powers Doctrine*

No specific constitutional text articulates a separation of powers doctrine. Although the doctrine has been thought to emanate from the Constitution's broad structural division of power between three coequal branches, its contours are not sharply defined.

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[177] *Id.* at 139 (emphasis added).

[178] Note, on the other hand, Justice Jackson's remark that Congress is "empowered to make rules for the 'Government and Regulation of land and naval forces,' by which it may to some unknown extent impinge upon even command functions." *Youngstown*, 343 U.S. at 644. It is not unreasonable, however, to construe the Government and Regulation Clause as applying to the organizational structure, rights, responsibilities, and discipline of the armed forces, rather than to the deployment of nuclear weapons. *See generally* Chappell v. Wallace, 462 U.S. 296, 300–302 (1983); Rostker v. Goldberg, 453 U.S. 57, 65 (1981).

[179] 343 U.S. at 587.

[180] *See supra* text accompanying notes 102–09.

[181] *See, e.g.*, 10 U.S.C. §§ 2301–2316 (1983) (procurement); 42 U.S.C. § 2121 (1973) (testing). *Cf.* Pauling v. McNamara, 331 F.2d 796, 798 (D.C. Cir. 1963) (detonation of nuclear weapons committed to Executive and Legislative Branches), *cert. denied*, 377 U.S. 933 (1964).

Up until the last twenty years, the Supreme Court had applied a rather rigid requirement that the functions of the branches be kept separate unless mixed functions are expressly allowed by the Constitution.[182] The Court's strongest articulation of this strict separationist approach is found in *Humphrey's Executor v. United States*:[183]

> The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential coequality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there.[184]

Signs of a new approach to separation of powers emerged in *Youngstown*. There, although the Court struck down the arrogation of legislative power by the President, Justice Jackson enunciated a more flexible doctrine than that of *Humphrey's Executor*: "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."[185] Later Supreme Court cases have quoted Jackson's view with approval.[186]

Of course, the same Court that has held that the three branches are not "hermetically" sealed from one another,[187] and that workable government necessitates some admixture of functions,[188] has also stressed that the constitutionally mandated "separation of powers was obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny."[189] The Court

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[182] *See* Springer v. Philippine Islands, 277 U.S. 189, 210–12 (1928); Myers v. United States, 272 U.S. 52, 116 (1926).

[183] 295 U.S. 602 (1935).

[184] *Id.* at 629–30.

[185] 343 U.S. at 635.

[186] *See* INS v. Chadha, 462 U.S. 919, 963 (1983) (Powell, J., concurring); Nixon v. Administrator of General Services, 433 U.S. 425, 441–43 (1977); Buckley v. Valeo, 424 U.S. 1, 122 (1976); United States v. Nixon, 418 U.S. 683, 707 (1974).

[187] *Buckley*, 424 U.S. at 121. *See Chadha*, 462 U.S. at 951.

[188] *Nixon v. Administrator*, 433 U.S. at 442 & n.5, 443.

[189] United States v. Brown, 381 U.S. 437, 442–43 (1965).

has emphasized that a "pragmatic, flexible approach"[190] does not mean that "the cumbersomeness and delays often encountered in complying with explicit Constitutional standards may be avoided, either by the Congress or by the President."[191]

The Supreme Court has thus hesitated to articulate a unified approach to the separation of powers. Either side in a separation of powers lawsuit would be able to cite extensively from recent Court opinions: one side for flexibility and the other for strict separation of functions. Perhaps the Court refuses to lay down one rule because each case must be analyzed on its specific facts. The proper relationship between coequal branches is therefore so dependent upon the context involved that a general rule may be unworkable.

Nonetheless, a guiding principle can be harmonized from the cases. The Court may perceive the separation of executive and legislative powers as so sensitive an area for adjudication that only in cases of substantial interbranch infringement will the Court reverse what the political branches have already done.[192] The simultaneous emphasis on flexibility and separation evinces the Court's need to preserve its own role: some interbranch flexibility averts the spectre of "government by injunction."[193]

Of course, "substantial infringement" does not provide a very precise framework for predicting when the Supreme Court will apply the separation of powers doctrine to reverse executive or legislative action. In *Chadha*, however, Justice Powell noted that substantial violation of the separation of powers doctrine involves either interference with another branch's constitutionally assigned functions[194] or assumption of a function more properly entrusted to another branch.[195] Thus, according to Powell's view, the separation of powers doctrine is meant to prevent excessive interference with and aggrandizement of the powers of one branch by another.

In his *Youngstown* concurrence, Justice Jackson tried to capture these values in his celebrated three-category test for determining the validity of executive action:

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[190] *Nixon v. Administrator*, 433 U.S at 442.

[191] *Chadha*, 462 U.S. at 963. *See also Youngstown*, 343 U.S. at 613–14 (Frankfurter, J., concurring.)

[192] *See Chadha*, 462 U.S. at 963 (Powell, J., concurring); *Nixon v. Administrator*, 433 U.S. at 443.

[193] Schlesinger v. Reservists Committee to Stop the War, 418 U.S. 208, 222 (1974).

[194] 462 U.S. at 963.

[195] *Id.*

1. The President's authority is greatest when "he acts pursuant to an express or implied authorization of Congress, for it includes all that he possesses in his own right plus all that Congress can delegate."[196]

2. In the "absence of either a congressional grant or denial of authority, [the President's power is lessened because] he can only rely upon his own independent powers." Because this category is generally one of concurrrent authority, congressional acquiescence or inaction may enable the President to act legitimately.[197]

3. The President's power is at its lowest when taking "measures incompatible with the expressed or implied will of Congress . . . for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter."[198]

Justice Jackson's test has been the subject of extensive commentary, although the Supreme Court has applied it in only one of its decisions.[199]

In the context of litigation over a nuclear freeze proposal, only Jackson's third category is relevant to our analysis. For if the President complies with the freeze statute, then executive action will not be in issue at all. However, if the President acts contrary to the statute, perhaps by ordering deployment of a nuclear weapon, he or she will have taken "measures incompatible with the expressed . . . will of Congress."[200] In those circumstances, according to Jackson, the executive action could be upheld only if the power to deploy nuclear weapons was exclusively the President's under the Constitution.[201] If Congress has *any* power over deployment, the President's action is invalid even if he or she has *concurrent* power to deploy.

Individual Justices of the Supreme Court and commentators have taken the view that Congress has the final word when

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[196] 343 U.S. at 635–36 (footnotes omitted).
[197] *Id.* at 636.
[198] *Id.* at 636–37.
[199] *See* Dames & Moore v. Reagan, 453 U.S. 654 (1981) (because the President acted with express and implied authorization from Congress, there was no need to determine if he had independent constitutional power to nullify attachments and suspend claims).
[200] *Youngstown*, 343 U.S. at 637.
[201] *Id.*

concurrent powers are at issue.[202] This analysis seems valid to the extent that the concurrent presidential power in question arises from the "Executive Power" of Article II, section 1. If Congress has concurrent power to take action, Congress could displace the President's power to initiate action under that Clause because Article II, section 3, requires the President to execute the congressional policy. But when the President's source of concurrent power arises from a constitutional grant of authority that includes an explicit policy-making function (such as the Commander-in-Chief or Treaty Clause),[203] there appears to be no constitutional basis for determining whether concurrent congressional power to make policy takes precedence in the event of a conflict between the branches.[204]

Thus, some doctrine is needed that suitably resolves conflicts between the constitutional powers of the President and Congress. This doctrine, I believe, is found in *United States v. Nixon*[205] and *Nixon v. Administrator of General Services*.[206] In *United States v. Nixon*, the power to protect confidential presidential communications was pitted against the judicial power to subpoena information. The Court concluded that neither power was absolute, but that it was "necessary to resolve those competing interests in a manner that preserves the essential functions of each branch."[207]

In *Nixon v. Administrator*, the Court once again balanced the presidential privilege of confidentiality against Congress's

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[202] *See id.* at 637–39 (Jackson, J., concurring); *id.* at 660–61 (Clark, J., concurring); Berger, *supra* note 86, at 48 & n.267; L. HENKIN, *supra* note 88, at 106.

[203] *See supra* text accompanying notes 159–82.

[204] One could argue that in a democracy the most representative branch should have the final word in a conflict of concurrent powers. Particularly when a decision of great national importance is to be made, we should be reluctant to vest such authority in just one person, at least if a more representative body has an equal claim to decision-making authority. On the other hand, some decisions of great national importance may require a more expeditious resolution. Decisions by Congress in those situations would be dysfunctional. A tension therefore exists between the values of political accountability and wise government. Perhaps because resolution of these competing principles would be very difficult in certain cases, and would require a judge to come precariously close to articulating and advocating a political theory, the Supreme Court has relied on another mode of analysis in cases of conflicting concurrent powers. *See infra* text accompanying notes 205–16.

[205] 418 U.S. 683 (1974).

[206] 433 U.S. 425 (1977).

[207] United States v. Nixon, 418 U.S. at 707. The Court held that, *on the facts of that case*, the integrity of the judicial system would suffer more without the presidential information than the President's need for confidentiality would suffer by having to give it up. *Id.* at 712–13.

"power to regulate Executive Branch documents."[208] As a result, the Court refined the separation of powers test it had elaborated in *United States v. Nixon*:

> [T]he proper inquiry focuses on the extent to which [the Act] prevents the Executive Branch from accomplishing its constitutionally assigned functions. *United States v. Nixon* [citation omitted]. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.[209]

Implicit in the holdings of *United States v. Nixon* and *Nixon v. Administrator* is the recognition that Congress does not *ipse dixit* have the final word when concurrent powers are in question. In fact, the Court in *United States v. Nixon* acknowledged that the case probably would have turned out differently if "military, diplomatic, or sensitive national security secrets" were involved.[210] In short, where neither branch has exclusive power and they are in conflict, the Court must determine on the specific facts before it which branch will suffer more institutional damage from an adverse decision.[211]

Applying the foregoing separation of powers principles to specific freeze proposals is the task of the next section. How each side will frame their arguments depends upon which of two litigation scenarios arises following passage of a freeze statute. Scenario One envisions the President complying with the statute but then challenging its constitutionality in federal court. The President would seek declaratory and perhaps injunctive relief. He or she would argue that the freeze statute usurps the Executive's exclusive constitutional powers as Treaty

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[208] *Nixon v. Administrator*, 433 U.S. at 445–46.

[209] *Id.* at 443.

[210] *United States v. Nixon*, 418 U.S. at 706, 710–11.

[211] Another possible approach may involve judicial encouragement of a compromise settlement between the Executive and Legislative Branches. *See* United States v. American Telephone & Telegraph Co., 551 F.2d 384 (D.C. Cir. 1976) (*AT&T I*) (the Court of Appeals declined to resolve the conflict of concurrent powers over a congressional subpoena without first giving both branches the opportunity to resolve their differences out of court); United States v. American Telephone & Telegraph Co., 567 F.2d 121 (D.C. Cir. 1977) (*AT&T II*) (court fashioned relief by building upon the negotiated compromises agreed to by both branches after remand from *AT&T I*). Thus, in those situations where time is not of the essence, judicial preference for one branch over the other is unnecessary. When concurrent powers conflict, a court can provide some modest judicial guidance and help facilitate a gradual political resolution of the controversy.

Maker and Commander-in-Chief.[212] Even if Congress has concurrent power, the President would assert that the freeze statute prevents him or her from carrying out the "constitutionally assigned functions" of negotiating a treaty with the Soviets in Geneva.[213]

Scenario Two envisions the President refusing to comply with the freeze statute[214] and congressional or private suits being brought for declaratory and injunctive relief. Plaintiffs would argue that the President has usurped Congress's exclusive powers to appropriate[215] and to "raise and support" the military forces as it sees fit.[216]

## II. Recent Congressional Proposals for a Nuclear Freeze

Constitutional analysis of nuclear freeze proposals necessarily wades into uncharted waters. Because no court has ever had to construe a nuclear freeze statute, the constitutional doctrines already discussed merely provide general guidance as to how a court might approach freeze statute litigation. Similarly, only a few cases have dealt specifically with the government's power to test and deploy nuclear weapons.[217]

The three congressional nuclear freeze proposals discussed below were introduced in the ninety-eighth Congress. None passed both the House and Senate, and only only one passed the House. Nevertheless, in light of their possible reintroduction and the introduction of similar proposals, the discussions below remain relevant.

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[212] *See supra* text accompanying notes 159–211 and *infra* text accompanying notes 213–239.

[213] See discussion of *Nixon v. Administrator*, 433 U.S. 425 (1977), *supra* text accompanying notes 209–10.

[214] As general examples, the President could order development of missiles or spend funds for warhead testing in contravention of a freeze statute. Other examples are set out in the context of specific freeze proposals discussed *infra*.

[215] *See supra* text accompanying notes 114–28.

[216] *See supra* text accompanying notes 102–09.

[217] *See, e.g.*, Greenham Women Against Cruise Missiles v. Reagan, 591 F. Supp. 1332 (S.D.N.Y. 1984), *aff'd*, 775 F.2d 34 (2d Cir. 1985) (deployment), discussed *infra* at text accompanying notes 320, 331; Pauling v. McNamara, 331 F.2d 796 (D.C. Cir. 1963), *cert. denied*, 364 U.S. 835 (1964) (testing); Nielson v. Seaborg, 348 F. Supp 1369 (D. Utah, C.D. 1972) (testing); Aleut League v. Atomic Energy Commission, 337 F. Supp. 534 (D. Alaska 1971) (testing).

### A. *A Proposal Mandating Executive Action*

#### 1. House Joint Resolution 13

On May 4, 1983, the House passed H.R.J. Res. 13,[218] by a vote of 278 to 149.[219] The companion bill in the Senate, S.J. Res. 2, was voted down by the full Senate on October 31, 1983, by a vote of 58 to 40.[220] In general, both resolutions called for a mutual and verifiable freeze on the production, testing and deployment of nuclear weapons, in addition to a reduction in existing arsenals.

At the time H.R.J. Res. 13 was being considered, the Reagan Administration was involved in Strategic Arms Reduction Talks (START) and Intermediate-Range Nuclear Forces (INF) talks with the Soviets.[221] Congress, sensing a ground swell of public support for a nuclear freeze,[222] wanted to ensure that the will of the people would not be ignored by the Administration. H.R.J. Res. 13 therefore attempted to "mandate objectives for the conduct of the Strategic Arms Reduction Talks (START) between the United States and the Soviet Union,"[223] including the "objective of negotiating an immediate, mutual, and verifiable freeze."[224] However, section 1(8) of the Resolution stated that "[n]othing in this resolution shall be construed by United States negotiators to mandate any agreement that would jeopardize our ability to preserve freedom."[225] Arguably, this section gave the negotiators some latitude to choose not to pursue a freeze at all.

It should be noted that H.R.J. Res. 13 can be construed as only *recommending* that the President pursue certain objectives in the START talks. Section 1 states that negotiations "between the United States and the Soviet Union *should* have the following objectives . . . ."[226] Because "legislators on both sides of the

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[218] H.R.J. Res. 13, 98th Cong., 1st Sess. (1983) [hereinafter cited as H.R.J. Res. 13].

[219] H.R.J. Res. 13, 98th Cong., 1st Sess., 129 CONG. REC. H2661 (daily ed. May 4, 1983).

[220] USA Today, Nov. 15, 1983, at 2, col. 1.

[221] *See* H.R.J. Res. 13 §§ 1 and 1(7).

[222] *See supra* text accompanying notes 4–7.

[223] *H.R. REP. No.* 31, 98th Cong., 1st Sess. 1 (1983).

[224] H.R.J. Res. 13 § 1(1). Other objectives for START included "incorporating ongoing negotiations in Geneva on intermediate range nuclear systems into the START negotiations." *Id.* at § 1(7).

[225] *Id.* at § 1(8).

[226] *Id.* at § 1 (emphasis added).

issue said that the resolution had symbolic importance only,"[227] one might reasonably construe section 1 as merely a resolution expressing the sense of the Congress rather than a prescription for executive behavior. Indeed, unlike section 1, other sections of the Resolution provide that the President "*shall*" act in a particular way.[228] Therefore, by using the word "should," section 1 may only *suggest* that the START talks be carried out with certain objectives in mind.

On the other hand, the drafters of H.R.J. Res. 13 apparently intended that section 1 be construed as mandatory.[229] By "mandating objectives,"[230] H.R.J. Res. 13 appears to do more than "help formulate" the United States's negotiating policy. For purposes of this Note, it will be assumed that section 1 requires United States negotiators to pursue certain negotiating objectives.

Other relevant provisions in H.R.J. Res. 13 include sections 3(a) and (b).[231] Section 3(a) apparently allows the President to make other arms control agreements with the Soviets or other nations so long as they are not inconsistent with the purpose of pursuing a bilateral freeze. Section 3(b) serves a dual function in that it tells a court that Congress believes H.R.J. Res. 13 does not infringe upon the President's treatymaking power and recommends a narrow construction of any provision that may have such a result.

Finally, it appears that section 5 of H.R.J. Res. 13 sows the seeds for interbranch conflict.[232] By asserting that the resolution

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[227] N. Y. Times, May 5, 1983, at B17, col. 1.

[228] Section 13, for example, states that the negotiations "shall" involve research programs, and in the very next sentence says that the negotiations "should recognize the difficulty of maintaining essential equivalence." H.R.J. Res. 13 § 13.

[229] The Committee on Foreign Affairs proclaimed that progress in arms control "is essential." The Committee reasoned that since Congress had to approve any START treaty negotiated by the President, it should help "form the negotiating posture of the United States." The bill provides that "House Joint Resolution 13 accomplishes this purpose by *mandating objectives* for the conduct of the START negotiations, including the negotiation of an immediate, mutual, and verifiable freeze in and reductions in nuclear weapons and their delivery systems." *H.R. REP. No.* 31, *supra* note 223, at 2.

[230] *Id.*

[231] Section 3 reads:

(a) Consistent with pursuing the overriding objective of negotiating an immediate, mutual, and verifiable freeze, nothing in this resolution shall be construed to prevent the United States from taking advantage of concurrent and complementary arms control proposals. (b) Nothing in this resolution shall be construed to supercede the treaty making powers of the President under the Constitution.

H.R.J. Res. 13 §§ 3(a) and (b).

[232] Section 5 reads: "Consistent with pursuing the overriding objective of negotiating an immediate, mutual, and verifiable freeze, nothing in this resolution should be con-

should not be construed so as to preclude the "maintenance and credibility of the United States nuclear deterrent," section 5 appears to ignore the obvious conflict that could ensue from simultaneously pursuing a freeze and a credible deterrent. Section 5 also does not specify whether the Congress, the President, or both, must decide whether measures are "necessary" to maintain deterrence. Sections 1, 3, and 5 therefore provide fertile ground for constitutional litigation. In these sections, Congress has tried to maintain some control over the President's negotiating posture while simultaneously giving him possible escape routes to avoid control entirely.

### 2. Standing

If passed, H.R.J. Res. 13 could lead to litigation in two ways. First, the President might seek a declaratory judgment in federal court that the Act unconstitutionally usurps and infringes upon presidential treatymaking powers.[233] Until resolved by a court, the President could either comply with the Act or postpone START. Second, if the President simply ignored the statute, congressional or private plaintiffs might bring an action against him or her for declaratory and injunctive relief on the ground that the President acted contrary to a valid law.[234]

In the first scenario, the President would no doubt have standing. He or she would have a sufficient personal stake in the action and would meet the injury in fact requirement because the allegedly invalid statute expressly regulates the President's own negotiating activities. The causation and redressability requirements of Article III would also be met because if the statute is held to be valid, the President must negotiate as Congress dictates. However, if a federal court declares the statute invalid, the President would have complete discretion over arms control negotiations.

In the second scenario, it is less likely that congressional or private plaintiffs would have standing. Executive noncompli-

strued to prevent measures necessary for the maintenance of and credibility of the United States nuclear deterrent." *Id.* at § 5.

[233] *See supra* text accompanying notes 159–70.

[234] *See infra* text accompanying notes 255–66. H.R.J. Res. 13 does not provide a mechanism for detecting presidential noncompliance. Presumably a congressional delegation would accompany United States negotiators to monitor implementation of the statute, *see* L. HENKIN, *supra* note 88, at 131–32, but there may be no constitutional obligation for the President to allow such a delegation. *Id. See infra* text accompanying notes 256–57.

ance would not nullify, in whole or in part, the votes of Congress or its members.[235] And citizen complaints about the President's failure to comply with the freeze statute will not alone suffice for standing.

In addition, freeze groups and peace advocates would find it very difficult to challenge executive noncompliance under section 702 of the Administrative Procedure Act (APA).[236] Any psychological interest in having the President actively pursue peace by negotiating a freeze does not appear even "arguably within the zone of interests to be protected or regulated"[237] by

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[235] *See* discussion of congressional standing, *supra* text accompanying notes 35–49; *see also* Henkin, *supra* note 45, at 647, 648–51.

[236] In such a challenge, plaintiffs would have to allege that they suffered "legal wrong" or were "aggrieved" within the meaning of a freeze statute because of the President's action. Administrative Procedure Act (APA) § 702 states that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702 (1977). In the absence of a freeze statute's intent to narrow the availability of judicial review, federal court standing to challenge federal agency action under APA § 702 requires that the plaintiff demonstrate (1) injury in fact, and (2) that the injury is to an interest "arguably within the zone of interests to be protected or regulated" by the freeze statute. Association of Data Processing Service Orgs. v. Camp, 397 U.S. 150, 153 (1970). *See* United States v. SCRAP, 412 U.S. 669, 686 (1973). Of course, other constitutional considerations may preclude standing to challenge agency action. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 473–74 (1982).

APA § 701(b)(1) defines "agency" as "each authority of the Government." Thus, unless they are exercising "military authority . . . in the field in time of war or in occupied territory," 5 U.S.C. § 701(b)(1)(G), the President and Defense Department are "agencies" within the meaning of the Act. *See* Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO v. Connally, 337 F. Supp. 737, 761 & n.43 (D.D.C. 1971) (the President as an "agency"); Jaffee v. United States, 592 F.2d 712, 719–20 (3d Cir. 1979) (the United States Army as an "agency"), *cert. denied*, 441 U.S. 961 (1979). On the other hand, judicial review under the APA is unavailable if a statute precludes judicial review or "agency action is committed to agency discretion by law." 5 U.S.C. §§ 701(a)(1) and (2) (1977). Several cases have held that judicial review is precluded under the latter exception when the agency makes a foreign policy decision. *See, e.g.*, Jensen v. National Marine Fisheries Service, 512 F.2d 1189, 1191 (9th Cir. 1975) (decisionmaking by the President and Secretary of State); Curran v. Laird, 420 F.2d 122, 128–33 (D.C. Cir. 1969) (decisionmaking by the President); American Federation of Gov't. Employees v. Hoffmann, 427 F. Supp. 1048, 1079–80 (N.D. Ala. 1976) (decisionmaking by the Army). Two of these cases are clearly distinguishable, however, in that they involve discretionary presidential action pursuant to, and consistent with, a statutory delegation of power. *See Jensen*, 512 F.2d at 1190–91; *Curran*, 420 F.2d at 128, 133. Conversely, freeze statutes generally attempt to mandate or prohibit presidential actions. *American Federation* is inapposite as well. There plaintiffs only alleged that the Army acted contrary to its own regulations. 427 F. Supp. at 1050–51, 1080. Conspicuously absent were allegations that the Army violated congressional mandates. Moreover, the court held that the regulations in question were "not intended to provide benefits to plaintiffs." *Id.* at 1083. Thus, judicial review may still be available under the APA in an appropriate case. Here, however, it does not appear that private plaintiffs would be injured in any way because of the President's actions. *See infra* text accompanying notes 237–39.

[237] Data Processing Service v. Camp, 397 U.S. 150, 153 (1970).

H.R.J. Res. 13.[238] It is possible, however, that Congress could pass a supplemental statute protecting psychological interests and ensuring that some private parties would have standing.[239] Congress, for example, could create a cause of action allowing plaintiffs to win injunctions against executive actions contrary to H.R.J. Res. 13. Congress could also limit these plaintiffs to those freeze groups which have been in existence for at least three years and have charters authorizing litigation to promote disarmament objectives.

Another option might be for Congress to enact a statute giving certain executive branch employees the legal right either to disobey presidential orders that violate the freeze statute, or to enjoin and declare unlawful presidential orders directed at them which entail similar alleged violations. Of course, any such plaintiff would have to allege that he or she personally had been given presidential orders contrary to the statute.[240] Possible plaintiffs under this "standing" statute include federal civil service employees who execute measures that the President regards as "necessary for the maintenance of and credibility of the United States nuclear deterrent"[241] even though these measures are allegedly inconsistent with "pursuing the overriding objective of negotiating an immediate, mutual, and verifiable freeze."[242]

### 3. Political Question

The facts and posture of each case are important in determining whether the case involves a political question.[243] If the President complied with a statute like H.R.J. Res. 13 and challenged its validity in court, congressional defendants would argue that this case, like *Goldwater*,[244] involves foreign affairs and a "dis-

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[238] *See infra* note 318.

[239] *See supra* text accompanying notes 50–58. In the absence of some statutory basis for standing, the psychological interests of freeze groups would probably be deemed to raise only "'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." *Valley Forge*, 454 U.S. at 475 (quoting Warth v. Seldin, 422 U.S. at 499–500 (1973)). Thus, even if some injury in fact to those interests were alleged to result from executive noncompliance with H.R.J. Res. 13, prudential limitations would likely dissuade a federal court from granting standing.

[240] *See supra* text accompanying notes 50–58.

[241] H.R.J. Res. 13 § 5.

[242] *Id.*

[243] *See supra* text accompanying notes 59–80.

[244] Goldwater v. Carter, 444 U.S. 996 (1979) (Powell, J. concurring).

pute between coequal branches of Government, each of which has resources available to protect and assert its interests."[245] The defendants would further argue that the statute gives the President several ways to avoid pursuing freeze objectives,[246] including simply not holding talks at all or postponing them indefinitely. The defendants would then argue that it is inappropriate for the Court to intervene when both branches can exercise their constitutional powers to influence the negotiations and, just like the treaty termination methods in *Goldwater*, there are several legitimate ways to strike a deal with other countries which involve congressional action such as reciprocal legislation. As such, the defendants would finally argue that the court should not choose among alternative methods of achieving arms control since this choice would require "an initial policy determination of a kind clearly for non-political discretion."[247]

The President, on the other hand, would respond that the Court would merely be interpreting the Constitution in determining whether the Executive has the exclusive power to outline the content and objectives of foreign negotiations.[248] Accordingly, Congress's *Goldwater* argument would be inappropriate because in that context the Constitution is silent on treaty termination methods and Congress has historically played a role in terminating treaties.[249] Here, the Constitution expressly gives the President the power to make treaties, and Congress has rarely attempted to legislate how the President should carry out foreign negotiations. Even if Congress could set foreign policy objectives, there is certainly no "textually demonstrable constitutional commitment" of such power to the legislature.[250]

The President could also rely on the Supreme Court's recent decision in *INS v. Chadha*,[251] where the Court refused to find a political question. Although it conceded that Congress had the constitutional power to enact the particular statute challenged in the case, the Court questioned "whether Congress ha[d] chosen a constitutionally permissible means of implementing

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[245] *Id.* at 1004.

[246] For example, the President might claim that avoiding the freeze objectives is necessary to maintain the credibility of United States deterrence. *See* H.R.J. Res. 13 § 5.

[247] Baker v. Carr, 369 U.S. 186, 217 (1962).

[248] *See supra* text accompanying note 66.

[249] *See Goldwater*, 444 U.S. at 1003, 1004 & n.1.

[250] *See Baker*, 369 U.S. at 217.

[251] 463 U.S. 919 (1983).

that power."[252] Congress cannot hide behind the political question doctrine by simply arguing that the President is challenging its legislative authority to enact the statute: "[I]f this turns the question into a political question, virtually every other challenge to the constitutionality of a statute would be a political question . . . . [Neither branch] can decide the constitutionality of a statute; that is a decision for the courts."[253]

In deciding this issue, a court would probably accept the President's arguments and not find a political question. The rationale in *Chadha* bolsters the Supreme Court's authority to entertain on the merits executive challenges to statutes even when "the particular constitutional question which [the Court decides is] essentially a 'separation of powers' issue."[254]

Stronger arguments for a political question would arise if the President were sued for acting contrary to the statute. If he or she negotiated without pursuing a freeze, a court would be somewhat reluctant to declare these Acts invalid or to enjoin them for fear of possibly reversing the negotiating process or jeopardizing agreements already in place. In this situation, a court would probably sense "an unusual need for unquestioning adherence to a political decision already made."[255] Furthermore, unless Congress was able to tell at an early stage that the President was violating the statute, its enforcement would be unlikely. Congress might try to have some of its members participate in the negotiations, but such action, if resisted by the President, would probably be invalid on the merits because it usurps the Executive's role as "sole organ" of communication in foreign affairs.[256] Congress might try sending mere observers to the negotiations to report any violation before the talks have progressed very far. Nevertheless, it seems unlikely that a court would uphold this practice in the face of arguments by the

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[252] *Id.* at 940–41.

[253] *Id.* at 941–42. Furthermore, the President would argue, there is no lack of standards for determining whether the statute is invalid; a court need only determine on the basis of case law and constitutional interpretation where the locus of power lies with respect to setting objectives for foreign negotiations. *See supra* text accompanying note 66.

[254] Nixon v. Administrator of General Services, 433 U.S. 425, 559 n.7 (1977) (Rhenquist, J. dissenting). The case involved an executive challenge to a statute as violating separation of powers principles, yet the Court did not express any reason why it should not hear the case. Although a political question argument was never raised in *Nixon v. Administrator*, this silence presumably did not preclude the Court from raising the issue if it felt that important principles of justiciability would be violated by reaching the merits.

[255] *Baker*, 369 U.S. at 217.

[256] *See supra* text accompanying notes 143–58.

President that national security information discussed in negotiations must remain confidential.[257]

Another scenario might involve the President failing to pursue freeze objectives because the statute provides that he or she need not agree to anything that would jeopardize America's "ability to preserve freedom"[258] or the "credibility of the United States nuclear deterrent."[259] A reasonable construction of the statute would seem to allow the Executive Branch to make these determinations. Even if a court itself wanted to make them, it is debatable whether the court has the "judicially discoverable and manageable standards"[260] by which to determine the validity of an executive finding that freedom or deterrence would be jeopardized.

Reversing an executive determination of such magnitude would express a "lack of [the] respect" due a coordinate branch of government.[261] Is a court better equipped than the President to decide what "preserving freedom" and "credible deterrent" mean? If so, the President would be greatly embarrassed should he or she tell the Soviets that production of a particular weapon cannot be frozen and a court then rules that it can. The "potentiality of embarrassment from multifarious pronouncements by various departments on one question"[262] seems obvious.

In response to these arguments, Congress would point out that the Court need only apply the law to the facts in determining whether the President acted contrary to the law. Because a court has authority to decide whether presidential determination of facts is grossly erroneous,[263] the President would have to offer good-faith evidence that a freeze would jeopardize freedom or deterrence before the court should defer to his or her judgment.

As to disrupting negotiations already underway, Congress would argue that the President should not be able to use the on-

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[257] In U.S. v. Nixon, 418 U.S. 683 (1974), the Supreme Court noted that it would likely not allow the subpoena of necessary information if the information involved military and diplomatic secrets. *Id.* at 706, 710–11.

[258] H.R.J. Res. 13 § 1(8).

[259] *Id.* at § 5.

[260] *See Baker*, 369 U.S. at 217.

[261] *See id.*

[262] *See id.*

[263] "A Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared . . . . [It can] inquire whether the exigency still existed upon which the continued operation of the law depended." *Id.* at 214, quoting Chastleton Corp. v. Sinclair, 264 U.S. 543, 547–48 (1922). *See also id.* at 216–17.

going nature of such talks as an excuse to avoid compliance with an arguably valid law. If the President thought the statute invalid, so the argument continues, he or she should have sued to have the statute declared invalid. Surely on such an important matter a court would have expedited the President's case so as not to delay impending negotiations.

A court, provided with these facts, would likely find a political question. The international ramifications of reversing negotiating postures or agreements already established by the President and the Soviets would dissuade a court from reaching the merits. This is a situation dominated by the need for finality in the political determination.[264] Moreover, Congress does have political weapons to influence the achievement of a bilateral freeze; perhaps reciprocal legislation can be enacted without specifying what the President can and cannot say to the Soviets.[265] Finally, a court has no principled basis upon which to determine whether the President acted to "preserve freedom and deterrence."[266]

Oddly enough, then, H.R.J. Res. 13 may raise a political question when Congress tries to enforce it but not when the President tries to invalidate it. In the former situation, judicial resolution might disrupt our foreign relations or preempt presidential judgment in areas where a court has no competence. In the latter situation, only constitutional interpretation is at stake. If Congress thinks the President might not comply with H.R.J. Res. 13, then it should pass a different statute or prepare for impeachment proceedings.

### 4. On the Merits

Although Congress has occasionally attempted to influence, if not determine, presidential negotiating objectives,[267] Presi-

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[264] *See Baker*, 369 U.S. at 213.

[265] *See supra* text accompanying notes 162–67.

[266] H.R.J. Res. 13 §§ 1(8), 5.

[267] *See, e.g.*, S. Res. 107, 98th Cong., 1st Sess. (1983) (stating sense of the Senate that START negotiations had reached an impasse and specifying negotiating terms that the President *should* raise with the Soviets before a certain date); H.R.J. Res. 61, 98th Cong., 1st Sess. (1983) (specifying negotiating terms that the President *should* raise in START); Nuclear Non-Proliferation Act of 1978 (NNPA), 22 U.S.C. §§ 3223(a), 3243 (1979) (*mandating* negotiating objectives). *See also* L. HENKIN, *supra* note 88, at 112–13. Interestingly, President Carter did not object to the mandatory provisions of the NNPA. *See S. REP. No.* 467, 95th Cong., 1st Sess. 45 (1977), *reprinted in* 1978 *U.S. CODE CONG. & AD. NEWS* 326, 368–70. Other "Presidents have been sensitive to such encroachments, have usually protested, and often disregarded them." L. HENKIN, *supra* note 88, at 113.

dents have historically set their own agendas in carrying out foreign negotiations.[268] The Supreme Court cases referring to the President as the "sole organ" of American foreign relations have at the very least held that the President has the power to initiate or cut off communications with foreign nations.[269] These cases also support the proposition that the President can determine the content of these communications.[270]

Assuming that the President has power to set negotiating objectives, the remaining questions are (1) whether that power is exclusive, and (2) whether H.R.J. Res. 13 impermissibly interferes with the President's treatymaking/sole organ powers, even if Congress has some concurrent power over the content of negotiations. As to the first question, some constitutional basis of congressional power must be discovered if the President is to be denied exclusive power over the negotiating process. Unlike the other freeze proposals discussed below,[271] H.R.J. Res. 13 does not regulate the level and composition of armaments but rather seeks to regulate the content of presidential negotiations. The Raise and Support Clauses, even broadly interpreted, do not appear to support this exercise of power.[272] In addition, the War Declaring[273] and Commerce Clauses[274] do not seem remotely qualified as sources of Congresional power. Because the Common Defense Clause,[275] as noted above, only allows Congress to spend, not regulate, for the common defense,[276] it too is unhelpful to Congress' position.

A more promising argument for Congress may lie in its inherent sovereignty powers.[277] Because Congress presumably views a nuclear freeze as essential to national survival, it could argue that the very sovereignty of the United States is endangered each day by the threat of nuclear war. Under these circumstances, Congress could argue that it not only has the power but the duty to act. Although the inherent sovereignty power has not been defined with any amount of precision,[278] Congress's

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[268] L. HENKIN, *supra* note 88, at 130–31.
[269] *See supra* text accompanying notes 146–51, 161–62 & note 150.
[270] *Id.*
[271] *See infra* text accompanying notes 295–305.
[272] *See supra* text accompanying notes 102–09.
[273] *See supra* text accompanying notes 110–13.
[274] *See supra* note 138.
[275] *See supra* note 114 and accompanying text.
[276] *Id.*
[277] *See supra* text accompanying notes 129–33.
[278] *See supra* text accompanying notes 129–33.

argument would at least be plausible. The President would have difficulty refuting this on the basis of the historic monopoly of the Executive Branch over the content of negotiations, because only in the last few years has the arms race reached proportions so great as to threaten our very existence.[279] Moreover, a decision as to how the arms race will be resolved involves such far-reaching national implications, with perhaps irreversible effects, that it should be made by the political body most representative of the nation as a whole.

It seems unlikely, however, that a court would find support for H.R.J. Res. 13 in the inherent sovereignty powers of Congress. The United States has had nuclear weapons for several decades and the President alone has conducted all of the nuclear arms negotiations in the past fifteen years, including those of SALT I and SALT II. The grave consequences of nuclear war cannot have become that much more grave in the last six years. In addition, even if a court acknowledged the existence of inherent sovereignty powers, those powers would most likely be allocated on the basis of naturally executive or legislative functions.[280] Responsibility for determining the content of negotiations carried on by the Executive would seem, on a pragmatic basis, to lie with that same branch.[281] Foreign negotiations would be hopelessly muddled if executive officials were required to persuasively convey ideas not supported by the President.

Finally, through the Necessary and Proper Clause,[282] Congress could argue that H.R.J. Res. 13 simply facilitates the President's treatymaking powers. The Necessary and Proper Clause, however, is not meant to usurp presidential powers.[283] If Congress could mandate negotiating objectives, it would seem to render the President merely a messenger, not a treatymaker. Surely the Framers did not comtemplate that the Necessary and Proper Clause would authorize Congress to take away presidential power. Instead the clause was designed to enable Congress

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[279] The urgency of the need to resolve the nuclear arms race is asserted in the legislative finding of fact that "the increasing stockpiles of nuclear weapons and nuclear delivery systems by both the United States and the Soviet Union have not strengthened international peace and security but in fact enhance the prospect for mutual destruction." H.R.J. Res. 13 (Preamble).

[280] *See supra* text accompanying notes 129–32.

[281] L. HENKIN, *supra* note 88, at 131.

[282] *See supra* text accompanying notes 134–39.

[283] *See supra* text accompanying notes 134–39.

to help the President carry out all of the powers invested in the Executive.[284]

Even if a court held that Congress had concurrent power to regulate the content of negotiations, relevant cases, particularly *Nixon v. Administrator*,[285] indicate that a court would invalidate H.R.J. Res. 13 to prevent congressional interference with ongoing presidential negotiations.[286] It appears that H.R.J. Res. 13 would drastically alter the focus of talks already begun—talks requiring months of preparation. Agreements already reached might require modification even if extensive governmental actions had been taken to carry them out.

H.R.J. Res. 13 could still be upheld, however, if it were "justified by an overriding need to promote objectives within the constitutional authority of Congress."[287] Under this approach, a court would weigh the importance of the President's and Congress's assertions of power in light of the circumstances, and would then ask how an adverse decision would harm each branch's essential functions.[288] In both instances, Congress would lose. Unless nuclear war is imminent, there appears to be no compelling reason why an assertion of congressional sovereignty power must trump the traditional treatymaking power of the President. Furthermore, validating H.R.J. Res. 13 would effectively eviscerate the President's treatymaking powers and upset treaty negotiations simultaneously being carried on by the Executive Branch. A decision adverse to Congress, on the other hand, would not upset Congress's traditional powers over foreign affairs, nor nullify Congress's inherent sovereignty power. As discussed below, there are other ways for Congress to achieve its objectives without excessively interfering with the President's constitutional powers.[289]

### 5. Severability

In *Buckley v. Valeo*,[290] the Supreme Court enunciated the following test for severability: "Unless it is evident that the

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[284] *Id.*

[285] 433 U.S. 425 (1977).

[286] In *Nixon v. Administrator*, the Court held that a statute admittedly within Congress's power would not be given effect when it "prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Id.* at 443.

[287] *Id.*

[288] *See, e.g., id.* at 443–45.

[289] *See infra* text accompanying notes 358–64.

[290] 424 U.S. 1 (1976).

Legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."[291] H.R.J. Res. 13 probably would fall as a whole since most sections are dependent upon the mandatory negotiating objectives in section 1.[292] There is no severability clause supporting a "presumption that Congress did not intend the validity of the Act as a whole, or any part of [it], to depend upon whether [section 1 of H.R.J. Res. 13] was invalid."[293] Moreover, most of the other sections of the Act incorporate section 1 by reference and are therefore not "fully operative as law"[294] without it.

### 6. Summary of H.R.J. Res. 13

H.R.J. Res. 13 tries to mandate objectives for presidential negotiations with the Soviets. The President would have standing to challenge the statute. Congressional or private plaintiffs, however, would probably not have standing to challenge presidential noncompliance, unless Congress passed another statute giving executive officials the right to ignore and enjoin presidential orders allegedly contrary to H.R.J. Res. 13. Even if congressional or private plaintiffs could get standing, their lawsuits would likely be dismissed because of a political question. The political question doctrine, however, would probably not preclude the President from attacking the statute.

On the merits, H.R.J. Res. 13 is probably unconstitutional because it (1) usurps exclusive presidential power to determine the content of foreign negotiations, and/or (2) interferes with ongoing negotiations with the Soviets. Consequently, if Congress decides to pass a freeze statute, it should not enact one like H.R.J. Res. 13; for this resolution is neither practical nor enforceable, even if its enactment is within the constitutional power of Congress.

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[291] *Id.* at 108 (quoting Champlin Refining Co. v. Corporation Comm'n, 286 U.S. 210, 234 (1932)).

[292] *See supra* text accompanying notes 229–30.

[293] INS v. Chadha, 462 U.S. 919, 932 (1983).

[294] *Buckley*, 424 U.S. at 108.

### B. *Reciprocal Legislation*

#### 1. The Comprehensive Nuclear Weapons Freeze and Arms Reduction Act of 1984, and the Arms Race Moratorium Act

The Comprehensive Nuclear Weapons Freeze and Arms Reduction Act of 1984 (Comprehensive Act)[295] and the Arms Race Moratorium Act (Moratorium Act)[296] were both introduced into the ninety-eighth Congress. Neither has yet been voted on by the House or Senate.

The purpose of both these Acts is to provide for a comprehensive bilateral and verifiable nuclear weapons freeze. To achieve this goal, the Comprehensive Act regulates presidential action,[297] while the Moratorium Act cuts off funding for nuclear arms.[298]

The Comprehensive Act stipulates that within sixty days of its passage the Administration must provide Congress with an operational plan for implementing a comprehensive freeze,[299] and within one hundred and twenty days the actual freeze must begin.[300] The freeze must continue so long as the Soviets act reciprocally.[301] If they do not, the President is instructed to inform Congress so that it may then decide "the extent to which the United States should modify its participation in the comprehensive freeze."[302] If the Soviets do respond favorably, the Com-

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[295] H.R. 6210, 98th Cong., 2d Sess. (1984).

[296] H.R. 5571, 98th Cong., 2d Sess. (1984).

[297] *See infra* notes 299–303 and accompanying text.

[298] *See infra* note 304 and accompanying text.

[299] H.R. 6210 at § 5. This plan is to be made by the Director of the United States Arms Control and Disarmament Agency, in consultation with the Secretary of Defense. *Id.*

[300] Section 6 of the Comprehensive Act "encourages" the President to communicate the bilateral freeze to the Soviets. *Id.* at § 6(a). The President is further encouraged to try to get the Soviets to respond to the proposal in writing. *Id.* at § 6(b). If the Soviets do respond in writing, section 6(c) directs the President to submit to Congress a copy of the response within three days of its receipt. *Id.* at § 6(c).

Section 7(a) requires the President, 120 days after enactment of the Act, to implement the operational plan developed under the Act. *Id.* at § 7(a).

[301] *Id.* at § 7(b).

[302] *Id.* at §§ 7(d), (c). The President's certification must include his or her recommended response for the United States. *Id.* at § 7(c). The Comprehensive Act is ambiguous because section 7 appears to allow the freeze to continue unilaterally until Congress passes new legislation determining our response to Soviet noncompliance. *See infra* text accompanying notes 371–73. On the other hand, sections 7(a) and (b) together may intend to give the President authority to respond to Soviet noncompliance in the interim before the new legislation. *See infra* text accompanying note 373. Overall, the statute tries to involve the Executive Branch in the comprehensive freeze, but the will of Congress prevails if the President refuses to cooperate.

prehensive Act provides that arms *reduction* negotiations "should" begin as soon as the comprehensive freeze is implemented.[303]

The Moratorium Act uses a simpler reciprocal approach to achieve a freeze. It begins by "encouraging" the President to suggest the moratorium to the Soviets. The President has ninety days after enactment of the Moratorium Act to convey such an offer. If he or she does not comply and if the Soviets communicate their willingness to agree to the moratorium, then at the end of the ninety day period "no funds may be obligated or expended by the United States for the flight testing or the deployment of new ballistic missiles, the flight testing against objects in space or the deployment of anti-satellite weapons, or the testing of nuclear warheads."[304]

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[303] *Id.* at § 8.

