HARVARD JOURNAL
on
LEGISLATION

VOLUME 26, NUMBER 1 WINTER 1989

ARTICLES

NOTES

STATUTE

BOOK REVIEW

HARVARD JOURNAL ON LEGISLATION
Harvard Law School
Cambridge, MA 02138

Phone: (617) 495-4400

The HARVARD JOURNAL ON LEGISLATION (ISSN 0017-808x) is published twice each year (winter and summer) by Harvard Law School students. Third-class postage paid at Boston, Massachusetts, and at additional mailing offices.

Publication Policy

The JOURNAL specializes in the analysis of legislation and the legislative process. It focuses on legislative reform and on organizational and procedural factors that affect the efficiency and effectiveness of legislative decisionmaking. The JOURNAL is especially interested in publishing articles that examine a public policy problem of nationwide significance and propose legislation to resolve it.

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The JOURNAL's subscription rate for the 1989 volume (Volume 26) is $20.00 domestic rate; $23.00 foreign surface rate; $35.00 foreign air mail. All correspondence concerning subscriptions should be addressed to the Subscriptions Manager, Publications Center, Harvard Law School, Cambridge, MA 02138.

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Indexes

Starting with Volume 23, the JOURNAL discontinued publication of volume-by-volume and five-year cumulative indexes. The JOURNAL is indexed in the *Index to Legal Periodicals*.

Faculty Advisor

STEVEN STARK

ARTICLE
DOUBLE INCHOATE CRIMES*

IRA P. ROBBINS**

American criminal law treats the inchoate crimes of attempt, conspiracy, and solicitation as substantive offenses punishable by criminal sanctions. The legal system criminalizes the types of behavior that constitute these offenses to intervene before an actor completes the intended illegal act. Some jurisdictions now recognize the concept of double *inchoate crimes, punishing inchoate offenses that are the immediate objects of other inchoate offenses.*

In this Article, Professor Robbins examines the concept of double inchoate crimes, first by tracing the evolution of inchoate offenses and then by reviewing the judicial development of double inchoate crimes. Arguing that double inchoate crimes are needed to fill gaps and criminalize behaviors not covered by exisiting statutes, the Article then examines the case law upholding double inchoate constructions. The Article goes on to evaluate cases that reject and criticize this concept and advocates a policy-based approach. Finally, Professor Robbins recommends retaining certain double inchoate crimes, proposes model statutes for inchoate offenses, and urges a certain degree of judicial discretion in using these constructions.

Contents

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> The refinement and metaphysical acumen that can see a tangible idea in the words an attempt to attempt to act is too great for practical use. It is like conceiving of the beginning of eternity or the starting place of infinity.[1]
>
> Perhaps philosophers or metaphysicians can intend to attempt to act, but ordinary people intend to act, not to attempt to act.[2]

INTRODUCTION

The inchoate crimes[3] of attempt, conspiracy, and solicitation are well established in the American legal system. "Inchoate" offenses allow punishment of an actor even though he has not consummated the crime that is the object of his efforts.[4] Indeed, the main purpose of punishing inchoate crimes is to allow the judicial system to intervene before an actor completes the object crime.[5]

Most American jurisdictions treat inchoate offenses as substantive crimes,[6] distinct and divorced from the completed crimes toward which they tend. Accordingly, attempt, conspiracy, and solicitation are defined broadly to encompass acts lead-

[1] Wilson v. State, 53 Ga. 205, 206 (1874).

[2] Allen v. People, 175 Colo. 113, 117, 485 P.2d 886, 888 (1971).

[3] For purposes of this Article, an "inchoate" crime is a prohibited act performed in anticipation of committing a "completed" crime. A "completed" crime is an act that itself achieves a harmful consequence prohibited by statute. Murder is the prime example of a completed crime, in that the prohibited act results in the intended harmful consequence, rather than in a realization of a stage of preparation in anticipation of another harmful consequence.

[4] Failure to consummate the ultimate crime, however, is not essential to conviction for an inchoate offense. In most jurisdictions, no rule of merger exists for conspiracy and several states allow prosecution for an attempted crime even when the defendant has realized the ultimate crime. *See infra* notes 102–103 and accompanying text (conspiracy cases); *infra* notes 30–31 and accompanying text (attempt statutes).

[5] This is the main premise of the Model Penal Code's provisions for inchoate offenses. *See* MODEL PENAL CODE art. 5 commentary at 294 (Proposed Official Draft 1985).

For purposes of this Article, an "object" or "target" crime is an offense to which an inchoate or anticipatory crime relates. An inchoate crime must have another crime as its object.

[6] For purposes of this Article, a "substantive" crime is one that is defined by statute or common law to prohibit a specific act or category of acts. Thus, the term "substantive" clearly encompasses completed crimes, such as murder. The broad application of inchoate offenses, however, makes it unclear whether they are substantive crimes or instead are general doctrinal categories that give courts discretion to extend criminal liability to acts that tend toward completed offenses.

The latter position suggests that crimes in the nature of attempt, although they are applicable to a narrower category of acts than attempt, are not substantive crimes. One can argue that assault is not a substantive offense when it is defined as an attempt to commit a battery. Similarly, burglary can be viewed as a species of attempt limited by the means (illegal entry) and setting (an enclosed structure). In addition, possession offenses, although narrowly defined, punish acts preparatory to traditional completed offenses.

ing to the commission of any completed crime. Rather than try to enumerate every act to which inchoate liability attaches, however, legislatures have enacted relatively short statutes containing abstract conceptual terms with universal application. The Model Penal Code's provision for attempt liability, for example, represents a middle-ground approach to this problem. It prohibits an act that constitutes a "substantial step" toward the completed offense. The Code then fleshes out the abstract term "substantial step" by listing several nonexclusive examples that have application to numerous completed crimes.[7] It has fallen to the courts to elaborate on the scope of inchoate offenses and decide when to administer them.

Thus, the concept of substantive inchoate crimes, by requiring a high degree of judicial interpretation, has vested great discretion in the judiciary. This discretion is similar to that of earlier courts in creating common-law offenses. In both circumstances, the court analyzes the policies underlying the criminal law and decides whether those policies require courts to punish certain acts.

My thesis is that, in inchoate offenses, courts should adopt a two-part analysis, asking: (1) whether the policy of the criminal law indicates that an individual's acts are sufficiently dangerous to society to warrant judicial intervention and punishment; and (2) whether the definition of attempt, conspiracy, or solicitation allows a court to punish those acts. The development of inchoate offenses in different jurisdictions has often resulted in a divergence in the answers to these two queries.

To punish a dangerous act not covered by established inchoate concepts, courts have two options. First, they may ignore precedent, extend statutory language, and change the definitions of concepts contained in inchoate offenses. For example, *A* decides to kill *B*, but wants the aid of another. *A* approaches *C* to ask him to help in the murder. *C* feigns agreement, and later informs the police.

The government indicts *A* for conspiracy to commit murder. The prosecution's success depends on how the court, within the guidelines set by the jurisdiction's conspiracy statute, defines the central term "agreement." Does it require that both parties intend to commit the object crime of murder, or that only one

Nevertheless, every American jurisdiction treats burglary, possession offenses, and at least some forms of assault as substantive crimes. Indeed, the prevalent view is that attempt, conspiracy, and solicitation are substantive offenses in that they proscribe a specific category of acts.

[7] MODEL PENAL CODE § 5.01 (Proposed Official Draft 1985).

act with such intent? In many American jurisdictions, the indictment for conspiracy would fail because there was no agreement. Nevertheless, most commentators agree that criminal liability should attach to *A*'s actions.

The second option, however, is that the court could allow the prosecutor to bring an indictment for the double inchoate crime of attempt to conspire to commit murder. Over the past century and a quarter, prosecutors have brought indictments making an inchoate offense the immediate object of another inchoate offense, with a completed crime as the ultimate object. This approach allows courts to extend liability to actions such as those of *A*, above, without distorting the concepts inherent in established inchoate offenses. But the courts faced with such indictments have divided over the validity of double inchoate offenses.[8]

Judicial inquiry into the validity of double inchoate offenses has focused on the question of whether an inchoate offense can have as its object another inchoate offense.[9] Treating attempt, conspiracy, and solicitation as the general inchoate offenses,

[8] The issue to be discussed in this Article—the validity of double inchoate offenses—must be distinguished from the issue of the validity of multiple convictions for discrete inchoate crimes that are designed to culminate in the same offense. Double inchoate offenses are characterized by the use of two inchoate offenses within a single count of an indictment. Prosecutors generally use double inchoate constructions, such as attempt to attempt and attempt to conspire, to circumvent the normal proximity requirements of inchoate offenses. At present, only three states explicitly prohibit by statute the use of such constructions. *See infra* note 153.

By contrast, the term "multiple convictions for inchoate crimes" refers to convictions for two or more inchoate crimes arising out of the same course of conduct toward a single substantive offense.

For example, *A* conspires with *B* to kill *C*. *B*, the hit man, is apprehended just as he is about to detonate a bomb that he has planted in *C*'s car, which *C* is driving. The prosecutor brings charges against *B* for both the attempt to commit murder and the conspiracy to murder.