[304] *Id.* at § 3(b)(1). The bilateral moratorium does not cover all nuclear weapons. Instead, it is limited to those deemed to involve "new destabilizing technologies." *Id.* at § 2(4). A "new ballistic missile" is defined by section 3(c)(1) of the Moratorium Act as "any ballistic missile (including any modification of an existing missile type that increases its throw-weight or number of reentry vehicles) with a range exceeding 600 kilometers that was not flight-tested by the United States or the Soviet Union before August 1, 1982." For the United States, this would include the MX and Trident II missiles. Letter from H.R. 5571 sponsors to congressional colleagues (date unknown). As for the Soviets, section 3(c)(1) would cover their SSX-24, SSX-25, and SSNX-23 missiles. *Id.* Both countries would halt testing and deployment of anti-satellite (ASAT) weapons. *See* H.R. 5571 § 3(c)(2). Section 3(c)(2) of the Moratorium Act defines an ASAT weapon as "any interceptor vehicle(s) intended for and capable of damaging an object in space." *Id.* Both countries also would halt "testing of nuclear warheads," defined as "the detonation of any nuclear explosive device." *Id.* at § 3(c)(3).

Section 3(b)(1) is ambiguous in that the funding cutoff appears inapplicable if either (1) the President conveys the moratorium offer to the Soviets within the 90-day period, (2) the Soviets respond after the 90-day period, or (3) the Soviets respond within the 90-day period but do not agree to the moratorium *in toto*. The first situation poses no real problem, for if the President conveys the moratorium offer within 90 days and the Soviets agree *in toto* within that period, then the Moratorium Act by its terms does not apply. *See id.* Congress's purpose will nevertheless be achieved in the form of a treaty. The second situation is not as easily dismissed. Technically, the Moratorium Act allows a recalcitrant President to avoid operation of the funding cut-off by waiting until the 90th day to convey the moratorium offer. Unless the Soviets agreed to the offer on that day, the Moratorium Act by its terms would not apply. *See id.* The President could then simply revoke the moratorium offer on the 91st day before the Soviets responded. The President's behavior in this situation may be impolitic, but it is acceptable under the statute. The President would, however, risk great public criticism for making obvious efforts to avoid enforcement of an assumedly valid law. This technical problem is mitigated somewhat by the fact that Congress could simply amend the Moratorium Act to give the Soviets more time to respond. Additionally, the Soviets too could prevent the problem by simply communicating their desire for a moratorium within the 90-day period—even if the President had not communicated with them first. *See* H.R. 5571 § 3(b)(1).

Section 3(b)(3) provides that each succeeding year after the moratorium begins the President must report to Congress "(A) on the progress being made by the United States in negotiating nuclear arms control agreements with the Soviet Union; and (B) on

Both of the reciprocal statutes[305] condition United States production, testing, and deployment of nuclear weapons on the actions of the Soviet Union. Therefore, the United States would reciprocally disarm in response to the level of disarmament by the Soviet Union. No treaty or international agreement is required for either statute to take effect. The largest difference between the two statutes is that one directly regulates presidential activity while the other provides for enforcement through funding cut-offs. This difference in enforcement mechanisms, however, does not significantly effect the validity of the constitutional analysis offered below.

### 2. Standing

The President probably would have standing to attack both of the reciprocal freeze statutes as an unconstitutional derogation of the Executive's Commander-in-Chief and treatymaking powers. As to the first claim, the President could meet the injury in fact requirement by alleging that both Acts illegally prevent the Commander-in-Chief from deploying nuclear weapons. The causation and redressability requirements could be met by simply alleging that, but for the Acts, the President would continue to deploy such weapons.

Regarding the treatymaking powers claim, the President could show injury in fact by alleging that the Acts undermine his or her bargaining position in nuclear arms negotiations with the Soviets. Causation and redressability could be shown by alleging that the Acts take effect irrespective of a prior treaty on the same subject, thus possibly upsetting any negotiated compromises already reached by the President.

Defense contractors and their employees, as well as European NATO officials, also have standing to challenge the Acts. Because a freeze would immediately shut down defense plants and put many people out of work, defense contractors could allege

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whether the President believes that continuation of the moratorium is in the best national security interests of the United States." If the President states in any annual report that he or she believes the moratorium is not in our best national security interests, "then the Congress may enact a joint resolution which terminates the moratorium and permits funds to be used" for testing and deployment. H.R. 5571 § 3(b)(3). The Moratorium Act does not expressly provide any mechanism by which Congress may learn of the President's displeasure with the moratorium other than at the specified annual intervals. However, there is no reason to believe that the Moratorium Act prevents such expressions.

[305] *See supra* notes 295–96.

a harm sufficient to satisfy the injury in fact requirement. Even though contractors and their employees would challenge the Acts on separation of powers grounds, they would have a direct financial stake in the resolution of the case on the merits. As for causation and redressability, if the court characterizes the Acts as invalid derogations of presidential powers, production, testing, and deployment would resume and the plaintiffs probably would get their contracts and jobs back. Of course, the plaintiffs would have to allege that it was "likely" that they would get their contracts and jobs back if the Acts were found invalid.[306]

Assuming European NATO officials have statutory access to American federal courts,[307] the argument for standing is somewhat analogous. If the United States implements a comprehensive freeze or moratorium, the alleged imbalance of nuclear forces in the European theater will not improve. If the Acts are invalid, however, the United States allegedly[308] would continue deployment of nuclear weapons in Europe to counterbalance

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[306] *See* Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982). Furthermore, plaintiffs would have fairly strong standing arguments based on Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), and INS v. Chadha, 462 U.S. 919 (1983), where companies and an alien individual, respectively, had a personal stake in the outcome of an interbranch power struggle.

Admittedly, *Youngstown* and *Chadha* involved federal government acts directed at identifiable plaintiffs, while both of the reciprocal Acts do not expressly revoke specific defense contracts or prohibit contracting with specific defense companies. However, identifiability is not a separate requirement for standing; rather it is relevant only insofar as it enables a plaintiff to meet the requirements of injury in fact, causation, and redressability more easily. *See supra* text accompanying notes 26–30. For example, both the Comprehensive Act and the Moratorium Act, while not expressly referring to defense contracts, would necessarily lead to their revocation. The injury in fact and causation here are only slightly less obvious than a freeze statute specifically referring to contract cut-offs with defense companies.

The more difficult issue would be for the defense contractors to show that it was likely that they would get their contracts back if the Act were invalidated. This could be asserted *a fortiori* if the Acts required a revocation of specific contracts or a cut-off of contracts with identifiable defense companies. Yet even without mentioning such, the redressability requirement can be met if plaintiffs allege (and perhaps back up with executive branch affidavits) that the Defense Department plans to (1) renew contracts upon invalidation of the Act, and (2) renew contracts with these particular plaintiffs. Thus while it is true that *Youngstown* and *Chadha* involved government acts directed at identifiable plaintiffs, that distinction should not determine the question of defense contractor standing under the Comprehensive Act and the Moratorium Act.

[307] Federal question jurisdiction under 28 U.S.C. § 1331 is available notwithstanding foreign citizenship. *See* 1 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 0.75[2] n.4 (1984).

[308] To satisfy the redressability requirement of standing, the European plaintiffs must at least allege that deployment by the Executive Branch is "likely" to proceed anew in Europe upon invalidation of the Act. *See Valley Forge*, 454 U.S. at 471.

the Soviets. Clearly European NATO nations and officials have a "personal stake"[309] in the resolution of the separation of powers issues.[310]

The Comprehensive and Moratorium Acts might also be litigated in suits to enjoin presidential noncompliance. For example, despite Soviet acceptance of a freeze, the President might refuse to implement the freeze plan called for under the Comprehensive Act within the required one hundred and twenty days. Then again, the President might continue to order the disbursement of funds on programs prohibited by the Moratorium Act. Under these circumstances, Congress would not have standing and would only have the rights of ordinary citizens because the presidential action does not inhibit its power to make law.[311] As noted earlier, citizens *qua* citizens would not have standing to complain about presidential violations of law that do not affect them personally.[312] Those civil servants who have an interest in employment that does not require them to execute presidential orders that may be invalid also would not have standing because their employment interest does not appear "arguably within the zone of interests to be protected or regulated"[313] by either of the reciprocal Acts.[314] Congress would have to pass another statute protecting that particular employment interest before those civil servants could get standing.[315]

On the other hand, standing under APA section 702 may be available to nuclear freeze groups and their members because their interest is arguably within the zone of interests protected or regulated by a freeze. These plaintiffs would argue that the Acts were passed in response to fears that an escalating arms race would increase the risk of nuclear war. That risk is of concern not only to governments but also to individuals, who must live with the constant, debilitating fear of nuclear war. Indeed, section 2(1) of the Comprehensive Act declares that "the greatest challenge facing human civilization is to prevent

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[309] Baker v. Carr, 369 U.S. 186, 204 (1962).

[310] *Cf. Chadha*, 462 U.S. at 936 (alien had standing to challenge a statute allegedly in violation of separation of powers principles when invalidation of the statute would prevent his deportation).

[311] *See supra* text accompanying notes 37–49.

[312] *See supra* text accompanying notes 29–30.

[313] *See* United States v. SCRAP, 412 U.S. 669, 686 (1973).

[314] The zone of interests test is a prudential limitation upon judicial cognizance of the plaintiffs' claim, *see Valley Forge*, 454 U.S. at 475 & n.12, in addition to serving as a requirement for judicial review under APA § 702. *See supra* note 236.

[315] *See supra* text accompanying notes 240–42.

the occurrence of nuclear war by accident or design."[316] Like the aesthetic interest protected by the National Environmental Policy Act in *United States v. SCRAP*,[317] the freeze Acts arguably protect the equally tangible interest of freedom from a daily, paralyzing fear that an escalating arms race will result in nuclear war.[318] This argument is both plausible and consistent with the purposes of these Acts. Of course, Congress could remove all doubt by enacting a standing statute for nuclear freeze groups and supporters.[319]

Other avenues do not appear nearly as promising.[320] For example, while taxpayer standing would seem available if the President violated the Moratorium Act by spending funds without authorization, the Supreme Court has twice declined to extend taxpayer standing to challenges of *executive* expenditures of funds.[321]

### 3. Political Question

Resolution of the political question issue for both reciprocal Acts depends upon the posture of the individual case. If the President or private plaintiffs challenge either of the Acts, *Chadha*[322] and *Nixon v. Administrator*[323] provide strong support

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[316] H.R. 6210 § 2(1).

[317] 412 U.S. 686 n.13.

[318] It is quite difficult to find a similar interest encompassed in H.R.J. Res. 13. The zone of interests regulated or protected by the Acts appears to be broader than that of H.R.J. Res. 13, the latter aiming more to control a specific executive function than to placate citizen fears. *See supra* text accompanying notes 237–39 & note 239.

[319] Once the legal interest had been established, freeze advocates would still have to show that they personally suffered as a result of presidential noncompliance with the Acts.

[320] Private plaintiffs may have standing to challenge executive testing or deployment of nuclear weapons on the ground that such actions subject them to unreasonable risks of injury. This theory was utilized by plaintiffs in Pauling v. McNamara, 33 F.2d 796 (D.C. Cir. 1963), *cert. denied*, 364 U.S. 835 (1964) (testing), and Greenham Women Against Cruise Missiles v. Reagan, 591 F. Supp. 1332 (S.D.N.Y. 1984), *aff'd*, 775 F.2d 34 (2d Cir. 1985) (per curiam) (private and congressional plaintiffs sought to enjoin the deployment of ninety-six cruise missiles at the U. S. Air Force Base outside of London). In *Pauling*, then Circuit Judge Burger dismissed the suit on political question grounds but held that the district court was "plainly correct" in finding that plaintiffs lacked standing. *Id.* at 797–98. In *Greenham Women*, both the district court and the circuit court of appeals dismissed on political question grounds without addressing the standing issue.

[321] *See supra* note 34. For other attempts at standing by private plaintiffs, *see supra* note 320.

[322] 462 U.S. 919 (1983).

[323] 433 U.S. 425 (1977). *See* discussion of *Chadha* and *Nixon* (notes 322 & 323, respectively) at *supra*, text accompanying notes 251–254 & note 254.

for the argument that such a suit raises no political question. Congress is not the beneficiary of a "textually demonstrable constitutional commitment"[324] of power to achieve a bilateral freeze; the President, too, can negotiate a bilateral freeze under the executive treatymaking powers.[325]

However, if a challenge was brought against the Comprehensive Act after the Soviets had already begun to comply with it, or against the Moratorium Act after the ninety day period when the bilateral moratorium was in effect, then Congress would have a strong argument that striking down either Act would upset the Soviets, undermine America's credibility, and jeopardize hopes for future agreements with the Soviets. Therefore, an "unusual need [would exist] for unquestioning adherence to a political decision already made."[326] This argument seems strong in light of the purposes of the political question doctrine.[327] The President should thus attack the constitutionality of the Comprehensive Act as soon as possible before the Soviets agree to, or begin compliance with, the freeze. Similarly, judicial challenge to the Moratorium Act within ninety days of its enactment appears necessary.

The other possible litigation scenario involves suit by private plaintiffs against the President for failure to comply with either Act. *Youngstown*[328] would seem to indicate that the political question doctrine should not bar suits by private plaintiffs. This stems from the ease with which a court need only interpret the law in question or determine if executive power exists to refuse compliance.[329]

However, both Acts have several twists that could lead to a finding of a political question. First, if the President deployed cruise missiles in Europe in violation of the Comprehensive Act, a judicial ruling that the President must de-deploy would greatly embarrass the United States, bring about serious rifts in the NATO alliance, and dangerously undermine the United States's bargaining posture with the Soviets. The "potentiality of embarrassment from multifarious pronouncements by various departments on one question"[330] is obvious, and as such a court

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[324] *See Baker* 369 U.S. at 217 (1962).
[325] *See supra* text accompanying notes 159–62.
[326] 369 U.S. at 217.
[327] *See supra* text accompanying notes 60–63.
[328] 343 U.S. 579 (1952).
[329] *See supra* text accompanying note 66.
[330] *Baker*, 369 U.S. at 217.

would have a difficult time not finding a political question.[331] Similarly, with respect to the Moratorium Act, once deployment takes place, *a fortiori* no further funds for deployment are spent. A court would actually force the expenditure of more funds in requiring the President to de-deploy already deployed missiles. While a court could certainly enjoin *future* expenditures, what form of relief would remedy expenditures already made?

A second political question issue arising under the Comprehensive Freeze Act involves the Act's ambiguity as to whether the President can respond immediately to Soviet noncompliance or must wait until new legislation is passed. If the Act does not allow the President to respond immediately, it may be unconstitutional.[332] If it does, and the President determines that the Soviets are not acting in a "reciprocal manner,"[333] by what standards can a court assess the validity of this factual determination? A court simply lacks the access to information and the necessary expertise[334] in the area of nuclear weapons capa-

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[331] *See* note 334.

[332] *See supra* text accompanying notes 365–368.

[333] H.R. 6210 § 7(c).

[334] *See id.* at 213. It is ironic indeed that dismissal of the suit to protect our foreign relations would preclude perhaps more compelling congressional arguments that deployment jeopardizes our foreign relations more than de-deployment.

Moreover, judicial challenge to prevent *anticipated* deployment in violation of either Act would probably lack justiciability. In *Greenham Women*, 591 F. Supp. 1332, the private plaintiffs alleged that deployment would tortiously subject them to unreasonable risks of harm and would also violate their rights under the Fifth and Ninth Amendments to the Constitution. The congressional plaintiffs alleged that deployment would violate their constitutional rights as members of Congress to declare war and provide for the general defense and welfare. The district court dismissed the suit on political question grounds. The court began by holding that determination of the "legality of the challenged action" was constitutionally committed to the courts. *Id.* at 1336. The district court was, however, unwilling to make this determination because "the factfinding that would be necesssary for a substantive decision is unmanageable and beyond the competence and expertise of the judiciary." *Id.* at 1338. Presumably the district court concluded that partial relief would be impossible to frame "without an initial policy determination of a kind clearly for nonjudicial discretion." *Baker*, 369 U.S. at 217.

The district court went on to point out that the relief plaintiffs requested—prevention of deployment—would seriously undermine United States foreign policy by disrupting the extensive military planning of the United States and other NATO nations. *Greenham Women*, 591 F. Supp. at 1339; *See Baker*, 369 U.S. at 217 ("unusual need for unquestioning adherence to a political decision already made").

On appeal, the Second Circuit affirmed in a short *per curiam* decision. *Greenham Women*, 775 F.2d 34 (2d Cir. 1985). The court of appeals, noting the district court decision, asserted that

> we believe it even clearer that the complaint of the non-congressional plaintiffs raises issues which . . . the Constitution [delegates] to coordinate political departments, and requests relief which cannot be granted absent an initial policy determination of a kind clearly for non-judicial discretion . . . . [W]e believe the claims [the congressional plaintiffs] raise are not ripe for decision,

bilities to pass on a presidential assertion that the Soviets are not reciprocating.[335] Similarly, the Moratorium Act gives the President authority to resume testing and deployment if the Soviets act "inconsistent[ly] with the moratorium."[336] This factual determination by the President would be given great deference by a court,[337] and a political question would probably be found because no "judicially discoverable and manageable standards exist" for questioning the President's judgment.[338]

In sum, then, the political question doctrine will generally not preclude litigation involving either reciprocal freeze Act. However, special circumstances may arise where the Court must, or at least should, defer to a political decision already made.

### 4. On the Merits

What Congress seeks to achieve in these Acts the President can achieve pursuant to his or her treatymaking powers. The President, for example, can sign a treaty incorporating a bilateral nuclear freeze,[339] provided, of course, that two-thirds of the Senate concur. The questions, therefore, are whether Congress has the constitutional authority to enact a bilateral freeze and, if it has concurrent power, whether Congress should prevail under the circumstances. I now turn to the first of these issues.

Both the Comprehensive Act and the Moratorium Act find their legitimacy through the Raise and Support Clauses. As Professor Henkin points out, Congress has inherent sovereignty power to enact reciprocal disarmament legislation.[340] Further-

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*see Goldwater v. Carter*, 444 U.S. 996, 997–98 (1979) (Powell, J., concurring), even assuming they have standing to raise such claims.

*Id.* at 1884–85 (citations omitted).

The court of appeals's opinion appears to give the political question doctrine much greater reach with respect to private, as opposed to congressional, plaintiffs, and does not even suggest that the political question doctrine would not bar a ripe suit if Congressional plaintiffs had standing. The importance of this interpretation should not be overemphasized. However, if a court lacks judicially discoverable and manageable standards by which to make factual determinations and cannot frame relief without making a non-judicial policy decision, neither plaintiff class should prevail. The role of the court must be the same in either case.

[335] *See infra* text accompanying notes 369–73.

[336] *See* H.R. 6210 at § 7(c).

[337] *See* discussion of *Greenham Women*, *supra* note 334.

[338] In the alternative to dismissal on political question grounds, a court's sense of its own lack of competence in the field may lead it to defer on the merits to a presidential factual determination unless completely unfounded.

[339] *See supra* text accompanying notes 158–61.

[340] *See supra* notes 162–67 and accompanying text.

more, at least with respect to production and testing, Congress has additional power under the Raise and Support Clauses.[341] Congress has traditionally had the last word on procurement and testing of nuclear arms.[342]

In addition, the Moratorium Act has a strong constitutional underpinning because of Congress's plenary power over government expenditures.[343] Within limits, Congress has the authority to prevent a governmental activity by simply not authorizing expenditures for that activity. It is not clear, however, whether Congress can refuse to authorize funds for activities that it cannot prohibit directly. Such activities would include those exclusively managed by the President. For example, Congress clearly could not prohibit the President's negotiators from negotiating with the Soviets. But could Congress prohibit expenditure of any funds by the Executive Branch for foreign travel to engage in arms negotiations? The Constitution would appear to permit this type of legislation, but such legislation cannot possibly be valid. If it were, Congress could effectively eliminate the power of the Executive Branch by simply failing to authorize funds for its continued operation. Without constitutional limits on the appropriations power, the Executive Branch would be unable to resurrect itself in the face of a blanket cut-off because it could not spend money "but in Consequence of Appropriations made by Law."[344]

To avoid this possibility, Congress must have a constitutional obligation to fund those activities that are essential to the exercise of constitutional powers allocated to the other two coequal branches. The very structure of the Constitution assumes three coequal branches capable of effective operation. The Framers' concept of checks and balances would be meaningless if Congress, by cutting off funds, could eviscerate the constitutionally delegated powers of the Executive and Judicial Branches.[345]

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[341] *See supra* text accompanying notes 102–09.

[342] *See supra* text accompanying notes 102–09 & note 181.

[343] *See supra* text accompanying notes 114–28. Article I, § 8, cl. 1 gives Congress "[P]ower to lay and collect taxes . . . to pay the debts and provide for the common Defence and general Welfare of the United States." Art. I, § 9, cl. 7 states that "[N]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law." It is interesting that Art. I, § 9, cl. 7 is found among a list of prohibitions of congressional, not executive, actions. However it is assumed here that the clause is equally applicable to the Executive Branch.

[344] Article I, § 9, cl. 7

[345] Of course, it would probably be impossible for the Executive to force congressional

Just as Congress cannot refuse to fund a power the President is constitutionally entitled to exercise, it may not have the exclusive or even concurrent power, called for in differing degrees by both reciprocal Acts, to set deployment policies. A strong argument can be made that as Commander-in-Chief, the President alone controls the armaments placed under executive authority,[346] subject only to Congress's power to declare war.[347] Once Congress decides to build a tank, it cannot tell the President where that tank should be deployed. Similarly, Congress cannot tell the President where to deploy nuclear weapons because the President, as Commander-in-Chief, is responsible for employing that which Congress has budgeted in the most effective mix.[348] Determining this mix is at the heart of what it means to "command the forces"[349] in peacetime. Nor is there any support in law or history for the proposition that the President loses the Commander-in-Chief power during peacetime.[350] Indeed, in a nuclear age, preparedness in peace may be more important than prowess in war; the former requires equal if not greater military acumen than the latter. The President, not Congress, will be held accountable for deployment decisions, and Congress does not have the military competence to make those decisions.[351]

While this argument may be supported by policy, the President can rely on only a few cases to support the proposition that he or she has *exclusive* deployment power.[352]

Even if Congress has concurrent power over deployment, one must ask which branch has the better claim to power in this situation under the test of *Nixon v. Administrator*.[353] The President would argue that deployment of nuclear weapons is the

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spending through judicial channels. The President could perhaps spend money appropriated for related, but not identical, line items, but such an action would itself be lawless. In the final analysis, therefore, effective constitutional government rests upon the willingness of both branches to voluntarily act in a responsible manner.

[346] *See supra* text accompanying notes 171–81.

[347] *See* L. HENKIN, *supra* note 88, at 108.

[348] According to Henkin, "It would be unthinkable for Congress to attempt detailed, tactical decisions, and as to these the President's authority is effectively supreme." *Id.*

[349] *See supra* text accompanying notes 171–81.

[350] The President would be held responsible if the peacetime forces were not arranged to maximize deterrence and to ensure preparedness for war. Moreover, the nature of military judgments requires centralized, confidential planning and flexible decision making. Neither is feasible with legislative control over deployment.

[351] [NO REF 351 IN TEXT] *See supra* text accompanying notes 345–50.

[352] *See supra* text accompanying notes 175–78.

[353] 433 U.S. 425 (1977). *See supra* text accompanying notes 208–09.

backbone of present military strategy and that congressional control of deployment would all but eliminate the role of the Executive in strategic planning. Military tactics should not be subject to the inconsistent civilian control of Congress. Moreover, because deployment neither necessitates war nor the subjugation of foreign territory, executive control of deployment does not emasculate Congress's war and sovereignty powers.

Congress, on the other hand, would argue that the arms race is out of control and that any level of deployment beyond that of the Soviets will drastically increase the risk of nuclear war and jeopardize our national sovereignty. Moreover, Congress has implied power from the War Declaring Clause to preserve peace,[354] and in this time of great international tension, further deployment arguably may provoke war and not promote peace. This rationale might constitute what the Court in *Nixon v. Administrator* referred to as "an overriding need to promote objectives within the constitutional authority of Congress."[355]

The arguments are very strong that the President possesses exclusive deployment power. Nevertheless, a court would probably avoid questioning this by holding that, short of imminent nuclear war, concurrent congressional power over deployment must give way to the President's power to command the forces under his or her control.[356] A holding against the President would effectively nullify the executive role in strategic military planning. A decision adverse to Congress, on the other hand, would not prevent that branch from pursuing its traditional responsibilities. Moreover, Congress has a great many other powers with which to influence deployment, including powers over production, testing, and appropriation.[357]

Testing and production decisions, unlike deployment decisions, are concededly the prerogative of Congress.[358] Presumably, Congress could halt all testing of nuclear weapons. Any weapon still on the assembly line at the time of a freeze would probably fall under the production power of Congress. Congress would argue that unfinished missiles are not "placed by law at [the President's] command"[359] and are therefore not yet part of

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[354] *See supra* text accompanying notes 110–13.
[355] 433 U.S. at 443.
[356] *See supra* text accompanying notes 171–81, 346–50.
[357] *See supra* text accompanying notes 102–09, 114–28, and 359–61.
[358] *See generally supra* note 181 and accompanying text.
[359] Fleming v. Page, 50 U.S. (9 How.) 602, 614 (1850).

the arsenal under the President's control. Because Congress determines the level and content of appropriations for the Armed Forces,[360] it could mark funds for only certain missile parts but not for their assembly. The President would be on very weak footing, indeed, to argue that Congress could not stop building what it had exclusive power to start.[361]

Both reciprocal freeze Acts go beyond a mere halting of nuclear testing because they tie the cessation of testing to an equivalent action of the Soviets. Such an arrangement is not within Congress's exclusive power; the President, too, could strike the same deal with the Soviets under the executive treatymaking power.[362] The analysis therefore revolves around the issues raised in *Nixon v. Administrator*[363] as to which branch prevails when concurrent powers conflict.

The President would argue that both reciprocal Acts excessively limit executive treaty negotiating options either by disrupting the treatymaking process or by wiping out the gains of an already signed pact. This could occur because the Soviets would know the limits of United States negotiating options.[364]

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[360] *See supra* text accompanying notes 102–09.

[361] Furthermore, even if the President controls already completed missiles, Congress could slow their deployment by refusing funds for basing silos or operational maintenance. Indeed, Congress could even dismantle finished nuclear weapons.

[362] *See supra* text accompanying notes 102–09.

[363] 433 U.S. 425 (1977).

[364] In addition to negotiating problems which may occur after the Acts come into effect, the Comprehensive Act might result in a peculiar situation if it was passed in the midst of ongoing negotiations between the Executive Branch and the Soviets. Assume, for example, that before the statutory one hundred and twenty days ran, a treaty was made with the Soviets and ratified by the Senate that called for the Soviets to freeze a particular type of weapon, while we agreed to postpone Star Wars research for five years. One hundred and twenty days after enactment, however, the Act requires that Congress freeze what the Soviets have frozen. Because postponement of research cannot fairly be construed as "reciprocal" freezing of an entire weapons system, the United States would have to freeze our equivalent weapons system in addition to carrying out our treaty obligation to postpone research. It is not entirely clear that the treaty would supercede the prior statute. A court would doubtless make every effort "to construe [the statute and treaty] so as to give effect to both." Whitney v. Robertson, 124 U.S. 190, 194 (1887). *See* Baker v. Carr, 369 U.S. 186, 212 (1962). Only if it could be said that the statute and treaty were "inconsistent" would the latter control. *Whitney*, 124 U.S. at 194. *See* L. HENKIN, *supra* note 88, at 163–64. Here there is nothing in the treaty that prohibits the United States from unilaterally freezing a particular weapons system. Thus the statute and the treaty can both be given effect "without violating the *language* of either." *Whitney*, 124 U.S. at 194 (emphasis added). Whether a court would imply an inconsistency between the statute and the treaty remains to be seen.

While Congress might argue that it would rescind the Act should such a situation arise, there is no guarantee that the House would go along with the Senate in agreeing to the Treaty terms by rescinding the Act. A bill to rescind the Act must pass both Houses, and the House might believe that postponing research *and* freezing production and testing of a weapons system is an even better approach to reducing the risk of

A further problem with the Comprehensive Act is that it ties the hands of the President in future negotiations by locking in a United States freeze response to a Soviet freeze. For example, the President might be willing to freeze two inferior United States weapons in exchange for a freeze on one superior Soviet weapon. Or the President might agree to freeze a superior United States weapon for a freeze on an equal Soviet weapon. However, the Act refers to a reciprocal freeze "to the extent of" a Soviet freeze.[365] Consequently, if the Soviets freeze only land-based ICBMs, the United States must freeze ICBMs or their nearest equivalent. The Comprehensive Act, therefore, gives the Soviet Union the advantage of being able to freeze those of its weapon systems that are superior to equivalent American systems and not freeze those of its systems that are inferior to equivalent American systems. In this way, the Act thoroughly robs the President of the negotiating flexibility so essential to performing the Executive's "constitutionally assigned function" as treatymaker.[366] Although Congress may generally have power to enact reciprocal legislation,[367] that legislation should not be allowed to interfere with ongoing executive negotiations.[368]

The Moratorium Act does not suffer from the same hands-tying problem found in the Comprehensive Act. Because the Moratorium Act does not become effective unless the Soviets agree to a full freeze following precise guidelines, there is no problem of a possible imbalance due to a partial Soviet freeze. Congress could point to this, and to the fact that the all-or-nothing basis of the Moratorium Act leaves the President free to negotiate alternative agreements, in order to argue that the Moratorium Act does not overly interfere with the President's treatymaking powers. It would not be unreasonable for a court

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nuclear war. In short, then, the Act may preclude the President and Senate together from determining relations with foreign nations. It is as if the House alone was able to veto an already ratified Treaty.

[365] H.R. 6210 § 7(b).

[366] *Nixon v. Administrator*, 433 U.S. at 443. As noted in T. FRANCK AND E. WEISBAND, FOREIGN POLICY BY CONGRESS 161 (1979): "When . . . flexibility, rather than immutability, is more likely to achieve the desired policy objective, legislation becomes a dysfunctional instrument."

[367] *See supra* text accompanying notes 161–67.

[368] Indeed, it is noteworthy that Professor Henkin's study does not indicate that any of the reciprocal statutes he surveys were passed over a presidential veto or over executive objections that on-going treaty negotiations would be jeopardized. Henkin, *supra* note 162, at 910–22.

to accept Congress's arguments in a situation where the President was not currently involved in negotiations. During negotiations, however, a court would most likely defer to the President's *specific* need for flexibility as outweighing Congress's desire to freeze testing in the absence of indications of imminent hostilities.[369] The result poses little problem doctrinally when one recognizes that traditional acceptance of reciprocal legislation by courts has assumed executive acquiescence to that legislation.[370] Here circumstances are quite the opposite.

If a court could find the reciprocal production and testing provisions to be valid,[371] the Comprehensive Act would still suffer from its ambiguity as to whether, once both sides have implemented a comprehensive freeze, the President can respond to discovered Soviet noncompliance *prior* to the enactment of new legislation. Clearly the Act contemplates that Congress has the final word regarding a response to Soviet noncompliance,[372] but sections 7(a) and (b) together may be construed to give the President interim power prior to legislation to adjust the level of our freeze to the new freeze level of the Soviets.[373]

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[369] This reasoning parallels that of the Supreme Court in *U.S. v. Nixon*, 418 U.S. 683 (1974). There the Court acknowledged that any resolution of the controversy would impinge upon the powers of one branch or the other. The relevant inquiry then became which branch's power would be impinged upon the most by an adverse decision. *See id.* at 707, 711–13. Under those circumstances, the Court held that the President's acknowledged need for confidentiality in communications is *general* whereas the constitutional need for production of relevant evidence in a criminal proceeding is *specific* and central to the fair administration of justice. *Id.* at 712–13. Thus the Moratorium Act may "interfere impermissibly", INS v. Chadha, 462 U.S. 919, 963 (1983), with the President's treatymaking powers in *this* case.

[370] *See supra* note 368.

[371] It is at least arguable that the production and testing provisions infringe less upon the President's treatymaking power than the deployment provisions infringe upon the Commander-in-Chief powers. The argument would be that domestic legislation, in this case regulation of production and testing, may frequently affect on-going treaty negotiations. The President therefore has the burden of establishing a rational delimiting principle which avoids the invalidation of all such legislation simply because the President is contemporaneously engaged in more or less related treaty negotiations.

[372] H.R. 6210 § 7(d).

[373] Section 7(a) directs the President to implement the comprehensive freeze after 120 days. Apparently the statute assumes that the Soviets have already agreed to the bilateral freeze. Section 7(b) states that implementation continues "so long as, and to the extent that, the Soviet Union acts in a reciprocal manner." H.R. 6210 § 7(b). Section 7(b) is not expressly qualified by sections 7(c) and (d). A prohibition of interim power would not be consistent with the Act's purpose to achieve a *bilateral* freeze. The notion that Congress probably intended an interim power is further supported by the fact that the Act covers deployment as well as production and testing. Even if an argument could be made that Congress wanted the President to wait for statutory authorization to carry out domestic activities like production and testing, a similar argument cannot be made for deployment. As to production and testing, the difference in time between an immediate presidential response and a reasonably prompt legislative response will probably

Section 7(d) of the Comprehensive Act, which provides that congressional legislation will ultimately determine the United States response to Soviet noncompliance,[374] is the final trouble spot. This section raises the issue of whether congressional detail in legislation starts to merge into administration; i.e., just what, how, and where the United States can produce, test, and deploy. Although section 7(d) may infringe upon the President's Commander-in-Chief and Executive powers,[375] a court would probably uphold it with respect to production and testing. In these two areas, Congress undoubtedly has power to regulate. Deployment is another matter altogether. The President's Commander-in-Chief power, although possibly not extending to production and testing,[376] does appear to cover deployment tactics.[377]

Perhaps the major problem with section 7(d) is not its possible constitutional infirmities, but its wisdom and practicality. Con-

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not make a crucial difference should conflict ensue, especially because neither side is likely to have substantially depleted its nuclear stockpiles. As to deployment, on the other hand, the difference between an immediate presidential response and a congressional response just a day or two later might significantly determine the course of a nuclear conflict. Here too, in an emergency situation the President's Commander-in-Chief powers are no doubt at their strongest. On both policy and constitutional grounds, then, section 7(b) should be construed at least to give the President interim power to deploy.

If section 7(b) is construed to deny interim power over production and testing, the President might argue that Congress had interfered with the Commander-in-Chief powers needed to respond to the newly discovered Soviet threat. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), probably defeats this argument. In *Youngstown*, the President's action of seizing domestic steel mills to gear up the American war machine was held invalid. *See id.* at 586. Here the situation is analogous, except that the domestic activity is production and testing of nuclear weapons. In *Youngstown*, the President's action was seen as contrary to legislative intent, while here the statute is ambiguous and the President's action would likely fall within Justice Jackson's "twilight zone." *Id.* at 637. The President could theoretically rely on three other sources of authority: the independent Commander-in-Chief power, *see supra* text accompanying notes 171–81; the purposes of the Act (which states that the "United States shall continue to implement the freeze so long as, *and to the extent that*, the Soviet Union acts in a reciprocal manner," H.R. 6210 at § 7(b) (emphasis added)); and the other statutes that delegate power to the President to arrange for production and testing of nuclear weapons. *See supra* note 181. However, a court would probably construe the ambiguous Act as delegating interim power over production and testing to avoid having to hold that the President has that power by virtue of the Commander-in-Chief Clause. The analysis employed by the Supreme Court in Dames & Moore v. Regan 453 U.S. 654 (1981), is analogous. In *Dames & Moore*, the Court stretched to find implied statutory power authorizing President Carter to settle claims against foreign nationals to avoid deciding whether the President possessed such power in the absence of statute. *See id.* at 688.

[374] H.R. 6210 at § 7(d).

[375] The President "shall take Care that the Laws be faithfully executed . . . ." U.S. CONST. art. II, § 3.

[376] *See supra* note 181 and accompanying text.

[377] *See supra* text accompanying notes 180–81.

gress may not be competent to outline greatly detailed responses to Soviet military strategy. Time delays, complexity, and lack of confidentiality in congressional proceedings all make the prospect of sound legislative responses unlikely. Indeed, section 5 of the Comprehensive Act implicitly acknowledges that the Executive Branch is best able to make implementation decisions concerning the original comprehensive freeze.[378] The Executive is more competent than Congress to respond to various forms of subsequent Soviet noncompliance. Perhaps by requiring the President to recommend a response to Congress, section 7(c) of the Comprehensive Act envisions the best of both worlds: executive expertise informing Congress's decisionmaking process.

### 5. Severability

Resolution of the severability question will depend on which, if any, provisions in the reciprocal Acts are found invalid.

The Comprehensive Act provides for several alternative ways of resolving the severability issue. If section 6(c)[379] alone is struck down, the heart of the Act (section 7) still remains "operative as law."[380] And notwithstanding the absence of a severability clause,[381] there is no indication that Congress would not want section 7 to continue without section 6(c).

If section 7 is held invalid with respect to deployment, the provisions dealing with production and testing still retain the force of law. The latter provisions alone are not inconsistent with the purpose of the Act: namely, to stop a futile arms race between the United States and the Soviet Union.[382] Although the Comprehensive Act speaks in terms of a *comprehensive* freeze,[383] section 7(b) contemplates a partial freeze to the extent of Soviet compliance.[384] There is also a presumption of severability,[385] and here there is no legislative history or other evidence to rebut that presumption.

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[378] *See* H.R. 6210 § 5; *see supra* note 299 and accompanying text.

[379] *See supra* note 300.

[380] Buckley v. Valeo, 424 U.S. 1, 108 (1976).

[381] A severability clause makes unnecessary an "elusive inquiry" into congressional intent. INS v. Chadha, 462 U.S. 919, 932 (1983).

[382] *See* H.R. 6210 § 2.

[383] *Id.* § 3.

[384] *See id.* § 7(b).

[385] *See Buckley*, 424 U.S. at 108; *cf.* 462 U.S. at 932 (statutory provision "presumed severable if what remains after severance is fully operative as a law").

If section 7 is held invalid with respect to testing, production, and deployment, the Comprehensive Act should be struck down as a whole. All of the other sections incorporate by reference the comprehensive freeze envisioned in section 7.[386] In short, Congress clearly had no independent purpose for the other sections of the Act. Without the comprehensive freeze, the rest of the Act is not "fully operative as a law."[387]

The toughest severability issue arises if section 7(d) of the Comprehensive Act is held invalid. The severability argument maintains that the presumption is in favor of severability, that the rest of the Act remains fully operative as law, and that Congress would find it more desirable to have partial freezes based on presidential determinations of Soviet noncompliance than no bilateral freeze at all. This argument would probably hold despite possible contentions that Congress knew the Soviets would not comply, that it foresaw and desired a much bigger role for itself in setting United States policy than the initial comprehensive freeze would allow, and that it therefore should be given the chance to discover a new statutory scheme that validly confers congressional control over foreign policy equal to that of the Executive.

With respect to the Moratorium Act, the most likely severability issue arises if the Act's deployment provisions are found invalid while its testing provisions are upheld. Surely the testing provisions alone are "fully operative as a law."[388] In addition, severability is presumed unless "it is evident" that Congress would not have enacted the testing provisions without the deployment provisions.[389]

References in the Moratorium Act to treating the moratorium as an all-or-nothing proposition are the strongest evidence against severability. For example, the Act takes effect only if the Soviets agree to the terms of the moratorium *in toto*.[390] Perhaps Congress made a legislative judgment that the complexity of a partial moratorium would make congressional ov-

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[386] Section 4 mandates congressional hearings on "verification procedures for the comprehensive freeze." H.R. 6210 § 4(a). Section 5 requires an operational plan for "implementation of the comprehensive freeze." *Id.* § 5. Section 6 envisions a Soviet response addressing "the extent to which the Soviet Union is prepared to implement the comprehensive freeze." *Id.* § 6(b).

[387] *Buckley*, 424 U.S. at 108.

[388] *Id.* at 108. *See also Chadha*, 462 U.S. 919 at 954.

[389] *See Buckley*, 424 U.S. at 108.

[390] *See* H.R. 5571 § 3(b)(1). *See also supra* note 304.

ersight difficult; or Congress may have perceived that the United States was ahead of the Soviets in deployment but behind in testing. A halt in both testing and deployment would maintain overall equivalency. However, a freeze exclusively on testing would allow the Soviets to catch up in deployment without the United States being able to catch up with the Soviets in testing. Furthermore, the best construction of section 3(b)(2) is that the President can resume all testing and deployment in response to Soviet noncompliance.[391]

On the other hand, Congress's intent to halt testing irrespective of deployment is evidenced by its reference to only the *testing* of nuclear warheads. The moratorium does not, for example, cover the addition of independently targetable warheads to an existing missile (MIRVing). Moreover, Congress chose testing and deployment, and not production, because the former are "adequately verifiable" by national technical means.[392] A

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[391] *Id.* Section 3(b)(2) of the Moratorium Act provides that if the President certifies to Congress at any time after beginning the moratorium that the Soviets have "conducted a test or deployed a missile or anti-satellite weapon or tested a nuclear warhead inconsistent with the moratorium, then funds may be obligated or expended by the United States for such testing and deployment." H.R. 5571 at § 3(b)(1). Presumably this leaves some room for presidential discretion in determining whether the Soviets have acted "inconsistent[ly] with the moratorium." *Id.*

Note, however, that discretion provided under section 3(b)(2) may frustrate the intent of Congress by allowing a hawkish President to define "inconsistent" too broadly. No doubt a presidential certification under section 3(b)(2) would be unreviewable as a factual determination beyond the competence of courts to evaluate. Thus section 3(b)(2) may too easily allow the freeze to be compromised. Conversely, section 3(b)(2) may frustrate congressional intent by allowing a pacifistic President to define "inconsistent" too narrowly or to refuse to make a certification at all. Moreover, section 3(b)(2) does not obligate the President to spend funds even if he or she makes a certification. Section 3(b)(2) may therefore allow the principle of bilateralness to be undermined. All of this should make lawmakers wary of writing statutes with only one President in mind.

A more difficult statutory construction problem involves the extent of presidential authority to spend for testing and deployment after certification of Soviet noncompliance. Section 3(b)(2) could be construed to mean that if the Soviets violate the moratorium in any way, complete resumption of testing and deployment by the United States would be allowed. *See* H.R. 5571 at § 3(b)(2). On the other hand, the section could also be fairly read to mean that the United States can test and deploy only to the extent that the Soviets have tested and deployed. *Id.* Indeed, if the Soviets conduct a test or deploy a missile in violation of the moratorium, section 3(b)(2) provides that funds may be resumed for "*such* testing and deployment." (emphasis added). The latter construction may be more consistent with the congressional purpose of halting the arms race, but the former construction is supported by the language of section 3(b)(1) which, as noted above, arguably treats the moratorium as an all-or-nothing proposition. *See supra* note 304. Moreover, if the President can deploy only what the Soviets deploy, then the Soviets can swing the military balance of power in their favor by deploying only those weapons systems that are numerically superior to their American counterparts. Such a construction of section 3(b)(2) is constitutionally suspect. *See supra* text accompanying notes 365–74.

[392] H.R. 5571 § 2(3).

testing freeze by itself would not be inconsistent with that national security concern, and it would be consistent with Congress's desire to freeze "new destabilizing technologies."[393] A court would probably accept the arguments for severability because that is the presumption in the absence of evidence to the contrary, and the arguments against severability rely upon hypothetical congressional motives.

6. Summary of the Comprehensive and Moratorium Acts

The purpose of the Comprehensive Act is to halt the production, testing, and deployment of all nuclear arms by both the United States and the Soviet Union. The Comprehensive Act is essentially reciprocal legislation requiring the United States to freeze at a level of weapons equivalent to that which the Soviets agree to freeze. The Act has a great deal of political appeal because it is simple and would stop a senseless arms race. Because the Act tries in so many ways to regulate a President's perceived constitutional powers, however, it is unlikely that it would avoid a presidential veto. As a result, a congressional override would probably be necessary.

If the constitutionality of the Comprehensive Act were litigated, careful selection of plaintiffs would avert standing objections. Although the political question doctrine would generally not apply, certain scenarios would probably lead a court to dismiss on the basis of a political question. On the merits, the Comprehensive Act is probably invalid to the extent that it seeks to regulate deployment. Congress, however, admittedly has power to regulate testing and production unilaterally. Nonetheless, the Act seeks to control testing and production contingent upon equivalent Soviet action. In addition, there is little question that such reciprocal legislation could greatly interfere with on-going treaty negotiations. A court would have to determine under *Nixon v. Administrator* whether production and testing regulation was nevertheless justified by some "overriding need."

The Comprehensive Act suffers from a number of other problems. First, it is ambiguous as to whether the President has power to respond in kind to Soviet noncompliance in the period before new legislation is passed. Constitutional difficulties with construing the Act as denying interim power would probably

[393] *Id.* at § 2(4).

lead a court to "find" such a power. Second, the lodging of power in Congress to determine United States responses to Soviet noncompliance is impractical.

The Comprehensive Act is well-intentioned and easy to understand. However, in reintroducing the Act, future drafters should take greater care to ensure that ambiguities and constitutional infirmities are minimized, if not eliminated. Simplicity is a virtue, but not at the expense of the Constitution.

The Moratorium Act attempts to achieve a bilateral moratorium on the testing and deployment of new ballistic missiles and anti-satellite weapons, and the testing of nuclear warheads. Unlike the proposals discussed above, the Moratorium Act cuts off funds for those activities if the Soviets agree within ninety days after enactment of the Act to do the same.

Standing to litigate the constitutionality of the Moratorium Act or to challenge executive noncompliance with it does not appear to pose a problem for a number of potential plaintiffs. The political question doctrine will probably not bar suit unless the moratorium has already taken effect or the President certifies that the Soviets are acting "inconsistently" with the moratorium.

On the merits, a funding cut-off for deployment will likely fare no better than a prohibition on deployment itself. Congress probably has an obligation to pay for deployment as an activity essential to the exercise of the Commander-in-Chief power in the nuclear age. Strong arguments can also be made that the testing provisions would impermissibly interfere with negotiations. Thus, the strength of the Act lies primarily in its simplicity and its deterrence of contrary executive action. People understand a funding cut-off. Even if the President could not be prevented from spending until judicial resolution of the controversy, the public and press would criticize the President for using tax dollars in violation of the law. A President would not likely be willing to accept such political risks in the absence of imminent hostilities.

## III. Foreign Policy by Politics or Litigation: Is There a Better Way?

At the outset, it was noted that nuclear arms represent a threat to humanity unlike that posed by any previous weapons systems. The range and destructive potential of nuclear weapons

make abrupt changes possible not only in the world balance of power but also in life as we know it. The prospect of such changes has justifiably resulted in much fear and trepidation. Thus fear, as well as the desire for peace, has influenced the widespread public reaction to the current nuclear arms race between the United States and the Soviet Union. Massive demonstrations in Europe and the United States have focused public awareness on the possibility of the annihilation of civilization.

Politicians listen to public opinion: political survival depends on it. Not surprisingly, then, the freeze movement has led to several congressional proposals which attempt in various ways to halt the nuclear arms race. Unfortunately, many of the proposals seek merely to assuage public sentiment and are therefore put forward without a great deal of analysis. Many nuclear freeze proposals, including those that have been examined here, tread to a greater or lesser degree upon the constitutional powers of the President. Similar congressional excesses were not unforseen by the Framers.[394] The Constitution should not, and does not, change simply in response to the decibel level of public outcry. No matter how important national objectives may be, they must be achieved within the bounds of law.[395]

But is law, any more than politics, a reliable guide to solving the most complex and pressing issue facing our nation today? Resolving the nuclear arms problem, if it can ever be resolved, will require concerted efforts. Foreign policy by litigation cannot

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> The authors of the Federalist Papers took the position that although . . . the Executive Department is the branch most likely to forget the bounds of its authority, "in a representative republic . . . where the legislative power is exercised by an assembly . . . which is sufficiently numerous to feel all the passions which actuate a multitude; yet not so numerous as to be incapable of pursuing the objects of its passions . . . ," barriers had to be erected to ensure that the legislature would not overstep the bounds of *its* authority and perform the functions of the other departments.

United States v. Brown, 381 U.S. 437, 443–44 (1965) (emphasis of the Court) (quoting THE FEDERALIST No. 48, at 383–84 (J. Madison) (J. Hamilton ed. 1880)).

[395] Justice Frankfurter's admonition to the Executive Branch in *Youngstown* is equally directed to Congress.

> A scheme of government like ours no doubt at times feels the lack of power to act with complete, all-embracing, swiftly moving authority. No doubt a government with distributed authority, subject to be challenged in the courts of law, at least long enough to consider and adjudicate the challenge, labors under restrictions from which other governments are free. It has not been our tradition to envy such governments. In any event our government was designed to have such restrictions. The price was deemed not too high in view of the safeguards which these restrictions afford.

343 U.S. at 443.

succeed, but will instead result in delaying the achievement of peace and stability because of uncertainty. That uncertainty prevents the initiation of agreements with some countries, and makes other countries wary of entering into agreements with the United States. Interbranch litigation prevents the United States from speaking with one voice to the rest of the world and undermines bargaining positions in negotiations. Even where litigation could resolve an issue in favor of one branch over another, the legal solution alone can hardly be relied on to answer the nuclear arms problem.[396] Moreover, judicial resolution of constitutional questions often leads to an all-or-nothing result, precluding flexibility in decisionmaking over nuclear weapons management. With so much uncertainty as to the most effective means of dealing with the nuclear arms problem and as to the Constitution itself, it is neither desirable nor necessary to make binding doctrinal pronouncements.[397] The most responsible course for the judiciary may well involve encouragement and facilitation of political compromise,[398] with decision on the merits available only as a last resort.

Fighting for every last inch of constitutional turf is not the method by which effective foreign policy is made. Interbranch cooperation is needed even if some power-sharing takes place.[399] The stakes are too high to chart any other course.[400]

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[396] *See* Tarr, *Arms Control: Lawyers Enter the Firestorm*, The National Law Journal, February 25, 1985, at 30, col. 1.

[397] In crisis situations, on the other hand, swift judicial resolution of a conflict between the President and Congress over decisionmaking authority may be necessary.

[398] See the discussion of United States v. American Telephone & Telegraph Co., *supra* note 211.

[399] *See* Schlesinger, *Congress and the Making of American Foreign Policy*, 51 FOREIGN AFFAIRS 78, 105–10, 112–13 (1973).

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> The decision to join issue over the respective Constitutional rights of executive and legislative branches, rather than on the merits of a foreign policy initiative, is symptomatic of what has become almost a national disease: a preoccupation with Constitutional theology, with its concomitant neglect of real questions of comparative advantage. Nixon approached the Cambodian air war and Carter the Mutual Defense Treaty as if the future of the Presidency, not Phnom Penh or Formosa, were at stake. As a result, intricate national policy decisions were made largely as fall-out in a battle over Constituional prerogatives. Similarly, Congress would rather defend its Constitutional prerogatives than discuss the merits of policy options . . . .
>
> The time has perhaps come when Congress and President should stop arguing over the Constitutional theology of the separation of powers and begin to examine its functional implications.

T. FRANCK & E. WEISBAND, FOREIGN POLICY BY CONGRESS 158–59 (1979) (footnote omitted) (emphasis in original).

Under many circumstances, "complementary effort"[401] probably means that Congress should not attempt to enact a freeze statute while the President is in the midst of negotiations with the Soviets. Constitutional concerns aside, a freeze or moratorium statute could disrupt months of intensive planning and preparation for the negotiations by the Executive Branch. On the other hand, the President should be sensitive to the legitimate role of Congress in influencing foreign policy, and should stay in regular contact with Congress throughout the course of negotiations. Perhaps there is no better way to achieve effective arms control at the present time.[402] Indeed, neither branch should try to shut the other out, for both Congress and the President have the "legal" means to resist constitutional limitations upon their respective powers.[403]

## IV. CONCLUSION

The congressional freeze proposals discussed in this note have serious constitutional shortcomings. This is not to say that legislative efforts can never pass constitutional muster, only that it is difficult to achieve a bilateral freeze without violating principles of separation of powers. Drafters of freeze proposals must take these constitutional principles into consideration, while also making sure that such proposals do not lead to foolish results. Agreeing to freeze what the Soviets freeze effectively allows the Soviets to dictate American arms control policy. And

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[401] *Id.*

[402] This is not to say that cooperation, though sensible, is without a constitutional basis. On the contrary, a court would be well within its authority in initially trying to guide the Branches to a political accommodation while viewing resolution on the merits as a last resort.

> The framers, rather than attempting to define and allocate all governmental power in minute detail, relied . . . on the expectation that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system. Under this view, the coordinate branches do not exist in an exclusively adversary relationship to one another when a conflict in authority arises. Rather each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodations through a realistic evaluation of the needs of the conflicting branches in the particular fact situation. This aspect of our constitutional scheme avoids the mischief of polarization of disputes.

*American Telephone & Telegraph Co.*, 567 F.2d 121, 127 (D.C. Cir. 1977) (footnote omitted). *See supra* note 211.

[403] *See supra* text accompanying notes 339–378.

statutes that take effect even if a treaty has been made can disrupt negotiated compromises and unilaterally disarm the United States. Perhaps the challenge before our nation is too vast. Let us hope not. In order to succeed, however, Congress and the President must be willing to share power without litigation. The risks are too great with a house divided.

# Legislative Research Bureau Report

## A Proposal to Strengthen State Measures for the Reduction of Infant Mortality

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*This report originated as a project of the Harvard Legislative Research Bureau (LRB), at the request of the Southern Regional Task Force on Infant Mortality, established by the Southern Governors' Association. The LRB, affiliated with the HARVARD JOURNAL ON LEGISLATION, assists clients in local, state, and national governmental offices by providing technical services in the research, preparation, and drafting of legislation. The LRB is staffed by students of Harvard Law School, and is a non-profit, non-partisan organization.*

High rates of infant mortality result in the loss of human potential and the loss of billions of dollars in health care costs, losses which could be prevented by proper planning, incentives, and priorities. In 1983, 40,627 infants under the age of one year died in the United States, an infant mortality rate of 11.2.[1] This rate was a record low for the United States,[2] but the rate for the black population continued to be almost twice that for the white population.[3] Despite the overall decrease, the United States ranked only fifteenth among selected countries for a low infant mortality rate during 1983.[4] High infant mortality rates

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[1] The infant mortality rate represents the number of deaths per 1,000 live births before one year of age. Provisional data indicate the rate for 1984 declined to 10.6. NATIONAL CENTER FOR HEALTH STATISTICS, ADVANCE REPORT OF FINAL MORTALITY STATISTICS, 1983, MONTHLY VITAL STATISTICS REPORT, Sept. 26, 1985, at 6. (DHHS Pub. No. (PHS) 85-1120). [hereinafter cited as STATISTICS REPORT].

[2] *Id.* at 1.

[3] CONGRESSIONAL RESEARCH SERV., REPORT PREPARED FOR THE SUBCOMM. ON HEALTH AND THE ENVIRONMENT AND THE SUBCOMM. ON OVERSIGHT & INVESTIGATIONS OF THE HOUSE COMM. ON ENERGY AND COMMERCE, H.R. REP. No. 362-7, 98th Cong., 2nd Sess. 10 (Comm. Print 98-W) (1984). [hereinafter cited as CRS REPORT].

[4] The countries in the ranking have estimated populations of one million or more and were able to provide complete counts of live births and infant deaths. Some of the countries ranked above the United States include Japan (6.6), Sweden (7.0), France (9.0), Canada (9.1), United Kingdom (10.2), and Singapore (10.7). *Infant Deaths and Infant Mortality Rates, by Urban/Rural Residence: 1979–1983*, 1983 DEMOGRAPHIC Y.B. OF THE UNITED NATIONS 343–47 (Table 15) (1985)[hereinafter cited as U.N. Y.B.].

reflect poor socioeconomic conditions[5] and inadequate action by government leaders to set priorities and to address the infant mortality problem. The United States should follow the lead of other countries and begin treating the reduction of the infant mortality rate as a top priority.[6]

Each state should work to reduce the rate of infant mortality by attempting to meet the prenatal care needs of all pregnant women through full use and coordination of federal appropriations and state programs. Efficient use of funds and tightened regulation of the services offered by health care providers should make it feasible to provide necessary prenatal care to all pregnant women who choose to continue their pregnancy to full term. However, state legislators should not blindly rely on the continuance of federal programs, since they may be threatened by budget reduction actions and the Reagan administration's views on public assistance. States should act aggressively by raising funds to ensure adequate prenatal care, and should lobby the federal government for additional funds.

In drafting legislation and developing programs, states should act with particular sensitivity to differences in language and culture. A growing percentage of low-income individuals are not fluent in English and many are not United States citizens.[7] Particular efforts should be made to provide multilingual information and translators where necessary. The use of only the English language and the exclusion of individuals who are not

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[5] *Infant Mortality: Hearings Before the Subcomm. on Rural Development, Oversight, and Investigations of the Senate Comm. on Agriculture, Nutrition, and Forestry*, 98th Cong., 1st Sess. 15 (1983)(statement of Dr. Jean Mayer, President, Tufts University) [hereinafter cited as *Rural Development Hearings*]; Rosenbaum, *The Prevention of Infant Mortality: The Unfulfilled Promise of Federal Health Programs for the Poor*, 17 CLEARINGHOUSE REV. 701, 703 (1983).

[6] In Sweden, ninety-nine percent of all pregnant women receive complete prenatal care. *See* Guyer, Wallach & Rosen, *Birth-Weight Standardized Neonatal Mortality Rates and the Prevention of Low Birth Weight: How Does Massachusetts Compare with Sweden?*, 306 NEW ENG. J. MED. 1230, 1233 (1982). The provisional infant mortality rate for Sweden in 1983 was 7.0. U.N. Y.B., *supra* note 4, at 346.

[7] According to the 1980 Census, over 23 million individuals speak a language other than English at home, and over four million speak English either "not well" or "not at all". 1 U.S. BUREAU OF THE CENSUS, 1980 CENSUS OF POPULATION, CHARACTERISTICS OF THE POPULATION, Sec. A: U.S., Table 256 (1984). In 1981, over 176 million aliens crossed into the U.S. via the Canadian and Mexican borders. U.S. DEP'T OF JUSTICE, 1981 STATISTICAL Y.B. OF THE IMMIGRATION AND NATURALIZATION SERV. 116 (1984). Due to language deficiencies or lack of citizenship, those individuals holding jobs are probably in the lowest paying areas of our economy. For example, in 1980 there were at least one million illegal immigrants residing in Texas, and most were in low paying jobs. Federal Reserve Bank of Dallas, *Immigration From Mexico: Effects on the Texas Economy*. ECON. REV., Sept. 1985, at 1–7.

citizens from obtaining prenatal care will not help lower the cost and incidence of low birth weight or infant mortality. States incur more costs through emergency services than they would by making preventive care available.[8]

Commissions and advisory councils established for the purpose of investigating state needs and methods of providing preventive care throughout a state may prove helpful in addressing infant mortality. However, states should not use the establishment of these investigative and advisory bodies as a means of delay nor rely on them to solve the infant mortality problem. Further, all legislation must have strict enforcement provisions. States must address the problem of infant mortality immediately and firmly to reduce the intolerable and ever growing costs to our society.

This Report addresses the need for state legislators to take the lead in ensuring comprehensive prenatal care for all pregnant women to solve the pressing problems of low birth weight and infant mortality. Legislation is necessary because health care providers and facilities have not acted on their own; indeed, it seems many are trapped by an unwieldy system which makes it economically difficult to serve patients who are not able to pay the full costs of care. States should commit themselves to coordinating health care programs, providing needed administration, and dedicating the necessary funds towards expansion of current programs.

Part I sets forth some of the problems which must be addressed in reducing the rate of infant mortality and details methods for states to deal with the identified problems. Part II discusses the need for full use by states of the federal programs providing funds for maternal and infant health care. Part III suggests ways for states to deal with the financial aspects of providing the necessary health care.

## I. Infant Mortality: Contributing Factors and Methods of Prevention

A primary, preventable cause of infant mortality is low birth weight.[9] Low-birth-weight infants have a low chance of healthy

[8] *See infra* note 20 and accompanying text.

[9] Low birth weight is defined as birth weight less than five pounds, eight ounces. Southern Regional Task Force on Infant Mortality, An Investment in the Future—Legislative Strategies for Maternal and Infant Health 32 (July 22, 1985) (on file at Harv. J. on Legis.) [hereinafter cited as Legislative Report].

survival,[10] are likely to need advanced technology and high cost care,[11] and will have a higher rate of rehospitalization.[12] Low-birth-weight infants also have an increased propensity for educational and family problems.[13] Factors contributing to low birth weight in infants include: inadequate prenatal care,[14] poor maternal nutrition,[15] use of cigarettes, alcohol, and drugs, inadequate spacing between pregnancies,[16] maternal age of less than eighteen and more than thirty-five years, race, low level of maternal education, and low maternal standard of living.[17]

While the United States has recently experienced an annual decrease in the infant mortality rate because of an increase in the survival rate of low-birth-weight infants,[18] the failure of states to prevent the birth of infants at low birth weight by providing a minimum level of prenatal and primary care services to pregnant women has resulted in a long-term financial drain on resources.[19] The average cost of intensive care for each low-birth-weight infant is $10,000 to $15,000, while the average cost

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[10] Low-birth-weight infants are forty times more likely to die in the first month of life. Southern Regional Task Force on Infant Mortality, Interim Report 11 (Feb. 24, 1985) (on file at HARV. J. ON LEGIS) [hereinafter cited as Interim Report]. They have a greater risk of congenital anomalies, lower respiratory tract conditions, and all other types of illnesses. *See* McCormick, *The Contribution of Low Birth Weight to Infant Mortality and Childhood Morbidity*, 312 NEW ENG. J. MED. 82, 86 (1985).

[11] The cost of caring for a low-birth-weight infant in a hospital when there are no complications is approximately $450 each day. *Rural Development Hearings*, *supra* note 5, at 7.

[12] Southern Regional Task Force on Infant Mortality, A Fiscal Imperative: Prenatal and Infant Care 6 (Feb. 24, 1985) (on file at HARV. J. ON LEGIS) [hereinafter cited as Fiscal Report].

[13] McCormick, *supra* note 10, at 85–88.

[14] Studies show that a pregnant woman who does not receive adequate prenatal care is significantly more likely to deliver a low-birth-weight baby. CRS REPORT, *supra* note 3, at 47–51.

[15] Both the course of pregnancy and the condition of the infant at birth are affected by the mother's diet. Berkenfield & Schwartz, *Nutrition Intervention in the Community—The "WIC" Program*, 302 NEW ENG. J. MED. 579, 579 (1980).

[16] Interim Report, *supra* note 10, at 11.

[17] McCormick, *supra* note 10, at 83–85; Guyer, Wallach & Rosen, *supra* note 6, at 1232–33.

[18] New technology has increased the survival rate of low-birth-weight infants. *See* McCormick, *supra* note 10, at 85. Unfortunately, however, there has been little change in the number of infants born at low birth weight. *See* Interim Report *supra* note 10, at 11.

[19] The annual cost of neonatal intensive care in the United States is over $1.5 billion. Fiscal Report, *supra* note 12, at 10. In addition to costs for intensive care, states incur costs for children who are needlessly handicapped because their mothers did not have access to preventive services. Rosenbaum, *The Maternal and Child Health Block Grant Act of 1981: Teaching an Old Program New Tricks*, 17 CLEARINGHOUSE REV. 400, 409 (1983). Lifetime costs of a retarded individual are approximately $2.5 to $3 million. *Rural Development Hearings*, *supra* note 5, at 7.

of comprehensive prenatal care is only $600.[20] If states ensured the provision of comprehensive prenatal care for all pregnant women, less money would be needed for remedial care of low-birth-weight infants and fewer infants would die needlessly.

Prenatal services which would reduce the incidence of low birth weight in infants, and thus reduce the costs involved with intensive care for low-birth-weight infants and services for handicapped children, are not available to many pregnant women. The reasons for the reduced availability of these services include the following: (1) prenatal care services are not centralized, resulting in a lack of comprehensive care for pregnant women; (2) health care providers are inaccessible to many pregnant women; (3) teenagers do not receive preventive services or reproductive education tailored to their needs; and (4) many pregnant women lack knowledge of both the importance and the availability of prenatal health care.

### A. *Comprehensive Prenatal Services*

A case management system is a cost-efficient means of ensuring the provision of comprehensive prenatal care to high risk pregnant women[21] to avoid costly remedial intensive care for low birth weights. Under a case management system, every pregnant woman is assigned to a health care provider who develops an integrated plan to meet all of the social and health needs of the client.[22] These providers should be qualified to provide obstetrical services, and may include physicians, nurses, nurse practitioners, and nurse-midwives. The case manager's responsibilities would include performing a physical as-

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[20] Children's Defense Fund, Preventing Children Having Children, 5 (1985) (on file at HARV. J. ON LEGIS.). Moreover, the cost of care for five high-risk premature infants equals the cost of prenatal care for 149 pregnant women. Fiscal Report, *supra* note 12, at 16.

When considering costs which a state will incur in establishing these programs, leaders should compute projected savings in at least the following areas: neonatal intensive care, rehospitalization of infants, special education for children with handicaps, and state public assistance to disabled individuals. Oklahoma estimated a savings of over nineteen million dollars each year. Oklahoma Task Force on Perinatal Care, Caring for Pregnant Women and Their Infants in Oklahoma: A State Plan 67 (Jan. 1984) (on file at HARV. J. ON LEGIS.).

[21] High-risk pregnant women are those who are affected by any of the factors contributing to low birth weight. *See supra* notes 14–17 and accompanying text.

[22] Southern Regional Task Force on Infant Mortality, Final Report, For the Children of Tomorrow 13 (Nov. 1985) (on file at HARV. J. ON LEGIS.) [hereinafter cited as Final Report].

sessment to determine the appropriate level of care for the pregnant woman, nutrition screening and referral to supplemental food programs, health education, parenting education, family planning, referrals to counseling, and follow-up for the first year following birth.[23] In meeting the social and health care needs of the woman, the case manager should also help in planning and preparation for any future pregnancies.

### B. *Geographical Accessibility*

The effectiveness of comprehensive prenatal services depends upon the accessibility of these services to the high-risk pregnant women. Women living in rural and inner city areas face particularly acute problems of geographical accessibility, because of the low number of health care providers within these areas.[24] These women must meet the expense of traveling to a provider or forego prenatal care. States should consider the following options in response: (1) provide transportation to health care providers; (2) establish rural and inner city health clinics; (3) operate mobile health units; and (4) license alternate health care providers.

Case managers and other necessary health care providers or county health departments should be responsible for providing health care related transportation for pregnant women. Publicly funded transportation should be made available to all pregnant women who have no other means of transportation. Where need can be identified within a defined area,[25] states should bring the

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[23] These services represent a minimum level of care to ensure a healthy mother and infant, as recognized by a number of states. *See e.g.*, CAL. WELF. & INST. CODE § 14134.5 (West Supp. 1986)(comprehensive perinatal services and health care providers responsible for delivery); CAL. HEALTH & SAFETY CODE §§ 283–287.5 (West Supp. 1986)(community-based perinatal system providing comprehensive care); TEX. REV. CIV. STAT. ANN. art. 4438d (Vernon 1986)(Texas Primary Health Care Services Act defines primary health care services and establishes a program for delivery); TEX. REV. CIV. STAT. ANN. art. 4447y (Vernon 1986)(Maternal and Infant Health Improvement Act provides a program for delivery of comprehensive maternal and infant health services).

[24] Garner, *Increasing Clients' Access to Medicaid Providers: New Developments*, 18 CLEARINGHOUSE REV. 1269, 1270 (1985).

[25] A needs based assessment should be performed to determine areas of the state which have large numbers of high-risk women and few qualified health care providers in order to determine the areas which would benefit the most from additional providers of prenatal care.

health care system to the high-risk women through rural health clinics and mobile health units.[26]

Staffing of the clinics and units by alternate health care providers, such as nurse-midwives,[27] could counteract the growing shortage of available physicians. Finding physicians who are willing to accept Medicaid and other low-income patients, particularly in the area of obstetrics can pose a particularly severe problem for many pregnant women.[28] By increasing the number of available alternative providers, states can save on health care costs. The use of nurse-midwives is particularly advisable because: (1) the cost of nurse-midwife care generally should be lower than that of physicians due to lower overhead costs, (2) the nurse-midwives will be serving many women who normally would have received no prenatal care because of prohibitive cost or inaccessibility, and (3) the services of nurse-midwives are covered by Medicaid.[29]

### C. *Teenage Pregnancy*

Teenagers gave birth to over 523,000 infants in the United States in 1982; almost ten thousand of those were to women under fifteen years of age.[30] Because of their young age and lack of knowledge of health care, pregnant teenagers are a high-risk group, quite likely to deliver low-birth-weight infants.[31] Given the human, social, and economic costs involved, it is irresponsible to ignore the problem of teenage pregnancy. The United States spent $16.65 billion for teenage childbearing costs in

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[26] Richmond, Virginia, uses mobile health units to serve areas where individuals are unlikely to travel to a health care provider, thus bringing the public health system to the individual. Final Report, *supra* note 22, at 14.

[27] *See* McCormick, *Childbearing and Nurse-Midwives: A Woman's Right to Choose*, 58 N.Y.U. L. REV. 661, 708 (1983). For examples of midwife legislation, *see* N.J. STAT. ANN. §§ 48:10-1 to 16 (West 1978); N.C. GEN. STAT. §§ 90:178.1–178.7 (1985).

[28] For example, only 56% of 485 active obstetricians in Massachusetts serve Medicaid patients. Many rural communities have no health care providers willing to accept Medicaid patients. It is feared that voluntary programs designed to increase the number of Medicaid providers will fail to fill the need because they only seek to meet a statewide enrollment goal and therefore do not affect area distribution of providers. Boston Globe, Sept. 18, 1985, at 48, col.3, 6.

[29] Medicaid will cover prenatal services performed by a nurse-midwife. 42 C.F.R. § 440.165(3) (1984). The federal subsidy in the form of matching funds will alleviate part of the state's financial burden.

[30] Children's Defense Fund, *supra* note 20, at 4.

[31] *Id.* Babies born to teenagers represent 20% of the low-birth-weight infants. In 1982, only 54% of infants born to women under the age of twenty had received prenatal care in the first trimester. *See id.* at 4–5.

1985.[32] States should attempt to discourage pregnancies in teenagers who have neither the education nor the resources to provide for themselves and their children. States should also provide adequate prenatal care to teenagers while encouraging them to remain in school. States should legislatively prevent the expulsion or exclusion of teenagers from any classes because of pregnancy.[33] Denying teenage mothers the right to continue their education contributes to low income status and may result in the need for long-term public assistance.[34] States could ensure adequate prenatal care through clinics with evening hours enabling teenagers to receive the necessary prenatal care and education without missing school[35] and through school health clinics that provide reproductive information, counseling, and referral to prenatal services.[36]

### D. *Outreach*

In order to bring qualified individuals into the health care system, states must engage in widespread, multilingual dissemination of information regarding the importance of prenatal care.[37] Every outreach effort should include explanations of the

[32] This figure includes costs for Aid to Families with Dependent Children (AFDC), Medicaid, and food stamps. D. Haffner, Public Costs for Teenage Childbearing 2 (February 1986) (Executive Summary from the Center for Population Options) (on file at HARV. J. ON LEGIS.).

[33] *See, e.g.*, MICH. COMP. LAWS ANN. § 380.1301 (West Supp. 1985)(no individual may be expelled or excluded from school because of pregnancy).

[34] Teenage mothers are less likely to marry, complete high school, or go to college, and are therefore more likely to have low incomes. Children's Defense Fund, *supra* note 20, at 4.

[35] These clinics should serve pregnant teenagers as well as teenagers seeking counseling on family planning, birth control, and decisions concerning pregnancy.

In Jackson County, Missouri, free pregnancy tests are available for teenagers. This provides an opportunity for the teenager to begin prenatal care or to receive family planning information. Southern Regional Task Force on Infant Mortality, Final Report, Appendix: State Data Sheets [hereinafter cited as Final Report, Appendix].

[36] Opponents to the provision of reproductive information to teenagers fear it will encourage sexual activity. Proponents, on the other hand, argue that such information will encourage sexual responsibility and knowledge of the consequences of sexual activity may persuade postponement of the activity. *See* Children's Defense Fund, *supra* note 20, at 3.

Education regarding the extent of the problem of teenage pregnancy is also important. For example, in 1984, New Orleans began the Improved Pregnancy Outcome Project in which adolescents in the eighth grade write and record radio public service announcements on reducing teenage pregnancy to be played on local rock radio stations. Final Report, *supra* note 22, at 16.

[37] Cultural and language barriers as well as an ignorance of the importance of health care may prevent pregnant women from seeking prenatal care. Administrative Petition to U.S. Dep't of Health and Human Serv., Black Women's Nat'l Health Network v. Secretary of HHS (1983), at 71 (on file at HARV. J. ON LEGIS.).

need for prenatal care, the locations where pregnant women may obtain prenatal care, and the availability of programs to cover the costs of medical expenses[38] and nutrition supplements.[39] These actions will increase the number of pregnant women seeking prenatal care and will increase the need for financial support for that care, but the relative savings in intensive and life-time care that would be required by low-birth-weight infants born in the absence of such care will outweigh the initial expense.[40]

## II. FEDERAL PROGRAMS

### A. *Maternal and Child Health Services Block Grants*

The Maternal and Child Health Services Block Grant Act[41] provides federal funds to states exclusively for the provision of health services to impoverished and medically underserved mothers and children.[42] States may use the funds for maternal and child health services and related activities, such as planning, administration, education, and evaluation.[43] The block grant funds could serve a vital purpose if used for coordination of other federal and state programs benefitting mothers and children, thus ensuring use of the funds from those programs for the intended purposes with minimal duplication and administrative costs.[44] States should also consider using the block grant

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[38] *See, e.g.*, 42 U.S.C. §§ 1396a–1396p (1982) (Grants to States for Medical Assistance Programs (Medicaid)).

[39] *See, e.g.*, 42 U.S.C. § 1786 (1982) (Special Supplemental Food Program for Women, Infants and Children (WIC)).

[40] *See supra* note 20 and accompanying text. North Carolina has committed funds to a regionalized system of perinatal services since 1974. (In 1984 the cost was $19 million.) During that time the infant mortality rate has declined by 37.4%. Final Report, Appendix, *supra* note 35.

[41] 42 U.S.C. §§ 701–709 (1982).

[42] The Act is the only federal program devoted exclusively to the health of women and children. The purpose of the block grants is to assure access to quality maternal and child health services, thereby reducing "infant mortality and the incidence of preventable diseases and handicapping conditions among children . . . ." *Id.* § 701(a)(1)–(a)(2).

[43] *Id.* § 704(a).

[44] Many women do not receive comprehensive prenatal care because of a lack of coordination of services and eligibility. Centralization of all available programs would ensure the provision of necessary services with no duplication between programs. Use of the block grant funds to administer this coordination would enable funds from federal and state programs designed to serve mothers and children to flow directly to the intended recipients.

funds for targeting of high-risk women and providing them with information about the available health services.[45]

Any excess in funds, made available by states not using their entire budgeted amount, is redistributed proportionately among the remaining states.[46] States should consider this reallocation element in their planning.[47]

### B. *Special Supplemental Food Program for Women, Infants and Children*

The Special Supplemental Food Program for Women, Infants and Children (WIC)[48] provides federal funds for supplemental foods and nutrition education to low-income pregnant, postpartum, and breast-feeding women, infants and children.[49] An initial medical evaluation of the effects of WIC indicated "greater weight gain during pregnancy, higher birth weight of infants born to WIC mothers, accelerated growth of WIC children, and a decrease in the rate of anemia."[50] Healthier infants and lower costs of postnatal care result from nutritional care to pregnant women. Every dollar of WIC funds spent for pregnant women saves approximately three dollars in health care costs.[51]

However, in a number of states, the federal allocation does not sufficiently cover needy pregnant women, infants and children within the state.[52] Inadequate WIC funding forces many states to serve only areas with a high percentage of low-income, high-risk populations, leaving wealthier communities with small

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[45] *E.g.*, MINN. STAT. ANN. § 145.882 (West Supp. 1986) provides for the use of block grant funds to target services to high-risk women. The funds will be distributed to county health departments according to a formula based upon the following factors: the county's low-birth-weight rate, the welfare level, and the average age of women giving birth.

[46] 42 U.S.C. § 702(b)(3)(A) (1982).

[47] States should also consider supplementation of the federal allocation. In FY 1985, Missouri supplemented the block grant funds through an appropriation of $600,000 for maternal and child health care, reaching an estimated two thousand needy women. Final Report, Appendix, *supra* note 35. Established programs which have proven successful should be targeted for additional future funding.

[48] 42 U.S.C. § 1786 (1982).

[49] 42 U.S.C. § 1786(a) (1982).

[50] Berkenfield & Schwartz, *supra* note 15, at 581. A Missouri study by W. Schramm showed that the cost of delivery and a month of care for women who had been on the WIC program in 1980 was $98 less than for those who had not been on the WIC program, $574 compared with $672. Wash. Post, Aug. 21, 1985, at 5.

[51] *Rural Development Hearings*, *supra* note 5, at 7.

[52] *E.g.*, *see infra* note 56.

pockets of poverty unfunded.[53] Further, when a WIC program reaches capacity, the states must enroll applicants by a priority system to fill vacancies that may arise.[54] These forms of distribution defeat the preventive purpose of the WIC program because they force a remedial method of serving mothers and infants already at nutritional risk.[55] Additional state funds allocated for the purpose of maintaining WIC as a preventive program would allow states to save money by providing for the nutritional needs of pregnant women while bringing them into the health care system for the provision of comprehensive prenatal care.[56]

Not only is there underfunding in the aggregate, but available funds are often underutilized because of planning constraints.[57] Therefore many states fail to realize the full potential benefit of health and cost savings provided by WIC. Rising food costs and imprecision as to the number of potentially eligible women, infants, and children within a particular year may lead distributive state agencies to plan conservatively, not using the entire allocation. Making supplemental state funds available would ensure full use of the WIC program by providing a cushion for planning. Additionally, states should fully utilize WIC funds, as they should Maternal and Child Health Services Block Grant funds, because unused federal WIC funds are also reallocated on the basis of need from states who underutilize to states making full use of their federal allocation.[58]

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[53] Berkenfield & Schwartz, *supra* note 15, at 579. Each state has its own method of determining eligibility for the WIC program. Massachusetts, for example, considers the nutritional risk involved, the level of income, and the geographic location of the individual. *Id.* at 579–80. Federal regulations require that when a maximum caseload is reached, states must direct their efforts toward covering high-risk women and children and attempt to maintain the caseload. 7 C.F.R. § 246.4(a)(11)(i) (1984).

[54] 7 C.F.R. § 246.7(d)(3) (1984).

[55] Berkenfield & Schwartz, *supra* note 15, at 580.

[56] Texas recognized that 55% of its mothers and 35% of its children in the WIC program were skipping meals due to lack of money to buy food. Ninety-one counties had no WIC program. In response, the legislature allocated an amount not to exceed 1% of the state's WIC grant to be used in the same way as the federal funds, and $12 million to expand the WIC services within the state by: (1) establishing projects in unserved counties, and (2) increasing the number of program participants in areas where the percentage served is less than the statewide average. Nutritional Assistance Programs Omnibus Hunger Act of 1985, tit. 2, §§ 2–4, 1985 Tex. Sess. Law Serv. 786, 787 (Vernon), *reprinted in* TEX. HUM. RES. CODE ANN. ch. 33 at 12 (Vernon Supp. 1986).

[57] The failure of WIC "is primarily the result of inadequate federal funding of WIC's direct service and administrative activities, states' failure to put state money into a proven program, and states' failure to spend the federal funds that are given." Rosenbaum, *supra* note 5, at 734.

[58] 42 U.S.C. § 1786(i) (1982).

### C. *Medicaid*

Medicaid is the largest public source of funds for medical care for low-income pregnant women and children. The infant mortality rate in the United States has declined steadily since 1965,[59] the year in which Medicaid was enacted.[60] The federal system of matching state Medicaid expenditures with federal funds allows states to increase the provision of health care services cost effectively.[61] The original purpose of Medicaid was to provide health care coverage for those individuals who could not otherwise afford it,[62] yet over thirty-four million people in the United States remain uncovered by either private health insurance or public programs, including Medicaid.[63] It is estimated that over seventy percent of the children living below the federal poverty level are uninsured or are covered by Medicaid or other insurance for only part of the year.[64]

#### 1. Lack of Participation

Locating health care services for individuals with Medicaid coverage presents a particular problem for people needing aid. Many health care providers and facilities will not accept Medicaid patients because of low reimbursement levels, the administrative red tape, and delays involved in obtaining reimbursement.[65] Some physicians refuse outright to serve Medicaid patients, others limit the number served to a small percentage

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[59] CRS REPORT, *supra* note 3, at 29.

[60] Social Security Amendments of 1965, Pub. L. No. 89-97, § 121, 79 Stat. 286, 343 (codified as amended at 42 U.S.C. §§ 1396a–1396p) (1982).

[61] R. BOVBJERG & J. HOLAHAN, MEDICAID IN THE REAGAN ERA 67 (1982). Federal matching currently varies from fifty percent to seventy-eight percent. CRS REPORT, *supra* note 3, at 35. The maximum amount which could be paid federally is eighty-three percent. 42 C.F.R. § 433.10(b) (1984). The federal matching percentage is inversely related to the state's per capita income relative to the national average. Therefore, the federal matching is increased to lower income states and is decreased to higher income states. *Id.*; BOVBJERG & HOLAHAN, *supra* at 2.

[62] 42 U.S.C. § 1396 (1982).

[63] Fifty percent to 75% of the poor remain uncovered. Wulsin, *Adopting a Medically Needy Program*, 18 CLEARINGHOUSE REV. 841, 842 (1984).

[64] Rosenbaum, *supra* note 5, at 708.

[65] The typical reimbursement for Medicaid is $0.60 for every $1.00, significantly below that of Blue Cross and Medicare, and the fee schedules rarely increase with inflation or the rising costs of medical technology. Additionally, the reimbursement claim forms are considered unnecessarily complicated, and the delays involved in collecting fees compound physicians' frustrations. Garner, *supra* note 24, at 1270.

of their caseload, and some accept only referrals.[66] Because the federal government shares in the financial burden of this system, states have an interest in ensuring that Medicaid works as efficiently as possible to save state expenditures for health care costs. State legislators should consider the following options: (1) raise the reimbursement level for health care providers; (2) monitor and control the reimbursement process; (3) require nondiscrimination by health care providers and facilities on the basis of Medicaid coverage; and (4) reduce medical malpractice expenses.

In order to encourage participation, states should set the reimbursement level high enough to attract health care providers throughout the state,[67] and should monitor and control the reimbursement process to ensure efficient payment of claims.[68] In some areas, however, states will need to do more to ensure health care for pregnant women and children. In these cases, states should take affirmative steps to require the provision of care to all pregnant women and children, such as requiring all graduates of state-supported medical schools to accept a specified number of pregnant women and children on Medicaid for a specified period of time.[69] In addition, states could require that no licensed health care facility deny services to pregnant women and children on Medicaid.[70] The process of applying for certificates of need[71] is an effective means of influencing the

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[66] *Id.* Lack of Medicaid program participation by physicians is also a product of the wealth of the community. As per capita income in a community increases, Medicaid participation decreases; a high proportion of residents below the federal poverty level in an area stimulates participation. Other factors which influence physician participation include the oversupply of physicians and the existence of medically needy Medicaid eligibililty. *Id.* at 1271.

[67] In establishing reimbursement rates, states must "seek to encourage a sufficient supply of medical services to meet in reasonable fashion the needs of Medicaid recipients." *DeGregorio v. O'Bannon*, 500 F. Supp. 541, 547 (E.D. Pa. 1980). An argument may be made that a state is in violation of the Medicaid requirement that the Medicaid plan be in effect in all political subdivisions of the state, 42 U.S.C. § 1396a(a)(1) (1982) and 42 C.F.R. § 431.50(1) (1984), in areas where there are not enough participating physicians to serve most Medicaid recipients. *See* Garner, *supra* note 24, at 1275.

[68] States have the power to change methods of payment and administration. 42 C.F.R. § 431.1–.804 (1984).

[69] Garner, *supra* note 24, at 1277. This requirement is based on the assumption that the state subsidizes the education of the students in its medical schools and is justified in requiring service in return.

[70] Enforcement for this requirement could be through fines and through making nonconforming health care facilities ineligible for any exclusion, deduction, exemption, or credit from any state tax.

[71] Some states require that before construction may begin on health care facilities the state must verify that the improvements are consistent with the goals and objectives of the state health plan. Approval is revocable if the construction does not follow the plan.

availability of care for Medicaid and other low-income patients. States could require health care facilities applying for a certificate of need to present a plan for providing care to indigents, including committing a percentage of the gross revenues to indigent care, and designing the admission procedures to ensure access. This would provide an opportunity for direct and continual influence on the future provision of health care. Most importantly, every state should require all health care facilities and qualified providers to accept and treat all individuals in emergencies, including women in active labor.[72] These recommendations are not intended to impose unreasonable demands on health care providers or facilities, but only to provide necessary preventive health care services in order to lower the overall cost of remedial care for all of society. Health care facilities and providers enjoy state protections and tax benefits; in return, states should be entitled to require these institutions and individuals to perform the services for which they were established and licensed.

States should consider options to reduce lawsuits and corresponding malpractice expenses by requiring arbitration or by limiting potentially large jury awards to the economic loss to the patient caused by the injury.[73] The increasing threat of malpractice suits has resulted in the denial of services to Medicaid and other low-income pregnant women.[74] Malpractice claims are likely to arise in the course of treatment of low income pregnant women because these women often suffer from generally poor overall health, and often do not have the resources to ensure proper nutrition and preventive care.[75]

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*See, e.g.*, FLA. STAT. ANN. §§ 381.494–.499 (West Supp. 1985); GA. CODE ANN. §§ 31-6-40–50 (1985).

[72] For example, the Massachusetts medical licensing board requires all physicians to treat public assistance recipients in emergencies. MASS. ADMIN. CODE tit. 243, § 2.07(10) (1985). GA. CODE ANN. § 31-8-42 (1985) requires emergency services to women in labor. GA. CODE ANN. § 31-8-45 (1985) provides a cause of action against hospitals for damages if emergency services are denied women in labor. Additionally, licensing procedures could be used for enforcement.

[73] *See generally* Medical Offer and Recovery Act of 1985, H.R. 3084, 99th Cong., 1st Sess. (1985) (If a health care provider gives the injured party a written tender to pay compensation benefits, including the net economic loss resulting from the injury and the attorney's fees, the party is foreclosed from bringing a civil action.); MICH. COMP. LAWS ANN. § 600.5040 (West Supp. 1985) (medical malpractice arbitration). *See generally* Legislative Research Bureau Report, *The Quest for Balance: Public Policy and Due Process in Medical Malpractice Arbitration Agreements*, 23 HARV. J. ON LEGIS. 267 (1986).

[74] Fiscal Report, *supra* note 12, at 8.

[75] According to a survey by the American College of Obstetrics and Gynecology, 12.3

### 2. Limited Eligibility

As an open-ended entitlement, Medicaid places no limit on the number of individuals who may benefit, only on the categories of individuals and the services to be covered.[76] States can save costs in remedial intensive care for infants by expanding the eligibility standards and the scope of services covered by Medicaid to ensure proper prenatal care for all pregnant women.[77] Medicaid automatically covers all individuals receiving assistance under Aid to Families with Dependent Children (AFDC).[78] States could reach more pregnant women and children by: (1) raising the AFDC standard of need; (2) covering unemployed parents under AFDC; and (3) covering medically needy pregnant women and children.[79]

Therefore, a key means of expanding Medicaid coverage is for each state to raise the standard of need for receipt of AFDC benefits.[80] The average AFDC standard of need for a family of four is currently $540 per month;[81] if a family brings in more income, it is not eligible for AFDC or Medicaid benefits. Twenty-nine states have a standard of need below the national average.[82] A large variance in standards of need exists among the states, which results in horizontal inequity for recipients and

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percent of its members have stopped delivering babies because of high malpractice premiums. Press, *The Malpractice Mess*, NEWSWEEK, Feb. 17, 1986, at 74, 75. In Massachusetts, Blue Shield is increasing the fee paid to obstetricians because increases in malpractice insurance premiums affect obstetricians disproportionately. It was reported that eighty-nine eastern Massachusetts obstetricians were refusing new prenatal patients because of the rates of malpractice premiums. Boston Globe, Feb. 14, 1986, at 21, col. 6.

[76] 42 C.F.R. §§ 435.1–.930 (1984) (eligibility); *id.* §§ 440.1–.270 (services).

[77] States have much autonomy to determine the scope of their Medicaid programs in terms of eligibility standards and services covered, subject to federal administrative and judicial review. R. BOVBJERG & J. HOLAHAN, *supra* note 61, at 2–3. Therefore, states could expand the scope of their programs to cover all necessary prenatal care and avoid the high costs of remedial care for low-birth-weight infants.