Another example: *A* solicits *B* to kill *A*'s wife. *B* refuses, so *A* solicits *C* to perform the same crime. Is *A* guilty of two counts of solicitation or only one? Many American jurisdictions prohibit conviction for more than one statutory inchoate crime for conduct designed to culminate in the same completed offense. *See, e.g.*, ALASKA STAT. § 11.31.140(b) (1983); HAW. REV. STAT. § 705-531 (1985); IND. CODE ANN. § 35-41-5-3(a) (West 1986); KY. REV. STAT. ANN. § 506.110(3) (Baldwin 1984); 18 PA. CONS. STAT. ANN. § 906 (Purdon 1983 & Cum. Supp. 1987); *see also* MODEL PENAL CODE § 5.05(3) (Proposed Official Draft 1985): "A person may not be convicted of more than one offense defined by [Model Penal Code art. 5, defining all inchoate offenses] for conduct designed to commit or to culminate in the commission of the same crime." *Id.* For a more extended discussion of limitations on indictments for multiple offenses and the distinction between double inchoate crimes and multiple convictions for inchoate crimes, see generally 1 P. ROBINSON, CRIMINAL LAW DEFENSES § 84(c) (1984).

[9] In addition, courts have questioned whether they have the authority to create double inchoate crimes. This argument suggests that double inchoate crimes are analogous to ex post facto laws or, more aptly, common-law conspiracy, which allowed courts the discretion to convict a party for committing a lawful act by unlawful means. Modern conspiracy statutes limit this discretion by making only criminal acts the proper objects of conspiracy. *See infra* notes 100, 110 and accompanying text.

this inquiry can extend to attempts to attempt, attempts to conspire, attempts to solicit, conspiracies to attempt, conspiracies to conspire, conspiracies to solicit, solicitations to attempt, solicitations to conspire, and solicitations to solicit. Analysis of the issue has arisen most frequently, however, with respect to three of these constructions—attempt to attempt, attempt to conspire, and conspiracy to attempt.

By surveying and analyzing the case law regarding these three constructions, this Article seeks both to establish the proper approach for assessing the validity of double inchoate offenses and to delineate the limits of judicial discretion to "create" such crimes. This Article argues that, although some double inchoate crimes are unnecessary, others do serve important purposes of the criminal law. This approach presupposes that the proper criterion for deciding the validity of double inchoate constructions is the need to fill gaps in the definitions of single inchoate crimes. To the extent that single inchoate crime statutes are refined, therefore, the need for judicially created inchoate crimes will diminish.

In Part I, the Article considers the crimes of attempt, conspiracy, and solicitation, and discusses certain crimes in the nature of attempt, such as assault, burglary, and possessory offenses. Part II surveys and analyzes the case law upholding double inchoate constructions. This section elaborates on the rationales provided by the courts—as well as those not explicitly stated—for use of these constructions. Part III examines the case law that rejects and criticizes reliance on double inchoate constructions. This section also compares the analytical approaches used by courts to examine critically double inchoate formulations and concludes that a policy-based approach is the most appropriate. Part IV applies this policy-based analysis to determine which inchoate constructions are necessary to the effective functioning of the criminal law. This section also delineates the limits of judicial discretion by formulating model statutes for inchoate offenses. The Article concludes, however, that a degree of judicial discretion is necessary to ensure that liability attaches to those actions that, in tending toward completed crimes, pose a significant danger to society.

I. The Concept of Inchoate Crimes

Inchoate—or anticipatory or relational—crimes allow the judicial system to impose criminal liability on conduct designed

to culminate in the commission of a substantive offense.[10] The inchoate offenses of attempt and solicitation, for example, provide the legal basis for courts to punish the actor who has performed every act necessary to effect his criminal design, but has failed to achieve the prohibited result due to an intervening fortuity.[11] More importantly, however, attempt and other inchoate offenses allow law-enforcement officials to prevent the consummation of substantive offenses by permitting intervention once an individual's actions, though not criminal in themselves, have sufficiently manifested an intent to commit a criminal act.[12]

Like a completed offense, an inchoate offense requires both a mens rea and an actus reus.[13] Unlike the actus reus in a completed offense, however, the proscribed act in an anticipatory crime is not prohibited because of its harmful effect, but because it demonstrates a firm purpose on the part of an indi-

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[10] MODEL PENAL CODE art. 5 commentary at 293 (Proposed Official Draft 1985). The Code's drafters suggest that inchoate crimes all share the characteristic that the conduct they make criminal "is designed to culminate in the commission of a substantive offense, but has failed in the discrete case to do so or has not yet achieved its culmination because there is something that the actor or another still must do." *Id.* This basic rule, however, does not apply wholly to conspiracy. Because conspiracy is designed not only as an inchoate crime but also as a means of punishing illegal group activity, the completion of a substantive offense generally does not preclude conviction for both the completed offense and the conspiracy. *See infra* notes 102–103 and accompanying text.

Because inchoate crimes are defined not only as discrete substantive offenses but also in terms of the ultimate offenses at which they aim or to which they relate, they are also called "relational" crimes. *E.g.*, J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 575 (2d ed. 1960).

[11] MODEL PENAL CODE art. 5 commentary at 294 (Proposed Official Draft 1985); *see also* W. LAFAVE & A. SCOTT, CRIMINAL LAW 498–99 (2d ed. 1986) (noting that the original purpose behind punishing attempts was to prevent crime). *See generally* Robbins, *Attempting the Impossible: The Emerging Consensus*, 23 HARV. J. ON LEGIS. 377, *passim* (1986).

[12] MODEL PENAL CODE art. 5 commentary at 294 (Proposed Official Draft 1985); GREAT BRITAIN LAW COMMISSION, INCHOATE OFFENSES: CONSPIRACY, ATTEMPT AND INCITEMENT ¶ 73 (Working Paper No. 50, 1973); *see also* Meehan, *Attempt—Some Rational Thoughts on its Rationale*, 19 CRIM. L.Q. 215 (1977).

> The law of attempt permits the authorities to intervene before the crime is consummated. The English Law Commission urges extensions of the law by arguing that "one of the main reasons for a law of attempt is to allow the authorities to intervene at a sufficiently early stage to prevent a real danger of the substantial offence being committed . . . ." The distinguishing factor here, as with impossible attempts, is that no actual harm is prevented by intervention on the part of the authorities, for by definition, it was impossible to achieve the harm intended. Nevertheless, *potential* harm can be prevented, as the person's dangerousness has been manifested—the unsuccessful poisoner who uses sugar may next hit with rat poison.

Id. at 236 (emphasis in original; footnote omitted). For further discussion of the predictive and preventive capacities of attempt liability, see *infra* notes 32–36 and accompanying text.

[13] *See* R. PERKINS & R. BOYCE, CRIMINAL LAW 605 (3d ed. 1982).

vidual to act in furtherance of a criminal intent.[14] The mens rea for inchoate crimes, therefore, is the specific intent to commit a particular completed offense, or target or object crime.[15] A central premise of Anglo-American criminal jurisprudence is that a court may not punish a bad intent that is not accompanied by a bad act.[16] Nevertheless, inchoate crimes focus on the mens

[14] The term "harmful" in this statement refers to actual harm to person or property. Most legal commentators, however, use the term in a broader context to refer to an increase in the potential risk to these legally protected interests. *See, e.g.*, Meehan, *supra* note 12, at 237–39 (arguing that a person who creates risk causes harm even if the intended consequences do not occur); *see also* Robbins, *supra* note 11, at 383–419 (discussing objective and subjective harm in attempt crimes).

For purposes of this Article, the term "harmful" is a concept of harm independent of particular laws defining crimes and specifying punishments. The terms "harm" or "ultimate harm" describe the kind of damage or injury to a legally protected interest that is ordinarily compensable in a civil action. This concept of harm includes not only damages or injury to a specific individual, but also injury to the interests of the collectivity—*e.g.*, failure to pay taxes, pollution of the environment, or some other verifiable social disutility.

The term "statutory harm" refers to any consequence of conduct constituting a necessary element of a specific offense as defined by law. Although ultimate and statutory harms may overlap, as with the death necessary to a murder, some consequences that are proscribed by the criminal law fall short of a meaningful injury to a legally protected interest. For example, the criminal law attributes significance to the act of agreement in a conspiracy and the act of breaking and entering in a burglary, although the consequences of either act alone are not sufficiently important to be considered an ultimate harm. The ultimate harm that is associated with conspiracy and burglary is the intent to commit some other crime.

Furthermore, not all crimes have a statutory harm. For example, criminal attempt is defined as a certain kind of conduct, without regard to its actual consequences, and the offense does not require proof that a particular harm actually occurred. *See* Schulhofer, *Harm and Punishment: A Critique of Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497, 1505–06 (1974). *But see* J. HALL, *supra* note 10, at 219–20 (suggesting that inchoate crimes cause ultimate and statutory or potential harm in that the proscribed conduct impairs the quality of daily life by increasing apprehension in the community and creating a higher probability of actual injury to members of the community).

[15] As used here, the term "specific intent" refers to a special mental element required above and beyond any required to commit the actus reus of the specific inchoate offense. For inchoate crimes, that special mental element is an intent to effect the consequences or ultimate harm that is proscribed by the completed object crime, even if the object crime requires no such intent. *See, e.g.*, W. LAFAVE & A. SCOTT, *supra* note 11, at 224–25. For example, although an actor may commit murder without an intent to kill, he cannot normally commit attempted murder without such an intent. Merritt v. Commonwealth, 164 Va. 653, 660, 180 S.E. 395, 398 (1935).