[78] 42 U.S.C. § 1396a(a)(10)(A)(i) (Supp. 1985).

[79] Medically needy refers to those individuals whose gross income and resources are too high for public assistance, but whose net income after medical expenses places them within the Medicaid qualification standards. 42 C.F.R. § 435.1(b)(3)(i) (1984).

[80] Rosenbaum, *supra* note 5, at 708. Each state sets a standard of need to determine initial financial eligibility for AFDC. Theoretically, the standard of need represents the amount necessary for a family of a particular size to meet basic expenses within that state. *See* Legislative Report, *supra* note 9, at 24.

[81] This average is computed from the standards of need of all states and the District of Columbia, as of February 1986. The state of Vermont has the highest standard of need, $911 per month, and the state of Kentucky has the lowest standard of need, $246 per month. THE SOCIAL SECURITY ADMINISTRATION, NEED AND PAYMENT AMOUNTS (Feb 1986) (on file at HARV. J. ON LEGIS.) [unpublished data] [hereinafter cited as SSA].

[82] *Id.*

taxpayers because resources are not properly allocated to those individuals with the greatest need.[83] Ideally, states should set their standards of need at least equal to the federal poverty level of $887.50 per month.[84]

A state plan of Medicaid coverage must include all pregnant women and children who would be eligible for AFDC if (1) a pregnancy has been medically verified and the child was born and living with the woman during the month of payment[85] or if (2) the state has a plan for the coverage of unemployed parents under AFDC.[86]

The AFDC-Unemployed Parent program[87] allows states to provide coverage for families living together where the principal wage earner has been unemployed for at least thirty days.[88] Coverage of pregnant women in unemployed families would not only cover many women who would not otherwise have prenatal care, but would reduce the incidence of family break ups, which often occur in order to obtain AFDC and Medicaid benefits for the remaining spouse and children.[89]

States have the option under Medicaid to cover individuals categorized as medically needy.[90] Since the medically needy program takes into account the medical expenses of a family, it helps to eliminate the effects of arbitrary cutoff points and helps to prevent a work disincentive for families with no health insurance coverage.[91] If a state chooses to cover any medically needy groups, it must cover pregnant women and children who would qualify for Medicaid, but for their income and resources.[92] Therefore, states concerned about rising costs could choose to expand coverage only to pregnant women and children. It has

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[83] T. GRANNEMANN & M. PAULY, CONTROLLING MEDICAID COSTS 23 (1983). The amount of benefits received depends upon the state in which a family lives. Interstate differences result in horizontal inequity by attracting low income individuals to states with relatively high costs of living and corresponding higher levels of public assistance. *Id.* at 24.

[84] The federal poverty level for a family of four is $10,650 each year, $887.50 each month. 50 Fed. Reg. 9517, 9518 (1985).

[85] 42 U.S.C. § 1396a(a)(10)(A)(III) (1982), 42 U.S.C.A. § 1396d(n)(1)(A) (West 1983 & Supp. 1985).

[86] 42 U.S.C. § 1396a(a)(10)(A)(III) (1982), 42 U.S.C. § 607(b) (1982).

[87] 42 U.S.C. § 607(b) (1982).

[88] *Id.* § 607(b)(1)(A).

[89] *See* Grannemann & Pauly, *supra* note 83, at 23.

[90] *See supra* note 79.

[91] *See* Wulsin, *supra* note 63, at 849. Individuals who earn too much money to be eligible for AFDC and Medicaid, yet do not earn enough to cover medical expenses, may feel forced to give up employment to qualify for public assistance.

[92] 42 C.F.R. § 435.301(b)(1) (1984).

been estimated that a full medically needy program would add approximately ten percent in costs and ten percent in eligible individuals to an existing Medicaid program.[93] However, the primary factor for state legislators to consider is that federal matching funds will provide a percentage of the cost[94] and these expansions will relieve state and local governments of a significant amount of remedial health care costs for infants born at a low birth weight.

## III. Fiscal Considerations for States

### A. *Cost Containment*

States should investigate measures of cost containment in order to keep costs at a minimum while serving all needy individuals. Rising health care costs and the growth of the medically indigent population adversely affect all parts of our economy, since the costs of indigent care are disproportionately shifted to paying patients,[95] to businesses purchasing employee insurance packages, and to taxpayers in counties supporting public hospitals.[96] Through proper planning and constructive changes in the delivery of preventive health care services, states can control many of the factors which influence the cost of care.[97]

#### 1. Adequate Prenatal Care

Adequate prenatal care for all pregnant women will provide the primary means of cost containment.[98] Infants receiving adequate prenatal care are healthier and require less high-cost

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[93] Wulsin, *supra* note 63, at 852. The overall cost of Medicaid expansion will depend upon the number of potential eligible individuals, the rate at which the services are used, and the cost of the services. Rosenbaum, *supra* note 5, at 713.

[94] *See supra* note 61.

[95] In 1983, a South Carolina study showed forty-three percent of indigent admissions were obstetric/gynecologic, pediatric, or newborn. During this year, sixty-nine million dollars in unpaid costs were shifted to paying patients. Fiscal Report, *supra* note 12, at 11.

[96] *See* S.C. Code Ann. § 44-6-132 (Law. Co-op. Supp. 1985) (legislative findings for the Medically Indigent Assistance Act).

[97] For an example of legislative efforts at cost containment, see Fla. Stat. Ann. §§ 395.501–.515 (West Supp. 1985) (repealed effective Oct. 1, 1988) (creates a Hospital Cost Containment Board to monitor charges and ensure affordable and accessible health care to all citizens).

[98] *See supra* note 20 and accompanying text.

intensive care. The cost of this care is often passed to other patients, businesses, and taxpayers since even those infants covered by Medicaid may require care for a longer period of time than Medicaid covers.[99] Pregnant women linked with health care providers through the case management system are more likely to seek advice from providers when complications do arise during pregnancy at a point when less expensive corrective measures can be taken. Pregnant women not under continual care are more likely to have complications and, with no provider identified for care, are more likely to use the costly avenue of emergency room care.[100]

### 2. Alternate Providers

The licensing of alternate providers such as nurse-midwives, rural health clinics, and other types of birth centers should lower the costs of perinatal care.[101] Every birth does not require the full range of possible resources; normal births with no complications may be performed more simply and at lower cost by qualified health care providers outside of a hospital. Increasing the availability of alternate sources of health care will enable more pregnant women to obtain preventive care resulting in more healthy infants. The care provided will be at a lower cost than that in a hospital with extensive staff and overhead costs.

### 3. Prospective Payment System

Another means of containing costs while providing needed services is through the establishment of a prospective payment system for Medicaid reimbursement.[102] Prospective payment systems attempt to prevent rapid cost increases by establishing

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[99] A number of states limit the length of stay for inpatient services under Medicaid. The impact on neonatal intensive care is particularly acute. Rosenbaum, *supra* note 5, at 719.

[100] D. FREUND, MEDICAID REFORM 49 (1984).

[101] "Perinatal" covers the time from conception through the first month after birth. For examples of birth center legislation, see FLA. STAT. ANN. §§ 383.30–.335. (West Supp. 1985) (repealed effective Oct. 1, 1994) (describes licensing of birth centers, education for clients, and prenatal care to be provided); R.I. GEN. LAWS §§ 23-17-1 to 29 (1985) (licensing of health care facilities).

[102] *See, e.g.*, ALASKA STAT. § 47.07.070 (1984) (prospective payments to health care facilities); FLA. STAT. ANN. § 395.515 (West Supp. 1985) (prospective payment arrangements between private insurers and hospitals as an incentive for cost containment); S.C. CODE ANN. § 44-6-140 (Law. Co-op. Supp. 1985) (conversion of Medicaid hospital reimbursement system to prospective payment system).

the maximum allowable amount health care providers can charge for services before they are delivered.[103] The established payment rate must be sufficient to ensure the availability of services to Medicaid recipients to the same extent as to the general population. States could base the allocation to health care facilities and providers on the level of services provided Medicaid patients in the previous year and the delivery projection, while also making allowance for the additional costs incurred by serving a disproportionate number of low-income patients.[104]

### B. *Funding*

Many of the suggested programs throughout this Report will require state funding. It would be short-sighted to dismiss programs providing better access to prenatal care because of the initial cost.[105] States can raise funds in a variety of ways[106] and the subsequent savings will more than outweigh the initial cost. The funding scheme should have the goal of equalizing care and costs across the state. For example, states could consider a tax on hospitals inversely proportional to the percentage of low-income patients served.[107] This is not only an equitable way to distribute the burden of health care for the indigent, but it would also encourage more hospitals to accept indigent and Medicaid patients. States could also consider a tax on counties by a

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[103] *See* Biles, Schramm & Atkinson, *Hospital Cost Inflation Under State Rate-Setting Programs*, 303 NEW ENG. J. MED. 664–65 (1980). Data from a study concerning prospective payment systems from 1976 to 1978 show a reduction in the average annual cost increases. *Id.* at 667. However, the overall evidence on effectiveness is still inconclusive. *Id.* at 664. For an example of such a program, see S.C. CODE ANN. § 44-6-140 (Law. Co-op. Supp. 1985).

[104] Prospective payments would be particularly effective as a means of payment for case managers. The case managers, responsible for finding the necessary care for each pregnant woman, would be encouraged to choose wisely among the available services. With close monitoring by the state to ensure continued high quality services, this should lead to a more competitive atmosphere among health care providers.

[105] *See supra* note 20 and accompanying text.

[106] Although not the most effective means of delivering quality health care, if there is a severe cashflow problem within a state, a phased implementation of some of the programs would allow time for the cost-savings to begin before the full fiscal impact of the program was felt on state revenues.

Phased implementation was recommended in a report of the Oklahoma Task Force on Perinatal Care as a means of achieving cost savings and providing revenue for further expansion. Oklahoma Task Force on Perinatal Care, *supra* note 20, at 60.

[107] Another method is a flat assessment on all hospitals. *See* FLA. STAT. ANN. § 395.101 (West Supp. 1985) (assesses hospitals 1.5% of the annual net operating revenue).

formula equally weighing property values, per capita income, and net taxable sales.[108] This would promote equal care across the state, since counties with a large percentage of citizens in poverty may not have the tax base to support a public hospital, yet these counties have the most need.

Taxes should not only make health care more available but could also be used to raise money to establish a trust fund for the medically indigent.[109] States could use interest and principal from this fund to compensate facilities serving more than the average number of indigent patients, to raise Medicaid reimbursement rates, and to supplement the WIC program. Additionally, the trust fund, if capable of receiving gifts, grants, donations, federal appropriations, or other forms of supplementation, might serve as a target for groups wishing to provide financial help to the health care system.

## IV. CONCLUSION

All states should evaluate their incidence of low birth weight and infant mortality and act quickly to address these problems by ensuring adequate prenatal care for all pregnant women. Efficient and full use of federal programs, and the implementation of additional state programs, should enable states to meet much of the need. Further, cost containment measures and innovative fund raising should relieve much of the burden which is currently shouldered by paying patients in health care facilities. State leaders must make a choice: fund high costs of remedial care and long-term public assistance or provide preventive care resulting in healthier residents with a lower need for long-term public assistance. The latter seems the wiser, healthier, and more cost efficient option.

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[108] *See* S.C. CODE ANN. § 4-6-150 (Law. Co-op. Supp. 1985).

[109] *See id.* (creates a Medically Indigent Assistance Fund to be used for compensation of hospitals providing health care to the medically indigent).

# COMMENT

## PROTECTING DEFENDANT-INTERVENORS FROM ATTORNEYS' FEE LIABILITY IN CIVIL RIGHTS CASES

DAVID ANDREW PRICE*

To encourage private enforcement of the civil rights laws, Congress has directed that prevailing plaintiffs in civil rights cases should generally receive awards of attorneys' fees from the defendants.[1] Without the attorneys' fee provisions of the civil rights laws, many individuals with meritorious claims probably would have had no opportunity to vindicate their claims in court.

In recent years, however, courts have frequently applied the attorneys' fee provisions in a manner that contravenes the purpose of ensuring access to justice. When private parties have entered a civil rights action as defendant-intervenors, seeking to present their views to the court, some courts have treated the intervenors the same as the primary defendants in making attorneys' fee awards. As a result, defendant-intervenors on the losing side have been required to pay substantial attorneys' fees to the prevailing plaintiffs.[2]

The defendant-intervenors in these cases can be placed in two categories. The first category consists of intervenors who enter a suit to defend the constitutionality of a challenged statute. For example, when civil rights groups challenge the constitutionality

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[1] *See, e.g.*, Civil Rights Attorney's Fees Awards Act, 42 U.S.C. § 1988 (1982); Title VII of Civil Rights Act, 42 U.S.C. § 2000e-5(k) (1982); Voting Rights Act, 42 U.S.C. § 1973*l*(e) (1982).

Courts cannot ordinarily shift attorneys' fees from one party to another without congressional authorization. *See* Alyeska Pipeline Serv. v. Wilderness Soc'y, 421 U.S. 240 (1975). For detailed discussions of the many statutes in which Congress has authorized fee shifting, see J. BENNETT, WINNING ATTORNEYS' FEES FROM THE U.S. GOVERNMENT (1985); M. DERFNER & A. WOLF, COURT AWARDED ATTORNEY FEES (1985); E. LARSON, FEDERAL COURT AWARDS OF ATTORNEY'S FEES (1981); Green, *From Here to Attorney's Fees: Certainty, Fairness, and Efficiency in the Journey to the Appellate Courts*, 69 CORNELL L. REV. 207 (1984) (procedural aspects); Note, *Promoting the Vindication of Civil Rights Through the Attorney's Fees Awards Act*, 80 COLUM. L. REV. 346 (1980).

[2] The cases are listed elsewhere in this Comment. *See infra* notes 18–19 and accompanying text.

of an abortion statute, a group that favors the statute might choose to intervene in its defense. The second category consists of intervenors who enter a suit to protect their own rights. When minority groups sue an employer to obtain an affirmative action program, white workers might intervene to ensure that their rights are adequately protected.[3]

By treating these defendant-intervenors the same as the primary defendants, courts have imposed heavy costs on their participation. Private individuals have been ordered to pay attorneys' fee awards as high as ninety thousand dollars.[4] This Comment will argue that fee awards against private defendant-intervenors are contrary to the purposes of the statutory fee provisions. It will then offer an approach to limit the liability of defendant-intervenors, thus ensuring that attorneys' fee awards will not hamper their access to the courts.

## I. CURRENT TREATMENT OF DEFENDANT-INTERVENORS

### A. *The Tests for Losing Plaintiffs and Losing Defendants*

The statutory provisions offer little guidance about when a fee award is appropriate or how the amount of the award should be determined; hence, the law governing attorneys' fee awards

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[3] *See* Schwarzschild, *Public Law By Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 919–26 (intervention often desirable to protect interests of white employees in affirmative action cases); *see also infra* note 38.

[4] In an abortion case, the losing defendant-intervenors were ordered to pay $90,643 to the plaintiffs. *See* Charles v. Daley, No. 79-C-4541 (N.D. Ill. Oct. 21, 1985) (available Jan. 20, 1986 on LEXIS, Genfed library, Dist file and WESTLAW, DCT database). The intervenors were a group of three private individuals. *See id.* In another case, the intervenors were ordered to pay $18,435. *See* Akron Center for Reproductive Health v. City of Akron, 604 F. Supp. 1275, 1294–95 (N.D. Ohio 1985). The intervenors were two individuals. *See* Akron Center for Reproductive Health v. City of Akron, 604 F. Supp. 1268, 1271 n.3 (N.D. Ohio 1984).

In the *Charles* case, the district court's judgment on the merits in favor of the plaintiffs was affirmed by the Seventh Circuit and was appealed to the Supreme Court. Charles v. Daley, 749 F.2d 452 (7th Cir. 1984), *prob. juris. noted sub nom.* Diamond v. Charles, 105 S. Ct. 2356 (1985). When the case was argued on appeal before the Supreme Court, Justice Stevens remarked to intervenors' counsel that "we could save you $100,000 by ruling that you had no business in this litigation at all." Diamond v. Charles, No. 84-1379, *argued*, 54 U.S.L.W. 3357 (U.S. Nov. 26, 1985). Unfortunately for the intervenors, they would probably be liable for fees even if they were later ruled to have been improper parties to the suit. *See infra* note 19 and accompanying text.

in civil rights cases is almost entirely judge-made.[5] To determine whether a losing party should be liable for attorneys' fees, a court must apply the Supreme Court's tests announced in *Newman v. Piggie Park Enterprises*[6] and *Christiansburg Garment v. EEOC*.[7] When the plaintiff prevails in a suit, the court must apply the test of *Newman*; when the defendant prevails, the court must apply the test of *Christiansburg Garment*.

In *Newman*, the Court held that a prevailing plaintiff should receive an award of attorneys' fees from the defendant "unless special circumstances would render such an award unjust."[8] The exception for special circumstances has proven so narrow, however, that few courts have ever found one.[9] Thus, under the *Newman* test, prevailing plaintiffs will almost always receive a fee award.

In *Christiansburg Garment*, the Court held that a prevailing defendant can receive a fee award from a losing plaintiff, but only if the suit was "frivolous, unreasonable, or groundless, or . . . the plaintiff continued to litigate after it clearly became so."[10] The Court emphasized that prevailing defendants should not routinely receive fee awards.[11] On the other hand, the Court rejected the view that a defendant should receive an award only if the plaintiff brought the action in bad faith.[12] The Court described its test as a balance between Congress's policies of

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[5] The relevant portion of § 1988 states merely that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (1982). Similarly, the Supreme Court has noted that "the terms of [42 U.S.C. § 2000e-5(k)] provide no indication whatever of the circumstances under which either a plaintiff *or* a defendant should be entitled to attorney's fees." Christiansburg Garment v. EEOC, 434 U.S. 412, 418 (1978) (emphasis in original).

Rather than creating a separate body of law for each fee provision, courts have generally construed the various provisions in identical or closely parallel ways. *See, e.g.*, Hughes v. Rowe, 449 U.S. 5, 14 (1980) (extending a § 2000e-5(k) rule to cover § 1988).

[6] 390 U.S. 400 (1968).

[7] 434 U.S. 412 (1978).

[8] 390 U.S. at 402.

[9] *See* M. DERFNER & A. WOLF, *supra* note 1, at ¶ 10.02(3). The phrasing of the "special circumstances" exception suggests that a defendant's inability to pay might permit the court to exempt him or her from attorneys' fee liability. Subsequent cases have made clear that a defendant's inability to pay does not qualify as a special circumstance. *See, e.g.*, Lenard v. Argento, 699 F.2d 874, 899-900 (7th Cir.), *cert. denied*, 464 U.S. 815 (1983).

[10] 434 U.S. at 422.

[11] *Id.* at 421-22.

[12] *Id.* at 419.

encouraging valid civil rights claims and discouraging those without foundation.[13]

### B. *Losing Defendant-Intervenors Under the Two Tests*

When the plaintiffs in a civil rights case prevail over defendant-intervenors as well as the primary defendants, the court must determine whether to treat the intervenors as defendants for the purposes of awarding fees. If the court treats the intervenors no differently from the primary defendants, then the intervenors will have to pay fees as defendants under *Newman*. Alternatively, the court can treat the intervenors as just another set of plaintiffs presenting their views. The intervenors will then be sheltered from attorneys' fee liability under the more restrictive test of *Christiansburg Garment*.

Courts have taken both approaches. For example, in cases where the losing defendant-intervenor was a government body, courts have not hesitated to treat these intervenors as defendants and to levy fee awards against them.[14] That approach toward government intervenors seems correct. As one court noted, government intervenors have a greater role in the controversy than simply presenting their views; they serve an official, "quasi-enforcement role."[15] Also, when one branch of a state government has intervened in support of a statute that another branch refused to defend, making the government intervenor share in the cost of the fee award helps to show "who is responsible for the constitutional deprivation and who has brought the burden of paying attorneys upon the public treasury."[16]

Where the losing defendant-intervenors were private individuals or groups, some courts have declined to levy fees against

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[13] *Id.* at 420. *See also* Note, *Prevailing Defendant Fee Awards in Civil Rights Litigation: A Growing Threat to Private Enforcement*, 60 WASH. U.L.Q. 75 (1982).

[14] *See* May v. Cooperman, 578 F. Supp. 1308, 1316–18 (D.N.J. 1984) (legislature intervened in support of statute that state attorney general refused to defend), *aff'd*, 780 F.2d 240 (3d Cir. 1985); Planned Parenthood Ass'n v. Pennsylvania, 508 F. Supp. 567, 571 (E.D. Pa. 1980) (state intervened in support of statute); Wisconsin Socialist Workers 1976 Campaign Comm. v. McCann, 460 F. Supp. 1054, 1059 (E.D. Wis. 1978) (state intervened in support of statute); *cf.* Haycraft v. Hollenbach, 606 F.2d 128 (6th Cir. 1979) (local judge intervened, in an official capacity, to offer alternative desegregation plan in school desegregation case).

[15] *May*, 578 F. Supp. at 1317.

[16] *Id.* at 1318.

them.[17] As noted earlier, however, many courts have held that private intervenors are no different from the primary defendants and that the intervenors must therefore pay a fee award.[18] Courts have even levied fee awards against private groups that had been refused permission to intervene—and consequently were not even parties to the suit.[19]

The party's reason for intervening has sometimes affected its fee liability. Where an intervenor has entered the suit to assert its own rights, rather than merely to defend a statute from attack, one might expect that courts would be more willing to protect the intervenor from fee liability. In one case, *Kirkland v. New York State Department of Correctional Services*,[20] the court found this factor decisive. Although the intervenors lost, the court exempted them from a fee award because they "reasonably believed" that the remedy sought by the plaintiffs would violate their constitutional rights.[21]

Asserting a constitutional right has not always been sufficient for an intervenor to avoid liability, however. In *Decker v. United States Department of Labor*,[22] the plaintiffs had brought an Establishment Clause challenge to a public employment program that placed some of its workers in sectarian schools. Catholic dioceses entered as defendant-intervenors and argued, unsuccessfully, that the remedy sought would violate the Free Exercise Clause. Without citing *Kirkland*, the court levied a fee award against the dioceses.[23]

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[17] *See* Kirkland v. New York State Dep't of Correctional Servs., 524 F. Supp. 1214 (S.D.N.Y. 1981); Chance v. Board of Examiners, 70 F.R.D. 334, 340 (S.D.N.Y. 1976).

In areas other than civil rights, some statutory provisions for attorneys' fees have been interpreted to preclude awards against intervenors. For example, the Ninth Circuit has declined to assess attorneys' fees against a union intervenor under the fee provisions of the Fair Labor Standards Act, 29 U.S.C. § 216(b) (1982). The court determined that the Act differed from § 1988 and § 2000e-5(k) because it expressly permitted awards only against lawbreaking employers. Richardson v. Alaska Airlines, 750 F.2d 763 (9th Cir. 1984).

[18] *See* Akron Center for Reproductive Health v. City of Akron, 604 F. Supp. 1268, 1272–74 (N.D. Ohio 1984); Charles v. Daley, No. 79-C-4541 (N.D. Ill. Oct. 21, 1985) (available on LEXIS, Genfed library, Dist file and WESTLAW, DCT database); Decker v. United States Dep't of Labor, 564 F. Supp. 1273, 1279–80 (E.D. Wis. 1983); Vulcan Soc'y v. Fire Dep't, 533 F. Supp. 1054, 1061–62 (S.D.N.Y. 1982).

[19] *See* Thompson v. Sawyer, 586 F. Supp. 635, 638–40 (D.D.C. 1984); Robideau v. O'Brien, 525 F. Supp. 878 (E.D. Mich. 1981); *cf.* Moten v. Bricklayers, Masons and Plasterers Int'l Union, 543 F.2d 224, 239 (D.C. Cir. 1976) (union was not a party to action at trial court level but attempted to appeal from judgment).

[20] 524 F. Supp. 1214 (S.D.N.Y. 1981).

[21] *Id.* at 1217.

[22] 564 F. Supp. 1273 (E.D. Wis. 1983).

[23] *See id.* at 1279–80.

## II. Arguments Against Imposing Liability on Defendant-Intervenors

### A. *Defendant-Intervenors and "Wrongdoing"*

Many courts have argued that an intervenor's opposition to the plaintiff's suit makes the intervenor an indirect participant in the constitutional violation. In *Akron Center for Reproductive Health v. City of Akron*,[24] for example, the court depicted the intervenors' opposition as "presenting a 'substantial barrier to the realization of the full constitutional rights of the [plaintiffs].'"[25] The *Decker* court described its award against the dioceses as "an award of attorney's fees for violating another's civil rights."[26]

As a basis for levying attorneys' fees, this argument does not survive any degree of scrutiny; it fails to distinguish adequately between a defendant who acts to violate someone's rights and an intervenor who merely petitions the government to act. Courts should recognize that the private defendant-intervenors in these cases are not wrongdoers. Unlike the primary defendants, the intervenors are not responsible for creating the challenged policies or for enforcing them. Because the intervenors are not wrongdoers, they should be treated differently from the defendants.[27]

If intervenors are really violators of civil rights, one might ask why intervenors are not required to pay an award of general damages as well as an award of attorneys' fees. If the intervenors were violating the plaintiffs' civil rights just by participating in the case, then presumably they should be liable to the plaintiffs not only at the fees stage but also at the damages stage. Yet courts have regularly declined to allow recoveries of damages against parties who merely participated in a suit or other-

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[24] 604 F. Supp. 1268 (N.D. Ohio 1984).

[25] *Id.* at 1273 (quoting Haycraft v. Hollenbach, 606 F.2d 128, 132 (6th Cir. 1979)). Similar language appears in Thompson v. Sawyer, 586 F. Supp. 635, 639 (D.D.C. 1984).

[26] *Decker*, 564 F. Supp. at 1280.

[27] A similar argument with respect to prevailing plaintiffs appears in *Christiansburg*. In explaining why prevailing plaintiffs should generally receive fee awards while prevailing defendants generally should not, the Court noted that "when a district court awards counsel fees to a prevailing plaintiff, it is awarding them against a violator of federal law." Christiansburg Garment v. EEOC, 434 U.S. 412, 418 (1978). This rationale for awarding fees against defendants obviously does not apply to defendant-intervenors.

wise petitioned a body of government.[28] The underlying reason is clear: "merely resorting to the courts . . . does not make a party a co-conspirator or a joint actor"[29] with the primary defendant.

An intervenor's status as merely a petitioner of the government, rather than an actor with governmental power, has additional significance. Because the constitutional authority for the fee provisions is Congress's power to enforce the Fourteenth Amendment,[30] an award against a private party that has committed no wrong seems inconsistent with the spirit of the provisions. The Supreme Court has consistently held that the Fourteenth Amendment applies only to state action and does not reach purely private action.[31] Thus, to award fees against a private party that merely sought to present its views before a court does not advance the purposes of the provisions in the same way as awarding fees against culpable defendants.

### B. *Defendant-Intervenors and Access to the Courts*

An award against a defendant-intervenor is inconsistent with the purposes of the fee provisions for a further reason: it burdens

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[28] *See* Evers v. County of Custer, 745 F.2d 1196, 1204 (9th Cir. 1984) (neighbors not liable for complaining to state officials when officials later interfered with plaintiff's rights); Gorman Towers v. Bogoslavsky, 626 F.2d 607, 614–15 (8th Cir. 1980) (landowner not liable for petitioning city officials to make unconstitutional zoning change); Weiss v. Willow Tree Civic Ass'n, 467 F. Supp. 803, 817–19 (S.D.N.Y. 1979) (neighborhood association not liable for judicial, administrative, and lobbying activity against planned housing development for Jewish group); Aknin v. Phillips, 404 F. Supp. 1150, 1153 (S.D.N.Y. 1975) (neighbors, requesting that village officials "do something" about noise from discotheque, not liable for subsequently enacted ordinances); *see also infra* notes 36–37 and accompanying text.

[29] Dennis v. Sparks, 449 U.S. 24, 28 (1980) (dictum). In *Sparks*, the plaintiffs alleged that private parties had conspired with a corrupt state judge to deprive them of property without due process. The Court allowed the conspiracy claim to go forward. *Id.* at 27.

In a later case, the Court ruled that private parties could be held liable for petitioning the government to enforce an unconstitutional law; however, it intimated that it would grant immunity if the private parties were shown to have petitioned in good faith. Lugar v. Edmondson Oil, 457 U.S. 922, 942 n.23 (1982). Such immunity can be analogized, in the realm of attorneys' fees, to *Christiansburg Garment*'s "frivolous, unreasonable, or groundless" test for unsuccessful plaintiffs: it immunizes those who seek to vindicate their legal interests, but it does not immunize those who abuse the process.

[30] U.S. CONST. amend. XIV, § 5. Congress indicated that it intended to rely on section 5 of the Fourteenth Amendment. *See* H.R. REP. NO. 1558, 94th Cong., 2d Sess. 7 n.14 (1976), *reprinted in* E. LARSON, *supra* note 1, at 287, 295 n.14; S. REP. NO. 1011, 94th Cong., 2d Sess. 5 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5908, 5912, *and in* E. LARSON, *supra* note 1, at 313, 319. The Supreme Court has repeatedly determined that Congress relied upon its Fourteenth Amendment powers to enact the fee provisions. *See* Fitzpatrick v. Bitzer, 427 U.S. 445, 452–56 (1976); Hutto v. Finney, 437 U.S. 678, 693–94 (1978); Maher v. Gagne, 448 U.S. 122, 132–33 (1980).

[31] The Fourteenth Amendment state action doctrine was first applied in the Civil Rights Cases, 109 U.S. 3 (1883).

the intervenor's access to the courts. Where the usual rationale for imposing attorneys' fees is absent—*i.e.*, that the party broke the law[32]—the resulting burden on the intervenor raises serious difficulties. Potential liability for an opponent's fees, in addition to one's own fees, may deter a prospective intervenor from entering the suit. Even if the actual extent of the deterrence is imagined to be slight (perhaps because the intervenors expect to win and thus fail to take the fee liability into account), the burden itself is still objectionable. It imposes a penalty upon the intervenors for lawfully taking part in a proceeding that affects their interests.

The burden may lead to constitutional objections. For example, the intervenors in one case were ordered to pay attorneys' fees despite having prevailed on some of the issues.[33] Such an award arguably runs afoul of the requirements of due process as announced in *Chicago & Northwestern Railway v. Nye Schneider Fowler*.[34] The Court in *Chicago & Northwestern Railway* invalidated a statute that sometimes required the winner of an appeal to pay the loser's costs.[35] For issues on which a party has prevailed, the rule of *Chicago & Northwestern Railway* apparently would preclude a fee award for the other side.

Recourse to constitutional doctrine is not necessary, however, to prevent attorneys' fee awards from burdening access to the courts. The burden can be prevented with appropriate statutory interpretation. When other statutes have threatened to create such a burden, the Supreme Court has removed the burden simply by interpreting the statutes in a way that avoided it. For

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[32] *See supra* note 27.

[33] *See* Vulcan Soc'y v. Fire Dep't, 533 F. Supp. 1054, 1061 (S.D.N.Y. 1982).

[34] 260 U.S. 35 (1922). Although the case has long been dormant, it has never been overruled.

[35] *Id.* at 47.

> Thus what we have here is a requirement that the carrier shall pay the attorneys of the claimant full compensation for their labors in resisting its successful effort on appeal to reduce an unjust and excessive claim against it. This we do not think is fair play. Penalties imposed on one party for the privilege of his appeal to the courts, deterring him from the vindication of his rights, have been held invalid under the Fourteenth Amendment.

*Id.* (citation omitted).

*See also* Cotting v. Kansas City Stock Yards, 183 U.S. 79 (1901):

> Suppose a law which, while opening the doors of the courts to all litigants, provided that a failure of any plaintiff or defendant to make good his entire claim or entire defense should subject him to a forfeiture of all his property or to some other great penalty; then . . . would not such a burden upon all be adjudged a denial of due process of law?

*Id.* at 101.

example, to prevent the antitrust laws from burdening access to the courts, the Supreme Court has developed the *Noerr-Pennington* doctrine. When a firm petitions the government in good faith through the courts, regulatory agencies, or other appropriate channels, the *Noerr-Pennington* doctrine holds that the act of petitioning is not a basis for antitrust liability.[36] The same is true in the area of labor law.[37] Similar considerations should lead the courts to construe the attorneys' fee provisions in civil rights cases with a view toward protecting intervenors.

Assuring access to the courts is especially important when the underlying substantive law is in a state of flux. Under those conditions, the representation of intervenors serves not only to protect their own interests but also to aid in the development of case law. If the perspective of an important class of individuals is unrepresented, the courts will receive skewed information. Thus, the resulting body of case law might not adequately protect members of the unrepresented class.[38] Fee awards against defendant-intervenors might even become a muzzle; judges and litigants could exploit the awards to silence the presentation of views that they oppose.[39]

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[36] *See* United Mine Workers v. Pennington, 381 U.S. 657, 669–70 (1965) (no Sherman Act violation for lobbying public officials to take action that could harm competitors); Eastern R. R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961); *see also* California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) (immunity does not apply to acts performed in bad faith). *See generally* Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80 (1977); Kintner & Bauer, *Antitrust Exemptions for Private Requests for Governmental Action: A Critical Analysis of the Noerr-Pennington Doctrine*, 17 U.C.D. L. REV. 549 (1984), *reprinted in* CORPORATE COUNSEL'S ANNUAL—1985 at 543.

[37] *See* Bill Johnson's Restaurants v. NLRB, 461 U.S. 731, 740–43 (1983).

[38] Many of the cases involving defendant-intervenors have been employment discrimination cases, with members of the "majority" intervening to protect their rights. *See* Thompson v. Sawyer, 586 F. Supp. 635 (D.D.C. 1984); Vulcan Soc'y v. Fire Dep't, 533 F. Supp. 1054 (S.D.N.Y. 1982); Kirkland v. N.Y. State Dep't of Correctional Servs., 524 F. Supp. 1214 (S.D.N.Y. 1981); Robideau v. O'Brien, 525 F. Supp. 878 (E.D. Mich. 1981).

Employment discrimination is an example of an area of the law that appears to be in a state of flux. Earlier, the Supreme Court refused to invalidate race-conscious affirmative action plans in employment. *See* United Steelworkers v. Weber, 443 U.S. 193 (1979). *See generally* Schiff, *Reverse Discrimination Re-defined As Equal Protection: The Orwellian Nightmare in the Enforcement of Civil Rights Laws*, 8 HARV. J.L. & PUB. POL'Y 627, 668–73 (1985) (reviewing post-*Weber* cases). Recently, however, the Court has permitted such plans less deference. *See* Firefighters Local Union No. 1784 v. Stotts, 104 S. Ct. 2576 (1984). If whites or nonwhites were consistently unrepresented in employment discrimination cases, the future development of case law would suffer as a result.

[39] *See* Rees, *Foul Play in "Public Interest" Litigation: The Joy of Attorneys' Fees*,

### C. *Treatment of Amici Curiae*

Courts have consistently assumed that an amicus curiae is exempt from attorneys' fee liability.[40] Yet the arguments used to justify awards against defendant-intervenors also apply to an amicus who argues in support of the defendant. Like a defendant-intervenor, an amicus who argues for the defendant has voluntarily entered the action in opposition to the plaintiff's pursuit of his or her civil rights. The immunity granted to amici can probably be explained best by two factors: first, the amici were not wrongdoers, and second, making them pay attorneys' fees would create an intolerable burden on their participation. In short, the same rationales that justify protection for amici also justify protection for defendant-intervenors.

Courts have simply ignored or assumed away the incongruity in the treatment of amici and intervenors. In *Vulcan Society v. Fire Department*, the court suggested that the intervenor ought to have participated only as an amicus, as that "would not have caused the expenses that [intervention] inflicted" upon the plaintiff.[41] This assumption is questionable; a persuasive amicus brief could also lead the plaintiffs to expend costly efforts in reply.

One might attempt to explain the incongruity by noting that an amicus plays a far smaller role than does an intervenor. Indeed, an intervenor may have the same rights in the litigation as the primary parties.[42] An amicus brief, in contrast, can be viewed as just one of many sources of influence on a court's decision; an amicus has no right to conduct discovery or to appeal an unfavorable decision.[43] However, this difference does

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REGULATION, Jan.-Feb. 1985, at 19. Rees contends that fee awards against defendant-intervenors have a disparate political impact: they benefit liberal public interest groups.

> The imposition of severe penalties on people who appear in court to defend their own rights under a law will perpetuate the present artificial situation in which the courts see individual rights on only one side of each case, while designating the other side as a mere governmental interest. The presence of flesh-and-blood people on both sides of civil rights cases makes it more awkward for a court to indulge in this legal fiction.

*Id.* at 54.

[40] Chance v. Board of Examiners, 70 F.R.D. 334, 340 (S.D.N.Y. 1976); *see also* Akron Center for Reproductive Health v. City of Akron, 604 F. Supp. 1268, 1274 (N.D. Ohio 1984) (dictum); Vulcan Soc'y v. Fire Dep't, 533 F. Supp. 1054, 1062 (S.D.N.Y. 1982) (dictum).

[41] *Vulcan*, 533 F. Supp. at 1062.

[42] *See* 7A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1920–1922 (1972 & Supp. 1985).

[43] *See* 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE § 3975 (1977 & Supp. 1985).

not justify complete immunity for amici, as the diminished role of an amicus in the litigation could be reflected simply by a reduction in its fee liability.

One might attempt to explain the inconsistency by appealing to a sense of reciprocity: an amicus on the prevailing side cannot *receive* attorneys' fees,[44] so it would be unfair to make an amicus on the losing side *pay* attorneys' fees. A prevailing defendant-intervenor, unlike an amicus, can receive fees from a losing plaintiff.[45] This explanation is also unsatisfactory, however. One could just as easily use it to justify immunity for parties who attempt unsuccessfully to intervene. As noted earlier, courts have sometimes levied fees against such parties.[46] Because the would-be intervenors presumably could not collect attorneys' fees if the defendants ultimately won, the reciprocity argument would protect them from liability if their side lost. Courts have not embraced the reciprocity argument in that situation.

The immunity that courts have fashioned for amici is proper because an amicus is not a wrongdoer and because an amicus should have access to the courts. Courts appear to recognize that treating an amicus like a defendant in awarding fees would contravene the purposes of the statutory fee provisions. Courts should also recognize that the same is true for defendant-intervenors. The immunity granted to amici makes the inappropriateness of treating defendant-intervenors like defendants even more clear.

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[44] In the one reported case where an amicus sought an award of attorneys' fees, the request was firmly rejected. *See* Miller-Wohl v. Comm'r of Labor and Indus., 694 F.2d 203 (9th Cir. 1982). A confusion arises because the word *amicus* is also used to describe a party appointed by the court to resolve specific difficulties in a case; an amicus of this kind can receive payment from the litigants, much as a commissioner or special master can. *See generally* Schneider v. Lockheed Aircraft, 658 F.2d 835, 853–54 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 994 (1982).

[45] *See* Baker v. City of Detroit, 504 F. Supp. 841 (E.D. Mich. 1980), *aff'd sub nom*, Bratton v. City of Detroit, 704 F.2d 878 (6th Cir.), *vacated on other grounds*, 712 F.2d 222 (6th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984); Commissioners Court v. United States, 683 F.2d 435, 439–40 (D.C. Cir. 1982); Donnell v. United States, 682 F.2d 240, 246 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1204 (1983); Seattle School Dist. #1 v. Washington, 633 F.2d 1338, 1349 (9th Cir. 1980), *aff'd*, 458 U.S. 457 (1982). In another case, the court did not have to choose between the *Newman* and *Christiansburg Garment* tests for awarding fees; the plaintiff's suit was unreasonable and vexatious, so the intervenors were eligible to receive fees under either test. *See* Prate v. Freedman, 583 F.2d 42 (2d Cir. 1978). In each of these cases, the prevailing defendant-intervenors were members of minority groups.

For a discussion of fee awards to prevailing defendant-intervenors, see Tamanaha, *The Cost of Preserving Rights: Attorneys' Fee Awards and Intervenors in Civil Rights Litigation*, 19 HARV. C.R.-C.L. L. REV. 109, 130–37 (1984).

[46] *See supra* note 19 and accompanying text.

## III. A Preferable Approach to Fee Liability for Defendant-Intervenors

In construing the statutory provisions for attorneys' fee awards in civil rights cases, the courts should attempt to reconcile the interests of plaintiffs, defendants, and intervenors. The practice of treating defendant-intervenors like defendants does not adequately reconcile those interests. At the same time, a blanket immunity for defendant-intervenors would also fail to reconcile the interests at stake. This section will therefore offer an approach that falls between the two extremes.

A blanket immunity for defendant-intervenors would often leave a heavy burden on the other parties. If the plaintiffs have expended effort to oppose the defendant-intervenors, the costs of that effort must fall on someone. If the intervenors are exempt, then the costs must fall on the plaintiffs or the primary defendants. Making the defendants pay would often be unfair, as they had no control over the defendant-intervenors. For example, the defendant-intervenors in one case litigated actively while the primary defendants refused to defend at all.[47]

Leaving the plaintiffs to pay their own attorneys' fees would also lead to some unfairness. At worst, it might create a loophole that would thwart the fee provisions entirely. If government defendants were liable for fees and intervenors were exempt, a government body would have an incentive not to defend a challenged policy; it could rely instead on private intervenors with an interest in the policy to mount a defense. Both the government and the intervenors would escape fee liability. As a result, the plaintiffs would be unable to receive a fee award from anyone.[48]

Rather than proposing a blanket immunity, this Comment proposes a standard that will alleviate the burden on defendant-intervenors while also taking into account the interests of other parties. Under this standard, an intervenor's treatment will depend on whether the intervenor had entered the suit to defend an existing statute or to assert its own rights. In the former situation, the intervenor will receive limited protection from

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[47] *See* May v. Cooperman, 578 F. Supp. 1308, 1316–18 (D.N.J. 1984), *aff'd*, 780 F.2d 240 (3d Cir. 1985).

[48] The court in *May v. Cooperman* noted this potential loophole as a reason for levying fees. 578 F. Supp. at 1318.

attorneys' fee awards; in the latter situation, the intervenor will receive more comprehensive protection.

### A. *Defendant-Intervenors Who Do Not Assert Their Own Rights*

When a defendant-intervenor argues that the remedy sought by plaintiffs would violate the intervenor's own rights, the need to maintain the intervenor's access to courts is particularly strong. When a defendant-intervenor merely seeks to defend the constitutionality of a statute from attack, the intervenor's access to the courts is still important, but it is less important in comparison because the nature of the potential harm is less severe. Invalidation of the statute would just deprive the intervenor of the statute's benefits; the intervenor had no prior right to those benefits. Also, the primary defendant is more likely to represent the intervenor's interests adequately in these cases, especially if the defendant is a government body and if the statute confers benefits on a sizable class of people.

Thus, when defendant-intervenors merely defend a statute from attack, they should have an intermediate level of protection from attorneys' fee awards. Their liability should be limited, but they should not be able to leave all costs on the plaintiff and the defendant. In particular, these intervenors should pay fees under a modified version of the *Newman* test.

Under this test, a defendant-intervenor would generally have to pay fees to a prevailing plaintiff. The awards would be limited in three ways, however. First, the intervenors would pay only the costs that their activity created, rather than sharing the costs equally with the primary defendant.[49] Second, if a court determined that an intervenor's efforts provided valuable assistance to the defendant, the court would shift an additional part of the intervenor's fee liability over to the defendant.[50] (The intervenor and the defendant could make other contractual arrangements to divide the fee burden in advance, if they desired.)

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[49] *See generally* Tamanaha, *supra* note 45, at 146 n.135. *Cf.* Grendel's Den v. Larkin, 749 F.2d 945, 959–60 (1st Cir. 1984) (apportioning fee award between defendants according to legal costs each created and ability of each to pay).

[50] A similar inquiry is currently made when a defendant-intervenor prevails. Courts generally award fees to a prevailing defendant-intervenor only if he or she made a substantial contribution to the litigation. If the intervenor's efforts simply duplicated the defendant's, then the intervenor will receive no award. *See* Donnell v. United States, 682 F.2d 240, 248–49 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1204 (1983).

Finally, the intervenor's liability would not be inflated by a contingency multiplier. In determining the amount of a fee award in a civil rights case, courts generally follow a two-step procedure: determining the reasonable value of the attorneys' services, and then multiplying that figure by a sizable bonus to reflect the riskiness of the case.[51] The analytical basis of the multiplier scheme is dubious,[52] but the use of a multiplier is especially troubling when the target of the award is not even a wrongdoer.

### B. *Defendant-Intervenors Who Do Assert Their Own Rights*

When defendant-intervenors enter a suit to assert their own rights, they are no different from plaintiffs. The purposes of the attorneys' fee provisions are served by encouraging these defendant-intervenors to participate in the suit. As a result, they should be treated as plaintiffs for attorneys' fees purposes. When they are on the losing side of a suit, they should enjoy the same protection as a losing plaintiff under *Christiansburg Garment*; that is, they should pay fees only if their participation was frivolous, unreasonable, or groundless.

One commentator, Brian Tamanaha, has proposed that the liability of these defendant-intervenors should depend mainly on "whether the party is a minority group representative."[53] If the intervenors were members of minority groups, then they would be exempt from liability. If not, then they would have to pay.[54] Tamanaha justifies this distinction on two grounds: first, that the civil rights laws are meant primarily to protect minority groups, and second, that minority groups are less able to afford legal counsel. In his view, a presumption in favor of minority groups "seems consistent, indeed almost mandated, when applying the civil rights fee award provisions."[55] He also suggests that the courts have tacitly applied this distinction in practice.[56]

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[51] *See* M. DERFNER & A. WOLF, *supra* note 1, at ¶ 16.04(2).

[52] *See* Leubsdorf, *The Contingency Factor in Attorney Fee Awards*, 90 YALE L.J. 473 (1981); Rader, *The Fee Awards Act of 1976: Examining the Foundation For Legislative Reform of Attorneys' Fee Shifting*, 18 J. MAR. L. REV. 77, 103–06 (1984).

[53] Tamanaha, *supra* note 45, at 148.

[54] *See id.* at 148–52.

[55] *Id.* at 150.

[56] *Id.* at 149 n.143. After presenting an extensive survey of cases, Tamanaha concluded

Tamanaha's proposal should be rejected. Defendant-intervenors asserting their rights should be treated as plaintiffs whether they belong to a minority group or not. His argument about ability to pay is obviously flawed: white people *as a group* might be affluent, but the particular white individuals who enter these cases (through their unions) are often blue-collar workers.[57]

More fundamentally, Tamanaha blurs the line between the attorneys' fee provisions and the substantive law. If the civil rights laws "were written mainly for minority groups,"[58] as Tamanaha says, then that emphasis should be reflected by the courts' decisions on the merits: members of minority groups should win and white intervenors should lose. It does not follow, however, that the intervenors should always pay a fee award.

If the civil rights laws clearly provide no protection to white intervenors, then the intervenors will be liable for fees under *Christiansburg Garment*. On the other hand, if the civil rights laws do provide some protection for them, then they should be able to bring their claims without the burden of attorneys' fee liability. That is the standard set for plaintiffs by *Christiansburg Garment*; it is also the proper standard for intervenors. Tamanaha's proposal would effectively judge the intervenors' case before they have presented it.

The proposal offered in this Comment reconciles the interests of intervenors with those of plaintiffs and defendants in a more principled way. Because the defendant-intervenors in these cases are not wrongdoers, courts should not treat them like wrongdoers when awarding attorneys' fees. People should be able to take part in a court proceeding that affects their interests without having to risk harsh financial penalties.

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that the courts had consistently favored minorities over nonminorities in making fee awards. *Id.*

His survey omitted at least one case in which a nonminority party received a fee award after challenging an affirmative action program. The party's substantive claims were later reversed on appeal, but that is a reflection on the substantive law rather than the law of attorneys' fees. *See* Bushey v. New York State Civil Serv. Comm'n, 571 F. Supp. 1562, 1581 (N.D.N.Y. 1983), *rev'd*, 733 F.2d 220 (2d Cir. 1984), *cert. denied*, 105 S. Ct. 803, *reh'g denied*, 105 S. Ct. 1384 (1985).

[57] *See supra* note 38.

[58] Tamanaha, *supra* note 45, at 149.

# COMMENT

## REGULATING ROCK LYRICS: A NEW WAVE OF CENSORSHIP?

CECELIE BERRY*
DAVID WOLIN**

> Music flows gently beneath the surface into dispositions and practices and from there it emerges bigger into men's contracts with one another; and it's from these contracts, Socrates, that it attacks laws and regimes with much insolence until it finally subverts everything private and public.
>
> —Adeimantus
> The Republic of Plato

Generations have wondered at the power of music to provoke rebellion or "soothe the savage beast." Rarely, if ever, has social change not seen a musical accompaniment which portends the coming of a new age. To the extent music catalyzes change, it may be regarded as a subversion of the collective morality, thus requiring severe restraint. Conversely, it may be viewed as a form of inspired communication or art, the expression of which is an essential freedom in a democratic society.

One class of music, popularly known as rock 'n' roll (rock), has recently come under heightened criticism. Various groups have come to believe such music offensive to their tastes or mores and detrimental to the minds of youth, the most impressionable consumers of rock. Consequently, the members of the Recording Industry Association of America have recently agreed to independently label their more controversial releases "Parental Guidance: Explicit Lyrics."[1]

The Parental Guidance (PG) label appears to be the least restrictive compromise among the numerous proposals for regulating, rating, or labelling rock proffered by concerned groups.

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[1] On November 1, 1985, the National Parent Teachers Association (PTA), Parent Music Resource Center (PMRC), and the Recording Industry Association of America (RIAA) agreed upon a scheme in which RIAA member companies would henceforth print a warning label on all albums which contain lyrics with explicit references to sex, violence, or drug and alcohol abuse. Alternatively, a member company may print the lyrics on the back of the album cover.

The National Music Review Organization has sought a seal of approval for records with a positive message.[2] The National Parent Teachers Association has requested an extensive ratings system and disclosure of lyrics on album covers.[3] Bemoaning the effect of so-called "porn-rock" on inner city youth, Jesse Jackson's PUSH advocated a ratings system.[4] The most visible and influential group, however, is the Parent Music Resource Center (PMRC), an association of Washington women who are concerned that ribald lyrics found in rock undermine decency and morality in youth.[5] The PMRC's efforts were pivotal in persuading the industry to adopt the PG label.[6] The record industry has capitulated to the demands of the PMRC, ostensibly to forestall legislation regulating rock lyrics. But did the threat of government interference warrant this preemptory action by the industry?

This Comment analyzes leading cases in First Amendment jurisprudence to determine if objectionable music falls within the scope of protected expression. We investigate whether the government could promulgate content-based restrictions of rock music releases by considering: first, the legal precedents which define nonspeech—the clear and present danger test and obscenity doctrine; second, the impact of variable obscenity on the First Amendment rights of minors; and third, the due process constraints governing state action. We conclude that even if the state possesses the power to restrict objectionable music,

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[2] *See* BROADCASTING, July 15, 1985, at 38. William Steding, founder of NMRO, has stated: "The council will make judgments based on the content as to the acceptability of music for today's youth. If it passes the guidelines, a record would get a label saying it is acceptable—just like a Good Housekeeping seal." *Id.* Steding is vice-president and general manager of Bonneville International Corporation's KAAM(AM)-KAFM(FM) Dallas and executive vice-president of Central Broadcast Division (Radio) for Bonneville.

[3] *See* Washington Post, Sept. 20, 1985, at B1, col. 4.

[4] *See* Weiss, *Porn-Rock: A Script for Censorship*, BILLBOARD, June 29, 1985, at 10. Rev. Jesse Jackson sees a correlation between music lyrics and the high rate of black teenage pregnancy.

[5] *See* Wharton, *D.C. Bluebloods Want X Rating For Porn Rock*, VARIETY, May 22, 1985, at 108. PMRC treasurer Sally Nevius stated that the group is concerned about the influence of certain rock lyrics on 11, 12, and 13 year-olds.

[6] *See* Zucchino, *Big Brother Meets Twisted Sister*, ROLLING STONE, Nov. 7, 1985, at 9. The PMRC has also requested that

> albums with explicit covers be wrapped or kept under the counter; that the record companies reassess their contracts with performers whose acts are explicitly sexual or violent acts on stage; and that video stations be pressured to exhibit "voluntary restraint" by not airing offending videos, which would be restricted to late night viewing.

*Id.*

such power will be so burdened by due process constraints that it poses no actual threat to the record industry.

Self-restraint by the offending industry is advocated as a less restrictive alternative to government regulation. Private regulation, however, raises unique policy concerns. Regulation by a private industry council can be an arbitrary, ungovernable form of restraint and a greater threat to First Amendment values than government-sponsored regulation. No tenable distinction between government restraints and self-regulation by private industry can be made when the result endangers free expression.

## I. GOVERNMENT REGULATION OF ROCK LYRICS: THE CONSTITUTIONAL LANDSCAPE

### A. *Clear and Present Danger and Obscenity: An Overview*

The First Amendment guarantees the right to self-expression and the right to receive information[7] in order to preserve what Justice Holmes labeled a "free trade in ideas."[8] However, the right to freedom of expression is not absolute. The state may regulate content if it can be shown that the message presents a clear and present danger or if the message falls into one of the limited categories which the Supreme Court has drawn to distinguish unprivileged expression, such as obscenity, from expression privileged under the First Amendment. Expression falling in the former category is not subject to the same due process scrutiny as protected expression.[9] In recent years, however, the line between unprotected and protected speech has been blurred.[10]

A child's First Amendment rights are subject to both parental and state qualification and control.[11] The state presently exercises its police power over children with respect to their rights to drive, gamble, consume alcohol, and purchase cigarettes. Government-sponsored restrictions on record releases, however, would arguably infringe upon a more fundamental right.

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[7] *See* Stanley v. Georgia, 394 U.S. 557, 564 (1965).

[8] Abrams v. United States, 250 U.S. 616, 630 (1919).

[9] *See* Roth v. United States, 354 U.S. 476, 485 (1957); Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942). *See also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 582 (1978).

[10] *See infra* text accompanying notes 31–48.

[11] *See infra* notes 23–30 and accompanying text.

Given that the ability to freely choose expressions or information of a given type rests on the Court's definition of obscenity, the precedents governing that question are of primary concern.

### B. *Rock Lyrics Under the* Miller *Test*

If rock lyrics can be classified as obscene, they are unprotected by the First Amendment and are subject to government regulation.[12] The current definition of obscenity is the three-pronged test announced in *Miller v. California*.[13] The *Miller* Court recognized the inherent dangers of regulating any form of expression, stating that statutes designed to regulate obscenity must be carefully circumscribed.[14] As a result, the definition is a narrow one and may be under-inclusive.

The *Miller* standard is difficult to apply to rock music. First, *Miller* requires that the works in question be "taken as a whole."[15] Thus songs with unintelligible lyrics, albums with only a few songs deemed obscene, and single releases with only a few objectionable lines may fall outside the *Miller* test. Second, works with serious artistic or political value are excluded from the definition of obscenity.[16] All but the most objectionable songs, those which are essentially nothing more than aural sex aids, could fall into this category.

Third, lyrics depicting violence or glorifying drugs, alcohol, or the occult are not obscene under the *Miller* standard because they do not appeal to the prurient interest. Content cannot be classified as obscene simply because of an objectionable theme,[17] and the presence of profanity may also be protected by the First Amendment.[18] The Supreme Court has not, how-

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[12] *See* Interstate Circuit v. Dallas, 390 U.S. 676, 704–08 (1968).

[13] 413 U.S. 15 (1973). The Court in *Miller* defined obscenity as follows: (1) whether the average person, applying contemporary community standards, would find that the work taken as a whole appeals to the prurient interest; (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) whether the work taken as a whole lacks serious literary, artistic, political, or scientific value. *Id.* at 23.

[14] *Id.*

[15] *Id.* at 24.

[16] *Id.*

[17] Kingsley International Pictures Corp. v. Regents, 360 U.S. 684, 687–88 (1959) (Court ruled that a state could not deny a license to show a film simply because it presented adultery in a positive light).

[18] Cohen v. California, 403 U.S. 15, 22–26 (1971).

ever, stated whether violent material may be censored on other grounds.[19]

In numerous decisions, the Court has employed a variable approach to obscenity[20] which entails an evaluation of the state's interest and a balancing of state concerns against the values underlying the First Amendment.[21] Under variable obscenity, the *Miller* "average person" standard is discarded in favor of the actual audience, which in the context of the rock lyrics controversy is youth.[22]

### C. *Rock Lyrics and Variable Obscenity*

#### 1. Variable Obscenity Defined: The State Interest in Children's Welfare

The state has a recognized interest in the welfare of children, giving it broader authority over the activities of children than over similar activities of adults.[23] The state also has broad powers for limiting parental freedom and authority in areas affecting the child's welfare.[24] This state interest does not automatically yield to First Amendment considerations.[25]

While society is free to express its special concern for children in a variety of regulatory schemes, this state power is not unlimited. The state may not violate a child's constitutional prerogatives under the guise of protecting the child's interest.[26] In *Wisconsin v. Yoder*, the Supreme Court embraced a balancing test to determine whether the state interest infringes upon a child's First Amendment rights.[27] A juvenile's right to self-expression has been upheld over the state interest in maintaining discipline in school.[28] Additionally, students' First Amendment rights were held sufficient to block a school board's effort to

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[19] Note, *Censorship of Violent Motion Pictures, A Constitutional Analysis*, 53 IND. L.J. 381, 383 (1977).

[20] *See supra* text accompanying notes 31–41.

[21] Shauer, *The Return of Variable Obscenity?*, 28 HASTINGS L.J. 1275, 1279 (1977) [hereinafter cited as *Variable Obscenity*].

[22] *See infra* text accompanying notes 23–33.

[23] Prince v. Massachusetts, 321 U.S. 158, 168 (1944).

[24] *Id.*

[25] *Id.* at 167.

[26] Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

[27] 406 U.S. 205, 214 (1972).

[28] Tinker v. Des Moines School District, 393 U.S. 503, 505–07 (1969).

remove objectionable books from a school library.[29] These cases demonstrate that while the state has power to regulate the First Amendment rights of children, it bears a heavy burden of justifying such regulation.[30]

### 2. Variable Obscenity Expanded: The Groundwork for Government Regulation?

Prior to *Miller*, the Supreme Court had used the variable obscenity approach to protect children. In *Ginsberg v. New York*, the Court ruled that the state had the power to adjust the definition of obscenity as it applied to minors to allow the state to restrict children's access to materials which would not otherwise be obscene.[31] The Court found that the state had an independent interest in protecting the welfare of children and in seeing that they are safeguarded from abuses which might inhibit their free, independent, and well-developed growth.[32] The statute in question was further justified as supporting parents in their responsibility to raise children.[33]

The validity of *Ginsberg* has not been addressed under the *Miller* standard.[34] Nevertheless, the same principles apply, though the definition has changed.[35] Consequently, the definition of obscenity as applied to minors under the variable standard still may not include expression of a serious artistic or political nature. Similarly, violence-, drug-, alcohol-, or occult-oriented lyrics may not be considered obscene, as they are outside the concept of prurient interest.[36]

Concern about pandering is central to the concept of variable obscenity.[37] If material is distributed in such a way as to deliberately appeal to those whose only interest is in titillation, then the Court may rationally determine that the work is obscene.[38] The Court may look to the motivation of the individual who is doing the distributing as well as that of the audience to whom

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[29] Board of Education v. Pico, 457 U.S. 853 (1982).
[30] Bates, *Private Censorship of Movies*, 22 STAN. L. REV. 618, 631 (1970).
[31] 390 U.S. 629, 637 (1968).
[32] *Id.* at 640.
[33] *Id.* at 639.
[34] Erznoznik v. Jacksonville, 422 U.S. 205, 213 n.10 (1975).
[35] F. SCHAUER, THE LAW OF OBSCENITY 89 (1976) [hereinafter cited as THE LAW OF OBSCENITY].
[36] *Id.* at 89.
[37] *Variable Obscenity*, *supra* note 21, at 1278.
[38] *Id. See also* Ginzburg v. United States, 383 U.S. 463 (1966).

it is directed.[39] Furthermore, the court may consider the manner of distribution, inquiring whether or not sexually explicit material is openly or publicly displayed.[40] Thus, a lewd or obscene album cover or an advertisement appealing to the prurient interest of the buyer may be determinative in the classification of a record as obscene.

The notion of variable obscenity, as applied to children, was expanded to cover indecent expression in *FCC v. Pacifica*.[41] The Court upheld the FCC's right to regulate indecent expression on radio because the broadcast media are more intrusive into the home and, consequently, more accessible to children than other media such as the written word or theater.[42] The Court used an analogy to nuisance law in its ruling.[43] The Court took pains to stress the narrowness of its holding, noting that the broadcast media are the most restricted media with respect to the First Amendment.[44] Justice Powell noted in a concurring opinion that children may be unable to exercise free choice to protect themselves from speech which may be shocking or which may have a lasting negative effect on their behavior.[45] The majority believed that indecent speech could be shielded from children without limiting access to adults.[46]

The Court did not indicate whether this extension to indecency would apply to other forms of communication.[47] Recorded media, however, unlike broadcast media, require an affirmative act by the audience to receive the expression. While television or radio listeners may have only limited control over what they will see or hear by screening and previewing programs or by checking listings, record listeners must affirmatively choose particular works and must operate the necessary audio equipment. The very young may lack the knowledge necessary to operate audio equipment, affording parents a greater degree of control.

Although obscenity regulations have historically been upheld because such speech is beyond the protective scope of the First

[39] *Variable Obscenity*, *supra* note 21, at 1278.
[40] *Id.*
[41] 438 U.S. 726 (1978).
[42] *Id.* at 749. Justice Brennan in dissent charged that the majority misconstrued the privacy element and ascribed too little weight to the protection of those who want to communicate. *Id.* at 762. He stressed the notion that to be obscene, expression must be in some significant way erotic. *Id.* at 767.
[43] *Id.*
[44] *Id.* at 767.
[45] *Id.* at 758 (Powell, J., concurring).
[46] *Id. But see id.* at 762 (Brennan, J., dissenting).
[47] *Id.* at 749. *See* Cruz v. Ferre, 755 F.2d 1415 (11th Cir. 1985).

Amendment, the plurality in *Pacifica* embraced the concept of lesser protected speech, explaining that indecent words offend for the same reason that obscenity offends and that neither has social value.[48] The plurality viewed indecent expression as existing in a gray area between protected and unprotected speech and, as a result, found regulation of indecent content to be justifiable.

### D. *Due Process Constraints: Judicially-Mandated Checks on Government Regulation of Artistic Expressions*

#### 1. Lesser-Protected Speech: How Vital the Interest in Protection?

As an incident of employing the balancing test of state interests versus First Amendment protections, the state acquired increased power to restrict certain forms of expression. For example, in *Young v. American Mini Theaters*, the Supreme Court upheld a Detroit ordinance which regulated certain "adult" theaters.[49] The Court found that the city's interest in preserving or improving its central business district was sufficient to support such a restriction, while the harm to First Amendment rights was slight.[50]

Justice Stevens, writing for the plurality, found a less vital interest in the uninhibited exhibition of material on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance.[51] Thus, the state interest in restriction does not have to be as great as it would if the expression were fully protected.[52] The plurality has in effect added the value of speech to the other

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[48] *Id.* at 746.

[49] 427 U.S. 50 (1976).

[50] *Id.* at 62. The Supreme Court has recently used the analysis of *Young* to uphold a city ordinance which prohibits the location of adult motion picture theaters within 1000 feet of any residential zone, dwelling, church, park, or school. Renton v. Playtime Theatres, Inc., ____ U.S. ____, 54 U.S.L.W. 4160, 4161 (1986). Justice Rhenquist, writing for the majority, noted that the ordinance was not directed at the content of the films, but at the secondary effects of adult theaters on the surrounding community. *Id.* at 4162. Consequently, this "content-neutral" ordinance was valid because it served a substantial government interest and left open alternative avenues of communication (or location). *Id.* at 4161–64. Significantly, the majority in *Renton* made no mention of the notion of "lesser protected speech" in its analysis.

[51] *Young*, 427 U.S. at 61.

[52] *Id.* at 70. "Few of us would march our sons and daughters off to war to preserve the citizens' right to see 'Specified Sexual Activities.'" *Id.*

factors in the balancing equation[53] when speech borders on obscenity.

Justice Stewart argued in a vigorous dissent that Stevens's justification for content-based regulation of otherwise protected speech would compromise free expression, leading to a tyranny of public opinion.[54] A majority of the Court has yet to embrace this notion of lesser protected speech, however.[55]

### 2. Censorship Systems and Procedural Safeguards: Vagueness, Overbreadth, and Continuing Availability

Any governmental censorship system which requires records to be rated by content or which bans obscene records necessitates the submission of the record to a government official (or government surrogate) prior to release. Such a system, which may prevent or unduly delay the dissemination of protected communication, must satisfy strict procedural safeguards. State regulation of expression must conform to procedures that will ensure against the curtailment of protected speech.[56]

In any system of censorship, there is the constant danger that the official in charge will be overzealous or unresponsive to the concerns and interests of an artist, as it is the censor's job to restrain.[57] Thus, when the Supreme Court held a system of censorship unconstitutional in *Freedman v. Maryland*, the justices insisted on procedural safeguards to lessen this inherent danger.[58] The burden was placed on the censor to prove that the expression was unprotected.[59] Furthermore, the Court stated that any prior restraint on communication must be limited to the preservation of the status quo and must allow for swift judicial review to impose a valid final restraint.[60] The statute, or its authoritative judicial construction, must assure that the censor will, within a specified brief time, approve the material or go to court to restrain it.[61] This limitation may be feasible for

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[53] *See infra* text accompanying notes 84–89.
[54] 427 U.S. 50, 86 (1976) (Stewart, J. dissenting).
[55] *See* supra note 50.
[56] Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 66 (1962).
[57] Times Film Corp. v. Chicago, 365 U.S. 43, 67–68 (1961) (Warren, C.J., dissenting); Friedman, *Motion Picture Rating System of 1968: A Constitutional Analysis of Self-Regulation by the Film Industry*, 73 COLUM. L. REV. 185 (1973).
[58] 380 U.S. 51, 58 (1964).
[59] *Id.*
[60] *Id.*
[61] *Id.*

films, as fewer than four hundred are released each year,[62] but it would be much more difficult to meet this standard in the rock context, given that over twenty-five thousand songs are released each year.[63]

The Court has often struck down censorship statutes on the ground that they were "void for vagueness."[64] In *Interstate Circuit v. Dallas*, the Court struck down a city ordinance which classified films as "not suitable for children" because it lacked "narrowly drawn, reasonable and definite standards for the officials to follow," giving censors too much discretion.[65] Vague statutes would not give musicians any guidance as to what is acceptable. Rather than risk a label or rating, artists may restrict themselves to writing innocuous lyrics to be sure to reach all audiences.[66] Vague statutes will not be cured by de novo judicial review.[67]

The implication to be drawn from *Interstate Circuit* and *Ginsberg*, decided on the same day, is that a state may restrict children's access to material which may not be restricted from adults, but the statute authorizing the restriction must be of sufficient specificity.[68] Consequently, regulation of records may not be based on so loose a standard as that of the "contributing to the delinquency of a minor" test.[69]

A statute regulating lyrics must also be drafted so as not to be overbroad. The danger in drafting such regulations is that they may be interpreted to include materials which are protected by the First Amendment and which are not sufficiently threatening to satisfy the state's burden of a compelling interest.[70] In *Erznoznick v. Jacksonville*, an ordinance which distinguished movies containing nudity was deemed overbroad since it restricted all nudity, even that used for scientific and artistic ends.[71] Similarly, an ordinance prohibiting drive-in theaters from exhibiting a film in which the "bare buttocks or the female

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[62] Cieply, *Records May Soon Carry Warning That Lyrics are Morally Hazardous*, Wall St. J., July 31, 1985, at 21, col. 4.

[63] *Id.*

[64] *See, e.g.*, Interstate Circuit v. Dallas, 390 U.S. 676, 690 (1968); *In re* Oliver, 333 U.S. 499, 511 (1948).

[65] 390 U.S. 676, 690 (1968).

[66] *Id.* at 684.

[67] *Id.*

[68] *Id.* at 685.

[69] THE LAW OF OBSCENITY, *supra* note 35, at 90.

[70] *Id.* at 154–55.

[71] 422 U.S. 205, 208 (1975).

breasts" were shown was held to be unconstitutional for overbreadth.[72] Although the Supreme Court struck down the ordinance in *Interstate Circuit* for vagueness, the Fifth Circuit had invalidated the ordinance because it restricted violent pictures.[73] The lower court found the ordinance overbroad because it went beyond the scope of the Supreme Court decisions on obscenity.[74]

It would indeed be a Herculean task to draft a statute that restricted objectionable lyrics yet survived scrutiny for vagueness and overbreadth. This problem is exemplified by the song "She Bop."[75] This song allegedly refers to female masturbation,[76] but nowhere is it explicitly mentioned. A song is not patently objectionable for children until a specific meaning is ascribed to it. "She Bop" contains no vulgar or violent lyrics, and no explicit references to sexual activity. To rate this record with a PG for sexual content would require a statute which allows the censor to interpret the words and search for metaphors. By providing wide latitude to interpret lyrics, many harmless songs may be included. Such a statute could not pass any test of constitutionality.

A third procedural safeguard inhibiting the use of restraints prohibits states from restricting access to adults simply because material is inappropriate for children.[77] Thus, the Supreme Court struck down a Michigan statute which completely banned the sale of material deemed unseemly for children, but not obscene.[78] The effect of the statute was to "reduce the adult population . . . to reading only what is fit for children."[79] As a consequence, no ordinance could totally ban the sale of a record unless it was deemed obscene under the *Miller* standard.

Even if a statute does not explicitly ban the material from adults, it may be void if it has the practical effect of prohibiting access to adults.[80] The Court has expressed a willingness to consider substance over form if a statute results in intimidation

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[72] Cinecom Theaters Midwest States, Inc. v. Fort Wayne, 473 F.2d 1297, 1302 (7th Cir. 1973).

[73] 366 F.2d 590, 598 (5th Cir. 1966), *rev'd on other grounds*, 390 U.S. 676 (1968).

[74] *Id.*

[75] Lauper, Lunt and Corbett, "She Bop" (1983, Red Sox/Portrait Music, Inc.).

[76] *See* Garboden, *Hearing Dirty Lyrics*, Boston Phoenix, Sept. 24, 1985, sec. 1, at 7, col. 4.

[77] *See* Butler v. Michigan, 352 U.S. 380, 383 (1957).

[78] *Id.* at 382–83.

[79] *Id.*

[80] Bantam Books v. Sullivan, 372 U.S. 58, 71 (1962).

and suppression of protected expression.[81] For example, informal sanctions will not be allowed to eliminate the safeguards of the criminal process.[82]

### E. *Government Regulation of Rock Lyrics: Uncertain Prospects, Empty Threats*

The balancing test used by the courts to regulate non-obscene speech is basically a modified clear and present danger test.[83] The first step in analyzing the constitutionality of government labelling of rock records is thus to determine if there is a substantial danger from which the public needs protection. Currently, there is no conclusive evidence to support the theory that giving children access to material of a sexual or violent nature is likely to cause antisocial or immoral behavior.[84] Even if the court finds a legitimate state interest in controlling objectionable lyrics, it seems impossible to isolate rock music from a plethora of other influences as an especially determinative factor in a child's adjustment into society. It is ridiculous to think that the state can single out the effect on a given child of hearing the rock group Twisted Sister from the effect of viewing, and listening to, Road Runner cartoons, television shows such as the A-Team or Dynasty, movies such as Raiders of the Lost Ark, professional wrestling events, or the baseball cocaine trial coverage.

Assuming, nevertheless, that rock lyrics are potentially dangerous, purchases of objectionable records must be made by impressionable youth in order for the danger to be sufficient to justify regulation. Figures from the Record Industry Association of America, however, show that in 1984 children aged ten to fourteen accounted for only nine percent of all purchases of rock records, children aged fifteen to nineteen years old accounted for twenty two percent, and the remaining records were purchased by buyers over twenty years old.[85] If the number of

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[81] *Id.* at 67.

[82] *Id.* at 69.

[83] Dennis v. United States, 341 U.S. 494, 510 (1951). Justice Frankfurter, concurring, noted that a showing of imminent danger to the security of the nation is not necessary when the effect of a statute is relatively small and the public interest to be protected is substantial. *Id.* at 542.

[84] *See infra* text accompanying notes 136–140.

[85] RECORDING INDUSTRY ASS'N OF AMERICA, INC., INSIDE THE RECORDING INDUSTRY: A STATISTICAL OVERVIEW 12 (1985).

record buyers is further discounted by the actual number of objectionable records, the state is unlikely to be able to meet its burden of justification.[86]

It seems unlikely that rock lyrics will be regulated under the clear and present danger test. Similarly, strict adherence to the prurient interest component of the obscenity standard would exclude all lyrics but those tending to incite lustful, morbid sexual interest. Few records, if any, would fall into this category. Other lyrics, those ostensibly advocating violence, the occult, incest, or drug abuse, would be constitutionally protected as expressions of ideas in which adults could readily take part.

If further expanded, however, the doctrine of variable obscenity applied to children would represent more substantial ground for government-sponsored regulation. The category of lesser-protected expressions, such as indecent speech in *Pacifica*, invites the courts to weigh the overall value of an art form. Thus courts could conceivably find that the artistic value of certain rock songs does not outweigh the state's interest in protecting children from inappropriate influences.

Even if the state can show a legitimate public interest in regulating records, that interest must still be balanced against the scope of the infringement. A restraint need not be total to be impermissible under the First Amendment.[87] A restraint must adhere to the procedural guidelines regarding vagueness, overbreadth, and judicial review. The restriction on free artistic expression would be out of proportion to the supposed harm because it would necessarily impose a submission requirement on all records even though the vast majority are apparently unobjectionable. "[S]urely this is to burn the house to roast the pig."[88] In addition, a classification system may restrict access to adults and more mature minors even though the music may not be objectionable to them.

The Supreme Court's commitment to strict scrutiny of content-based restraints, and the constitutional challenges to government action that that commitment allows, represent a significant barrier to any government action against the rock industry.

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[86] The records that the PMRC and others vilify are a small portion of the overall market. They do include songs from popular artists but also include a wealth of material from many obscure acts. Washington Post, Sept. 15, 1985, at H1, col. 1.

[87] Engdahl v. Kenosha, 317 F. Supp. 1133, 1135 (E.D. Wis. 1970).

[88] Butler v. Michigan, 352 U.S. 380, 383 (1957).

Consequently, the threat of government regulation is most likely to remain only a threat. Furthermore, government should be wary of undertaking the burden of administering a regulatory scheme, for both practical and ideological reasons. Practically, rock lyric restraint does not appear to be a justifiable use of resources in a government replete with waste and bureaucracy. Ideologically, Americans shudder at the notion of government censorship. Because government restrictions would be subject to repeated judicial review, the need for state action is dubious and the political fallout uncertain. Government will almost certainly opt out of the rock lyrics controversy.

In effect, the government has learned to exercise self-restraint, choosing to use the threat of its regulatory power to induce private industry to do the same. In doing so, Congress has not so much protected First Amendment freedoms and due process rights as it has passed responsibility to private regulators. The consequence to freedom of expression may be dire. The constitutional landscape indicates that the judiciary plays a central role in balancing constitutional rights with community mores. Such checks are not available in a private regulatory scheme. It is to the effects of such a scheme that our inquiry now turns.

## II. The Legal and Social Policy Issues Relating to Self-Regulation of the Record Industry

### A. *Where Private Interests and State Action Converge: The Censorship Effect*

Pressure groups such as the PMRC frequently assert that they do not seek censorship and have repeatedly cast censorship as a uniquely governmental function.[89] Self-regulation, they argue, will be less restrictive.[90] The state action doctrine would seem to justify this view. Under the doctrine, one's constitutional rights are only clearly actionable when violated by government.[91] In effect, the theory, narrowly defined, legitimates pri-

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[89] *See* Washington Post, Aug. 29, 1985, at G1, col. 1.

[90] *See* McBee, *Now It's Labels on 'Porn Rock' to Protect Kids*, U.S. News & World Rep., Aug. 26, 1985, at 52.

[91] Civil Rights Cases, 109 U.S. 3 (1883); *see also*, Shelley v. Kramer, 334 U.S. 1 (1948).

vate or community-sponsored norms as effectuating the goal of self-government.[92] Political leverage often blurs the distinction between governmental and nongovernmental powers,[93] however, and state action has been found where private activities result in the usurpation of a governmental function.[94] A private council which would define lyrics as either "obscene" or "inappropriate," thus earmarking them for special restrictive treatment, would be engaging in an essentially public function that is at once quasi-judicial and quasi-legislative.

Government by such private groups leads to a monopolistic concentration of power—such as that held by the Code and Rating Administration (CARA) whose influence dominates the marketing and distribution of eighty-nine percent of motion pictures made in the United States.[95] The state action theory endangers the operation of free market principles as well as personal liberty.[96] Thus, while state censorship is constitutionally proscribed, private groups may usurp a government interest and expand upon its regulatory function without fear of judicial reprisal.[97]

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[92] *Shelly*, 334 U.S. at 13. Although the Court therein struck down a state court's enforcement of a racially restrictive covenant, the case is often cited for Justice Vinson's caveat: "The Fourteenth Amendment erects no shield against merely private conduct, however discriminatory or wrongful." *Id. See also*, Bates, *supra* note 30, at 652 n.188.

[93] The conception of the power elite developed by C. Wright Mills identifies various strata of decisionmaking influence. Although pressure groups such as the PMRC are not among what Mills would have considered the highest levels of the power elite, they are clearly among "'those who count' even though they may not be 'in' on given decisions of consequence, nor in their career move between hierarchies." He observes that the elite operate through high-level lobbying, or "liaison work," that is generally extragovernmental until the elites must "reach below their own realms"—as to pass a bill through Congress. C. WRIGHT MILLS, THE POWER ELITE 290–292 (1956).

[94] The Court in Marsh v. Alabama, 326 U.S. 501 (1946), held that a certain private entity was sufficiently public in nature to require adherence to the Constitution. *Id.* Later cases expanded the definition of privately-held entities serving a public function. Many of those cases implicate First Amendment-related rights. Among other public functions defined by the court are: maintenance of a public library, Kerr v. Enoch Pratt Free Libr., 149 F.2d 212 (4th Cir. 1945); construction of facilities for public education, Ethridge v. Rhodes, 268 F. Supp. 83 (S.D. Ohio 1967); and regulation of participation in the electoral process, Terry v. Adams, 345 U.S. 461 (1953).

[95] *See* Bates, *supra* note 30, at 623.

[96] *See* Wirtz, *Government by Private Groups*, 13 LA. L. REV. 440 (1958). Citing labor unions and corporations as private economic groups that have acquired governmental functions, Wirtz observes that "[t]he restraining forces of competition are at least substantially diminished and with that diminution there emerges increasingly the question of whether private concentrations of group power will operate with less resultant danger to individual freedoms than is deemed to flow from 'public' or 'governmental' concentrations." *Id.* at 455. Although the record industry is a victim of regulation by private groups, we consider Wirtz's analysis of the effects to be applicable. *See also* Friedmann, *Corporate Power, Government by Private Groups, and the Law*, 57 COLUM. L. REV. 155 (1957).

[97] Discussing the constitutional implications of the acquisition of traditional govern-

Despite the dangers of abdicating to private groups the power to regulate expression, private regulation is lauded as a means of preserving individual liberties from government intrusion. This misplaces the locus of the free speech concern, emphasizing the source rather than the substance of regulation. It will be shown that cloaking regulatory powers in private hands actually will facilitate another, more virulent type of censorship.

### B. *The Struggle for Parental Sovereignty: Benefits and Costs*

The participation of private groups in governmental matters is justified on the grounds of furthering "patron and parental sovereignty"[98]—the idea that advisory ratings facilitate the joint interests of parents and state governments in regulating the content of records for young consumers.

There are numerous problems with this justification. Advisory film ratings are generally ignored by parents of moviegoing youth,[99] and parents may have little control of their children's listening habits. Additionally, parents are not likely to have as great an interest in music because it is widely presumed to have far less impact than the audio-visual impact of lewd or suggestive films. In short, the effect of advisory ratings as a facilitator of parental concern and state interest is minimal. Far greater is the resultant chilling effect of advisory ratings on the processes of formal and informal self-regulation.[100]

In order for formal or informal self-regulation to be effective, the role of pressure groups and the threat of "outside intervention must remain high."[101] It is in playing a significant and sustained role in monitoring rock lyrics that a private group's function comes to resemble that of government. Any industry

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mental power by non-governmental groups, Miller suggests that "governing power, wherever located, should be subject to the fundamental constitutional limitation of due process of law." Miller, *The Constitutional Law of the Security State*, 10 STAN. L. REV. 620, 633 (1958).

[98] R. RANDALL, CENSORSHIP OF THE MOVIES: THE SOCIAL AND POLITICAL CONTROL OF A MASS MEDIUM 79 (1968).

[99] *Id.* at 179–80. Even if parents did look to these ratings for guidance, the ratings really provide very little information. *See infra* notes 120–21 and accompanying text.

[100] RANDALL, *supra* note 98, at 180. *See also* Krauthammer, *X Ratings for Rock*, Washington Post, Sept. 20, 1985, at A27, col. 1, for the view that any system of classification actually amounts to a form of censorship disguised as consumer information.

[101] Randall, *supra* note 98, at 181. The author notes that in the case of film, informal censorship has become attenuated as the pressure of private groups has declined.

council is likely to be greatly influenced by these pressure groups.

### C. *Self-Regulation: Its Roots and Its Progeny*

#### 1. The Development of the Movie Ratings System

An example of a self-regulating system in the media industry is the movie ratings system. The history of censorship in the film industry is extensive, with private religious groups playing a significant role in pressuring for a review scheme.[102] Under pressure from private groups, the movie industry sought to forestall a series of new censorship statutes, purportedly designed to protect children.[103] On November 1, 1968, the motion picture industry instituted its own program of film classification, "The Motion Picture Rating System."[104]

Under this system, which is still in effect, all films produced or distributed by MPAA members, and therefore most movies shown in the United States, are submitted to CARA, which issues a preliminary "probable" rating, including "suggestions" for changes that may improve upon the probable rating.[105]

There is no stated criteria for each rating.[106] While this permits CARA to adapt to changing times, it also puts the contents of the nation's films wholly within the discretion of the CARA director.[107] As a result, the criteria for the rating change with

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[102] *See* Friedman, *supra* note 57, at 189.

[103] *See* E. DEGRAZIA & R. NEWMAN, BANNED FILMS: MOVIES, CENSORS & THE FIRST AMENDMENT 119 (1982). Louis Nizer, general counsel for the Motion Picture Association of America (MPAA), noted that a classification system "would give the public notice" that the industry was "doing everything possible" to distinguish between "adult entertainment" and "films suitable for all ages." *Id.*

[104] *See* Friedman, *supra* note 57, at 191. The system was created under the joint auspices of the MPAA, the International Film Importers and Distributors of America (IFIDA), and the National Association of Theater Owners (NATO).

[105] *See* E. DEGRAZIA & R. NEWMAN, *supra* note 103, at 120. Each film is reviewed by the entire CARA staff, which discusses the film and reaches a consensus judgment. When the finished film is viewed, CARA states its objections so that producers may go back and re-edit the film in an effort to obtain a less restrictive rating. *Id.*

[106] *See* Friedman, *supra* note 57, at 194. The standards applied to determine the ratings include: upholding the dignity of human life; exercising restraint in portraying juvenile crime; not demeaning religion; prohibiting extreme violence and brutality, obscene speech, gestures or movements; and limiting sexual content and nudity. E. DEGRAZIA & R. NEWMAN, *supra* note 103, at 120.

[107] *See* Friedman, *supra* note 57, at 195.

each CARA director, and filmmakers are often forced to seek advice prior to filming in an effort to avoid re-editing.[108]

The objective of the system was to enhance parental sovereignty and to forestall censorship by the government. It has, however, failed as a font of consumer information,[109] while abridging the rights of filmmakers and their audiences with a system of self-censorship that is without any constitutional constraints.[110]

Although the ratings system lacks post-release vigor, obtaining a desired rating in the production and distribution stages may be crucial to a picture's success. The X rating remains a powerful tool because it drastically reduces attendance.[111] Arguably, the X rating goes too far. Many theaters simply refuse to show X movies.[112] By prohibiting juveniles under seventeen from seeing certain films, the system usurps the rights of parents to give children access to non-obscene expression that they may deem suitable for their children.

Although the system permits "adult" films, it still unjustifiably interferes with non-obscene expression. In addition to denying children access to X material without the substantial justification that the state must provide as a precondition to invoking its public power, the economic impact of an X rating encourages producers to reshape scripts and re-edit films to get a less restrictive rating.[113] As long as the National Association of Theater Owners (NATO) member-operated theaters—ninety percent of

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[108] *Id.* A producer dissatisfied with the classification of a film may appeal to the Code and Rating Board which includes the head of the MPAA, 12 of its board members, 8 members of the NATO board, 2 members of the Producers' Guild, and 2 IFIDA members. A two-thirds vote of the Board is necessary to uphold an X rating, while a majority will uphold the other ratings. E. DEGRAZIA & R. NEWMAN, *supra* note 103, at 120.

[109] The movie ratings fail to inform parents or children of the grounds for the rating—whether the R rating was due to sex, violence, profane language, or some combination thereof. The ratings alone do not indicate to parents specifically what to watch for in choosing films. Currently, the X is applied to violence as well as sexual content. Many films formerly rated PG are now rated R because of violent content, but the R rating is rarely enforced, as many theater owners allow youngsters to attend R movies. E. DEGRAZIA & R. NEWMAN, *supra* note 103, at 121.

[110] *See* Friedman, *supra* note 57, at 186. The MPAA standards are not limited by obscenity doctrine and would be invalid for overbreadth if promulgated by state action. *Id.* at 208. *See also* Butler v. Michigan, 352 U.S. 380 (1957). Under constitutional standards, the system would also be impermissibly vague because it allows the CARA director too much discretion. Friedman, *supra* note 57, at 220.

[111] *See* Friedman, *supra* note 57, at 202. *See also* E. DEGRAZIA & R. NEWMAN, *supra* note 104, at 121, where it is noted that the choice of an X connotes a crossing out, a negative, implying disapproval.

[112] *See* Friedman, *supra* note 57, at 217.

[113] *Id.* at 216.

all screens—refuse to show X films, and young audiences are barred from the remaining ten percent, filmmakers are forced to anticipate CARA's rulings.[114] When they do, they are changing the message of their films to conform to an industry standard of suitability for young persons.[115]

The system interferes with the filmmakers' and the public's rights of expression in a manner that would be clearly unconstitutional if executed by the government. It is a type of restraint on communication which lacks the general due process guarantee of an independent judicial review, which would be required in a government-sponsored system of regulation. The effect in terms of movies not made or non-obscene expressions rendered unavailable to the public is unknown. Yet it is precisely that ignorance which, as a consequence of too few due process controls, creates a climate ripe for censorship.

### 2. The Politicization of Rock: Then and Now

The history of rock reflects a similar denouement. Political elites have criticized rock since the 1950s, when congressional hearings were held on the apparent relationship between rock and juvenile delinquency.[116] Celebrities such as Alan Freed, named King of the Disc Jockeys, were forced out of the business after a congressional investigation found them guilty of accepting bribes from record companies to play their releases.[117]

Rock was again the subject of congressional investigation in 1973 when former Senator James Buckley (R-N.Y.) equated rock music with the drug culture.[118] Buckley accused Columbia Records and its parent company CBS of engaging in "payola"

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[114] *Id.* at 216.

[115] *Id.* at 206.

[116] Amendment to Communications Act of 1934 (Prohibiting Radio and Television Stations from Engaging in Music Publishing or Recording Business). *Hearings on S. 2834 before the Subcomm. on Communications of the Senate Committee on Interstate and Foreign Commerce*, 85th Cong., 2nd Sess. (1958). The charges that rock music was corrupting were part of a larger battle between two performing rights organizations for control of the radio listening market: Broadcast Music Inc. (BMI) and the American Society of Composers Authors and Publishers (ASCAP). BMI was largely responsible for popularizing black rhythm and blues and country and western music, the forerunners of rock. For more on the ASCAP-BMI controversy, *see* S. CHAPPLE & R. GAROFALO, ROCK N' ROLL IS HERE TO PAY 64–68 (1977).

[117] *Responsibilities of Broadcasting Licensees and Station Personnel, 1960: Hearings before the Subcomm. on Legislative and Foreign Commerce of the House Comm. on Interstate and Foreign Commerce*, 86th Cong., 2nd Sess. (1960).

[118] 93 CONG. REC. 37849-53 (1973) (statement of Sen. Buckley).

in the form of drugs to disc jockies and programmers to promote records and acts.[119] Buckley applauded MGM Records president Mike Curb for dropping eighteen acts accused of promoting hard drugs through their music.[120]

Given this history of periodic political harrassment, the National Association of Broadcasters has been quick to comply with PMRC demands by requesting that lyrics accompany new releases. Though the content of radio broadcasts is already regulated by the Federal Communications Commission,[121] the spectre of more stringent enforcement has spawned what is perhaps a prematurely conciliatory response among broadcasters. The record industry's own legislative agenda likewise makes it particularly vulnerable to the criticism of political elites.[122] It is small wonder that even a non-investigatory congressional hearing threatens the industry. The result could be a restriction of songs available for adult as well as adolescent listeners.[123] Private listeners, both adults and children, could be deprived as record companies drop controversial acts which, denied valuable airtime, are no longer profitable.[124]

The effect of self-regulation is to decentralize censorial power, not to eradicate it. Although citizen groups deny that censorship is their objective, advisory ratings are not effective unless they

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[119] *Id.* at 37850.