[16] Most crimes that the law punishes are individual or social harms. This emphasis on the results of conduct necessarily requires some kind of act as a basis for penal sanction. Although the intent behind conduct takes on legal significance when that conduct results in certain proscribed consequences, criminal intent that remains within the mind of the individual or manifests itself only in conversation causes no demonstrable social harm.

Furthermore, common experience indicates that nearly everyone entertains some criminal intent during his lifetime. A criminal-justice system that punishes only those who allow such thoughts to rule their conduct is both more fair and more efficient than one that punishes individuals who are either careless or foolish enough to speak of intentions on which they may never act. R. PERKINS & R. BOYCE, *supra* note 13, at 605; *see* G. WILLIAMS, CRIMINAL LAW: THE GENERAL PART 2, 33 (2d ed. 1961).

rea and render ancillary the actus reus to realize the predictive and preventive purposes of the criminal law.[17]

The three main formulations of inchoate liability are attempt, conspiracy, and solicitation. The treatment of these concepts as substantive offenses, distinct from the completed offenses that are their objects, is of comparatively late origin. Each of the three had its beginning in the authority of common-law courts to create offenses.[18] Despite the independent origins and development of the three offenses, conspiracy and solicitation can be viewed as early stages of an attempt to commit a completed offense.[19] Further, specific substantive crimes such as assault and burglary have inchoate aspects and can therefore be viewed as crimes in the nature of attempt.[20]

A. *Attempt*

Although the law of attempt has roots in the early English law,[21] its formulation as a general substantive offense is a rela-

[17] In inchoate offenses, the proscribed conduct is ancillary to the mens rea, in the sense that it only serves to determine the likelihood that the actor would have done everything necessary to realize his criminal intent. It is not ancillary, however, in the sense that most jurisdictions punish conduct that fails to culminate in a particular crime less severely than successful conduct, even though the intent informing both is identical. Emphasis on actual harm in determining the degree of penal sanction is a vestige of the criminal law's early role as an instrument of official retribution. Actual damage or injury was once a prerequisite to the existence of a crime. The doctrines of attempt, conspiracy, and solicitation have developed based on the theory that conduct that is proximate to an ultimate harm is itself a harm, albeit a lesser one. J. HALL, *supra* note 10, at 584; Schulhofer, *supra* note 14, at 1498–1501; *see* G. WILLIAMS, TEXTBOOK OF CRIMINAL LAW 404–06 (1983) (stating that comparative leniency for attempt reflects a crude retaliation theory, in which the degree of punishment is a function of the amount of damage done rather than the intent of the actor).

[18] For a discussion of the historical origin of attempt, conspiracy, and solicitation, see *infra* notes 21–22 (attempt), 99 (conspiracy), 126 (solicitation) and accompanying text.

[19] *See* Robbins, *Solicitation*, in ENCYCLOPEDIA OF CRIME AND JUSTICE 1502, 1505 (S. Kadish *et al.* eds. 1983) (conceptualizing conspiracy and solicitation as steps in the direction of crime on a continuum of preparatory acts, rather than as distinct crimes).

[20] W. LAFAVE & A. SCOTT, *supra* note 11, at 497.

[21] Although the early English law only punished conduct that resulted in actual harm, in rare instances several fourteenth-century courts convicted individuals of certain heinous felonies even though they had only unsuccessfully attempted to commit those felonies. These solitary convictions rested on the doctrine of *voluntas reputabitur pro facto*—the intention is to be taken for the deed. It is apparent from the reports, however, that these courts did not penalize intent alone. Rather, the defendant must have manifested his intent by some deed tending toward the execution of the completed felony. J. HALL, *supra* note 10, at 560–65; W. LAFAVE & A. SCOTT, *supra* note 11, at 495–96; Sayre, *Criminal Attempts*, 41 HARV. L. REV. 821, 822–27 (1928).

The sixteenth-century Court of the Star Chamber, instituted partly to correct the defects of the common-law courts, entertained cases involving conduct now categorized as attempt as part of a trend of dealing with antisocial conduct theretofore unrecognized

tively recent development.[22] Generally, the elements of attempt are: (1) the intent to commit the completed crime; (2) the performance of some step, usually a substantial one, toward its commission; and (3) the failure to consummate the substantive crime.[23] Many American jurisdictions now make specific provisions for the punishment of attempts to commit certain offenses,[24] and almost all cover the rest of the field with a general attempt statute.[25] With few exceptions, these general statutes cover attempts to commit any felony or misdemeanor.[26]

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as criminal because of its lack of direct harm. J. HALL, *supra* note 10 at 563–67. In a prosecution, in 1615, Francis Bacon, the Attorney General, urged the Star Chamber to adopt a doctrine of criminal attempt. Bacon successfully argued that the court should punish as a high misdemeanor any combination or practice tending to a capital offense or felony, "though it took no effect." *Id.* at 568. Due to political abuses, the Star Chamber was abolished in 1640. Sayre, *supra*, at 828.

[22] *See* J. HALL, *supra* note 10, at 571–73; W. LAFAVE & A. SCOTT, *supra* note 11, at 495–96; Sayre, *supra* note 21, at 836. The modern doctrine of attempt has its origin in the case of Rex v. Scofield, Cald. Mag. Rep. 397 (1784). In *Scofield*, the court indicted the defendant on a charge of placing a lighted candle and combustible material on another's house with intent to set fire to it, even though the house did not burn. *Id.* at 400. Such conduct clearly would constitute an attempt to commit arson in modern law. Prior to *Scofield*, however, the courts imposed attempt liability only for two categories of offenses: attempted treason and attempts to subvert justice, such as subornation of perjury and attempted bribery of the King's officials. Sayre, *supra* note 21, at 834–35.

The court in *Scofield* established the premises that a criminal intent may make criminal an act that was otherwise innocent in itself, and, conversely, that the completion of an act, criminal in itself, was not necessary to constitute a crime. *Scofield*, Cald. Mag. Rep. at 400.

Rex v. Higgins, 102 Eng. Rep. 269 (1801), extended the decision in *Scofield*. In *Higgins*, the authorities indicted the defendant for soliciting a servant to steal his master's goods. There was no allegation or proof that the servant acted on the solicitation. The court ruled that it could indict a person for any act or attempt that tended "to the prejudice of the community." *Id.* at 275; *see* Robbins, *supra* note 19, at 1503.

[23] *See* People v. Miller, 2 Cal. 2d 527, 530, 42 P.2d 308, 309 (1935); State v. Bereman, 177 Kan. 141, 142, 276 P.2d 364, 365 (1954); State v. Patrick, 545 S.W.2d 686, 687 (Mo. Ct. App. 1976).

[24] *See, e.g.*, CAL. PENAL CODE §§ 347 (attempt to murder by administering poison), 218 (attempted train wrecking), 455 (attempted arson) (West 1988); IOWA CODE ANN. §§ 707.11 (attempt to commit murder), 713.2 (attempted burglary) (West 1979 & Cum. Supp. 1988); MD. ANN. CODE art. 27, §§ 10 (attempt to burn building or property), 290 (attempt to manufacture, distribute or possess controlled substance) (1982); VT. STAT. ANN. tit. 13, §§ 509 (attempted arson), 2307 (attempted murder), 3434 (attempted sabotage) (1974 & Cum. Supp. 1988); W. VA. CODE §§ 61-2-7 (attempt to kill or injure by poisoning), 61-3-4 (attempted arson) (1984).

[25] FLA. STAT. ANN. § 777.04(1) (West 1976 & Cum. Supp. 1987); MICH. COMP. LAWS ANN. § 750.92 (West 1968); N.J. STAT. ANN. § 2C:5-1 (West 1982); N.Y. PENAL LAW §§ 110.00 to -.10 (McKinney 1987); WASH. REV. CODE ANN. § 9A.28.020 (Cum. Supp. 1987). *See generally* Robbins, *supra* note 11, at 419–42 (discussing attempt statutes in the context of the defense of impossibility).

[26] CONN. GEN. STAT. ANN. § 53a-51 (West 1985); D.C. CODE ANN. § 22-103 (1981); MO. REV. STAT. § 564.011 (1986); TEX. PENAL CODE ANN. § 15.01 (Vernon Cum. Supp. 1988); UTAH CODE ANN. § 76-4-101 (1978); VT. CODE ANN. tit. 13, § 9 (1974); *cf.* N.M. STAT. ANN. § 30-28-1 (1984) (felonies only); TENN. CODE ANN. § 39-1-501 (1982) (felonies only).