[120] *Id.*

[121] 47 U.S.C.A. § 307. The Commission is empowered to grant a broadcast license "if public convenience interest or necessity is served thereby." *Id.* According to the Court, the standard leaves "wide discretion and calls for imaginative interpretation." FCC v. RCA Communications, 346 U.S. 86, 90 (1953). Additionally, a 1970 FCC directive, entitled "Licensee Responsible to Review Records Before Broadcast," stated that a station that broadcasted songs referring to drugs "would raise serious questions as to whether continued operation of the station is in the public interest." Washington Post, Sept. 15, 1985, at H5, col. 1.

[122] H.R. 2911, 99th Cong., 1st Sess. (1985). This bill, the Home Audio Recording Act, is the latest of several attempts by the recording industry to levy a tax on the home taping industry. The bill also provides for royalties to the record industry from the sale of blank tapes and tape recorders.

[123] Harrington, *Rock With a Capital 'R' And a 'PG 13'*, Washington Post, Sept. 15, 1985, at H1, col. 3, where it was noted that "word is spreading that some mall record stores have already been informed that if they carry records with an explicit sticker warning, their leases may be cancelled." *Id.*

[124] It is important to note that record companies or broadcasters seldom drop controversial groups or programs if they are highly profitable. Compare the fates of Alan Freed and Dick Clark as described in S. CHAPPLE & R. GAROFALO, ROCK 'N ROLL, *supra* note 116, at 60–64 (1977). However, there are, inevitably, victims of political pressure. *See* text accompanying notes 129–33. For an analysis of the effects of the FCC directive, "Licensee Responsible to Review Records Before Their Broadcast," on records receiving airtime, *see* R. DENISOFF, SOLID GOLD: THE POPULAR RECORD INDUSTRY 406–26 (1975).

are, to some extent, coercive. It is this element of coercion that raises the spectre of censorship. The industry's move towards self-restraint is activated by the consistent pressure of private groups who, ironically, seem to have a disproportionately high influence in government. That so small a group can intimidate a whole industry and alter the legislative process calls into question the integrity of our political system itself. When the government/nongovernment distinction blurs, the restraint most fundamental to freedom—the refinement and allocation of power through a system of checks and balances—is lost.

## III. THE VALUES CONFLICT: DECENCY VERSUS TOLERANCE

### A. *Rights-Protective Vigilance: Who Needs It and Why*

The effect of the recording industry's recent decision to comply with requests for increased self-restraint by affixing warning labels is likely to be short lived, just as movie ratings became virtually meaningless as sex and violence in films increased throughout the seventies.[125] Profits for the movie industry also increased under the movie ratings system.[126] It appears that censorship movements are very much the product of a conservative social and political climate. To be effective, this climate must persist, mobilizing the convictions and energies of the politically influential. Otherwise, the industry's tendency to accommodate consumer tastes, thus maximizing its profit, will lead to the demise of any artificial restrictions.[127] In this light, it appears that the greatest protector of free expression is the profit motive.[128]

Why then should we worry? There are any number of libertarian free-riders who subscribe to the notion that this, too, will pass. Today's activist conservatism does not seem so transient, however. When censorship is effectuated by private rather than government groups, it has been treated as beyond the reach of

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[125] S. CAGIN & P. DRAY, HOLLYWOOD FILMS OF THE SEVENTIES: SEX, DRUGS, VIOLENCE, ROCK 'N ROLL & POLITICS (1984). *See also How the Movie Ratings Rate*, CHANGING TIMES, Dec. 1981, at 70.

[126] Wall St. J., Jan. 3, 1978, at 10, col. 4.

[127] RANDALL, *supra* note 98, at 181.

[128] This notion may be misleading, however, given the industry's financial incentives to ingratiate itself with various pressure groups in order to enhance its legislative agenda. *See supra* note 122.

the law, so that today's political elites clearly have the freedom as well as the desire to exploit their influence to its limits. Free trade cannot protect free expression when small distributors as well as producers are subject to intimidation. Yet, there persists an orthodox view of censorship as capable of legal solution. However,

> [t]his view misconceives not only the nature of the enemy, but also that of the war itself. Its formalism overestimates the efficacy of legal power, in the same fashion that another kind of formalism often overestimates the efficacy of military power, as applied to problems essentially social and political in character.[129]

Because censorship is the product of social and political conditions, it is not sufficient to rely on legal controls to protect free expression. This is especially true when self-regulation is encouraged as a means of avoiding governmental intrusions and ensuring the primacy of community standards. For in fact, community standards are too often the province of outspoken, well-organized elites, and too rarely subject to society-wide discourse and debate. It is precisely because open, unrestrained discourse is presumed to be a shared value in democratic societies that shared participation is essential.

### B. *Unrestricted Musical Expression—A Valuable Barometer of Social Values and Ideals*

The controversy concerning record lyrics has arisen because certain groups view music as society's guidepost: as goes music, so goes youth and the future of America. Those who search for the causes of rape, sexual irresponsibility, and drug abuse and who believe that the cause of miscreant behavior can be found in music come from all points on the political spectrum.[130] On the other hand, there are those who argue that emphasis on any art form as a significant social force is misguided and that the fault for these social ills lies more deeply imbedded in our societal and interpersonal values.

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[129] *Id.* at 232.

[130] Dougherty, *Parents v. Rock*, PEOPLE MAG., Sept. 16, 1985, at 46. Feminists, religious fundamentalists, conservative Republicans such as Spiro Agnew and Sen. James Buckley, and civil rights activists such as Jesse Jackson have, at one time or another, criticized the content of rock music.

The aphorism that sex sells is not unique to rock, and ratings on music labels would not reverse what is an economic and social reality. In fact, ratings only tend to arouse consumer interest, resulting in increased purchases.[131] For example, the 1984 release, "Relax"[132]—a blatantly sexual dance tune by Britain's Frankie Goes to Hollywood—became the first song in years to be banned from the airwaves by the BBC. The popularity of the song had declined before the ban, but following the ban, the popularity of "Relax" was revived. It now stands as one of the biggest selling British singles of all time.[133] Thus, a rating system may be counterproductive by bringing increased attention to the song and its lyrics and greater fame to its performer, as the success of R and PG movies bears witness.

Without ratings, few take the time to notice words. A study of young people's listening habits was conducted by R.S. Denisoff in the mid-sixties.[134] The subject of the study was a nihilistic, pessimistic song of warning by a nineteen-year-old songwriter called "Eve of Destruction."[135] Denisoff found that only thirty-six percent of the listeners in his sample interpreted the lyrics to "Eve of Destruction" in the composer's terms, while twenty-three percent misconstrued the lyrics entirely and thirty-seven percent could express only some of the sentiments in the song after repeated listening.[136]

In contrast, current advocates of regulation subscribe to the "hypodermic needle theory,"[137] basing their position on the following assumptions: that "the values expressed in the song are clear to a majority of listeners; the values are subscribed to by a large proportion of listeners and the values are likely to influence the attitudes and behavior of the uncommitted."[138]

The emphasis on values in the hypodermic needle theory indicates that criticism of rock music results from a perceived value conflict between protesting groups and younger listeners. Many behavioralists perceive the source of the ensuing intergenerational conflict as a necessary process of adolescent maturation, encompassing "the challenges of relating self to soci-

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[131] *Id.*
[132] Johnson and O'Toole, "Relax" (1984, Island/Warner Brothers Music, Inc.).
[133] *See* Dougherty, *supra* note 130, at 46.
[134] R. DENISOFF, SING A SONG OF SOCIAL SIGNIFICANCE (1972).
[135] Sloan, "Eve of Destruction," (1965, ABC/Dunhill Music, Inc.).
[136] R. DENISOFF, *supra* note 134, at 132.
[137] *E.g.*, ORMAN, THE POLITICS OF ROCK MUSIC 63 (1984).
[138] *Id.*

ety, a redefinition of personal values and complex physiological changes."[139]

Relating self to society is most easily accomplished through the mass media, as teenagers' desire to separate themselves from parents leads them to experiment with other value systems. Thus, "the hero worship of rock and film stars, so prevalent among adolescents, facilitates the teenager's search for identity and a new self-image."[140] Finally, it is noted that

> teenagers' tolerance for the portrayal of sex and violence in the media is consistent with their changing values, lifestyles and authority testing. The gradual shift during late adolescence towards more news and public affairs programs along with growing interest in newspapers and news magazines, is a reflection of this acceptance of reality.[141]

The values controversy underlies both the concept of obscenity as unprotected speech and loyalty to so-called community norms. Despite the endurance of these concerns in the American legal and social consciousness, no decisive evidence exists to indicate that artistic expression, such as that in rock, alters values or behavior. At bottom, then, we must determine the rational basis for this fear, if any, and the purpose that it serves.

The problems of adolescence cannot be attributed solely to today's racy rock music—nor can the problems of our society. In part, it is our own affinity for the violent and the sexually suggestive that commends these as incidents of adulthood to our children. As mere affinities, these may even be characteristically human. But when a perennially shirtless, monosyllabic Rambo becomes a national hero to adults, we should expect our youth to embrace the outrageous.

In that sense, the inter-generational conflict is one of social dimensions. Viewing the choice between family values and rock as a choice between order and chaos, authority and anarchy, necessitates a struggle for control by parents and paternalistically-minded elites. Even if one believes that the bedrock of society is eroding, it would seem that tampering with free expression will quell, but not silence, the debate concerning how best to attain identity and independence, through adaptation or rebellion. We can attempt to halt the adolescents' pursuit of an

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[139] R. Avery, *Adolescent Use of Mass Media*, 23 AM. BEHAV. SCIENTIST, Sept./Oct. 1979, at 64.

[140] *Id.*

[141] *Id.* at 65.

answer to this conundrum, or we can accept that each individual seeks answers in his or her own way. The unrestrained freedom to do so ensures their maturity and ours.

## IV. Conclusion

While it is reasonable for the record industry to take measures designed to forestall government regulation of rock lyrics, the action must be commensurate to the actual threat. Any such regulation must be narrowly tailored to root out only that speech unprotected by the First Amendment, or else the state interest in regulation must be so great as to justify a restriction of protected speech. It is highly questionable whether the regulation of much rock music could meet either substantive test. Drafting a statute which would survive the Court's definition of variable obscenity would also be extremely difficult, if not impossible. Any statute which did survive would be so constricted by procedural safeguards as to be rendered relatively harmless.

Although the actual threat of government regulation is not as great as perceived, the industry has chosen to regulate itself. In doing so, it will be free from the constitutional restraints under which government regulators must labor. Yet there appears to be no rational policy reason for industry restraint. To the groups most directly affected by the regulation of rock lyrics, the musicians and the listeners, a restriction which needlessly inhibits expression is intolerable, no matter what the source.

It has thus been political pressure which forced the industry to agree to label objectionable albums. This action appears harmless, but it unnecessarily concedes the disputable point that rock lyrics are a major cause of the problems of youth in America. This concession measurably increases the credibility of the pressure groups who seem to have a larger agenda. Further restrictions may lead to regulation of rock concerts, album covers, and music videos. The placement of warning labels on album covers sets a bad precedent for the music industry and society generally. For in reliance on private enforcement of nebulous community standards, the industry has both legitimated and encouraged further censorship efforts.

# BOOK REVIEW

## THE CLAMOR OF IMMIGRATION AND AMERICA'S CRISIS OF VALUES

*Review by Anne Wortham**

CLAMOR AT THE GATES: THE NEW AMERICAN IMMIGRATION. Edited by *Nathan Glazer*. San Francisco, Cal.: Institute for Contemporary Studies, 1985. Pp. ix, 337, notes, contributors. $25.95 cloth, $10.95 paper.

America faces an immigration crisis: not a crisis of overcrowding or of scarcity, but a crisis of values. According to Glen Dumke, in his preface to *Clamor at the Gates*, the crisis constitutes the American public's recognition of the increasing disparity between "the warm and noble invitation on the Statue of Liberty" and "what is really happening" (p. ix). The crisis became acutely apparent in the early 1980's, when, after decades of relative inattention to the control of immigration, the United States finally realized that it had lost control over its ports and borders.

United States immigration policy had been under review since the Select Commission on Immigration and Refugee Policy was established by Congress in 1978.[1] As the Select Commission drafted its recommendations for legislative reform, public interest in immigration was heightened by several developments: the arrival of a flotilla of 125,000 immigrants from the Cuban port of Mariel; increased Haitian migration; increased admission of legal refugees, mostly Southeast Asian "boat people"; and the increasing influx of legal and illegal immigrants from Mexico and Latin America. In 1980, the United States acquired an estimated half a million new illegal aliens and three-quarters of a million legal immigrants and refugees.[2]

Since 1981, Congress has been debating the Simpson-Mazzoli Immigration Reform and Control Act, which embodies most of

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[1] The commission issued its report in March of 1981. U.S. SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY: U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST (1981).

[2] SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, STAFF REPORT, SUPPLEMENT TO THE FINAL REPORT 230–31 (1981).

the important recommendations of the Select Commission.[3] The failure of Congress to adopt immigration reform legislation has added to public concern over current immigration policies. This concern is exacerbated as well by the arrival of the greatest number of immigrants since the 1920's.[4] As Nathan Glazer points out in his introduction to *Clamor at the Gates*,

> opinion is confused and uncertain as to whether this adds to our strength or our weakness, as well as whether it demonstrates our openness and generosity, or our simple incapacity to forge a national policy on the key question of who shall be allowed to become an American, along with our helplessness before the decisions of cynical nations trying to rid themselves of unwanted people (p. 3).

The articles in *Clamor at the Gates* are thoughtful analyses of a confusing clamor that many officials and citizens are hard

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[3] On March 17, 1982, the Simpson-Mazzoli bill was introduced in the House of Representatives by Representative Roman L. Mazzoli (D-Ky.), 128 CONG. REC. H951 (daily ed. Mar. 17, 1982), and in the Senate by Senator Alan K. Simpson (R-Wyo.), 128 CONG. REC. S2306 (daily ed. Mar 17, 1982), the respective chairmen of the House and Senate immigration subcommittees. Since it was introduced, the bill has undergone several revisions. The Senate passed legislation in 1982, 128 CONG. REC. S10619 (daily ed. Aug. 17, 1982), 1983, 129 CONG. REC. S6970 (daily ed. May 18, 1983), and 1985, 131 CONG. REC. S11750 (daily ed. Sept. 19, 1985). The House passed a bill of its own in 1984, 130 CONG. REC. H6150 (daily ed. June 20, 1984). Because of differences between the bills, Congressional conferees failed to reach a compromise on the legislation. The sponsors of the 1985 bills were Senator Simpson and Representative Peter W. Rodino (D-N.J.). Both were passed by the Senate in September 1985, and are now pending in the House Judiciary Committee.

The major provisions of the bill passed by the Senate are:

1. Employers would be subject to civil penalties of $100 to $2000 for each illegal alien they hired. If there was a "pattern or practice" of violations, the employer would be subject to a penalty of $3000 to $10,000 for each illegal alien hired.
2. Legal status would be offered to illegal aliens who had entered the United States before January 1, 1980, and had lived here continuously since then.
3. Aliens who gained legal status would first become temporary residents and then, after two and a half years, could become permanent residents if they could show a knowledge of the English language and of American history and government. Aliens could apply for citizenship after five years as permanent residents.
4. In order to increase the Border Patrol and other enforcement activities of the Immigration and Naturalization Service, $840 million would be authorized for the agency in the fiscal year 1987.
5. Farmers would be permitted to bring up to 350,000 alien workers into the country to harvest perishable fruit and vegetables. The workers could stay in the country for up to nine months a year and could move from one farm to another within a designated region.

[4] Between 1920 and 1930, the largest number of immigrants arrived in 1921 (805,228), 1923 (522,919), and 1924 (706,896). The smallest number of arrivals was 241,700 in 1930. In the years since, the number exceeded the 1980 total of 530,639 only in 1978 when 601,422 arrived. U.S. IMMIGRATION AND NATURALIZATION SERVICE, 1976 ANNUAL REPORT 39 [hereinafter cited as 1976 ANNUAL REPORT], *cited in* T. KESSNER AND B. BOYD CAROLI, TODAY'S IMMIGRANTS, THEIR STORIES: A NEW LOOK AT THE NEWEST AMERICANS 302–03 (1983).

put to understand. Proceeding from its editor's notion that "an epoch's problems are determined by its perspectives" (p. 214), it offers a variety of angles from which the "immigration perplex," to use John Crewdson's term,[5] may be viewed and understood.

In the first group of essays, Lawrence Fuchs, who served as executive director of the Select Commission on Immigration and Refugee Policy, reflects on the principles underlying the Commission's recommendations and the extent to which the Simpson-Mazzoli bill expresses these principles. Harris N. Miller, who served as a consultant to Congressman Romano L. Mazzoli and on the staff of the House Judiciary Committee, provides a history of the attempts to make Simpson-Mazzoli into law. Edwin Harwood departs from the thrust of most of the book's articles and questions whether enforcement of any immigration reform is possible. Rudolfo O. de la Garza identifies the attitudes underlying the opposition of Mexican-American leaders to current immigration reform.

The second group of essays addresses the economic impact of both legal and illegal immigration. Urban Institute economist Thomas Muller looks at the economic effects of immigration in terms of assumptions about the labor force, the economic structure, and immigrant characteristics. Vernon M. Briggs, Jr., focuses on how immigration policies relate to employment trends and how immigration determines and responds to trends in the labor market. Focusing on the case of the Korean community in Los Angeles, Ivan Light considers the social and economic costs and benefits of immigrant entrepreneurship.

The third group of essays addresses some of the problems of assimilation and adaptation to American society. Peter I. Rose surveys the patterns of assimilation among various groups of Asian Americans. Nathan Glazer outlines the response of educational policy to immigrant and minority children and their varied racial, ethnic, cultural, and linguistic backgrounds. Peter Skerry examines the extent to which the perspectives of their social and historical place in America influence the social and political attitudes of Mexican Americans in the Southwest.

The final two essays deal with problems of national sovereignty and citizenship. Demographer Michael Teitlebaum con-

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[5] J. CREWDSON, THE TARNISHED DOOR: THE NEW IMMIGRANTS AND THE TRANSFORMATION OF AMERICA 343 (1983).

siders the implications of mass expulsions by foreign governments and offers suggestions as to how future mass expulsions might be deterred. Peter H. Schuck examines how conceptions of political community influence immigration law.

Collectively, the articles refute two lines of argument. First, the authors provide a wealth of evidence that invalidates many of the concerns people have about the immigrants themselves and their impact on American life. Indeed, one aspect of the immigration problem is the persistence of myths about immigration that fuel so much anti-immigration sentiment. Second, all of the authors argue (if only implicitly) against the libertarian position that insists on free, unrestricted immigration.

By identifying the issues and questions that surround the history of the immigration problem, the articles present us with ways of thinking about immigration as well as assessing the ideas of experts in the field. The book's most important contribution is its articulation of the way principles of American national identification dictate the terms of immigration policy, and how the transformation of American values has contributed to the crisis that grips the nation. The problem of immigration is more than a problem of effective policy and successful enforcement; it is a problem of national identity. That is why it is such a troublesome matter.

## I. Myths About Immigration

Objections to immigration are no longer expressed principally in terms of bigotry or xenophobia. Irrational and unfounded concerns about immigration are, however, still common. The articles in *Clamor at the Gates* effectively answer these concerns. Four myths about immigration are especially recurrent:

1. *Immigration is at record levels; too many people are coming here.* As Michael Teitlebaum has stated elsewhere, there are no more immigrants arriving now than at the peak period of 1900–1910.[6] It is true, as Vernon Briggs points out, that the United States accepts twice as many legal immigrants and refugees as all the rest of the world combined (p. 135). The influx

[6] Morganthau, *Closing the Door?*, Newsweek, June 25, 1984, at 18, 21. The number of arrivals in 1907 was 1,285,348. In the years since, the number reached over one million only in 1910 (1,041,570), 1913 (1,197,892), and 1914 (1,218,480). The only years prior to 1907 during which the number exceeded a million were 1905 (1,026,499), and 1906 (1,100,735). 1976 Annual Report, *supra* note 4, at 39.

has not reached crisis proportions, however. Even in 1980, when the United States accepted three-quarters of a million legal aliens (due to an exceptionally large number of refugees), the number admitted did not exceed the numbers in the years around the turn of the century.

As Teitlebaum and others view it, America is by no means demographically "full."[7] Indeed, in Teitlebaum's view, no country is ever "full." In addition, America is no longer literally the "nation of immigrants" that it once was. The phrase is usually meant to imply a nation whose population is made up of a substantial proportion of foreign-born. In support of the description of America as a "nation of immigrants," Briggs argues that if we consider all the flows of immigrants—legal immigrants and immediate relatives, refugees, asylees, illegal aliens—"it is likely that immigration in the 1980's accounts for as much as half of the annual growth in the population and probably an even greater percentage of the real growth in the labor force" (p. 145). But, as Peter Schuck points out, "[m]ore than 14 percent of the United States population in 1910 was foreign-born compared to less than 5 percent in 1970" (p. 302). He also notes that even if illegal aliens were included in these figures they would raise the total by only one or two percentage points. "In 1980, eight other industrialized countries had a higher percentage of foreign-born than the United States did" (p. 302).

Julian Simon points out that "[n]ot only is the present stock of immigrants only about a third as great proportionally as it was earlier, but it also is a small proportion considered by itself. That is, less than one person in 15 in the United States now was born abroad . . . ."[8]

What *is* true is that more people from other countries are attempting to enter the United States than ever before in the nation's history. In 1980, the United States granted 12,000,000 temporary visas to foreign visitors, and 760,000 legal immigrants and refugees were admitted. John Crewdson reports that according to Immigration and Naturalization Service statistics, "two and a half times as many applied for and were refused non-immigrant visas in 1978 than were denied in 1970, and nearly three times as many arriving passengers were turned away at airports or along the border for 'lack of admissibility.'"[9]

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[7] *Id.* at 21.
[8] Simon, *What About Immigration?*, THE FREEMAN, January 1986, at 8, 9.
[9] J. CREWDSON, *supra* note 5, at 101.

2. *Immigrants take jobs from American workers.* Lawrence Fuchs is convinced that even illegal aliens "probably create more jobs than they take away."[10] Thomas Muller argues that although immigrants compete with Americans for low-wage, low-skilled jobs, immigrants have little impact on the total employment rate. They take jobs that native-born Americans refuse (p. 112). The immigrant labor supply and low wages help to keep many businesses in this country instead of overseas. Americans also benefit from the fact that the cheap labor keeps retail prices down.

Not all of the authors agree that the effects of immigration on the labor market are primarily positive. One reason for this disagreement is that there is so little data available on the employment experiences of immigrants arriving since 1965. Vernon Briggs argues that despite the paucity of data, there is enough information to discern adverse effects on the labor market. He argues that the recent immigrant flow consists mainly of minority group members who tend to cluster in local labor markets that are already composed of persons from similar ethnic and racial backgrounds. This makes it very likely that immigration has had an adverse effect on the employment opportunities of minority citizens (p. 150). Briggs also argues that while illegal immigrants are not the only cause of unemployment and low-income patterns in unskilled and semi-skilled occupations, they certainly are *a* factor that cannot be overlooked (p. 154).

3. *Immigrants wind up on welfare and raise taxes for Americans.* Many public officials oppose the amnesty provision in the Simpson-Mazzoli bill[11] because they fear amnesty for illegal aliens would make them eligible for public service benefits. This concern is justifiable for the short run, writes Muller, but not for the long run. Muller argues that the majority of non-Hispanic immigrants will contribute more in taxes than they will demand in services.

> While the cost of providing services for Hispanics may exceed the average for all residents, at least part of this deficit may be offset, at the national level, by other immigrant groups. A distributional problem can exist if low-wage immigrants with large families are the dominant group in an area, since this would lead to an additional burden on taxpayers. In the longer run, as the income of Hispanics rises,

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[10] Morganthau, *supra* note 6, at 21.
[11] *See supra* note 3.

> the burden they may impose would be reduced or eliminated (p. 128).

Muller cites a report by Julian Simon to the Select Commission which shows that over a twelve-year period from the time of entry, the typical immigrant uses substantially fewer services than a native-born resident.[12] Where expenditures for immigrants are above average at the state or local level, they are usually for education, not welfare services.

What about illegal immigrants? The data is inconclusive and conflicting. Schuck reports evidence that illegals receive few welfare benefits precisely because those who seek benefits do not get past the initial screening (p. 304). Simon cites a 1984 study of illegal aliens in Texas that found the taxes they paid were greater than the cost of the services provided to them by the state.[13] The study found that the food stamps program is the only federal welfare program that illegals use.[14] In areas where they are concentrated, illegals draw most heavily on medical and educational services.

In addition to income taxes, illegals contribute a considerable amount to government revenues through Social Security taxes. In the 1970's, a Labor Department study found that seventy-three percent of working illegals had income tax withheld from their paychecks, and seventy-seven percent paid social-security tax.[15] "Fearing detection, however, few file for the income-tax refunds owed them, and the vast majority are too young to apply for social-security benefits—even if they dared."[16] These uncollected payments become government revenues.

4. *Immigrants arrive with little education and few skills.* The articles by Light on Korean entrepreneurship, Rose on Asian Americans, Skerry on Mexican Americans, and Glazer on education policy provide more than enough evidence of the ability of the new immigrants to assimilate—though by no means uniformly—into American society. Light presents an argument that is echoed by the other authors in their case studies:

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[12] *See also* Simon, *supra* note 8 at 13, and Simon, *Immigrants, Taxes, and Welfare in the U.S.*, in POPULATION AND DEVELOPMENT REVIEW (forthcoming).

[13] S. WEINTRAUB AND G. CARDENAS, THE USE OF PUBLIC SERVICES BY UNDOCUMENTED ALIENS IN TEXAS: A STUDY OF STATE COSTS AND REVENUES (1984), *cited in* Simon, *supra* note 8, at 13.

[14] *Id.* at 14.

[15] Beck, *Costs and Benefits*, NEWSWEEK, June 25, 1984, at 23.

[16] *Id.*

> Americans must forego the habit of assuming immigrants were once the "wretched refuse" of benighted countries. With the exception of Mexican and some Latin American immigrants, the general level of socioeconomic status among new immigrants surpasses that of the American common man. As a result, new immigrants possess class resources in excess of the underdog Americans, blacks and Mexicans. This novel situation is called "leapfrog migration" to indicate the lodgement of immigrants in the middle rather than, as previous[ly] known, at the bottom of the social ladder (p. 175).

This is true of pre-Mariel Cubans and Koreans, reports Light, who "were highly educated in their countries of origin, well endowed with money upon arrival in the United States, and middle or upper-middle class in social origin" (p. 174). Glazer and Rose point out that Chinese, Japanese, and Asian Indians tend to attain a better economic status than that of the majority of Americans. Rose notes that although Filipinos still rank lowest among Asian Americans in terms of their overall socioeconomic status, the most recent arrivals include "a large percentage of highly educated physicians, lawyers, engineers, and teachers" who know English and "shar[e] many of the same attitudes about making it in America that other Asians possess" (p. 200).

Rose observes that even the newest Asian Americans—the uprooted Indochinese refugees—have, in varying degrees, moved "from barely peripheral involvement to extensive participation [in the economy]" (p. 207). They have done so not with substantial federal financial assistance, but instead with the advantages of "marketable skills, English language capability, a trove of cash, a number of American contacts made during the war, or a combination of these" (p. 208).

## II. The Libertarian Alternative

The libertarian viewpoint is referred to only by Nathan Glazer, Peter Schuck and Lawrence Fuchs. The whole of this work, however, may be viewed as presenting an alternative to the libertarian position. The libertarian viewpoint is worth noting because, though a minority position, it remains a source of American ambivalence toward immigration.

A typical expression of the libertarian position is a statement printed in a pamphlet published by the Foundation for Economic Freedom in 1951:

> Can we hope to explain the blessings of freedom to foreign people while we deny them the freedom to cross our boundaries? To advertise America as the "land of the free," and to pose as the world champion of freedom in the contest with communism, is hypocritical, if at the same time we deny the freedom of immigration as well as the freedom of trade . . . . A community operating on the competitive basis of the free market will welcome any willing newcomer for his potential productivity, whether he brings capital goods or merely a willingness to work . . . .[17]

From Julian Simon comes a more recent endorsement of the libertarian position:

> I suggest we should be glad that our society is sufficiently attractive to have what is called an immigration problem. The Soviet Union and other totalitarian countries have no difficulty of this sort. What a sad commentary on those societies that people want so much to leave that they are willing to risk their lives. This should remind us of how wonderful it is that people want to come here.[18]

The libertarian position on immigration holds that a society based on freedom, justice, and individual rights should not be concerned about the movement of peoples with respect to their national, racial, ethnic or economic characteristics. There is no way of limiting this movement without violating the very values on which such a society is based.

The central value underlying the libertarian conception of immigration policy is freedom of movement. On this view, migration must neither be forced on people nor denied them against their will. Governments and citizens must recognize migration as the "assertion of human volition."[19] Thus, governments cannot rightfully force their citizens to emigrate; whatever the state's rationale for such action, it violates the rights of those expelled. Similarly, governments cannot rightfully exclude law-abiding, peaceable individuals from immigrating.

The libertarian view holds that a free and open society must have free and open borders. Because it champions a uniform conception of rights, libertarianism teaches that the principles guiding national immigration policy should be analogous to those guiding internal movement. "If it is sound to erect a barrier

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[17] Cooley and Poirot, *The Freedom to Move*, *reprinted in* THE FREEMAN, January 1986, at 5, 7.

[18] Simon, *supra* note 8, at 16.

[19] Grubbs, *Just Another Wetback*, NATIONAL REVIEW, February 14, 1986, at 46.

along our national boundary lines, against those who see greater opportunities here than in their native lands, why should we not erect similar barriers between states and localities within our nation?" ask the authors of the 1951 pamphlet.[20] Libertarianism's premises also underlie its position that there is no inherent conflict between humanitarian values and economic self-interest. Writes Julian Simon:

> We do not need to balance the gains to [immigrants] against the sacrifice to ourselves. We do not even need to raise the ethical issue of drawing a boundary around our nation and saying that those lucky enough to be born within are entitled to opportunities that we deny to others. Immigration is good for ourselves at the same time that it is good for the immigrants.[21]

Without mentioning the libertarian position by name, Lawrence Fuchs identifies six pro-immigration perspectives, four of which are consonant with the libertarian view. He views these four perspectives as rationalizations invoked by various interests that benefit from illegal immigration. Their appeal is one reason "it is so difficult to achieve a fundamental reform that might deter the flow of illegal or undocumented workers" (p. 26).

The first perspective may be called the "romantic immigration perspective." Since many of us came from immigrant stock, we should welcome those who seek to follow a similar path. The second highlights our own unique relationship with our southern neighbor, Mexico. The future stability of Mexico will be threatened if we shut off illegal immigration. The third outlook may be termed the "human rights perspective." If a universal right to emigrate exists, there must be a corresponding right to immigrate. The fourth is the "economic growth perspective." Since the labor of illegal immigrants actually contributes to economic growth, we should welcome immigration. These views, writes Fuchs, "would lead one to conclude that since nothing is broken there is nothing to fix" (p. 26); however, Fuchs himself is not persuaded.

In a totally libertarian world, opening a nation's borders might pose no threat to the society's cultural, political, and economic interests. But the world is not libertarian. Thus, the issues of

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[20] Cooley and Poirot, *supra* note 17, at 6.
[21] Simon, *supra* note 8, at 16.

immigration are more difficult to answer than the libertarian position suggests.

## III. The Need for Immigration Reform

The authors of *Clamor at the Gates* do not dismiss the immigration problem, but attempt to define it stripped of myths, questionable hypotheses, and biased perspectives. In various degrees, the authors subscribe to three perspectives on illegal immigration that Fuchs identifies as having shaped the deliberations of the Select Commission and which underlie some of the provisions of the Simpson-Mazzoli bill.

The law and order/national sovereignty perspective focuses on the control of borders as a basic right of sovereignty. The fairness perspective questions "an immigration law that establishes limits and preferences in which a great many people find themselves waiting in line while others abuse their visas or cross the borders without valid documents" (p. 27). The national unity perspective emphasizes that the "growth of an underclass identified by ethnicity will undermine the civic culture . . . by leading to rigid ethnic stratification, vitiating equal opportunity and protection of the laws" (p. 27).

In his concluding essay, Glazer addresses these perspectives in part by outlining four concerns that make necessary an effective immigration policy. First, it is not enough for an immigration law to be just; it must also be enforced to be respected. Second, without an effective immigration policy there may be a political backlash in response to the annual increase in the numbers of undocumented immigrants. Third, uncontrolled immigration decreases the opportunity for the advancement of minority groups already in America. Fourth, only an immigration policy that reflects our society's values will be a legitimate determinant of who can get in and who must stay out.

On the first point, we do need an immigration law that is not only just but which can be enforced and therefore respected. But as Edwin Harwood points out, "Americans say they support more effective immigration controls, but their support is shallow. And they do not give the illegal immigration problem a very high priority in comparison with other policy issues" (p. 82). Harwood's observation is borne out by a *Newsweek* poll conducted in June 1984 by the Gallup Organization.[22] The survey

[22] Morganthau, *supra* note 6, at 21.

showed that although 55% of the public thinks illegal immigration is a "very important" problem, they are more concerned about unemployment (84%), inflation (73%), and the threat of nuclear war (70%); their concern about illegal immigration is at about the same level of national priority as protecting the environment (57%). The poll found little variation of concern from state to state, and no significant difference by race: "residents of states along the Mexican border are only slightly more likely (63%) to call the problem 'very important' . . . whites, nonwhites, and blacks are about equally likely to say illegal immigration matters."[23]

In a study of attitudes of Mexican Americans toward immigration, Rudolfo O. de la Garza found that neither immigration reform in general nor Mexican immigration in particular is of primary concern to most Mexican Americans. "Neither elites nor the general public include immigration among the most important issues affecting their local communities or the nation at large" (pp. 99–100).

Effective regulation depends on the adequate funding of the Immigration and Naturalization Service (INS), argues Harwood (p. 88). But since Americans do not perceive illegal immigration as a threat that warrants the expenditures required to deal with the problem, Congress is unwilling to adequately fund the INS to carry out its mission.

Inadequate funding is not the only problem the INS faces. John Crewdson reports that the agency is "shot through with nepotism, incompetence, corruption, and brutality."[24] Both its border patrols and internal enforcement bureaus are insufficiently staffed, and the entire system is collapsing beneath a mountain of paperwork. The INS can no more keep track of foreign visitors and legal immigrants than it can deter and deport illegal aliens. Crewdson wrote of the situation in 1980: "Each day tens of thousands of aliens entered the country legally, leaving behind them a paper trail of 48 million files, with which the INS simply could not hope to cope."[25] As one INS official told him, "[w]e have no idea who came, who left, and, of course, who's here."[26]

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[23] *Id.* at 20.
[24] J. CREWDSON, *supra* note 5, at 114.
[25] *Id.* at 115.
[26] *Id.*

The second reason we need an effective immigration policy is to prevent a political backlash in response to annual increases in the number of undocumented immigrants. As Harris N. Miller puts it, if we do not have a rational policy that closes "the back door" of illegal immigration, we could face an illiberal or xenophobic backlash that would demand the closing of "the front door" of legal immigration.[27]

Senator Alan K. Simpson (R-Wyo.), the prime Senate sponsor of the Simpson-Mazzoli bill, makes his case for reform by displaying cards and papers seized several years ago by the INS from one illegal alien. Simpson told a *Newsweek* reporter,

> Here's my whole pitch. [The illegal] got an Illinois driver's license, he enrolled in college, got tuition [aid], picked up food stamps, got a social security card, got an AFL-CIO card, got a supplemental food card, got Medicare and Medicaid, got another driver's license. And he got unemployment [compensation] . . . . If we allow this to continue, our systems will be gimmicked to death and will break down . . . .[28]

We need reform, says Simpson, because "unless we correct the situation, we will truly forfeit our heritage of taking care of legal immigration."[29]

The third reason Glazer gives for demanding an effective immigration policy concerns the impact that the new Hispanic, Asian, and black minorities are having on the opportunities of existing minorities who continue to suffer from poor education, poor jobs, low income, and other social problems. Both Thomas Muller and Vernon Briggs address this issue. Muller observes that minorities (blacks in particular) have not been adversely affected by the Mexican immigrants. The level of economic growth will dictate whether this trend continues. "If opportunities in more skilled and higher paying jobs continue to be available to minorities, the scale of job competition between immigrants and minorities should remain modest. Should opportunities for blacks to advance become constrained, conflicts will inevitably arise" (p. 132).

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[27] From a statement made at briefings on immigration sponsored by the Institute for Contemporary Studies and held at the National Press Club and the Rayburn House Office Building, Washington, D.C., July 25, 1985. The idea of closing the back door in order to keep the front door open was put forth originally by Father Theodore Hesburgh who chaired the Select Commission on Immigration and Refugee Policy. For the Hesburgh statement, *see supra* note 2, at 3.

[28] Beck, *supra* note 15, at 24.

[29] *Id.* at 21.

Briggs points out that as a result of "a strong clustering pattern of immigrants in local labor markets of the central cities of a few large states it is very likely that many immigrants compete directly with other citizen minority workers for available jobs" (p. 150). To the degree that the job competition from illegal aliens and refugees has adversely affected the opportunities of minority citizens, "uncontrolled immigration has worked at cross purposes with other human resources policies initiated [since 1965] and designed principally to increase the economic opportunities available to these minority citizen groups" (p. 150).

Finally, we need an immigration policy that reflects our values and that, on this basis, determines who we will welcome and how we will enforce that decision. Our present policy of granting entry reflects certain values: reuniting families, providing a haven for refugees, and welcoming persons possessing skills that are in short supply. But those values clash with the values underlying our failure to restrict those who enter illegally. Glazer asks: do we want to welcome the world, exercising the least control over who shall enter and thereby reflect free-market principles, or do we want to exercise the prerogatives of national sovereignty and restrict entry to only those we consider worthy and desirable?

Glazer's concern over the grounding of immigration policy in American values is echoed by several of the authors. Fuchs writes that immigration "addresses fundamental questions of American identity . . . . To address immigration policy is to ask: What kind of a country are we? What kind of a country do we wish to be, and why?" (p. 18).

At present our immigration policy represents a conflict of American societal values. Its ineffectiveness is due as much to this tension as to anything else. As Schuck points out, there is a conflict between *individualist* values on the one hand—values that underlie the nation's view of itself as an unrestrictive, open universalistic community—and the *nationalist* values on the other—values entailed in the nation's view of itself as a restrictive community based on national preferences and interests (p. 287). Schuck describes how the government's changing role in American society has heightened this conflict:

> Open borders, easy citizenship, and equal rights, which raised no special difficulties when government played no significant role in promoting distributional justice, seem

> more problematic in a society in which politics and public law entitlements are central. When government allocates almost as much wealth—often in the form of public benefits and legal statuses—as the market, when courts have interpreted the Constitution to constrain government's power to pick and choose who shall receive its largesse, and when the duties that most individuals owe government are (apart from taxation) minimal, the stakes in the definition of community—in inclusion and exclusion—increase markedly (p. 288).

These political changes make it more difficult for government to sever the social and economic attachments that immigrants quickly form once they enter United States territory. Immigration law would be easier to enforce under a legal order based on "individualistic values which emphasized the government's conditional consent to entry as the sole source and measure of its legal obligations to aliens . . ." (p. 288). But our legal order is slowly and subtly shifting to "more open-textured, 'communitarian' values, which derive those obligations—and aliens' rights—from more diffuse conditions, such as social relationships, interdependencies, and expectations" (p. 289). This transformation of the legal order has an impact on INS law enforcement, making it difficult to detect, apprehend, and deport illegal aliens.

"America, then, faces a poignant predicament," according to Schuck. He views it as follows:

> Committed to the rule of law but confronted by millions of individuals who, sociologically and legally speaking, have found community here only after flouting that law, American society cannot easily legitimate their presence. Committed to the moral primacy of mutual consent, a liberal ethos cannot comfortably embrace those who enter and remain by stealth. Committed to universal human rights, liberalism can only secure those rights in the real world through political institutions that can actually implement its values, institutions that for the foreseeable future are those of the *nation* (p. 289).

This is only one dimension of the problem of community that is reflected in the immigration problem. The conflict between American conceptions of national sovereignty and individual sovereignty present a further contradiction in immigration law. From the 1880's, when restrictive immigration began, until the early 1980's, immigration policy was derived from a conception of national sovereignty analogous to individual sovereignty.

Like property law, immigration law was meant to preserve sovereignty over one's domain (p. 291). Immigration law's traditional view of national sovereignty is that the nation cannot be obliged against its will to enter into a continuing relationship with anyone but a citizen, except on conditions prescribed by Congress (p. 294). The government owes no legal obligation to those who seek to enter or remain without its explicit consent. Schuck discusses the political aspects of recent immigration history and the ideological transformation in contract law, tort law, and constitutional law that have, since the 1960's, begun to undermine the individualistic foundations of classical immigration law, especially its core notion of national sovereignty. Of changes in the law, he writes:

> [i]n contract law, [the movement toward a communitarian legal order] has led courts to subordinate individualistic liberal values of autonomy and self-determination to communitarian values emphasizing state paternalism and distributive justice. . . . Ideals of distributive justice, economic efficiency, social equality, and human dignity have increasingly become explicit criteria of decision . . . .
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> The same moral ideals and legal consciousness that in private have narrowed individual sovereignty and expanded duties to strangers have begun to constrict governmental autonomy in public law as well. . . . [C]ourts have expanded the legal rights of many groups, including criminal defendants and convicted prisoners, which are arguably less deserving and needful of special judicial protection than aliens (pp. 297–98).

The extent to which these communitarian values in the legal order have influenced immigration law can be seen in a number of court cases involving the provision of day care, public education, and other public services to undocumented alien children; union protection for illegal workers; welfare benefits to aliens; and procedural rights to excludable, undocumented aliens who wish to receive asylum under the Refugee Act of 1980.

Finally, the movement toward a more communitarian legal order is seen in some of the provisions of the Simpson-Mazzoli legislation. Schuck argues that this can be seen not only in the legalization provisions[30] but, for example, in the increased immigration quotas for Mexico and Canada and in improvement of asylum procedures. The legalization provisions make clear

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[30] See *supra* note 3.

"that the traditional legal concept of community should be redefined to conform to the far broader sociological idea of community, based on the reality of existing relationships, interdependencies, and expectations" (pp. 300–01).

## IV. Ideological Sources of the Problem

The simultaneous conflict and transformation of conceptions of community in the American legal order certainly explains the direction that immigration law is taking. But these conceptions also account for the ambivalence that Americans have toward immigration.

Why is the new immigration perceived as a problem in the first place? Why is it such an agonizing and perplexing issue for most Americans? Glazer offers four reasons: (1) Americans expect immigration to continue; (2) they expect immigrants to become citizens; (3) they expect them to adapt economically and socially to the larger American society; (4) they expect them to overcome fairly quickly the differences in income and occupation that separate "majorities" from "minorities" and that separate immigrants from natives (pp. 236–37). In other words, Americans expect permanent residence, assimilation, and upward mobility, and their response to the problems of immigration and the needs of immigrants reflects these expectations.

The expectation that immigration would continue has existed throughout much of American history. One of the complaints against the British king in the Declaration of Independence was that "he has endeavored to prevent the population of these states; for that purpose obstructing the laws for naturalization of foreigners; refusing to pass others to encourage their migration hither . . . ."[31] Although the power to regulate immigration is not expressly mentioned in the Constitution, a temporary provision of Section 9 of Article I, which was included to allow the slave trade to continue until 1808, in effect forbade Congress to restrict immigration before that date.

Until 1882, when Congress passed the Chinese Exclusion Act,[32] immigration policy in the United States was one of free

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[31] The Declaration of Independence para. 9 (U.S. 1776).