Among modern American jurisdictions, some statutes provide that failure is an element of the offense.[27] Further, the rule of merger operates only to the extent that a defendant cannot be convicted of both a completed offense and an attempt to commit it.[28] All jurisdictions treat attempt as a lesser included offense of the completed crime.[29] Moreover, many jurisdictions have held that a defendant may be convicted of the attempt if the state proves the completed crime,[30] and several states so provide by statute.[31]

The distinction in attempt law between attempt and preparation reflects the notion that the act on which liability is based must sufficiently manifest criminal intent.[32] The standards de-

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[27] *See, e.g.*, MASS. ANN. LAWS ch. 274, § 6 (Law. Co-op. 1980); MICH. COMP. LAWS ANN. § 750.92 (West 1968); NEV. REV. STAT. § 193.330 (1985); N.M. STAT. ANN. § 30-28-1 (1988); W. VA. CODE § 61-11-8 (1984).

[28] *See, e.g.*, GA. CODE ANN. § 16-4-2 (1988); ILL. ANN. STAT. ch. 38, para. 8-5 (Smith-Hurd 1972); OKLA. STAT. ANN. tit. 21, § 41 (West 1983); UTAH CODE ANN. § 76-4-302 (1978); WIS. STAT. ANN. § 939.72 (West 1982).

[29] *See, e.g.*, ALA. CODE § 13A-1-9(a)(2) (1985); ILL. ANN. STAT. ch. 38, para. 2-9 (Smith-Hurd 1972); ME. REV. STAT. ANN. tit. 17-A, § 152(3-A) (1983); MO. ANN. STAT. § 556.046 (Vernon 1979); OHIO REV. CODE ANN. § 2945.74 (Page 1987).

[30] *See, e.g.*, Guzik v. United States, 54 F.2d 618, 619 (7th Cir. 1931), *cert. denied*, 285 U.S. 545 (1932); State v. Shepard, 7 Conn. 54 (1828); Greenwood v. United States, 225 A.2d 878, 880 (D.C. 1967); Commonwealth v. Creadon, 162 Mass. 466, 467, 38 N.E. 1119, 1119 (1894); State v. Braathen, 77 N.D. 309, 316, 43 N.W.2d 202, 207 (1950).

[31] ARIZ. REV. STAT. ANN. § 13-110 (1978); COLO. REV. STAT. § 18-2-101(1) (1986); MONT. CODE ANN. § 45-4-103(5) (1983); OR. REV. STAT. § 161.485(1) (1985); TEX. PENAL CODE ANN. § 15.01(c) (Vernon 1974 & Cum. Supp. 1988).

Commentary to the Texas provision suggests its rationale:

> Subsection [(b)] expressly eliminates a defense that is raised, though rarely successfully, in attempt cases . . . . Subsection [(b)] conflicts with Subsection (a), however, which makes failure to complete the offense an element that the state must prove. There is no problem if the actor is convicted of attempt as a lesser included offense in a prosecution for the completed offense, . . . but in a prosecution for attempt alone, the conflict will pose problems in some cases.

Id. § 15.01(c) commentary at 516 (Vernon 1974 & Cum. Supp. 1988). In other words, this provision ensures that, in a case difficult to prove, the state can at least bring an indictment for attempt without concern that the defendant can clear himself by proving that he completed the object offense. *Contra* MISS. CODE ANN. § 97-1-9 (1972) (prohibiting conviction for attempt or assault with intent to commit crime if object offense was consummated).

[32] *See* Skilton, *The Requisite Act in a Criminal Attempt*, 3 U. PITT. L. REV. 308 (1937). The author argued that

> "Sufficient" is, of course, a weasel-word; but generalizations can hardly be more definite than that. Another way to put it is to say that this additional factor, which, combined with intent, makes the defendant guilty of attempt must be substantial, and not merely trivial, in character . . . . No more definite rule of law can be suggested, in determining the requisite magnitude of this additional factor, than to say that the defendant's conduct must pass that point where most men, holding such an intention as the defendant holds, would think better of their conduct and desist

veloped by courts and criminal-law experts to determine the sufficiency of an act for attempt liability reflect the developing rationales that are unique to anticipatory crimes.[33] The principal purpose behind punishing an attempt, unlike that of a completed crime, is not deterrence.[34] The threat posed by the sanction for an attempt is unlikely to deter a person willing to risk the penalty for the object crime.[35] Instead, the primary function of the crime of attempt is to provide a basis for law-enforcement officers to intervene before an individual can commit a completed offense.[36] A secondary function is to punish those who have carried out their criminal scheme but have failed to effect the harmful result due to the intervention of external physical circumstances, including on-the-spot prevention.[37]

Id. at 309–10; *see also* W. LAFAVE & A. SCOTT, *supra* note 11, at 504–09 (discussing distinction between "preparation" and "attempt").

Courts occasionally cloud the distinction between preparation and attempt by holding that preparatory acts satisfy attempt's actus reus requirement under certain circumstances. *Id.* at 431–32; *see* Bell v. State, 118 Ga. App. 291, 293, 163 S.E.2d 323, 325 (1968) (because the act was dangerous to people and property, proof that the actor brought dynamite to certain premises was sufficient to establish the crime of attempt to destroy those premises by dynamite).

[33] For a particularly cogent survey of the judicial tests that are used to distinguish preparation from attempt, see generally P. LOW, J. JEFFRIES & R. BONNIE, CRIMINAL LAW 131–37 (1986) [hereinafter LOW].

[34] MODEL PENAL CODE art. 5 commentary at 293–94 (Proposed Official Draft 1985). The commentary states:

> Since these offenses always presuppose a purpose to commit another crime, it is doubtful that the threat of punishment for their commission can significantly add to the deterrent efficacy of the sanction—which the actor by hypothesis ignores—that is threatened for the crime that is his objective. There may be cases where this does occur, as when the actor thinks the chance of apprehension low if he should succeed but high if he should fail in his attempt, or when reflection is promoted at an early stage that otherwise would be postponed until too late, which may be true in some conspiracies. These are, however, special situations. General deterrence is at most a minor function to be served in fashioning provisions of the penal law addressed to these inchoate crimes; that burden is discharged upon the whole by the law dealing with the substantive offenses.

Id.

[35] *Cf.* W. LAFAVE & A. SCOTT, *supra* note 11, at 499 (reasoning that the crime of attempt may provide an effective deterrent in those cases in which the actor believes that his chance of apprehension is low if he succeeds, but high if his attempt miscarries in some way).

[36] Ullman, *The Reason for Punishing Attempted Crimes*, 51 JURID. REV. 353, 363 (1939); W. LAFAVE & A. SCOTT, *supra* note 11, at 498–99. For a discussion of the various rationales behind attempt liability, see, *e.g.*, Meehan, *supra* note 12 (emphasizing the importance of attempt liability in predicting and preventing social danger).

For a discussion of balancing the danger to society with individual freedom in the context of a criminal law policy that aims at distinguishing dangerous offenders, see M. MOORE, S. ESTRICH, D. MCGILLIS & W. SPELMAN, DANGEROUS OFFENDERS: THE ELUSIVE TARGET OF JUSTICE (1984) [hereinafter DANGEROUS OFFENDERS].

[37] W. LAFAVE & A. SCOTT, *supra* note 11, at 499.

The first case to distinguish attempt and preparation, *Regina v. Eagleton*,[38] introduced a "last proximate act" standard for determining the actus reus of attempt.[39] Under this approach, an actor is not liable for attempt unless he has done all that he intends to do to accomplish the target crime.[40] For example, a would-be murderer commits the last proximate act when he shoots at his intended victim.[41] Courts since *Eagleton* uniformly have rejected the last-proximate-act standard in favor of standards that give police a margin of safety by allowing them to intervene after an actor's criminal intent becomes sufficiently apparent.[42]

The two basic standards developed since *Eagleton* reflect different rationales behind criminalizing attempt. The first, a "proximity" standard, focuses on the *dangerousness of the actor's conduct* and emphasizes what steps remain for him to take to complete the object crime.[43] The second, and more recent

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[38] 169 Eng. Rep. 826 (Crim. App. 1855).

[39] *Id.* at 836.

[40] LOW, *supra* note 33, at 132.

[41] *Id.*

[42] MODEL PENAL CODE § 5.01 commentary at 321 (Proposed Official Draft 1985).

[43] *Id.* at 321–26 (Proposed Official Draft 1985). The drafters of the Model Penal Code criticized this approach on the ground that it does not give law-enforcement authorities legal basis to intervene "until the actor ha[s] the power, or at least the apparent power, to complete the crime forthwith." *Id.* at 322. They argued that the vagueness of the standard provides little guidance in answering the question of how close is close enough for preventive arrest. *Id.*

The tests that have been developed under the proximity standard are premised on the notion that the primary purpose of the criminal law is to punish dangerous conduct. LOW, *supra* note 33, at 133. Courts employing proximity tests have suggested that punishment of the actor is only justified if preparatory conduct comes dangerously close to accomplishing the harmful result that is proscribed by the completed offense. *Id.* at 133–34.

The courts have developed three tests reflecting the proximity rationale: (1) the "physical proximity" test; (2) the "indispensable element" test; and (3) the "dangerous proximity" test. MODEL PENAL CODE § 5.01 commentary at 321–24 (Proposed Official Draft 1985); LOW, *supra* note 33, at 132–33. The physical-proximity test requires that the actor come "very near to the accomplishment of the crime." People v. Rizzo, 246 N.Y. 334, 338, 158 N.E. 888, 889 (1927); *see* State v. Dumas, 118 Minn. 77, 84, 136 N.W. 311, 314 (1912) (noting that the test requires "something more than mere preparation, remote from the time and place of the intended crime"). The test measures proximity in terms of necessary steps not taken, time, and geographical distance. MODEL PENAL CODE § 5.01 commentary at 321–22 (Proposed Official Draft 1985); LOW, *supra* note 33, at 132.

The indispensable-element test requires that the actor acquire control over every element that is indispensable to his criminal objective. *See* MODEL PENAL CODE § 5.01 commentary at 323–24 (Proposed Official Draft 1985); LOW, *supra* note 33, at 133. The rationale behind this test is that, until the defendant has gained control of those aspects of his criminal scheme that the court identifies as indispensable, he remains insufficiently proximate to success. W. LAFAVE & A. SCOTT, *supra* note 11, at 505. In cases in which the actor has failed to gain control of an indispensable element, the courts using this test have refused to find that he has committed an attempt. *See, e.g.*, People v. Orndorff,

development, an "equivocality" standard, focuses on the *dangerousness of the actor himself* and emphasizes what the actor has already done in imputing criminal intent to his actions.[44]

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261 Cal. App. 2d 212, 216, 67 Cal. Rptr. 824, 826 (1968) (defendant was not guilty of attempted theft by means of bunco scheme because the intended victim did not withdraw money from the bank); *In re* Scherman, 40 Kan. 533, 541–42, 20 P. 277, 282–83 (1889) (defendant was not guilty of attempting to defraud insurance company because the named beneficiary neither filed a false claim nor agreed to do so). Courts have employed this test most frequently in those cases that required that the defendant induce someone else to take certain action. LOW, *supra* note 33, at 133.

Some courts, however, have applied this test to cases in which the defendant could not undertake the object offense until he obtained some item. *See, e.g.*, United States v. Stephens, 12 F. 52, 56 (D. Or. 1882) (noting that an actor who intended to smuggle whiskey was not guilty of attempt because he failed to acquire whiskey); State v. Fielder, 210 Mo. 188, 201-02, 109 S.W. 580, 583 (1908) (actor who intended to vote illegally was not guilty of attempt because he failed to obtain a ballot).

The dangerous-proximity test, espoused by Justice Holmes, requires that analysis of an actor's nearness to completion of the offense be tempered by the gravity of the harm threatened, the degree of apprehension aroused, and the probability that the conduct would result in the intended offense. For Justice Holmes' exposition of this approach, see Hyde v. United States, 225 U.S. 347, 388 (1912) (Holmes, J., dissenting); Commonwealth v. Kennedy, 170 Mass. 18, 22, 48 N.E. 770, 771 (1897); O.W. HOLMES, THE COMMON LAW 68–69 (1881). Such an approach would allow courts to interpret the requirements of attempt more broadly in some offenses than in others. Although this approach has the benefit of allowing authorities to intervene earlier in schemes to commit serious offenses, its reliance on judicial discretion invites widely divergent results in drawing the line between attempt and preparation not only among different offenses, but also among cases regarding attempts to commit the same offense. MODEL PENAL CODE § 5.01 commentary at 322–23 (Proposed Official Draft 1985); LOW, *supra* note 33, at 133–34.

A variant of the proximity standard is the "probable desistance" approach. Although it is oriented largely toward the dangerousness of the actor's conduct, this approach gives slightly more emphasis to the dangerousness of the actor himself. Under this test, an actor's conduct constitutes an attempt if, in the ordinary and natural course of events, without intervention from an outside source, it will result in the crime intended. MODEL PENAL CODE § 5.01 commentary at 324 (Proposed Official Draft 1985). Thus, this test requires a judgment in each case that the actor had broken through a psychological barrier past which it was unlikely that he would turn back in his efforts to commit the crime. Because there is no empirical basis for predicting the probability of desistance at various stages of different criminal endeavors, however, most courts ostensibly using this approach actually adopt a physical-proximity approach. *Id.* at 324–25; W. LAFAVE & A. SCOTT, *supra* note 11, at 507.

[44] The equivocality standard is premised on the notion that the primary purpose of attempt law is to give law-enforcement officials a legal basis for subjecting dangerous individuals to rehabilitative measures and restraints that adequately protect the public. Unlike the proximity standard, the equivocality standard focuses on what the actor already has done, instead of on what remains to be done. The equivocality test requires that the actor's criminal intent be evident on the face of his conduct. MODEL PENAL CODE § 5.01 commentary at 326–29 (Proposed Official Draft 1985); LOW, *supra* note 33, at 134.

Consequently, the equivocality standard emphasizes the actor's intent as imputed from his actions, rather than from the proximity of his actions to the actus reus of the target crime. This approach is based on the assumption that there is a strong relationship between the actor's state of mind and the external appearance of his acts:

> While the actor's behavior is externally equivocal the criminal purpose in his mind is likely to be unfixed—a subjective equivocality. But once the actor must

The Model Penal Code has incorporated the equivocality standard in its definition of an attempt as "an act or omission constituting a *substantial step* in a course of conduct planned to culminate in commission of the crime."[45] The Code goes on to define certain preparatory acts as substantial steps that may be "strongly corroborative of an actor's criminal purpose."[46] Because it does not consider proximity to the actus reus of the object crime, the Model Penal Code's approach effectively draws the line between attempt and preparation further back in the continuum of preparatory acts leading to culmination of the object offense.[47] The Code's subjective approach also comes

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> desist or perform acts that he realizes would incriminate him if all external facts were known, then in all probability a firmer state of mind exists.

MODEL PENAL CODE § 5.01 commentary at 329 (Proposed Official Draft 1985).

[45] MODEL PENAL CODE § 5.01(1) (Proposed Official Draft 1985) (emphasis added). The drafters of the Model Penal Code looked more favorably on the rationale behind the equivocality approach—*i.e.*, that the essential purpose of the criminal law is to restrain dangerous persons rather than to deter dangerous or potentially dangerous conduct. *Id.* § 5.01 commentary at 331. Nevertheless, the drafters rejected the "res ipsa loquitur" or "unequivocality" test devised by Justice Salmond of New Zealand. As he stated the test in Rex v. Barker, [1924] N.Z.L.R. 865 (N.Z. Ct. App.):

> An act done with intent to commit a crime is not a criminal attempt unless it is of such a nature as to be in itself sufficient evidence of the criminal intent with which it is done. A criminal attempt is an act which shows criminal intent on the face of it. The case must be one in which *res ipsa loquitur*.

Id. at 874 (Salmond, J.). For another early expression of support for the res ipsa loquitur test, see, *e.g.*, J. SALMOND, JURISPRUDENCE 388–89 (G. Williams 10th ed. 1947). Under this test, the actus reus serves as the only proof of the intent and can have no purpose other than the commission of the specific object crime. *Id.*

The drafters of the Model Penal Code criticized this test on the ground that it did not consider other evidence of purpose, such as the actor's confession or another's testimony about the actor's representations of intent. Because few instances of conduct are so unequivocal as to manifest purpose, the drafters reasoned that such a rigid standard might exclude from liability externally equivocal acts guided by an unequivocal purpose that prosecutors could corroborate using other means. MODEL PENAL CODE § 5.01 commentary at 328–31 (Proposed Official Draft 1985).

[46] MODEL PENAL CODE § 5.01(2) (Proposed Official Draft 1985). The Model Penal Code proposes three alternative subsections under which attempt liability can be imposed. *Id.* § 5.01(1). Subsection (a) covers cases in which the defendant mistakenly believes that he has satisfied the actus reus of the substantive offense. Subsection (b) punishes a defendant who believes that he has done everything necessary to cause the prohibited result. Subsection (c) imposes liability on a defendant who believes that he has taken a substantial step toward committing the object crime. *Id.*

If the defendant believes that he has completed the offense (subsection (a)), or has done everything necessary to cause the prohibited result (subsection (b)), then he necessarily has taken a substantial step toward committing the object crime. Thus, the substantial-step requirement includes the other cases. On the proper relationship among the three subsections, see Robbins, *supra* note 11, at 422–30.

[47] The drafters criticized proximity tests as vague and one-dimensional, emphasizing physical and temporal proximity with insufficient regard to the dangerousness of the actor's personality, as demonstrated only partially by the dangerousness of his actions. MODEL PENAL CODE § 5.01 commentary at 321–24 (Proposed Official Draft 1985). The drafters noted several cases in which criminal purpose was clear, but in which the defendant's actions were classified as preparatory only. *Id.* at 328.

closer to punishing evil intent alone, but seeks to mitigate this criticism by defining substantial step—the actus reus—in terms of acts that constitute necessary elements of specific offenses.[48] The acts from which the Code allows factfinders to infer wrongful intent and a resolute purpose to realize that intent, however, include acts not necessarily unlawful in themselves.[49]

B. *Crimes in the Nature of Attempt*

Prosecution for the substantive crime of attempt is just one means by which the criminal law can reach conduct that merely tends toward the commission of a completed offense. Several other substantive crimes also have major inchoate elements. These include assault and burglary, which originally dealt with the most common forms of attempt prior to recognition of attempt as a discrete substantive offense,[50] and the category of offenses prohibiting possession of materials that the actor would be likely to use to commit a crime.[51]

1. Assault

At common law, a criminal assault was defined as an attempt, combined with present ability, to commit a battery.[52] Any crim-

[48] With the "substantial step" approach, the drafters introduced elements of the objective theory of criminality. One commentator argued, however, that the list of examples given in section 5.01(2) is so loosely drawn that it gives little guidance concerning when the authorities can intervene. Such examples as "lying in wait" and "reconnoitering" seem too equivocal to allow criminal liability to attach to them in all cases. Furthermore, the advent of the "stop and frisk" decisions beginning in the late 1960's arguably rendered unnecessary the imposition of criminal liability so that police could take action to prevent crimes. Misner, *The New Attempt Laws: Unsuspected Threat to the Fourth Amendment*, 33 STAN. L. REV. 201 (1981).