[32] The Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882) (repealed 1943), suspended the entry of Chinese laborers to the United States for 10 years and set a fine of $500 and one year imprisonment per violation if ship captains disobeyed. In 1943, when China was a wartime ally of the United States, Congress repealed the Chinese Exclusion Act. Chinese Exclusion Repeal Act, ch. 344, 57 Stat. 600 (1943).

and unrestricted admittance. In 1776, Thomas Paine put forth a view on immigration that continues to arouse the humanitarian passion of Americans. Paine declared that since "[t]he old world is overrun with oppression," America was "obliged to receive the fugitive, and prepare in time an asylum for mankind."[33] George Washington also viewed America as a haven of refuge for all the world's oppressed. "The bosom of America is open to receive . . . the oppressed and persecuted of all nations and religions."[34]

The view of America as the haven of the world's oppressed and the expectation that immigration would continue clashed with the realities of anti-immigration sentiment which began to crystallize in the 1830's. In 1903, Emma Lazarus' poem was inscribed on the base of the Statue of Liberty. The sonnet invited nations of the world to "[g]ive me your tired, your poor . . . [s]end these, the homeless, tempest-tossed to me," but the policy of restricting immigration by keeping out certain kinds of immigrants was in full force by 1903. As mentioned, Congress had already excluded Chinese from entry in 1882. Beggars, anarchists, prostitutes, procurers, the mentally ill, and other "undesirables" were also excluded.[35] In one of a series of decisions relating to immigration the Supreme Court declared that Congress had exclusive authority to control immigration as part of its foreign commerce power.[36] The Court made it clear that admission to the United States is a privilege, not a right, and that Congress may exclude aliens on account of their beliefs or opinions.[37]

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[33] T. KESSNER AND B. BOYD CAROLI, *supra* note 4, at 5.

[34] *Id.*

[35] In 1885, three years after the Chinese Exclusion Act, Congress limited the importation of low-paid contract labor and prohibited the immigration of people who held contracts. Act of Feb. 6, 1885, ch. 164, 23 Stat. 332. This was followed in 1891 by a law forbidding agents of American employers to solicit labor abroad. Act of Mar. 3, 1891, ch. 551, § 4, 26 Stat. 1084. The law also extended the list of excluded groups to include persons having certain diseases, persons convicted of crimes involving moral turpitude, and persons believing in polygamy. Act of Mar. 3, 1891, ch. 551, § 1, 26 Stat. 1084.

[36] Chae Chan Ping v. United States, 130 U.S. 581, 606–07 (1889) (citizen of China denied entry under the revision of 1888 to the Chinese Exclusion Act of 1882).

[37] *See* Chae Chan Ping v. United States, 130 U.S. 581 (1889); Nishimura Ekiu v. United States, 142 U.S. 651 (1892) (citizen of Japan seeking entry to the U.S. was refused under the Act of March 3, 1891); Kaoru Yamataya v. Fisher, 189 U.S. 86 (1903) (citizen of Japan forbidden entry by the Immigration Act of 1891 which denied entry to paupers or persons likely to become public charges); and United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537 (1950) (denial of entry to a German woman upheld). *See also supra* note 35 and R.K. CARR, M.H. BERNSTEIN, D.H. MORRISON, AMERICAN DEMOCRACY IN THEORY AND PRACTICE 126 (1960).

As Peter Schuck points out, the immigration problem of whom we will welcome really arises out of the larger problem of how different racial and ethnic groups can live together in a pluralistic society. From its beginnings, America's experiment with democracy has been to make one country out of many peoples. As Schuck observes, the nation's immigration problem is a reflection of its problem of community—of America's ongoing attempt to build unity from diversity, to eliminate the ambiguities in the national slogan *E Pluribus Unum*—Out of the Many One. Whenever Americans address the problem of immigration they are dealing with the problem of community. In other words, whom shall we welcome to make up the many?

How Americans deal with the "clamor at the gates" depends on how they perceive and respond to the clamor within the gates. In his book *Affirmative Discrimination*,[38] Glazer views the immigration/community perplex as the consequence of a distinctive American orientation to ethnic diversity. This orientation is reflected in three decisions that have guided American thought and political action throughout most of the nation's history:

> First, the entire world would be allowed to enter the United States. The claim that some nations or races were to be favored in entry over others was, for a while, accepted, but it was eventually rejected. And once having entered into the United States—and whether that entry was by means of forced enslavement, free immigration, or conquest—all citizens would have equal rights. No group would be considered subordinate to another.
>
> Second, no separate ethnic group was to be allowed to establish an independent polity in the United States. This was to be a union of states and a nation of free individuals, not a nation of politically defined ethnic groups.
>
> Third, no group, however, would be required to give up its group character and distinctiveness as the price for full entry into the American society and polity.[39]

The first of these decisions included a conception of American nationality "defined by commitment to ideals, and by adherence to a newly or freshly joined community defined by its ideals, rather than by ethnicity."[40] As Glazer notes, "American" did

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[38] N. GLAZER, AFFIRMATIVE DISCRIMINATION: ETHNIC INEQUALITY AND PUBLIC POLICY (1975).

[39] *Id.* at 5.

[40] *Id.* at 8.

inevitably come to denote an "'ethnicity,' a 'culture,' something akin to other nations."[41] Unlike nations of Europe and Asia, however, American national identification has been a continual struggle between the nation understood in terms of a common culture and the nation understood in terms of ethnic diversity. An analogous struggle has also taken place throughout American history between an inclusive and an exclusive view of American nationality.

Glazer defines the inclusive view of American nationality as holding that whatever the ethnic or racial origins of citizens of the United States, the American nationality must be defined in terms of certain political and social concepts and, as Arieli has put it, "as a way of life and an attitude which somehow represents ultimate social values."[42] Underlying the idea of inclusiveness is a faith in the nation's capacity to assimilate people of all nations into a "fluid, variegated culture."[43] Those who favor exclusion view Americans as "carriers of some special racial commitment to liberty and free government",[44] and fear that the inclusion of strangers from all over the world will be a threat to American homogeneity. Exclusionists suspect immigrants, their habits, their culture, and their impact on political and economic life.[45]

From the very beginning America has defined its national identity in terms of the rejection of ethnic exclusivity. The American Revolution weakened not only America's ethnic identification with England, but with the entire Old World.[46] As Glazer points out, the name "American" makes no reference to the ethnic or racial origins of the citizens of the United States.[47] The dominant values of the American society—equality and achievement—are, by their nature, nonexclusive.[48]

Until the 1880's, the tendency toward exclusivity prevailed in the system of slavery and discrimination against blacks, in extermination and expulsion policies against American Indians, and in the often violent outbursts of nativism against immi-

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[41] *Id.*

[42] Y. ARIELI, INDIVIDUALISM AND NATIONALISM IN AMERICAN IDEOLOGY (1964) *quoted in id.* at 15.

[43] J. HIGHAM, STRANGERS IN THE LAND; PATTERNS OF AMERICAN NATIVISM, 1860–1925 (1955) *cited in* N. GLAZER, *supra* note 38, at 15.

[44] N. GLAZER, *supra* note 38, at 17.

[45] *Id.* at 18–19.

[46] S. LIPSET, THE FIRST NEW NATION (1963) *cited in* GLAZER, *supra* note 38, at 11.

[47] N. GLAZER, *supra* note 38, at 10.

[48] *Id.*, at 11.

grants. Yet, during that same period, between the 1770's and the 1880's, America's immigration policy was inclusive and basically unrestrictive and unregulated.

This paradox has continued. Exclusivity did not become a guiding principle of immigration policy until the Chinese Exclusion Act of 1882,[49] followed by the 1921 national origins quota system[50] which remained the basis of immigration policy until 1965. American social and political values took on a more inclusive character, however, beginning with the abolition of slavery and climaxing with the Civil Rights Act of 1964[51] and the Voting Rights Act of 1965.[52]

The 1960's and 1970's saw the convergence of inclusiveness and exclusiveness in ethnic-racial policy which aimed to redress past discrimination and injustice by entitling minorities to special rights and requiring "racial balance" in public and private institutions. The same convergence occurred in immigration policy. In order to eliminate the racism and exclusivity that had guided immigration policy since the 1920's, the Immigration Act of 1965[53] removed all national and racial preferences as criteria of admittance. The Act also made the distribution of visas under the overall ceiling of immigration seemingly more equitable by allowing every nation, regardless of size, a maximum 20,000 immigrants.[54] Since no one expected an increase in Western Hemisphere immigration, a limit was set for the first time on this source. However, there were no limits on immediate relatives in the bill's family reunifiction provision, which had been strongly advocated by descendants of immigrants from Southern and Eastern Europe against whom the quota system had discriminated.

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[49] *See supra* note 32.

[50] The national origins system used country of birth, as well as the number of previous immigrants and their descendants, to set the quota of how many aliens from a certain country could enter annually. In 1921, the 1910 census was used for determining quotas. The effect of this was to keep out immigrants from Southern and Eastern Europe, who began arriving in noticeable numbers in the 1880's, and to favor those from the countries of Northern and Western Europe. The quota system was revised in 1924 to limit the number of immigrants to two percent of the particular nationality that was resident in the United States according to the 1890 census. The annual limit was set at not more than 150,000 immigrants. In 1929, a new permanent system went into effect, which based the quota for each country on the proportionate number of the nationality living in the country in 1920.

[51] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified in scattered sections of 28 and 42 U.S.C.).

[52] Voting Rights Act of 1965, 42 U.S.C. §§ 1973–1973(p) (1982).

[53] Immigration Act of 1965, Pub. L. No. 89-236, 79 Stat. 911 (codified in scattered sections of 8 U.S.C.).

[54] *Id.*

The Immigration Act was seen as a nondiscriminatory law that would not greatly change the source or the volume of immigration. However, the contradictions between its inclusive and exclusive provisions produced consequences that its supporters did not intend. The family reunification provision had been included to redress past discriminatory quota restrictions against Southern and Eastern European immigrants. But, as Glazer notes (p. 8), there was no longer a strong demand for entry from Europe; thus the chief beneficiaries became migrants from troubled countries of Asia, Latin America, and the West Indies. Because Latin America and the West Indies were included in the Western Hemisphere, the limits set on immigration from this region put immigrants from these poorer nations at a disadvantage. The legal limits were soon surpassed and immigrants began entering illegally.

The arrival of the new immigrants, eighty percent of whom are "minorities," has heightened the tension between the traditions of inclusiveness and exclusiveness, and between individualistic and communitarian conceptions of community. With their influx the problem of immigration has become the problem of community through an unprecedented development. As Glazer explains,

> these new immigrants are the beneficiaries of decisions that were not made with them in mind but that place them in protected classes. Certainly those who voted for both the Civil Rights Act and the Immigration Act never dreamed that the two would intersect to place the new immigrants in a privileged class as compared with most native Americans.[55]

Indeed, from their protected position the new immigrants are making entirely new demands on the American polity. In their demand for bilingual education, some Hispanics have, as Theodore White puts it, "made a demand never voiced by immigrants before: that the United States, in effect officially recognize itself as a bicultural, bilingual nation."[56] Not only does the law require bilingual education programs in the nation's school districts; some cities require that ballots be printed not only in English but also in the minority language(s) prevailing in the area.[57]

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[55] N. GLAZER, ETHNIC DILEMMAS, 1964–1982 8 (1983).

[56] T. WHITE, AMERICA IN SEARCH OF ITSELF: THE MAKING OF THE PRESIDENT, 1956–1980 363 (1982).

[57] When the Voting Rights Act of 1965 was renewed in 1975 for seven years, 42 U.S.C. §§ 1973(a)(a)–1973(1)(a), its protection was extended to Spanish-speaking minorities and

As Charles Keely suggests, the problem of community posed by the dominance of immigrants from Asia and Latin America are two-fold:

> [First,] the new immigrants became eligible for programs seeking to bolster equality of access as measured by equality of achievement. If affirmative action is to right past wrongs, why should a recent immigrant qualify? In addition, many of the recent immigrants have been skilled and professional people . . . . On what basis can one justify their being categorized as a disadvantaged minority soley because of ethnic ancestry?
>
> Second, the concentration of new immigrants from Asian and Latin countries, which are also the areas of origin of the bulk of illegal migrants and the preponderance of refugees, has raised the issue of the absorptive capacity of the American society . . . . What is different from the past is that the very groups focused on by policies to foster equality are augmented in considerable numbers by new residents within an atmosphere of government-sponsored emphasis on ethnicity.[58]

These troubling issues indicate that we cannot hope to arrive at a just and effective immigration policy without taking into account the problems of community and nationality that the immigration problem reflects.

In the final analysis, then, the American problem of immigration is a problem of national identity. It is both a legal and a philosophical problem. We must decide whether the country is to exist as a multi-ethnic society which emphasizes individual rights or which emphasizes group rights.[59] We cannot respond rationally to the clamor at the gates without a consensus on how to deal with the clamor within the gates.

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other "language minorities." The Act requires that bilingual election machines be provided in areas where over five percent of the voting-age population are of a single-language minority and less than fifty percent are registered or had voted in the 1972 presidential election. E. LADD, THE AMERICAN POLITY: THE PEOPLE AND THEIR GOVERNMENT 391 (1985).

[58] Keely, *Immigration and the American Future*, in ETHNIC RELATIONS IN AMERICA 32 (1982) *quoted in* N. GLAZER, *supra* note 38, at 8.

[59] *See* N. GLAZER, *supra* note 55, at 254–73.

# BOOK NOTE

## A BRAVE NEW ROLE: THE FALL AND RISE OF AMERICAN POLITICAL PARTIES

*Review by Kirk J. Nahra**

THE PARTY GOES ON: THE PERSISTENCE OF THE TWO-PARTY SYSTEM IN THE UNITED STATES. By *Xandra Kayden and Eddie Mahe, Jr.* New York: Basic Books, Inc., 1985. Pp. viii, 240, appendix, notes, index. $17.95 cloth.

In recent years, political scientists proclaimed the demise of American political parties.[1] Literature detailing the decline was extensive, and indicated that the American party system was on its last legs: voter allegiance was declining; party organizations were weak; and competing political actors, such as political action committees, were becoming increasingly powerful.[2]

Following the 1980–84 campaigns, however, some dissenting voices have announced a reemergence of the party as an important factor in the political equation.[3] The most thorough analysis of the rebirth of American political parties to date comes from *The Party Goes On* by Xandra Kayden[4] and Eddie

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[1] "In a world in which political scientists disagree on almost everything, there is a remarkable agreement among the political science profession on the proposition that the strength of American political parties has declined significantly over the past several decades." Orren, *The Changing Styles of American Party Politics*, in THE FUTURE OF AMERICAN POLITICAL PARTIES: THE CHALLENGE OF GOVERNANCE 31 (J. Fleishman ed. 1982).

[2] *See, e.g.*, D. BRODER, THE PARTY'S OVER: THE FAILURE OF POLITICS IN AMERICA (1972); W. CROTTY, AMERICAN PARTIES IN DECLINE (1984); E. LADD, WHERE HAVE ALL THE VOTERS GONE? THE FRACTURING OF AMERICA'S POLITICAL PARTIES (1982); R. SCOTT & R. HREBENAR, PARTIES IN CRISIS: PARTY POLITICS IN AMERICA (2d ed. 1984); M. WATTENBERG, THE DECLINE OF AMERICAN POLITICAL PARTIES, 1952–1980 (1984); Ranney, *The Political Parties: Reform and Decline*, in THE NEW AMERICAN POLITICAL SYSTEM 213 (A. King ed. 1978).

[3] *See, e.g.*, D. PRICE, BRINGING BACK THE PARTIES (1984); Adamany, *Political Parties in the 1980's*, in MONEY AND POLITICS IN THE UNITED STATES: FINANCING ELECTIONS IN THE 1980's 70 (M. Malbin ed. 1984) [hereinafter cited as MONEY AND POLITICS]; Bibby, *Party Renewal in the National Republican Party*, in PARTY RENEWAL IN AMERICA: THEORY AND PRACTICE 102 (G. Pomper ed. 1980); Kayden, *The Nationalizing of the Party System*, in PARTIES, INTEREST GROUPS, AND CAMPAIGN FINANCE LAWS 257 (M. Malbin ed. 1980); Longley, *National Party Renewal*, in PARTY RENEWAL IN AMERICA: THEORY AND PRACTICE 69 (G. Pomper ed. 1980); Sabato, *Parties, PACs and Independent Groups*, in THE AMERICAN ELECTIONS OF 1982 72 (T. Mann & N. Ornstein eds. 1983).

[4] Political consultant; member, The Campaign Finance Study Group, Institute of Politics, John F. Kennedy School of Government, Harvard University.

Mahe, Jr.[5] In their book, the authors argue that the parties came out of the troubled times of the 1970's with a refortified position in American politics. The new position combines the parties' special characteristics with the realities of today's political system, to dramatically increase the parties' strength in politics. Although the outlook is probably more optimistic than the authors allow, their basic message is clear: "[t]he American party system, like the Phoenix, has risen from the ashes of turmoil" (p. 1), and the parties "are beginning to emerge as the single most effective participant[s] in electoral politics outside the campaign organization" (p. 11).

Their argument proceeds roughly as follows. Americans have always been concerned with the power of political parties (pp. 32–36).[6] A series of governmental reforms instituted in response to these fears have severely weakened the parties (pp. 32–44).[7] In addition, a number of social factors have combined to weaken the parties, especially at the state and local levels (pp. 44–53).[8] This combination of factors resulted in the virtual extinction of the party system by the mid-1970's (pp. 59–60).[9] Since that time, the parties, primarily at the national level, have begun to reevaluate their role in American politics and have consequently embarked on a series of changes which have altered their role in the operation of campaigns (pp. 74–93).

Kayden and Mahe are concerned primarily with the organizational changes that have affected American parties. They focus on the nationalizing forces in American politics, which have caused a dramatic shift over the last few decades from a system dominated by state and local parties to one that is controlled by the national party organization.[10] This evolution has been successful; as the parties have adapted to the new political environment, they have retained and even strengthened their posi-

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[5] Political consultant; former Deputy Chairman of the Republican National Committee.

[6] *See* D. PRICE, *supra* note 3, at 97–100.

[7] *See infra* notes 13–22 and accompanying text.

[8] *See infra* notes 23–27 and accompanying text.

[9] *See, e.g.*, W. CROTTY, PARTY REFORM 3 (1983) ("American political parties are in serious trouble."); Orren, *supra* note 1, at 31 ("Regardless of how one measures partisanship . . . there is massive evidence attesting to the weakened condition of the parties in the United States.").

[10] *See, e.g.*, D. PRICE, *supra* note 3, at 38–46; Hadley, *The Nationalization of American Politics: Congress, the Supreme Court, and the National Political Parties*, 4 J. SOC. & POL. STUD. 359 (1979); Kayden, *supra* note 3, at 257; Longley, *Party Nationalization in America*, in PATHS TO POLITICAL REFORM 167 (W. Crotty ed. 1980).

tion in American democracy by developing their capacity to provide campaign services (pp. 183–210).

As far as it goes, this argument is a strong one, and *The Party Goes On* is the most complete analysis to date of the new role of American parties. While the book's conclusions are overly cautious and its structural approach is somewhat confusing, the book is nonetheless an important contribution to the study of American political parties.

## I. The Fall of American Parties

In order to clarify the new role parties play in politics, it is necessary to understand the trip they have taken. *The Party Goes On* lists a number of factors that contributed to the widespread belief in party decline (pp. 28–56). The authors' discussion of the various factors is necessarily cursory, but the book nevertheless provides a good starting point for analyzing the decline of the parties.

That the book is general is both a positive and negative characteristic. It covers a wide variety of issues, but fails to cover any in sufficient depth and often relies on anecdotal material rather than hard evidence. Therefore, while it is difficult to quarrel with most of the authors' conclusions, one has the feeling that many of the issues are more complex than the authors portray them to be. Most importantly, the authors fail to prioritize the causes of party decline and virtually ignore certain "political" factors in their analysis of how the parties reached their "nadir" (p. 9).[11]

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[11] The authors virtually ignore a number of what might be termed political factors in their discussion of party decline, factors that are an essential part of the current political equation and can still be manipulated by the political players. While a number of these issues are discussed at some point in the book, most notably the chapter on political action committees (PACs) (pp. 125–53), they are not considered as factors in party decline. These factors include the rise of political consultants, *see infra* note 63, the increased influence of television in our political system, *see infra* note 64, the relation between the president and the party, *see infra* note 21, and the role of PACs as an alternative to party financing, *see infra* note 78.

The failure to discuss these factors is significant because they are the ones that are most likely to have a continuing impact on our politics. While factors like Civil Service reform and the New Deal played an important part in changing the roles of the parties, their effects are settled and it is unlikely that the parties will be able to modify their effects. *See* Adamany, *Political Finance and American Political Parties*, 10 Hastings Const. L.Q. 497, 513–14 (1983). What I have labelled as political factors will continue to have an evolving effect on American politics, and any discussion of party resurgence needs to consider them.

According to the authors, the decline of the parties[12] can be traced to two sets of factors: reforms which have actually weakened the parties and external/social factors which have had significant permanent impact on the functions of political parties.

### A. *Reform Efforts*

Much of the recent discussion of party decline focused on reforms[13] in the presidential selection process.[14] Without a doubt, these reforms played an important role in the parties' ability to control the presidential nomination, and thus were considered as a prominent factor in party decline. Jeane Kirkpatrick, for example, argues that the "most important source of party decomposition [is] the *decisions* taken by persons attempting to reform the parties."[15] Other commentators echo similar views.[16] Despite the focus of political scientists on recent presidential reforms, Kayden and Mahe remind us that the reforms of the 1970's are only the last step in a century-long effort to

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[12] Kayden and Mahe consider five factors in assessing party decline: 1) loss in control over nominations; 2) loss in control of resources; 3) reduced ability to contest elections; 4) reduced ability to influence government; and 5) rise in the unpredictability of voting behavior (pp. 29–30).

[13] These reforms took place primarily in the Democratic Party. For information on the individual reform commissions, from the McGovern-Fraser Commission, following the 1968 election, to the Hunt Commission, following Ronald Reagan's election in 1980, see W. CROTTY, *supra* note 9, at 37–100; and D. PRICE, *supra* note 3, at 145–83. There was some discussion in the Republican Party of reforms that would have achieved many of the same objectives as the McGovern-Fraser changes, but these rules were not approved. For a discussion of reform efforts in the Republican Party, see W. CROTTY, *supra* note 9, at 205–32.

[14] *See, e.g.*, W. CROTTY, *supra* note 9; N. POLSBY, CONSEQUENCES OF PARTY REFORM (1983); B. SHAFER, QUIET REVOLUTION: THE STRUGGLE FOR THE DEMOCRATIC PARTY AND THE SHAPING OF POST-REFORM POLITICS (1983). According to one commentator,

> [i]t has become fashionable among a certain group of pundits and political scientists to blame the reforms undertaken by the Democratic Party after its 1968 Convention for all manner of political ills—declining voter participation, the proliferation of single-issue groups, weak presidential leadership, poor congressional performance, and, above all, the decay of the political party. So great has been the hostility to these reforms . . . that one expects any day now to see a book published that blames these reforms, not only for our political ills, but for cancer, heart disease, and falling arches.

Gans, *How the White House is Won*, Wash. Post, Aug. 12, 1979 (Book World), at 10.

[15] J. KIRKPATRICK, DISMANTLING THE PARTIES: REFLECTIONS ON PARTY REFORM AND PARTY DECOMPOSITION 2 (1978) (emphasis in original).

[16] *See, e.g.*, Ranney, *supra* note 2, at 213. However, according to Gary Orren, "it is a sentimental self-deception to believe that the amendment of election rules will suddenly revive strong party structures." Orren, *supra* note 1, at 32.

reform the political parties.[17] These prior changes have probably had longer lasting (and virtually irreversible) effects on the party role than the recent changes in the nomination process.

Kayden and Mahe's discussion of presidential reforms is cursory, and one is encouraged to look elsewhere for a detailed analysis.[18] Curiously, the authors include the nomination reforms in their chapter on party resurgence, despite their agreement with the prevailing view that such reforms have generally accelerated party decline. Although Kayden and Mahe argue that "the Democratic reforms, while painful at the time, were consistent with the needs of the organization to adjust itself to a changing environment and play an important role in the developing strength of the system as a whole" (p. 60), they fail to explain how these reforms have aided the parties in developing their new role, rather than merely hindering them in selecting the nominee.

From one vantage point, the nomination rules allow the parties great latitude in shaping their role in politics, since the presidential nomination process is one in which the parties can control their own fate. For example, the Democrats enacted such reforms primarily to broaden the participatory base in the presidential selection process.[19] The continuation of this reform

[17] The reforms began with the "Revolt against King Caucus" (p. 32) in the early 1800's (pp. 32–36). *See generally* Cunningham, *Presidential Leadership, Political Parties, and the Congressional Caucus, 1800–1824*, in THE AMERICAN CONSTITUTIONAL SYSTEM UNDER STRONG AND WEAK PARTIES 1 (P. Bonomi, J. Burns, & A. Ranney eds. 1981) [hereinafter cited as AMERICAN CONSTITUTIONAL SYSTEM]. During the Progressive era, the most important changes took place. *See* Thelan, *Two Traditions of Progressive Reform, Political Parties, and American Democracy*, in AMERICAN CONSTITUTIONAL SYSTEM, *supra*, at 17. These reforms led to the Tillman Act, ch. 420, 34 Stat. 864, 865 (1907) (current version at 2 U.S.C. § 441b (1982)), which prohibited corporate contributions to federal campaigns (p. 37). The remainder of the reforms, directed primarily at local parties, have had a lasting effect on the fate of these parties. By introducing the Australian Ballot (pp. 38–39), which was printed by the government and included candidates of all parties, the reformers made a move against straight ticket voting. Similarly, the move toward holding primary elections took the nominations from the hands of the party leaders and placed control over candidate selection with the party membership at large (pp. 39–41). In addition, the movement toward nonpartisan elections at the local level eliminated the parties completely from a large number of local races (pp. 41–44).

[18] *See* sources cited *supra* note 14. *See also* J. CEASER, PRESIDENTIAL SELECTION: THEORY AND DEVELOPMENT 260–303 (1979); W. CROTTY, DECISION FOR THE DEMOCRATS (1978); S. WAYNE, THE ROAD TO THE WHITE HOUSE 91–111 (1981).

[19] For a discussion of events leading to the reform efforts, see W. CROTTY, *supra* note 9, at 13–24; Bode & Casey, *Party Reform: Revisionism Revised*, in POLITICAL PARTIES IN THE EIGHTIES 3 (R. Goldwin ed. 1980); Tabach-bank & Kelly, *Reform of the Delegate Selection Process to Democratic National Conventions: 1964 to the Present*, 7 SW. U.L. REV. 273 (1975). For a critique of the Democratic reform approach, see Ladd, *Party "Reform" Since 1968: A Case Study in Intellectual Failure* in AMERICAN CONSTITUTIONAL SYSTEM, *supra* note 17, at 81.

process every four years since 1972 suggests the difficulties involved in modifying party rules to meet changing goals.[20]

Although such reform efforts have had an effect on the party's role in presidential nominations, it is unclear from the authors' analysis how important these changes have been in the overall scheme of party decline. Given the book's general thesis of a new party role in politics, it seems incongruous to place so much emphasis on the impact of these reforms on party decline, when so much of the party's new role does not involve the presidential race.[21] Nonetheless, by focusing party attention beyond the presidential race, these reforms have had a significant, although apparently unintended, effect on getting the parties to where they are today.[22]

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[20] Following the 1984 campaign, the Democrats appear relatively satisified with their selection process. *See* Cook, *Democrats Alter Rules Slightly in Effort to Broaden Party Base*, 1985 CONG. Q. 2158; Cook, *Many Democrats Cool to Redoing Party Rules*, 1985 CONG. Q. 1687.

[21] One of the political aspects of party decline that the authors ignore is the weak relationship between the president and the party. While the president is the titular head of his or her party, the standard view is that "no president is an effective party leader." R. PIOUS, THE AMERICAN PRESIDENCY 121 (1979). The explanations for this weak relationship are numerous, but primarily involve the conflicting goals and constituencies of the president and his or her party, which have been exacerbated by the growth of presidential campaign organizations that exist with little help from the parties. *See* Ranney, *supra* note 2, at 236–41. Public financing of presidential campaigns has increased this tendency by providing funds to the candidate directly, rather than channelling them through the parties. *Id.* at 241–43.

Presidents Carter and Reagan have demonstrated two different approaches to party leadership. Carter virtually ignored the party and its officeholders, *see* Cook, *Carter and the Democrats: Benign Neglect?*, 1978 CONG. Q. 57, and used the Democratic National Committee almost exclusively for his own political purposes rather than to achieve general party goals. *See* Adamany, *supra* note 3, at 86. In contrast, President Reagan acted to strengthen the party machinery from the time he received the nomination in 1980. *See* Jones, *Nominating 'Carter's Favorite Opponent'*, in THE AMERICAN ELECTIONS OF 1980 61, 89 (A. Ranney ed. 1981). For a discussion of White House activities during the 1982 elections, see Sabato, *supra* note 3, at 79. President Reagan's ultimate impact on the party machinery is not clear at this point. For a more detailed look at the presidential-party relationship see Brown, *The Presidency and the Political Parties*, in THE PRESIDENCY AND THE POLITICAL SYSTEM 313 (M. Nelson ed. 1984); Cronin, *Presidents and their Parties*, in RETHINKING THE PRESIDENCY 287 (T. Cronin ed. 1982); Ranney, *The President and His Party*, in BOTH ENDS OF THE AVENUE: THE PRESIDENT, THE EXECUTIVE BRANCH, AND CONGRESS IN THE 1980'S 131 (A. King ed. 1983).

[22] For several reasons, the reforms may be a mixed blessing for the parties. First, given the nature of their activity and supporters, parties are generally not able to act as effectively in primary campaigns as in general elections, since it is not possible to employ party resources fully until a candidate has been selected. Because so much of the race for the presidency involves the pre-nomination process, the party is not as capable of effectively selecting its presidential nominee under the primary system as it would be if the decisions were made by party leaders in smoke-filled rooms. *See generally* J. KIRKPATRICK, *supra* note 15, at 7–11.

A second major factor in the resurgence of the parties is the development of party power bases independant of the presidential office. *See* D. PRICE, *supra* note 3, at 40–

### B. *External/Social Factors*

The authors' analysis of external/social factors is more intriguing, despite its brevity. Over the long run such factors have probably been the dominant reason for the permanently altered role of the parties. Because such factors have had an impact on the society at large rather than on the rules of a political party, their effects will be more difficult to reverse than the changes in the nomination process. Factors included in the discussion are: Civil Service reform;[23] the New Deal;[24] upward mobility;[25] decline in confidence in all institutions (pp. 49–51);[26] and such general social factors as the women's movement and the expansion of the media (pp. 49–53). Although the authors fail to elab-

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41. Much of the credit for the resurgence of the Republican Party must go to Chairman Bill Brock, who served following the Ford years. Without the burdens of an incumbent President, he was able to devote his activities to developing a strong party organization. Contrast this with the Carter-Democratic National Committee relationship during the same period. *See* Adamany, *supra* note 3, at 86; Walsh, *Bill Brock: Architect of Republican Revival*, Wash. Post, Nov. 20, 1980, at A21–A24.

A third major factor in party renewal is the strength of the party congressional and senatorial committees. These groups, which possess resources rivalling those of the national party, can act independently of the president to a large extent and can emphasize a different political agenda. *See generally* L. SABATO, THE RISE OF POLITICAL CONSULTANTS, 290–97 (1981); Adamany, *supra* note 3, at 76–93. The emergence of these committees as a factor in the political equation in their own right has given the party a capacity for longer-range planning than any organization controlled by a single president can provide. The strength of these organizations, which enabled the parties to develop significant financial resources independant of any presidential effort, bodes well for the future of the parties.

[23] The reform in Civil Service, beginning with the Pendleton Act of 1883, ch. 27, 22 Stat. 407 (codified as amended in scattered sections of 5, 18, & 40 U.S.C. (1982)), minimized the role of patronage as a major incentive for party service. As the number of Civil Service positions increased, party members at the local level lost much of their interest in participating in campaigns and party leaders lost a great deal of their ability to recruit and retain active party workers (pp. 44–45).

[24] The New Deal helped remove one of the reasons for the strength of the local parties. Previously, the local party often provided services and opportunities for upward mobility to the poor or immigrant groups who had not yet settled into their adopted country. In return for these services, the party received volunteers during the campaign and loyalty at the polls. As New Deal programs expanded and the government began to provide more services to the public, the local party continued to lose workers and supporters, greatly straining party resources at the local level (pp. 45–46).

[25] With the New Deal programs came a renewed belief in upward mobility and people who had formerly relied on the party now began to see the government as a ladder to success. This trend brought a new group of people to party membership who worked for the party not for material gains, but for social and ideological reasons (pp. 46–49).

[26] Declining confidence in all institutions, primarily during the 1960's and 1970's, coupled with the traditionally low popular opinion of parties, was manifested in a general disdain for politicians and their parties. *See generally* S. LIPSET & W. SCHNEIDER, THE CONFIDENCE GAP: BUSINESS, LABOR AND GOVERNMENT IN THE PUBLIC MIND (1983) (detailing the loss of confidence in most American institutions). For a look at current public attitudes toward the parties, see W. CROTTY, THE PARTY GAME 6–9 (1985).

orate on the differential impact of these societal changes, such factors seem to have affected the local parties more than the national organization. By usurping many of the functions of the local parties, these changes gradually weakened the local parties and shifted influence to the national organizations.[27]

For purposes of discussing the changing world of politics, the external/social factors, for the most part, can be considered closed, in the same manner as the early party reform efforts. While the Democrats may be able to modify their party rules, we are unlikely ever to need the parties to provide general social services, nor are we about to eliminate the Civil Service system, nonpartisan local elections, or presidential primaries. A discussion of party resurgence, therefore, must consider how the parties have met the challenge that these changes presented. This is the primary focus of *The Party Goes On.*

## II. THE CASE FOR RESURGENCE

The dominant message of *The Party Goes On* is that the parties have successfully adapted to the changes in the political system.

> Today's political party is stronger, not only because it is more professional and has more money, but because it is now in a relatively better position to influence the outcomes of elections and the behavior of government than it was before, and more than any other single actor on the political scene (p. 183).

While recognition of this evolution has been slow,[28] the presence of the new political party represents a significant change in our political system.

As the authors emphasize, changes in the nature of the party organization have played a prominent role in the resurgence of political parties.[29] Historically, the party system was dominated

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[27] *See supra* note 24. Since the national party was generally not involved in these areas, its traditional role was not affected, and the national parties gained at the expense of the local organizations. While the authors are clearly aware of the impact of these changes on the local parties, they fail to discuss the effect on the national/state/local party relationship.

[28] While the authors claim that "no one will admit that the parties are back" (p. 26), they are not the only scholars to spot this trend. *See* sources cited *supra* note 3. However, few people will stake a claim to continued party resurgence.

[29] For discussions of party organization, see C. COTTER, J. GIBSON, J. BIBBY, & R. HUCKSHORN, PARTY ORGANIZATIONS IN AMERICAN POLITICS (1984); A. GITELSON, M. CONWAY, & F. FEIGERT, AMERICAN POLITICAL PARTIES: STABILITY AND CHANGE 72–97 (1984).

by state and local parties, which provided services to voters and money to the national organization.[30] The national party itself was a shell organization, with little impact on public policy and only a small role in campaigns outside the presidential race.[31] Today, in contrast, "the national party is a full-time, professional organization, which provides sustenance to the state and local parties" (p. 21). The shift in control from state to national parties, and the manner in which it has been accomplished, is a dominant theme of the authors' analysis, and a necessary ingredient in an understanding of party resurgence.

### A. *Parties and the Law*

Legislative and legal changes have been major factors in the organizational evolution of the parties. Court action and congressional regulation of campaign financing have resulted in a dramatic increase in the power of the national parties, both *vis à vis* the state and local parties and in relation to other actors in the political system.

Historically, national party organizations were largely free from regulation, especially in comparison to their state and local counterparts.[32] Today, while the courts have begun to place more restrictions on party activity, few federal statutes limit party actions.[33]

By far, the most important statute regulating national party affairs is the Federal Election Campaign Act (FECA).[34] Significant debate occurred throughout the late 1960's and early 1970's

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[30] *See* sources cited *supra* note 10.

[31] *See* H. BONE, PARTY COMMITTEES AND NATIONAL POLITICS (1958), and C. COTTER & B. HENNESSY, POLITICS WITHOUT POWER: THE NATIONAL PARTY COMMITTEES (1964).

[32] *See* Mitau, *Judicial Determination of Political Party Organizational Autonomy*, 42 MINN. L. REV. 245 (1957); Starr, *The Legal Status of American Political Parties, I*, 34 AM. POL. SCI. REV. 439 (1940); Starr, *The Legal Status of American Political Parties, II*, 34 AM. POL. SCI. REV. 685 (1940). The parties were not mentioned by federal statutes until the 1970's. Adamany, *supra* note 3, at 71.

[33] *See* Brisbin *Federal Courts and the Changing Role of American Political Parties*, 1984 N. ILL. U.L. REV. 31; Fay, *The Legal Regulation of Political Parties*, 9 J. LEGIS. 263 (1982); Freeman, *Political Party Contributions and Expenditures under the Federal Election Campaign Act: Anomalies and Unfinished Business*, 4 PACE L. REV. 267 (1984). *See also* Kester, *Constitutional Restrictions on Political Parties*, 60 VA. L. REV. 735 (1974); Rotunda, *Constitutional and Statutory Restrictions on Political Parties in the Wake of Cousins v. Wigoda*, 53 TEX. L. REV. 935 (1975).

[34] Federal Election Campaign Act, Pub. L. No. 92-225, 86 Stat. 3 (1971) (codified as amended in scattered sections of 2, 8, & 47 U.S.C.(1982)).

about the necessity of campaign reform,[35] inasmuch as there had been few changes[36] in the regulation of federal campaigns since the Corrupt Practices Act of 1925.[37] The primary campaign finance law until 1971, this Act "was neither enforced nor enforceable."[38] The Act set "impossibly low limits on campaign expenditures . . . , then allowed them to be ignored through the fiction that candidates were officially ignorant of, and thus not legally responsible for, most of the money spent in their campaigns."[39]

In 1971, Congress took its first tentative steps towards comprehensive campaign reform by enacting FECA,[40] which provided for disclosure of campaign contributions, contribution ceilings, and media spending limits.[41] The impact of these provisions was minimal,[42] partially because Watergate soon demonstrated the need for further reform.[43]

By contrast, the 1974 FECA amendments[44] represented "the most ambitious and thoroughgoing reforms of the election pro-

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[35] *See* sources cited in Nicholson, *Buckley v. Valeo: The Constitutionality of the Federal Election Campaign Act Amendments of 1974*, 1977 WIS. L. REV. 323, 324 n.9.

[36] The most important interim change had been the Hatch Act of 1939, ch. 410, 53 Stat. 1147 (codified as amended in scattered sections of 1, 5, & 18 U.S.C. (1982)), which placed contribution limits on individuals, expenditure ceilings on certain campaign committees, and strictly limited the ability of federal workers to participate in federal campaigns. Aside from the limits on campaign activities by federal employees, this Act was ineffective as a regulatory tool for campaigns because numerous committees could be set up to evade the limits. *See* H. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS AND POLITICAL REFORM 26–27 (2d ed. 1980); Malbin, *Introduction* in MONEY AND POLITICS, *supra* note 3, at 7.

[37] Federal Corrupt Practices Act of 1925, Pub. L. No. 68-506, 43 Stat. 1070, *repealed by* Federal Election Campaign Act of 1971, Pub. L. No. 92-25, 86 Stat. 3.

[38] G. JACOBSON, MONEY IN CONGRESSIONAL ELECTIONS 164 (1980). For background on campaign finance practices, see D. ADAMANY, CAMPAIGN FINANCE IN AMERICA (1972); A. HEARD, THE COSTS OF DEMOCRACY (1960); G. THAYER, WHO SHAKES THE MONEY TREE? AMERICAN CAMPAIGN FINANCE PRACTICES FROM 1789 TO THE PRESENT (1973).

[39] G. JACOBSON, *supra* note 38, at 164–65.

[40] Pub. L. No. 92-225, 86 Stat. 3 (1971) (codified as amended in scattered sections of 2, 8, & 47 U.S.C. (1982)).

[41] *See* H. ALEXANDER, FINANCING POLITICS: MONEY, ELECTIONS AND POLITICAL REFORM 35–37 (3d ed. 1984).

[42] The law did not take effect until April 7, 1972, during the heart of the presidential campaign. The constitutionality of the provisions was questioned from the time of passage. *See, e.g.*, Fleishman, *Freedom of Speech and Equality of Political Opportunity: The Constitutionality of the Federal Election Campaign Act of 1971*, 51 N.C.L. REV. 389 (1972–73). For a look at what FECA did in its original incarnation, see Staats, *Impact of the Federal Election Campaign Act of 1971*, 425 ANNALS 98 (1976).

[43] For examples of the Watergate campaign finance abuses see *Buckley v. Valeo*, 519 F.2d 821, 839–40 & nn.38–40 (D.C. Cir. 1975).

[44] Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified as amended in scattered sections of 2, 5, 18, 26, & 47 U.S.C. (1982)).

cess ever enacted by Congress."[45] Congress enacted strict regulations concerning contributions and expenditures in federal campaigns and introduced more stringent disclosure requirements designed to allow public scrutiny of campaign funding.[46]

After its passage, FECA was challenged by a diverse group of political actors, including Senator James Buckley (Conservative, NY), liberal activist Stewart Mott, the American Conservative Union, the New York Civil Liberties Union, and presidential candidate Eugene McCarthy. The Supreme Court, in *Buckley v. Valeo*,[47] invalidated many of the provisions of the Act, but left the overall framework standing.[48] The 1976 amendments,[49] implementing changes required by *Buckley*, continued to alter the process of financing federal campaigns, which con-

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[45] Polsby, *Buckley v. Valeo: The Special Nature of Political Speech*, 1976 SUP. CT. REV. 1, 2.

[46] The statute also created the Federal Election Commission (FEC). 2 U.S.C. § 437c(a). For a look at the 1974 FECA provisions, see Alexander, *The Future of Election Reform*, 10 HASTINGS CONST. L.Q. 721, 723–24 (1983).

[47] 424 U.S. 1 (1976) (per curiam).

[48] The Court's decision in *Buckley* has been criticized on a number of fronts. One of the strongest critics has been Judge Skelly Wright, who sat on the panel of the Court of Appeals for the D.C. Circuit that upheld the 1974 Act. *See* Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609 (1982) [hereinafter cited as Wright, *Money and the Pollution of Politics*]; Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001 (1976). Another critic has been Judge Harold Leventhal, who criticizes the Court for a failure to appreciate "any sense of the history of campaign legislation, of the grievous abuses that prompted it, the frustration that accompanied it, the evasion and political pressures that have undermined all less-than comprehensive measures of reform." Leventhal, *Courts and Political Thickets*, 77 COLUM. L. REV. 345, 362 (1977). *See also* W. CROTTY, POLITICAL REFORM AND THE AMERICAN EXPERIMENT 169 (1977). "The history of the regulation of political financing is essentially one of massive fraud perpetuated on the American public." *Id.*

These attacks have continued, as the Court has continued to evaluate the constitutional validity of FECA. *See, e.g.*, Federal Election Comm'n v. Nat'l Conservative Political Action Comm. (NCPAC), 105 S. Ct. 1459, 1480 (1985) (White, J., dissenting) ("In overzealous protection of attenuated First Amendment values, the Court has once again managed to assure us the worst of both worlds."); Cox, *Constitutional Issues in the Regulation of the Financing of Election Campaigns*, 31 CLEV. ST. L. REV. 395 (1982).

According to one commentator, "Congress has been left with a law that conforms to no one's idea of sound public policy." Smolka, *The Campaign Law in the Courts*, in MONEY AND POLITICS, *supra* note 3, at 214. This result was foreshadowed by Chief Justice Burger in his *Buckley* opinion: "Congress intended to regulate all aspects of federal campaign finances, but what remains after today's holding leaves no more than a shadow of what Congress contemplated. I question whether the residue leaves a workable program." *Buckley*, 424 U.S. at 235 (Burger, C.J., concurring in part, and dissenting in part).

[49] Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475 (codified as amended in scattered sections of 2, 18, & 26 U.S.C. (1982)).

sequently became more regulated than at any time in our nation's history.[50]

For the most part, the Court's decision in *Buckley* did not specifically deal with the party provisions of FECA, focusing instead on the First Amendment rights of individuals and other political groups.[51] While FECA provided the first real limits on party activity in campaigns, major political parties were placed in a favored position relative to other political actors. FECA allowed larger contributions to the parties than to any other groups, and allowed the parties to contribute more to candidates than any other group or individual.[52]

The financing scheme set up by FECA played an important role in determining how the parties could raise money. One of the primary purposes of FECA was to minimize the impact of political "fatcats", donors who contributed tens of thousands of dollars to candidates and groups.[53] In reaching this goal FECA emphasized obtaining small contributions from a large pool of donors.[54] The Republicans were the first to realize the impact of this new scheme, and they developed an extensive direct mail capacity which has been the route to their new-found wealth.[55]

The parties' efforts at raising money, led by the Republicans, have been extremely successful. In the 1980 campaign cycle, Republican committees at the national level raised a total of $130.3 million, while their Democratic counterparts raised $23 million.[56] During the 1981–82 election cycle, the Republicans raised $214 million, while the Democrats raised $40.1 million.[57] By 1984, Republican fundraising had increased 40% from

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[50] "The FECA Amendments of 1974 probably represented the most sweeping set of campaign finance law changes ever adopted in the United States, if not in the world." Malbin, *Introduction*, in MONEY AND POLITICS, *supra* note 3, at 7.

[51] *See* Freeman, *supra* note 33, at 274–75.

[52] For example, while an individual may give as much as $5000 per year to a nonparty committee, he or she may give up to $20,000 to a political party committee over the same period. 2 U.S.C. § 441a(a)(1) (1982). Similarly, while individual contributions to candidates are limited to $1000 per election, *id.* at § 441a(a)(1)(A), and nonparty committees may give $5000, *id.* at § 441a(a)(2)(A), national party committees may give $17,500 to senatorial candidates, *id.* at § 441a(h), in addition to coordinated expenditures, *see infra* note 61.

[53] *See Buckley*, 424 U.S. at 25.

[54] The overall effect of the contribution ceilings is "merely to require candidates to raise funds from a greater number of persons." *Id.* at 21–22.

[55] Much of the Republican fundraising success has been built on small contributions from a large pool of donors. *See* Adamany, *supra* note 3, at 76.

[56] *Id.* at 75.

[57] FEDERAL ELECTION COMMISSION, RECORD, July 1985, at 10. During 1982, the two parties together raised more than did all the PACs combined. L. SABATO, PAC POWER: INSIDE THE WORLD OF POLITICAL ACTION COMMITTEES 152 (1984).

1982, to $303.2 million, while the Democrats raised $97.2 million, up 143%.[58]

While fundraising efforts have been successful, it is the parties' ability to spend that money in several ways that has been the most significant reason for their increased power in campaigns.[59] Parties can spend their money in three ways. Direct contributions to candidates, as allowed by FECA, are a relatively insignificant part of the parties' financial capacity in campaigns, given the rising expense of winning virtually any contested race.[60]

Coordinated expenditures[61] and general party spending,[62] on the other hand, allow parties to provide an enormous range of campaign services.[63] These services include polling, advertis-

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[58] FEDERAL ELECTION COMMISSION, RECORD, July 1985, at 10.

[59] The activities of the parties in the 1980–84 elections have been well documented. *See* Adamany, *supra* note 3; Arterton, *Political Money and Party Strength*, in THE FUTURE OF AMERICAN POLITICAL PARTIES: THE CHALLENGE OF GOVERNANCE 101, 104–16. (J. Fleishman ed. 1982); Bibby, *Party Renewal in the National Republican Party*, in PARTY RENEWAL IN AMERICA: THEORY AND PRACTICE 102 (G. Pomper ed. 1980); Conway, *Republican Political Party Nationalization, Campaign Activities, and Their Implications for the Party System*, 13 PUBLIUS 1 (1983); Jacobson, *Party Organization and Campaign Resources in 1982*, 100 POL. SCI. Q. 603 (1985–86); Sabato, *supra* note 3; Wekkin, *Political Parties and Intergovernmental Relations in 1984: The Consequences of Party Renewal for Territorial Constituencies*, 15 PUBLIUS 19 (1985).

[60] The Senatorial campaign committees can give $17,500 directly to their candidates. 2 U.S.C. § 441a(h) (1982). The House committees, because they are not specifically provided for in FECA, are restricted to the $5000 contribution applicable to all political committees. By comparison, winners of Senate races in 1984 received average contributions from PACs of $595,908, out of average receipts of $2,999,821. Clymer, *'84 PACs Gave More to Senate Winners*, N.Y. Times, Jan. 6, 1985, § 1, at 20, col. 1.

[61] Coordinated expenditures are expenditures made by party committees in cooperation with candidates, basically in-kind contributions. The term is not defined by the FECA, and is only mentioned in the FEC guide to party committees. FEDERAL ELECTION COMMISSION, CAMPAIGN GUIDE FOR POLITICAL PARTY COMMITTEES 10–11 (1984). The category is the result of a quirk in the regulatory scheme, which makes political parties the only political groups which are unable to spend unlimited amounts on independent expenditures. In *Buckley*, the Court invalidated limits on independent expenditures, allowing PACs and individuals to spend unlimited amounts independently of a campaign. *Buckley* 424 U.S. at 45–51. By FEC regulation, the parties are not allowed to make independent expenditures, 11 C.F.R. § 110.7(b)(4) (1985), and the category of coordinated expenditures was created to allow the parties to spend more than the limits imposed by FECA. Coordinated expenditures are strictly limited by statute. 2 U.S.C. § 441a(d)(3) (1982).

[62] FECA allows unlimited party spending in a number of general areas, primarily general party building activity such as institutional advertising and get-out-the-vote efforts. These expenditures are considered independent of any "clearly identified candidate." 2 U.S.C. § 431 (17), (18) (1982).

[63] The growth in the political consulting profession has provided an alternative to parties by supplying the technical campaign services such as polling and advertising that formerly only the parties could provide. *See generally* L. SABATO, THE RISE OF POLITICAL CONSULTANTS (1981). Consultants also support the general growth of PACs by providing political services to them, which further expands their ability to compete with parties. According to Sabato, "[t]here is no more significant change in the conduct

ing,[64] candidate recruitment, fundraising, voter mobilization, and issue research. Unlike independent expenditures, which are expenditures made without consulting the candidate or his or her organization, "coordinated" services can be provided where they are most needed at the candidate's direction.

Given the increased nationalization of the party system,[65] the next development in the evolution of the national parties appears to be to use state and local parties more effectively and to exercise control over them through political and legal means. In a series of cases, including *O'Brien v. Brown*,[66] *Democratic Party v. Wisconsin*,[67] and *Cousins v. Wigoda*,[68] the Supreme

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of campaigns than the consultant's recent rise to prominence, if not preeminence . . . . [They] have inflicted severe damage upon the party system and masterminded the modern triumph of personality cults over party politics in the United States." Peterson, *The $2 Million Men in the $11 Million Race*, The Wash. Post Nat. Weekly Edition, Jan. 27, 1986, at 13, col. 1. One of the party's goals in trying to reclaim some of its lost power must be to provide a candidate with some incentive to look towards the party for campaign assistance rather than turning to a political consultant.

[64] Television has been one of the crucial areas where the parties have been able to help their candidates. Television, and the increased role of the media in general, can be seen as a factor in general party decline in that the media has replaced the party as the provider of political information. *See* S. SALMORE & B. SALMORE, CANDIDATES, PARTIES AND CAMPAIGNS: ELECTORAL POLITICS IN AMERICA 17–36 (1985) (discussing campaigns before television) and W. CROTTY, *supra* note 2, at 73–75. Television has "radically altered the way in which the political process operates at its most fundamental level." AMERICAN ASSEMBLY, THE FUTURE OF AMERICAN POLITICAL PARTIES 5 (1982). In effect, television and the media "have simply reshaped the exercise of politics in America." W. CROTTY, THE PARTY GAME 139 (1985). *See generally* A. RANNEY, CHANNELS OF POWER: THE IMPACT OF TELEVISION ON AMERICAN POLITICS 30 (1983).

Despite the threat posed by television, the parties have adapted. They have begun to put television to their own use, by helping their candidates prepare advertising and using the media for institutional party advertising. *See, e.g.*, Adamany, *supra* note 3, at 82–83, 97–99; Sabato, *supra* note 3, at 77–79, 84–86.

[65] *See* sources cited *supra* note 10. *See also* Longley, *National Party Renewal* in PARTY RENEWAL IN AMERICA: THEORY AND PRACTICE 69 (G. Pomper ed. 1980).

[66] 409 U.S. 1 (1972). In *O'Brien*, the Supreme Court stayed an appeals court decision on the validity of challenges to the seating of delegates at the 1972 Democratic National Convention, allowing the party convention to decide the issue "[i]n light of the availability of the convention as a forum to review recommendations of the credentials committee . . . [,] the lack of precedent to support the extraordinary relief granted by the Court of Appeals, and the large public interest in allowing the political processes to function free from judicial supervision." *O'Brien*, 409 U.S. at 5.

[67] 450 U.S. 107 (1981). The Court held that a state could not constitutionally compel the national party to seat at its convention a delegation chosen in an open primary in violation of the national party's rules, as "[a] political party's choice among the various ways of determining the makeup of a state's delegation to the party's national convention is protected by the Constitution." *Id.* at 124. For a detailed look at this litigation, see G. WEKKIN, DEMOCRAT VERSUS DEMOCRAT: THE NATIONAL PARTY'S CAMPAIGN TO CLOSE THE WISCONSIN PRIMARY (1984).

[68] 419 U.S. 477 (1975). The Court reversed the state appellate court's finding which gave "primacy to state law over the National Political Party's rules in the determination of the qualifications and eligibility of delegates to the Party's National Convention." *Id.* at 483.

Court has given the national party almost exclusive control over delegate selection procedures. These holdings "clearly establish a body of precedent and provide a constitutional framework for the supremacy of national party authority."[69]

In combination with increased national party control over state party activity, legislative changes have strongly restricted the role that state and local parties could play in federal elections. Centralization of campaign activity brought about by FECA virtually eliminated grass-roots activity in presidential campaigns.[70] In response to this problem, the 1979 FECA amendments[71] attempted to restore a state and local party role in federal campaigns. It appears that the parties will be able to use their extensive resources to reverse to some degree party decline at the state and local level by channelling funds through these groups to benefit party candidates.[72] However, it can be argued that the state and local parties are only acting as a front for national party spending.

The most recent development involving state and local parties has been the growth of soft money funds. This money is received by state and local parties and is then used for activities that benefit both federal and state candidates, although it does not meet FECA requirements.[73] The practice, while not fully developed, has been criticized in the media and challenged by the consumer group Common Cause.[74] The legal status of such funds is unclear at this time.

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[69] Longley, *supra* note 10, at 185.

[70] CAMPAIGN FINANCE STUDY GROUP, JOHN F. KENNEDY SCHOOL OF GOVERNMENT, HARVARD UNIVERSITY, AN ANALYSIS OF THE IMPACT OF THE FEDERAL ELECTION CAMPAIGN ACT, 1972–78, at 4-19 to 4-32 (1979).

[71] Pub. L. No. 96-187, 93 Stat. 1339 (1979) (codified in scattered sections of 2, 5, 18, 22, 26, & 42 U.S.C. (1982)).

[72] In FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27 (1981), the Supreme Court upheld an FEC ruling that allowed state parties to transfer their spending power to the national committees through the use of agency agreements. This decision has allowed the parties, primarily the Republicans, to double the coordinated expenditures in federal campaigns. *See* Adamany, *supra* note 11, at 519.

[73] *See* Sabato, *supra* note 3, at 105 n.17. This money generally can be raised directly from corporations or from individuals in excess of the FECA limits. *Id. See generally* 50 Fed. Reg. 51,535–40 (Dec. 18, 1985). The money is used to fund state and local party activities or for general party spending, such as institutional advertising. It is estimated that the Reagan campaign raised approximately $24 million in soft money for the 1984 campaign, while Mondale raised $10 million. Brownstein, *Soft Money*, NAT'L J., Dec. 7, 1985, at 2828.

[74] The growth in soft money funds has prompted great concern among critics of the campaign financing system. *See, e.g.*, E. DREW, POLITICS AND MONEY: THE NEW ROAD TO CORRUPTION 14–19, 101–110 (1983). Common Cause has asked the FEC to promulgate restrictions on soft money, 50 Fed. Reg. 477 (1985), and the FEC has held

How the parties have fared under the FECA regime has been a matter of considerable debate. From the parties' perspective, the law is undesirable because it places limits on their activities, provides public funding to presidential candidates rather than to the parties that nominate them,[75] and creates opportunities for alternative sources of funding, mainly political action committees (PACs), to emerge.[76] However, the parties are given substantial preference in FECA and they have adapted to the law, making its quirks operate in their favor.

Kayden and Mahe, taking the overly cautious approach which characterizes their entire book, say only that the law "may" turn to the advantage of the parties (p. 187). While the law has given the parties a favored status relative to individuals[77] and PACs,[78] the manner in which FECA has affected the parties seems to have been expressed best by Morley Winograd, Michigan Democratic Party Chairman: FECA is "neither inherently

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hearings on the subject. 50 Fed. Reg. 51,535 (1985). No results have been announced as of March, 1986.

[75] Because presidential candidates receive funding under the Presidential Election Campaign Financing Act, 26 U.S.C. §§ 9001–9013 (1982), candidates face expenditure limits that could not otherwise be constitutionally enforced, *see* Republican National Committee v. FEC, 487 F. Supp. 280 (S.D.N.Y.), *aff'd* 445 U.S. 955 (1980), and FECA limits the amount parties can spend on behalf of their presidential candidate. *See* 2 U.S.C. § 441a(c), (d)(2).

[76] *See generally* D. PRICE, *supra* note 3, at 242–45.

[77] *See supra* note 52.

[78] A major debate has emerged on the relationship of parties to political action committees (PACs). PACs have been the most visible source of competition for the parties, and much of the criticism of FECA has centered around the increasing role of PACs in our political system. *See, e.g.*, E. DREW, *supra* note 74; Chiles, *PAC's: Congress on the Auction Block*, 11 J. LEGIS. 193 (1984); Wertheimer, *The PAC Phenomenon in American Politics*, 22 ARIZ. L. REV. 603 (1980). *See also* sources cited *infra* note 92. The number of PACs grew from 113 in 1972 to 608 in 1975, and to 4009 by the end of 1984, FEDERAL ELECTION COMMISSION, RECORD, Aug. 1985, at 6. Over the same period their funding has increased dramatically. *See* L. SABATO, *supra* note 57, at 16.

In a chapter entitled "Why the Interest Groups Can't Beat the Parties," Kayden and Mahe take the somewhat controversial position that "interests will never dominate the parties," due to the ability of the parties to bring minorities together to form majorities (p. 126). Their discussion of PACs is concise and informative, focusing on who the interests are, what we fear about them, and the threat posed by independent expenditures from PACs (126–42). They successfully rebut the challenge from PACs to the parties, and conclude that while the "party/interest group relationship is a two-way street, . . . the party always has the wider lane"(p. 151).

The authors' conclusion seems consistent with that of some other commentators. Larry Sabato, for example, discusses the bipartisanship of PACs and the symbiotic relationship between parties and PACs, concluding that "the parties are clearly meeting whatever challenge PACs pose to their authority and predominance in the political system." L. SABATO, *supra* note 57, at 159. For other views, see Adamany, *PACs and the Democratic Financing of Politics*, 22 ARIZ. L. REV. 569, 593 (1980); Orren, *supra* note 1, at 37; Sorauf, *Political Parties and Political Action Committees: Two Life Cycles*, 22 ARIZ. L. REV. 445, 454 (1980).

evil or automatically beneficial for political parties . . . [but it is] simply another piece of the political equation, a dependent variable subject to manipulation."[79] Regardless of any inherent change in the parties' position as a result of the Act, the parties are adapting to the system implemented by FECA and are strengthening their place in the political equation, in a manner that is probably more effective than the authors allow.

### B. *The Future of the Parties*

As Kayden and Mahe suggest, the future of the political parties is a bright one. However, two major questions remain for the next few election cycles to decide. First is the issue of how well the parties will be able to attract and retain voters after their decline in the 1960's and 1970's.[80]

The two parties took different approaches to regaining their strength. The Democrats "sought to improve their processes by extending the franchise of active party participation to those who had been left out" (p. 186). The Republicans, on the other hand, "focused on their organizational strength, making a committed effort toward fundraising and professionalism" (p. 186). It may be argued that the question of which party took the more effective approach, at least in the short run, can be answered by looking at the last two presidential elections.

Much discussion of the long-term impact of these changes has focused on the voter identification issue, evaluating whether there has been a "realignment" or a "dealignment"[81] in the party system. To date, the evidence is unclear.[82] Both parties continue

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[79] Commentary of Morley Winograd, in PARTIES, INTEREST GROUPS AND THE CAMPAIGN FINANCE LAWS 305 (M. Malbin ed. 1980). *See also* Malbin, *What Should Be Done About Independent Campaign Expenditures?*, 6 REGULATION 41, 45 (Jan.-Feb. 1982). "For the most part, the [FECA] has neither helped nor hurt the parties; it has simply stayed out of the way." *Id.*

[80] *See, e.g.*, D. PRICE, *supra* note 3, at 10–18; R. SCOTT & R. HREBENAR, *supra* note 2, at 168–88. "The most persuasive evidence of party decline is the decrease in allegiance among voters." Adamany, *supra* note 72, at 506.

[81] "In a dealignment, voters move away from parties altogether; loyalties to the parties, and to the parties' candidates and programs, weaken, and more and more of the electorate become 'up for grabs' each election." Ladd, *The Brittle Mandate: Electoral Dealignment and the 1980 Presidential Election*, 96 POL. SCI. Q. 1, 3 (1981).

[82] *See, e.g.*, Ginsberg & Shefter, *A Critical Realignment? The New Politics, the Reconstituted Right, and the 1984 Elections*, in THE ELECTIONS OF 1984 1 (M. Nelson ed. 1985); Ladd, *As the Realignment Turns: A Drama in Many Acts*, 7 PUBLIC OPINION 2 (Dec.-Jan. 1985); Ladd, *On Mandates, Realignments and the 1984 Presidential Election*, 100 POL. SCI. Q. 1 (1985); Schneider, *Antipartisanship in America*, in PARTIES AND DEMOCRACY IN BRITAIN AND AMERICA 99 (V. Bogdanor ed. 1984).

to make efforts to capture the popular vote and develop stable party loyalties. As Martin Wattenberg has argued, there seems to be an increasingly neutral, rather than negative, attitude towards the parties.[83] If he is correct, this may give both parties the opportunity to make large inroads into the mass of uncommitted voters, a positive change for the party system as a whole.[84]

The second question for the parties' future is whether a two-party equilibrium will develop in raising and spending the "first and most essential element in political party activity and effectiveness in the 1980's": money.[85] While there is significant debate whether there has been a realignment favoring the Republicans,[86] there is no question but that the Republicans far surpass the Democrats in fundraising capacity at this time.[87]

The issue, as phrased by the authors, is an important one: "The concern of many is not whether the Republican party is the party of the future, but whether the Democrats can survive and compete in a reasonable balance against the Republicans" (p. 204). While some commentators feel that the nature and composition of the Democratic coalition is such that they will never match the Republican's fundraising ability,[88] the authors' assessment appears correct. The ability of the parties to adapt is such that at worst, the Democrats will not retain their status as the majority party in the electorate (p. 207).

### C. *Parties in the Campaign Financing Scheme*

The party role in campaign financing has not been the subject of intense judicial scrutiny. In *Buckley*, the Court appeared to reserve comment on the constitutionality of campaign spending limits as they apply to parties,[89] and no subsequent case has made this challenge. Given the Court's failure to apply limits directly to party spending and a series of decisions which have expanded the ability of different groups to spend money in

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[83] M. WATTENBERG, *supra* note 2, at 50.
[84] *Id.* at 51.
[85] Adamany, *supra* note 3, at 105.
[86] *See* sources cited *supra* note 82.
[87] *See supra* note 58 and accompanying text.
[88] *See, e.g.*, Adamany, *supra* note 3, at 105–06; Arterton, *supra* note 59, at 110, 115.
[89] *See* Freeman, *supra* note 33, at 274–75.

campaigns,[90] constitutional and policy considerations support an increased role for parties in our campaign financing structure.

There are certainly strong policy arguments for increasing the role of parties by expanding their ability to provide services to candidates. A detailed analysis of why American politics needs strong parties is beyond the scope of this Book Note.[91] However, two main arguments about the party role in the campaign finance structure will be addressed.

First, powerful parties can act as a counterweight to what is widely seen as the most significant threat to the integrity of the campaign process, the rise of PACs.[92] Most importantly, increased support from parties would diminish candidate reliance on PACs and allow parties to perform some of their traditional functions more effectively.[93]

Similarly, increasing the party role can fill some of the gaps in the campaign finance system created by Supreme Court decisions.[94] For example, while courts have rejected speech equality as a rationale for limiting speech rights in campaigns,[95] equality in the political sphere is certainly a desirable policy goal.[96] Increasing the parties' ability to support their candidates may go a long way towards insuring competitive races, at least as far as funding is concerned. The FECA amendments of 1979[97]

[90] *See* FEC v. NCPAC, 105 S. Ct. 1459 (1985); First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

[91] For discussions of why strong parties are necessary, *see, e.g.*, Banfield, *In Defense of the American Party System*, in POLITICAL PARTIES IN THE EIGHTIES 133 (R. Goldwin, ed. 1980); Pomper, *The Contribution of Political Parties to American Democracy*, in PARTY RENEWAL IN AMERICA: THEORY AND PRACTICE 1 (G. Pomper, ed. 1980).

[92] *See* Jackson, *Growing Anti-PAC Sentiment Leads to Proposals to Overhaul Federal Campaign-Finance System*, Wall St. J., Jan. 20, 1986, at 34, col. 1. *See generally* CONGRESSIONAL RESEARCH SERVICE, OPTIONS TO LIMIT PAC POLITICAL FINANCING AND INDEPENDENT EXPENDITURES REGARDLESS OF SOURCE IN CONGRESSIONAL ELECTIONS—SOME LEGAL AND CONSTITUTIONAL CONSIDERATIONS (1983).

[93] *See* L. SABATO, *supra* note 57, at 176–77; Adamany, *supra* note 78, at 597–602; Adamany, *Political Action Committees and the Democratic Politics*, 1983 DET. C.L. REV. 1013; Alexander, *supra* note 46, at 736.

[94] "By striking down one portion of an integrated and comprehensive statute, the Court has once again transformed a coherent regulatory scheme into a nonsensical, loophole-ridden patchwork." *NCPAC*, 105 S. Ct. at 1480 (White, J., dissenting).

[95] "The concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley*, 424 U.S. at 48–49.

[96] *See, e.g.*, Wright, *Money and the Pollution of Politics*, *supra* note 48; Note, *Equalizing Candidates' Opportunities for Expression*, 51 GEO. WASH. L. REV. 113 (1982–83). For critiques of Wright, *see generally* Fleishman & McCorkle, *Level-up Rather than Level-down: Toward a New Theory of Campaign Finance Reform*, 1 J.L. & POL. 211 (1984); Nelson, *Regulation of Independent Political Campaign Expenditures: Less is More and Wright is Wrong*, 7 HARV. J.L. PUB. POL'Y 261, 282–92 (1984).

[97] Federal Election Campaign Act Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1979) (codified in scattered sections of 2, 5, 18, 22, 26, & 42 U.S.C. (1982)).

recognized a need for increased party activity, at least at the state and local level, but a more powerful party presence in federal campaigns would be a desirable policy goal.[98]

In support of the policy goals that recommend a strengthened party position in national campaigns, a strong argument can be made that limits on party spending are unconstitutional.[99] There are two strands to this argument. First, the Supreme Court's decision in *Federal Election Commmision v. National Conservative Political Action Committee (NCPAC)*[100] invalidating a $1000 limit on independent expenditures in presidential campaigns is the most recent indication that "the more the courts look at [FECA] the less they see that can pass constitutional muster."[101]

As the Court held in *Buckley* and later reaffirmed in *Citizens Against Rent Control v. Berkeley*,[102] "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests in restricting campaign finances identified thus far."[103] With this understanding, it is unclear how the parties could be seen to pose a threat of the kind of quid pro quo that the Court has apparently required to validate limits on spending.[104] Is it possible for a party candidate to be corrupted by his or her party? The Court has narrowly defined the compelling state interests to be served in campaign regulation,

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[98] The parties' "role is absolutely central to American democracy's future health and success, and for that reason if no other the parties should be accorded special, preferential treatment by the campaign finance laws." L. SABATO, *supra* note 57, at 176. *See* D. PRICE, BRINGING BACK THE PARTIES 254–60 (1984). For a discussion of the potentially negative effects of expanding party resources, see Malbin, *Looking Back at the Future of Campaign Finance Reform* in MONEY AND POLITICS, *supra* note 3, at 240–42; Adamany, *Political Finance and the American Political Parties*, 10 HASTINGS CONST. L.Q. 497, 530 (1983).

[99] One scholar has cautiously advanced a similar argument. *See* Freeman, *supra* note 33, at 287–93.

[100] 105 S. Ct. 1459 (1985).

[101] Smolka, *supra* note 48, at 244.

[102] 454 U.S. 290 (1981).

[103] *NCPAC*, 105 S. Ct. at 1469.

[104] The Court has not clearly defined corruption. According to the *NCPAC* Court, "[c]orruption is a subversion of the political process. Elected officials are influenced to act contrary to their obligations of office by the prospect of financial gain to themselves or infusions of money into their campaigns. The hallmark of corruption is the financial quid pro quo: dollars for political favors." *NCPAC*, 105 S. Ct. at 1469. Given the Court's reasoning in *Buckley* and *NCPAC*, and its quid pro quo language, a specific agreement in exchange for a contribution would be necessary to justify campaign restrictions. Because the definition of independent expenditures requires that there be no prior consultation, 2 U.S.C. § 431 (17) (1982), there is, by definition, no threat of corruption from independent expenditures.

despite significant reason to do otherwise,[105] and the evil feared from party contributions seems minimal compared to the threats that the Court has sanctioned in previous cases.[106]

The second possible challenge to the constitutionality of limitations on party contributions stems from the manner in which Federal Election Commission (FEC) regulations define party contributions. Party committees are prevented from making independent expenditures in campaigns because the FEC has determined that the party cannot be sufficiently independent from its candidate.[107] Since a party is defined so that it cannot be independent of its candidates, it could not exercise improper influence over its own candidates in the manner described by the Court in cases like *NCPAC*. It may also be argued that the campaign rules prevent the party from giving to a candidate that has been defined to be part of itself, apparently contradicting the holding in *Buckley*.[108] While this does not seem to be as powerful an argument as the absence of potential corruption as a rationale, it seems strong enough to warrant a court challenge.

## III. Conclusion

The political system described in *The Party Goes On* is not "the same as it was before" (p. 1). The party system today

> is a new animal, dependent on different resources, performing different tasks. It is based in Washington and draws its strength from small contributors across the nation. It is a professional organization that provides more resources to

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[105] *See, e.g., NCPAC*, 105 S. Ct. at 1475–77 (White, J., dissenting) (Limitations on independant expenditures struck down by the Court were justified by the congressional interest in promoting the appearance and reality of equal access to the political arena.); Wright, *Politics and the Constitution*, *supra* note 48.

[106] In *NCPAC* the Court considered it only "hypothetically possible," and thus insufficient to allow limitation, that "candidates may take notice of and reward those responsible for PAC expenditures by giving official favors to the latter in exchange for the supporting messages." *NCPAC*, 105 S. Ct. at 1469. The Court also rejected the justification that "candidates and elected officials may alter or reaffirm their own positions on issues in response to political messages paid for by the PACS." *Id.* at 1469. The Court has also rejected spending limits in referendum campaigns, apparently without regard for how specific candidates will be affected, arguing that there is no threat of corruption where issues, rather than candidates, are involved. *Bellotti*, 435 U.S. at 790–792; *Citizens Against Rent Control*, 454 U.S. at 299–300.

[107] 11 C.F.R. § 110.7(b)(4) (1985).

[108] In *Buckley*, the Court ruled that limitations on a candidate's spending on his or her own behalf could not be upheld. *Buckley*, 424 U.S. at 51–54. The analogy to a party spending for its own candidate may be somewhat tortured, but is certainly a realistic argument.

> campaigns than any other single participant in the electoral process. No individual, no group can compete with the party's ability to raise and spend money, and to provide a host of other services from polling information to press releases (pp. 3–4).

Gone are the days of local machines and party domination at the polls.

For a time the parties did not appear capable of meeting the challenges generated by the political process and commentators began to warn of the dangers presented by a party-less system.[109] Today, however, the parties are back. It is difficult to take issue with the authors' conclusion that "the party of the future is here" (p. 190), and my view is that the authors do not go far enough in recognizing the strength of today's parties. The parties have risen to the challenges presented by the political system, and have adapted to the new political environment, providing campaign assistance at a level other political actors will be unable to match. This modern party will continue to perform increasingly important functions in politics as services are further developed and candidates rely more and more on the party's resources. It is not possible to predict whether the parties will ever achieve a more cohesive role in developing public policy.[110] The ultimate limits of party activity have not yet been reached, and may not be for some time. What is clear is that, despite the hard times they have suffered, the parties do, indeed, go on.

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[109] *See, e.g.*, Committee on Party Renewal, *National Position Paper* in PARTIES AND THEIR ENVIRONMENTS: LIMITS TO REFORM? 169 (R. Harmel & K. Janda eds. 1982).

> Without parties we are threatened by a politics of celebrities, of excessive media influence, of political fad of the month clubs, of massive private financing by various "fatcats" of state and congressional campaigns, of gun-for-hire campaign managers, of heightened interest in "personalities" and lowered concern for policy, of manipulation and maneuver and management of self-chosen political elites.

[110] For a defense of party goverment, see AMERICAN POLITICAL SCIENCE ASSOCIATION, TOWARD A MORE RESPONSIBLE TWO PARTY SYSTEM (1950); Cutler, *Party Government Under the American Constitution*, 134 U. PA. L. REV. 25 (1985). Larry Sabato has argued that "the coordinated expenditures, institutional advertising, media services, tracking polls, candidate schools, and all the rest are having the effect of drawing candidates closer to the parties." Sabato, *supra* note 3, at 104.

# RECENT PUBLICATIONS

THE NEW URBAN REALITY. Edited by *Paul E. Peterson.* Washington, D.C.: The Brookings Institution, 1985. Pp. 294, index. $31.95 cloth, $11.95 paper.

*The New Urban Reality* is a collection of ten essays originally presented at a University of Chicago conference on "The Future of Our City." Although several of these essays focus on the unique problems of Chicago, they do offer a more general analysis of the technological, economic, and racial forces that are currently reshaping America's cities. As each essay points out, the confluence of these forces has dramatically altered not only the urban landscape but also the very character of city life.

The broadest statement of this new urban reality appears in sociologist John Kasarda's essay, "Urban Change and Minority Opportunities." Kasarda demonstrates that recent advances in transportation and communications technologies have significantly reduced the locational advantages that the older cities of the Northeast and Midwest once enjoyed for manufacturing. Partially offsetting the exodus of manufacturing jobs from these cities is the growth in jobs related to the service and retail industries that have emerged in many downtown areas (pp. 47–49). Nonetheless, Kasarda points out that these new service jobs have educational requisites that large numbers of inner city minority residents simply cannot meet (pp. 49–51). Exacerbating this problem is the fact that many inner city households cannot obtain transportation to the suburban areas where the manufacturing jobs have relocated (pp. 55–56). In this way, much of the minority population is confined to inner city areas that offer only white-collar service jobs requiring high school or college educations. Kasarda concludes that this confinement has led to rising unemployment, increased labor force dropout rates, and growing welfare dependency among inner city residents (p. 56).

The other essays expound on the broad themes presented by Kasarda. Several of these essays specifically explore the problems accompanying the changing racial composition of the typical American city. For example, in his essay "Race and Neighborhood Transition," sociologist Elijah Anderson provides an interesting anecdotal account of daily life in the integrated and gentrifying community of "Village-Northton," the fictitious

name of a real community in a large Eastern city. As Anderson demonstrates, daily life in "Village-Northton" is dominated by the concern for safety. This concern motivates both the black and white residents of the community to engage in what Anderson describes as the "social process of mental notation," whereby the residents form a mental picture of their environment by observing each other engage in the same everyday activities (p. 109). Anderson also notes that this concern for safety often leads to racial stereotyping, even though "Village-Northton" prides itself on its racial tolerance. Whites, for example, distrust young black males, particularly those who "wear sneakers, 'gangster caps,' and sunglasses, and carry large portable radios" (p. 113). Although Anderson concedes that this distrust of young blacks stems not from racial hatred but from a desire for safety on the streets, he does warn that racial hostility may erupt if "blacks feel they are being overly scrutinized by whites or when whites blame blacks for feelings of humiliation or harassment . . ." (p. 114).

In his heavily documented essay, "The Urban Underclass in Advanced Industrial Society," William Julius Williams moves from the dynamics of gentrification to "the tangle of pathology in the inner city." After analyzing the statistics on black crime rates, teenage pregnancy, female-headed families, and welfare dependency, Wilson asks, "[w]hy have the social conditions of the urban underclass deteriorated so rapidly since the mid-1960s?" In answering this question, Wilson restates the views expressed in his book *The Declining Significance of Race* by rejecting the theory that contemporary racial discrimination is primarily responsible for the desperate plight of the urban underclass. Instead, he points to such factors as historic discrimination, the population explosion of young minorities in crowded ghetto neighborhoods, and the unavailability of manufacturing jobs due to their relocation out of the central cities (pp. 142–57). Although Wilson suggests that the current cessation of black migration to the cities may soon improve the economic situation of urban blacks, he nonetheless recommends huge increases in public spending designed to create jobs in the ghettoes. Of course, given the present concern for reducing the federal budget deficit, such a solution is politically unattainable.

In fact, the essays generally provide few solutions to the problems created by the new urban reality, even though Part Three of the book is entitled "The Policy Response." For ex-

ample, Kasarda cites the inability of the urban poor to commute to manufacturing jobs outside the cities as a major reason for the appalling growth in urban unemployment and welfare dependency. No solution is offered, however, to help the urban poor travel economically to those jobs.

Similarly, Herbert Jacob's essay, "Policy Responses to Crime," tells us that the crime rate is a national phenomenon beyond the control of local government policy but fails to offer any new approaches to this admittedly complex problem. Although Jacob provides a good historical description of the ways cities have responded to increases in their crime rates, he merely recites the hackneyed idea that local communities must undertake certain private initiatives to ensure their own security. These initiatives include not only the expansion of private police forces but also an increased willingness among people to "keep an eye on their neighbors' houses" and to "stay out of neighborhoods where they do not 'belong'" (p. 252).

This failure to offer a set of substantive policy responses to the problems currently plaguing America's cities is perhaps *The New Urban Reality*'s greatest weakness. Although it admirably outlines these problems, it offers few solutions. Consequently, *The New Urban Reality* is useful for the lay reader seeking somehow to articulate the conditions defining his own urban environment. For the urban policymaker, however, it merely restates the perplexing questions with which he is all too familiar.

—*Dennis C. Shea*

ESTRANGEMENT: AMERICA AND THE WORLD. Edited by *Sanford J. Ungar*. New York: Oxford University Press, 1985. Pp. 305, notes, chronology, index. $19.95 cloth.

The American foreign policy debate of the Reagan years has focused largely on two competing paradigms. The first views American foreign policy failures in recent years as directly attributable to a decline in American will, a phenomenon popularly known as the post-Vietnam syndrome. The classic expression of this thesis may be found in Jeane Kirkpatrick's 1979 article, "Dictatorships and Double Standards,"[1] which brought

[1] Kirkpatrick, *Dictatorships and Double Standards*, COMMENTARY, Nov. 1979, at 34.

her to the attention of then-presidential candidate Ronald Reagan. Kirkpatrick, in criticizing President Carter's supposed abandonment of the Shah of Iran, lamented that "where once upon a time an American president might have sent Marines to assure the protection of American strategic interests, there is no room for force in this world of progress and self-determination."[2]

The problem with Kirkpatrick's critique lies not only with her cynical dismissal of the aforementioned values, but also with her casual assumption that the use of force would have *assured* the protection of American interests. Thus, the second paradigm views American foreign policy dilemmas as largely stemming from the refusal of U.S. policy makers to acknowledge and adjust to America's new role in a rapidly changing world. Sanford Ungar succinctly expresses this second paradigm in his introductory essay to *Estrangement*. "What America must do now is uniquely complex and difficult: It must rethink its role in the world and it must begin by recognizing that old myths of invulnerability and invincibility are no longer sustainable" (p. 23).

The twelve essays in *Estrangement* use this second paradigm as a framework for analyzing America's position in the world. Thus, *Estrangement* begins with the proposition that the U.S. finds itself aloof and isolated from much of the world not because of a "decline of American will," but because of the world's postwar recovery and "its evolution into a seemingly less congenial place for America" (p. 23). The authors, a distinguished group of scholars, diplomats, and journalists whose essays were commissioned for the seventy-fifth anniversary of the Carnegie Endowment for International Peace, attempt to identify and examine the various forces that have led to America's current state of estrangement.

The book's description of this estrangement may be analyzed in terms of three broad, interrelated themes: relations between the U.S., the Third World and its allies; the conflict between the U.S. and the Soviet Union; and the nature of the American people themselves. In developing the first theme, Donald McHenry argues that U.S. policy makers, during the postwar phase of rapid decolonization, pleased no one by continually wavering between support for traditional allies and affirmation

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[2] *Id.* at 35.

of principles of self-determination. Americans have still not developed a "durable, sophisticated understanding of nationalism" (p. 91) and, as a result, the U.S. finds itself increasingly isolated and beleaguered in the United Nations and other multilateral diplomatic arenas. Ali Mazrui notes the fundamental asymmetry between America's willingness to loudly proclaim the superiority of Western lifestyles, capitalism, and democracy, and its unwillingness or inability to understand the needs and aspirations of the Third World. Finally, Lester Thurow argues that the U.S., in reaction to its increasing economic vulnerability, has veered towards a short-sighted protectionist policy which has estranged the U.S. from its allies and lessened its ability to play a managing role within the alliance.

*Estrangement* depicts U.S.-Soviet relations as a series of misunderstandings, mutual suspicions, and lost opportunities. The potential for U.S.-Soviet cooperation in the immediate postwar years is probably overstated here. The author (Robert Dallek) suggests that if Truman had been less bellicose, "it is conceivable that Moscow would have responded in kind" (p. 45). Yet, he also admits that "the Soviets tended to read sincere overtures as signs of weakness or deviousness" (p. 49). The book argues that an undue preoccupation with the Soviet threat has damaged U.S. relations with the Third World by causing the U.S. to be less tolerant of ideological diversity. Similarly, this preoccupation has led the U.S. to bicker with its allies over the appropriate level of military spending and the use of economic sanctions. *Estrangement* suggests that superpower tensions can be reduced through more well-defined and realistic regional understandings and a reduction in the nuclear arms race.

*Estrangement* bogs down somewhat when it attempts to explain U.S. behavior abroad through a single, unifying vision. Philip Geyelin argues that the U.S. historically has been disinclined to intervene abroad. In necessarily explaining away countless global U.S. military excursions, however, his theory loses its credibility and cohesiveness. Frances Fitzgerald, on the other hand, describes a dogmatic and expansionist U.S. foreign policy which is the result of a nineteenth-century evangelical zeal. Although both theories provide some valuable insights, neither provides a complete explanation of U.S. behavior.

James Chace comes closer to the mark when he describes U.S. foreign policy as plagued by an "exaggerated sense of

vulnerability" (p. 228). This futile search for invulnerability has sometimes led to foolish military interventions due to a failure to distinguish between vital and general interests (p. 247). Chace, making a crucial distinction, therefore views U.S. foreign policy as interventionist rather than isolationist or expansionist.

Many of the arguments advanced in *Estrangement*'s critique of traditional U.S. foreign policy decisionmaking are familiar ones that have been made before. The book is an important one, however, because it presents these themes in a comprehensive and convincing manner. *Estrangement* does not purport to offer a prescriptive vision of an ideal foreign policy. Rather, it makes a valuable contribution to the foreign policy debate by eloquently appealing for a humanistic policy that recognizes the sometimes painful and confusing realities of a world where America is no longer predominant.

—*Christopher T. Shaheen*

EDUCATION ON TRIAL: STRATEGIES FOR THE FUTURE. Edited by *William J. Johnston*. San Francisco, Cal.: Institute for Contemporary Studies Press, 1985. Pp. xiii, 326, appendices, notes, contributors. $12.95 paper.

Reform movements seem perenially a part of the American educational scene. Leaders of the Progressive era, for example, advocated curriculum reforms which would instill "American" values in young immigrants. The launching of Sputnik in 1958 precipitated major revisions of science and math curricula. More recently, the "back to basics" movement has prompted reforms at state and local levels. The release in March 1986 of the Department of Education report, "What Works: Research About Teaching and Learning," will probably provoke more criticism and debate.[1]

*Education on Trial: Strategies for the Future* aspires both to "examine progress in efforts to implement reforms" and to "step back and reexamine the essential problem" (p. xi). Almost two dozen experts—theoreticians as well as practitioners—contributed essays covering education from kindergarten through professional school. The essays cover topics ranging from

[1] *See* N.Y. Times, Mar. 1, 1985, at 1, col. 7.

"Building Effective Elementary Schools" (pp. 53–65) to "Electronic Technologies and the Learning Process" (pp. 231–46). The result is a work which mirrors public confusion over what the purpose of education should be, but which provides valuable insights for anyone interested in the reform movement. *Education on Trial*'s message is sobering: however one defines the problem of American education today, there is no quick fix available to solve that problem.

The contributors generally seem to agree on why public confidence in American education dipped to its current nadir. Several essays outline the chronology in broad strokes. The democratization of education in the 1940's and 1950's culminated in a call for equality of access to educational institutions in the 1960's. The pursuit of excellence and the emphasis on academic achievement in education became subordinated to permissive, freewheeling curricula grounded in a perceived need for "relevance" in education (pp. 12–16, 39–42, 79–84). Predictably, the loosening of academic standards produced students ill-prepared to cope with an increasingly complex society. The pendulum has only recently begun the long swing back, as educators finally confront the tension between egalitarianism and excellence.

While the essayists seem to agree about how the current reform movement evolved, they present conflicting views about what direction the reform movement should take. The conflicts stem not only from how each expert defines the purpose of education, but also from his or her vantage point as theoretician or practitioner. For example, Ruth Love, a former superintendent of the Chicago public school system, reviews current reforms in public education on local, state, and federal levels; her report examines facts and figures (pp. 37–49). In contrast, Madeline Hunter, a professor of education specializing in "translating psychological theory into educational practice" (p. 350), describes model standards promulgated by the National Association of Elementary School Principals. In contrast to Love's concrete approach, Hunter writes on a more abstract level, stressing the need for a curriculum "provid[ing] knowledge of physical self" which would emphasize features that make "an individual proactive rather than merely reactive to his physiological self" (p. 61).

It is difficult to come away from the book with a comprehensive understanding of opposing points of view on any particular issue in the reform debate. Even so, the essays in these sections

impress one with the need to unify educational philosophy from elementary through post-secondary levels—whatever that philosophy may be. The essays also indicate how necessary it is in modern society to provide for some sort of bridge between school and the "real world," as exemplified by the private business sector's involvement in "Adopt-A-School" programs (pp. 74–75).

Several essays refer to the importance of increasing teachers' salaries and recruiting qualified personnel. In addition, *Education on Trial* includes a helpful essay about flaws in teacher training—in schools of education as well as on the job (pp. 177–97). This essay proposes a training program which would better ensure that teachers know *how* to teach (pp. 182–87), and a graduated career structure based on a civil service model which would reward experience as well as excellence (pp. 193–95). Regrettably, the authors of this essay fail to grapple with the political obstacles that their proposals would surely encounter.

*Education on Trial* also provides information on current legislative reforms. The information is scattered throughout the essays, as well as in an appendix describing a sample of state educational reforms adopted since 1983. The book's real strength as a legislative review, however, lies in its "case study" of Senate Bill 813, the bold California response to the current education reform movement. First, Bill Honig, the California State Superintendent of Public Instruction during the bill's passage, reviews the components of the legislation, which included common curriculum standards for the state and provisions for measurable goals in student performance (pp. 125–39).

Following up on Honig's analysis, James Likens, Professor of Economics at Pomona College, traces the shift in education in California from "equity to excellence" (pp. 143–46), and realistically appraises the probable effects of Senate Bill 813 and related educational reforms. Likens argues that the reform movement ignores some important aspects of education in California. For example, requiring "all high school teachers to take a course of study that has been successful for middle class Anglos [and] Asians" (p. 154) might not make much sense in a state with a growing minority population; the minorities often speak little English and come from varied socioeconomic backgrounds (pp. 152–54). The contrast between legislative "theory" and "practice" in these essays flags many of the obstacles that

educational reformers in other states should note when lobbying for similar legislative reforms.

*Education on Trial* enriches not only the current debate about the nuts and bolts of specific reforms, but also the broader debate about the purpose of education. Giving our educational system a sense of purpose does not require a rigid, lock step curriculum that ignores regional and individual differences. It does, however, require agreement about whether our schools should develop academic skills (such as English and math), more broadly defined attitudes and abilities (such as good citizenship or a healthy psyche), or some combination of both. As the disagreements among the essayists reveal, we cannot develop any sort of coherent educational vision without confronting the implicit tensions between equality and excellence—tensions which our pluralistic society complicates even further.

*—Lauren B. Sandler*

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