[49] Examples of acts from which a factfinder can infer intent and impose liability even though the acts are not unlawful in themselves include lying in wait, enticement, and reconnoitering. *See* MODEL PENAL CODE §§ 5.01(2)(a)–(c) (Proposed Official Draft 1985).

[50] W. LAFAVE & A. SCOTT, *supra* note 11, at 497.

[51] *Id.*

[52] *See, e.g.*, Chapman v. State, 78 Ala. 463, 465 (1885) (presenting and aiming loaded gun was not assault because the defendant lacked present ability); Mullen v. State, 45 Ala. 43, 46 (1871) (defendant guilty of assault with intent to murder when he pointed a gun that he believed to be loaded at another and pulled the trigger three times); People v. Lee Kong, 95 Cal. 666, 668–70, 30 P. 800, 801 (1892) (defendant who fired a pistol through the roof, believing that a policeman was on the roof spying on him, was guilty of assault with intent to murder because assault was defined as "unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another"); State v. Sears, 86 Mo. 169, 174 (1885) (if one points at another a gun that he believes is loaded, he is guilty of assault); State v. Godfrey, 17 Or. 300, 305–07, 20 P. 625, 627–

inal assault was a misdemeanor.[53] Because the law of assault crystallized before the law of attempt, the element of present ability requires an act with closer proximity to the completed act—the causing of bodily injury contemplated by battery—than does an attempt.[54] Nevertheless, many courts[55] and commentators[56] have contended that, because assault is itself

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28 (1889) (pointing an unloaded gun at another is not assault if assault is defined as attempted battery, coupled with present ability) (superseded by statute, as stated in State v. Garcias, 296 Or. 688, 679 P.2d 1354 (1984)); Smith v. State, 32 Tex. 593, 593 (1870) (defendant was not guilty of assault because he did not have the ability to commit battery even though he manifested his intention to do so by threatening gestures and accompanying words).

As evinced by the decisions above, actual present ability or the defendant's belief that he possessed present ability was required. In most jurisdictions, however, apparent present ability is sufficient. *See, e.g.*, Wells v. State, 108 Ark. 312, 314–15, 157 S.W. 389, 390 (1913) (defendant who advanced with a knife toward a fleeing party was guilty of assault because assault required apparent rather than actual ability); Macon v. State, 295 So. 2d 742, 745 (Miss. 1974) (if the defendant resists arrest with an unloaded gun, he is guilty of assault with a deadly weapon because he effectively can resist arrest or may cause the sheriff to shoot him, regardless of whether the gun is loaded); State v. Machmuller, 196 Neb. 734, 738–39, 246 N.W.2d 69, 72 (1976) (a person who points an unloaded weapon at another is guilty of assault if the person aimed at does not know whether the gun is loaded but has no reason to believe that it is unloaded); State v. Curtis, 14 Wash. App. 735, 736, 544 P.2d 768, 769 (1976) (one may commit second-degree assault with an apparently loaded gun that is in fact unloaded because it is apparent rather than actual present ability which gives effect to attempt); State v. Thompson, 13 Wash. App. 1, 3, 533 P.2d 395, 397 (1975) (apparent power is the only prerequisite of a statute punishing assault with a weapon likely to produce bodily harm).

[53] MODEL PENAL CODE § 211.1 commentary at 174–80 (Proposed Official Draft 1980). At common law, assault was but an attempt to commit a battery. Battery was a misdemeanor that punished any unlawful application of force to another willfully or in anger. There was no common-law offense of aggravated battery. Attacks resulting in injuries short of mayhem—intentional disfigurement of a disabling character—were treated as ordinary batteries. Thus, all assaults were misdemeanors at common law.

The penalty at common law for a misdemeanor, however, was theoretically unlimited. Thus, the common law punished assaults and attempts with relative severity even though they were classified as misdemeanors. G. WILLIAMS, *supra* note 16, at 606–07.

[54] *See, e.g.*, State v. Davis, 23 N.C. 125, 127 (1840) (an actor does not commit an assault until he begins to execute violence); Fox v. State, 34 Ohio St. 377, 380 (1878) (assault is an act done toward the commission of a battery only if the next act would appear to complete the battery); State v. Mortensen, 95 Utah 541, 550–51, 83 P.2d 261, 265–66 (1938) (Hansen, J., dissenting) (to prove an attempted rape, the prosecution may prove an overt act that falls short of assault).

[55] *E.g.*, *In re* M., 9 Cal. 3d 517, 521–22, 510 P.2d 33, 35–36, 108 Cal. Rptr. 89, 91–92 (1973); People v. Gordon, 178 Colo. 406, 407, 498 P.2d 341, 342 (1972); Green v. State, 82 Ga. App. 402, 405, 61 S.E.2d 291, 293 (1950); People v. Maxwell, 36 Mich. App. 127, 128, 193 N.W.2d 176, 177 (1971); State v. Currence, 14 N.C. App. 263, 265, 188 S.E.2d 10, 12 (1972).

[56] *E.g.*, 1 W. BURDICK, LAW OF CRIME § 135, at 176–77 (1946) ("Thus embracery is an attempt to bribe a juror, an assault an attempt to commit battery, and there can be no attempt to commit these offenses."); W. CLARK & W. MARSHALL, CRIMES 246 (7th ed. 1967) ("There can be no such offense as an 'attempt to attempt' a crime. Since a simple assault is nothing more than an attempt to commit a battery, and aggravated assaults are nothing more than attempts to commit murder, rape, or robbery, an attempt to commit an assault, whether simple or aggravated, is not a crime."); 2 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 227 (1883) ("It is singular, but it is

an attempt to commit a battery, the crime of attempted assault cannot exist.

Currently, a few American jurisdictions define assault as an attempt to commit a battery or to produce bodily harm,[57] while several more add to this definition the requirement that the actor have a present ability to commit the battery.[58] A majority of states have weakened the inchoate aspect of assault by defining it in the alternative as an unlawful act that places another in reasonable apprehension of an immediate battery.[59] This adjunctive definition not only broadens the concept of criminal assault to include aspects of assault's definition in tort, but also treats assault as a substantive offense with a different mental element than battery—an intent to put another in apprehension of a battery, rather than an intent to commit a battery.[60] In addition, an increasing number of states, following the Model Penal Code, have entirely eliminated the inchoate aspect of assault by redefining assault to constitute the completed offense of battery.[61]

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also true, that there are a large number of crimes which it is impossible to attempt to commit . . . . [A] man could hardly attempt to commit perjury, or riot, or libel, or to offer bad money, or to commit an assault, for an attempt to strike is an actual assault."); 1 F. WHARTON, CRIMINAL LAW AND PROCEDURE § 72, at 154 (R. Anderson ed. 1957) ("As an assault is an attempt to commit a battery, there can be no attempt to commit an assault.").

[57] *See, e.g.*, State v. Thompson, 27 N.C. App. 576, 577, 219 S.E.2d 566, 568 (1975) (defining assault as an "intentional offer or attempt by force or violence to do injury to the person of another"); State v. Pope, 414 A.2d 781, 788 (R.I. 1980) (assault is an "unlawful attempt or offer, with force or violence, to do a corporal hurt to another, whether from malice or wantonness") (quoting State v. Baker, 20 R.I. 275, 277, 38 A. 653, 654 (1897), *overruled on other grounds*, State v. Acquisto, 463 A.2d 122, 124 (R.I. 1983)); MINN. STAT. ANN. § 609.224 (West 1987 & Cum. Supp. 1988); N.M. STAT. ANN. § 30-3-1(A) (1978); OKLA. STAT. ANN. tit. 21, § 641 (West 1983); UTAH CODE ANN. § 76-5-102(1)(a) (1978); W. VA. CODE § 61-2-9(b) (1984).

[58] *See* People v. Gardner, 402 Mich. 460, 479, 265 N.W.2d 1, 7 (1978) (defining simple assault as either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of an immediate battery); CAL. PENAL CODE § 240 (West 1988); IDAHO CODE § 18-901(a) (1987); KAN. STAT. ANN. § 21-3408 (1981) ("apparent ability" requires an "immediate apprehension of bodily harm"); S.D. CODIFIED LAWS ANN. § 22-18-1(1) (1988); WYO. STAT. § 6-2-501(a) (1988).

[59] *See* People v. Gardner, 402 Mich. 460, 479, 265 N.W.2d 1, 7 (1978) (defining assault as an unlawful act that places another in reasonable apprehension of an immediate battery); State v. Thompson, 27 N.C. App. 576, 577, 219 S.E.2d 566, 567 (1975) (assault is a "show of violence causing a reasonable apprehension of bodily harm"); DEL. CODE ANN. tit. 11, § 602 (1987); FLA. STAT. ANN. § 784.011 (West 1976); MINN. STAT. ANN. § 609.224 (West 1987 & Supp. 1988); N.Y. PENAL LAW § 120.15 (McKinney 1987); VT. STAT. ANN. tit. 13, § 1023(a)(3) (1974).

[60] For discussion of the incorporation of the tort concept of assault into the criminal law, see generally R. PERKINS & R. BOYCE, *supra* note 13, at 161–63; Perkins, *An Analysis of Assault and Attempts to Assault*, 47 MINN. L. REV. 71, 74–76 (1962).

[61] For a listing of states that have adopted this approach and a discussion of the Model Penal Code provision from which it derives, see *infra* note 538.

All of the states retaining the traditional definitions of assault have expanded the concept statutorily by codifying so-called "aggravated assaults" as distinct felony offenses.[62] The aggravating circumstance that justifies the more serious punishment usually includes a grievous intent in the mind of the assailant, such as in assault with intent to kill, or suggests a dangerous means of perpetration, such as in assault with a deadly weapon.[63] Some states have also enacted general aggravated-assault statutes that penalize an assault to commit any felony not otherwise provided for by statute.[64] Consequently, an assault with intent to commit a particular crime is the same as an attempt to commit that crime, except that the former requires a greater degree of proximity.[65]

2. Burglary

At common law, burglary was defined as the breaking and entering into the dwelling house of another at night with the intent to commit a felony therein.[66] The common law classified burglary, with arson, as a crime against habitation rather than as a crime against property.[67] The distinction reflected the greater likelihood of violence incident to burglary, and justified

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[62] *See, e.g.*, CAL. PENAL CODE § 220 (West 1988) (with intent to commit rape, mayhem, sodomy, or oral copulation); GA. CODE ANN. § 16-5-21(a)(1) (1984 & Cum. Supp. 1987) (with intent to murder, rape, or rob); MASS. ANN. LAWS ch. 265, §§ 15 (with intent to murder or maim), 18 (with intent to rob, being armed), 18A (with intent to commit felony during burglary), 20 (with intent to rob, not being armed) (Law. Co-op. 1980 & Cum. Supp. 1987); TENN. CODE ANN. §§ 39-2-102 (with intent to commit felony), 39-2-103 (with intent to murder), -104 (with intent to rob) (1982); VA. CODE §§ 18.2-51 (1982) (shooting, stabbing, etc., with intent to maim, kill, etc.).

[63] *See, e.g.*, CAL. PENAL CODE §§ 244 (with caustic chemical), 245 (with deadly weapon) (West 1988); MASS. ANN. LAWS ch. 265 § 15B(b) (Law. Co-op. 1980 & Cum. Supp. 1987) (using dangerous weapon); MICH. COMP. LAWS ANN. § 750.82 (West 1968) (with dangerous weapon); N.M. STAT. ANN. § 30-3-2(a) (1978) (with deadly weapon); N.C. GEN. STAT. § 14-34.2 (1986 & Supp. 1987) (with deadly weapon on police officer, fireman, or emergency medical-services personnel); OKLA. STAT. ANN. tit. 21, § 645 (West 1983) (with dangerous weapon).

[64] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1204 (1978 & Cum. Supp. 1987) (includes assaults on law-enforcement officers and teachers); ILL. ANN. STAT. ch. 38, ¶ 12-2(a) (Smith-Hurd 1979); KAN. STAT. ANN. § 21-3410 (1981); N.M. STAT. ANN. § 30-3-2 (1988); S.D. CODIFIED LAWS ANN. § 22-18-1.1 (1988).

[65] R. PERKINS & R. BOYCE, *supra* note 13, at 172.

[66] *Id.* at 246; *cf.* Comment, *Breaking as an Element in Burglary*, 23 YALE L.J. 451, 466 (1914) (noting early statutes that eliminated the distinction between dwellings and other structures and conveyances).

[67] R. PERKINS & R. BOYCE, *supra* note 13, at 246; Note, *Statutory Burglary—The Magic of Four Walls and a Roof*, 100 U. PA. L. REV. 411, 411 (1951).

treating the offense as a felony.[68] Likewise, the importance the common-law courts accorded the security of the home and the increased chance of violence to the dwelling's inhabitants, as well as the undeveloped state of attempt law, justified imposing liability on an actor before he completed the intended felony.[69]

Burglary at common law was but a form of attempt, in which the required elements merely constituted a step taken toward the commission of some other offense.[70] Statutory revision of the elements of burglary, however, has resulted in an offense even more similar to attempt.[71] Burglary is no longer limited to dwellings, but in most jurisdictions embraces any structure, including uninhabited buildings, tents, boats, cars, and even motorcycles.[72] Most jurisdictions have abolished the requirements of breaking[73] and of committing the offense under cover

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[68] W. LAFAVE & A. SCOTT, *supra* note 11, at 800; Note, *Rationale of the Law of Burglary*, 51 COLUM. L. REV. 1009, 1022–23 (1951); Note, *supra* note 67, at 411.

[69] W. LAFAVE & A. SCOTT, *supra* note 11, at 800; Note, *supra* note 91, at 1020.

[70] MODEL PENAL CODE § 221.1 commentary at 62–63 (Proposed Official Draft 1980). The Code's commentators contended that burglary developed due to the common law's strict proximity requirement for attempt, rather than as a substitute for the as yet undeveloped attempt law. *Id.*

[71] *See* Note, *supra* note 67, at 433–40 (noting effacement of the distinction between elements of attempt and burglary and decrying fact that they are inconsistently punished).

[72] *See, e.g.*, ALASKA STAT. § 11.46.310 (1983) (any building for second-degree burglary); CONN. GEN. STAT. ANN. § 53a-103 (West 1985) (buildings); MD. ANN. CODE art. 27, §§ 31B–33 (1982); N.Y. PENAL LAW §§ 140.20, -.25 (McKinney 1987); 18 PA. CONS. STAT. ANN. § 3502(a) (Purdon 1983) (limited to occupied structures).

Most state statutes, however, treat burglary of a dwelling or inhabited building as a higher degree of the offense. *See, e.g.*, FLA. STAT. ANN. § 810.02(3) (West 1976 & Supp. 1988) (upgrading burglary if "there is a human being in the structure or conveyance at the time the offender entered or remained in the structure or conveyance"); HAW. REV. STAT. § 708-810(1)(c) (1985) (enhancing sentence for offender who "recklessly disregards a risk that a building is the dwelling of another, and the building is such a dwelling"); LA. REV. STAT. ANN. § 14:60 (West 1986) (includes any structure or conveyance in which a person is present if the defendant is armed with a dangerous weapon or commits a battery while committing the burglary); MO. ANN. STAT. § 569.160(1)(3) (Vernon 1979) (if "[t]here is present in the structure another person who is not a participant in the crime"); S.C. PENAL CODE ANN. § 16-11-310 to -311 (Law. Co-op. 1985 & Cum. Supp. 1987).

[73] *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 13-1506 to -1508 (1978 & Cum. Supp. 1987); LA. REV. STAT. ANN. § 14:62 (West 1986); MO. ANN. STAT. §§ 569.160–.170 (Vernon 1979); N.J. STAT. ANN. § 2C:18-2 (West 1982); 18 PA. CONS. STAT. ANN. § 3502 (Purdon 1983). *Contra* IND. CODE ANN. § 35-43-2-1 (Burns 1979); MD. ANN. CODE art. 27, §§ 29-34 (1983); MISS. CODE ANN. §§ 97-17-19 to -33 (1972); NEV. REV. STAT. § 28-507 (1985); R.I. GEN. LAWS §§ 11-8-1 to -5.1 (1981 & Cum. Supp. 1988); TENN. CODE ANN. §§ 39-3-401 to -406 (1982).

Several states, although not requiring a breaking, make breaking and entering an element of a more serious degree of burglary. MASS. ANN. LAWS ch. 266, §§ 14-18 (Law. Co-op. 1980 & Cum. Supp. 1987); MICH. COMP. LAWS ANN. § 750.110 to -.111 (West 1968); OKLA. STAT. ANN. tit. 21, §§ 1431, 1435 (West 1983); VA. CODE ANN. § 18.2-89, -90 (1988); W. VA. CODE § 61-3-11(a) (1984) (breaking and entering during daytime).

of the night.[74] Also, most jurisdictions have diluted the specific-intent requirement by expanding the scope of the object offense to include all crimes, rather than only felonies.[75] The modern law of burglary thus aims to protect not only persons in their dwellings, but also people and property within any structure.[76]

Burglary is distinguished from attempt in that it is not subject to the rule of merger.[77] An actor who makes an unprivileged entry into a structure and commits a crime therein is criminally liable for both the completed offense and the burglary.[78] Thus,

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[74] *See, e.g.*, CONN. GEN. STAT. ANN. §§ 53a-101, -103 (West 1985); DEL. CODE ANN. tit. 11, §§ 824–826 (1987); FLA. STAT. ANN. § 810.02 (West 1976 & Supp. 1988); OKLA. STAT. ANN. tit. 21, §§ 1431, 1435, 1438 (West 1983); WYO. STAT. § 6-3-301 (1983).

Some state statutes, however, treat entry of a dwelling during the nighttime as an aggravating factor. *See, e.g.*, CONN. GEN. STAT. ANN. § 53a-102 (West 1985); DEL. CODE ANN. tit. 11, § 826 (1987); MD. ANN. CODE art. 27, §§ 29, 30(a) (1982); N.H. REV. STAT. ANN. § 635:1(II) (1986); N.D. CENT. CODE. § 12.1-22-02(2)(a) (1976).

[75] *See, e.g.*, N.J. STAT. ANN. § 2C:18-2 (West 1982); N.Y. PENAL LAW §§ 140.20–.30 (McKinney 1987); OKLA. STAT. ANN. tit. 21, § 1431 (West 1983) (applicable to dwellings only); 18 PA. CONS. STAT. ANN. § 3502 (Purdon 1983); S.D. CODIFIED LAWS ANN. §§ 22-32-1, -3, -8 (1988); *cf.* GA. CODE ANN. § 16-7-1 (1988) (theft and felonies only); IOWA CODE ANN. § 713.1 (West 1979 & Cum. Supp. 1987) (felony, assault, or theft); MD. ANN. CODE art. 27, §§ 30, 32 (with intent to steal or commit felony), 33, 33A (with intent to steal) (1982); MICH. COMP. LAWS ANN. §§ 750.110, -.111 (West 1968 & Cum. Supp. 1987) (felony or larceny); TENN. CODE ANN. §§ 39-3-401, -403, -404 (1982) (felony).

Further, several courts have held that an unlawful intrusion into the dwelling of another is itself sufficient to support a jury's finding of intent to steal. *E.g.*, People v. Soto, 53 Cal. 415, 416 (1879); People v. Shepardson, 251 Cal. App. 2d 33, 36, 58 Cal. Rptr. 809, 812 (1967); *Ex parte* Seyfried, 74 Idaho 467, 469–70, 264 P.2d 685, 687 (1953); Garrett v. State, 350 P.2d 983, 985 (Okla. Crim. App. 1960); State v. Hopkins, 11 Utah 2d 363, 365, 359 P.2d 486, 487 (1961).

[76] Note, *supra* note 67, at 433. This shift in emphasis is manifested in most jurisdictions by the division of the offense into varying degrees. *See supra* notes 73–75 and accompanying text (discussing different grades of burglary). Not only do elements of the common-law offense (such as dwelling and nighttime) serve as aggravating conditions, but other elements that reflect the offense's early rationale—protection of people—also increase the severity of the offense. *See, e.g.*, Reeves v. State. 245 Ala. 237, 240, 16 So. 2d 699, 702 (1943) (presence of person in dwelling brings a greater penalty); People v. Stroff, 134 Cal. App. 670, 673–74, 26 P.2d 315, 316 (1933) (carrying a gun during a burglary increases the penalty).

[77] *See, e.g.*, DEL. CODE ANN. tit. 11, § 827 (1987); ME. REV. STAT. ANN. tit. 17-A, § 401(3) (1983); NEV. REV. STAT. § 205.070 (1985); TENN. CODE ANN. § 39-3-407 (1982); WASH. REV. CODE ANN. § 9A.52.050 (1977). *Contra* N.H. REV. STAT. ANN. § 635:1(IV) (1986) (providing that courts cannot convict a person for both burglary and the object crime unless the latter is a class A felony); 18 PA. CONS. STAT. ANN. § 3502 (Purdon 1983) (requiring merger unless the object crime is a first- or second-degree felony); *cf.* Maynes v. People, 169 Colo. 186, 192, 454 P.2d 797, 800 (1969) (concurrent rather than consecutive sentences are appropriate, because burglary and larceny are parts of a single transaction); People v. King, 66 Ill. 2d 551, 566, 363 N.E.2d 838, 844–45 (multiple convictions with concurrent sentences are appropriate if indictments for burglary and the object crime arise from a series of incidental or closely related acts) (superseded by statute as stated in People v. DeSimone, 108 Ill. App. 3d 1015, 439 N.E.2d 1311 (1982)), *cert. denied*, 434 U.S. 894 (1977).

[78] *See, e.g.*, Mead v. State, 489 P.2d 738, 740–43 (Alaska 1971) (upholding convictions and consecutive sentences for burglary and larceny in building arising from same acts);

the crime of burglary allows punishment for the offense committed and also for the attempt to commit it in a particular manner—by making an unprivileged entry.[79] Compounded liability is imposed to punish both aspects of intent in burglary: (1) the intent to make an unlawful entry; and (2) the added mental element of intent to commit another offense within the violated structure.[80]

3. Constituent-Element Crimes

Many modern criminal codes include offenses defined in terms of conduct in itself arguably harmless, but still penalized because it very likely constitutes a step towards the harm punished by a completed offense. These crimes include the possessory offenses—such as possession of burglars' tools,[81] possession of

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People v. White, 115 Cal. App. 2d 828, 829–30, 253 P.2d 108, 109 (1953) (upholding convictions and consecutive sentences for burglary, robbery, and assault with a deadly weapon arising from failed theft from store) (superseded by statute as stated in People v. Burns, 157 Cal. App. 3d 185, 203 Cal. Rptr. 594 (1984)); Jenkins v. State, 240 A.2d 146, 148–49 (Del. 1968) (upholding convictions for burglary and felony murder arising from same unauthorized entry), *aff'd sub nom.* Jenkins v. Delaware, 395 U.S. 213 (1969).

[79] *See* State v. Benton, 161 Conn. 404, 411, 288 A.2d 411, 414 (1971) (crime of breaking and entering is a distinct offense that is complete without actual larceny).

[80] *See* Mead v. State, 489 P.2d 738, 742 (Alaska 1971) (allowing merger "would ignore the law's traditional view that breaking and entering is itself a serious offense"). *But see* MODEL PENAL CODE § 211.1 commentary at 61–66 (Proposed Official Draft 1980); Comment, *Burglary: Punishment Without Justification*, 1970 U. ILL. L.F. 391. The expanded, modern definition of burglary has become increasingly subject to criticism. With the expansion of the concept of "dwelling" to include almost any structure and the relaxation of the requirement of "night," the chance that the structure will be inhabited during the unlawful entry is greatly reduced. Consequently, the greater possibility of danger over other trespasses that the earlier concept of burglary aimed to deter is no longer a consideration in the offense's rationale.

Furthermore, by relaxing the specific-intent requirement to include almost any completed offense and imputing from the mere fact of entry the intent to commit a crime therein, courts punish burglary far more severely than most of the offenses that the defendant might commit within the structure. Combined with the possibility of punishment for both the burglary and the completed offense committed within the structure—a practice allowed in almost all jurisdictions—modern burglary statutes create an unjustifiable disparity: a defendant who *attempts* to commit a crime within a structure can be punished far more severely than if he completed the offense a few feet away. It is difficult to see that a crime necessarily entails more harm when it is committed in a building or a car, so as to justify the imposition of additional punishment. Note, *supra* note 68, at 1024–25.

[81] *See, e.g.*, CONN. GEN. STAT. ANN. § 53A-106 (West 1985); DEL. CODE ANN. tit. 11, § 828 (1987); ILL. ANN. STAT. ch. 38, para. 19-2 (Smith-Hurd 1979); OR. REV. STAT. § 164.235 (1985); TENN. CODE ANN. § 39-3-408 (1982 & Supp. 1988).

a forged instrument with intent to issue or use it,[82] possession of narcotics with intent to distribute them,[83] possession of an instrument adapted for the use of narcotics by subcutaneous injection,[84] possession of a weapon with intent to use it against another unlawfully,[85] and possession of explosives with intent to use them in committing an offense.[86]

The rationale behind punishing these offenses is that it is improbable that an individual would possess such materials unless he intended to use them to commit a specific crime.[87] To a large extent, the law imputes an intent to commit a completed crime to the mere act of possession.[88] For example, most stat-

[82] *See, e.g.*, CAL. PENAL CODE §§ 475 (bills and notes), 475a (checks), 476 (fictitious instruments), 484i (credit cards) (West 1988); MD. ANN. CODE art. 27, § 55 (1987) (forged physician's prescription); MICH. COMP. LAWS ANN. § 750.157p (West 1968 & Cum. Supp. 1988) (credit cards with intent to sell or circulate); OHIO REV. CODE ANN. § 2913.31(a)(3) (Anderson 1987); S.C. CODE ANN. § 16-21-10 (Law. Co-op. 1985) (forged automobile certificate of title, registration, or license plate).

For statutes that punish possession of forgery devices, see, *e.g.*, NEV. REV. STAT. § 205.790 (1987) (means of forging credit cards); N.D. CENT. CODE § 12.1-24-02 (1985); OKLA. STAT. ANN. tit. 21, § 1550.31 (West 1983) (means of forging credit cards); R.I. GEN. LAWS § 11-49-6 (1981) (same); VA. CODE ANN. §§ 18.2-171 (device for forging written instruments), -196 (device for forging credit cards) (1988). For statutes that punish possession of counterfeit items, see, *e.g.*, CAL. PENAL CODE §§ 472 (seals), 479 (gold or silver, coins) (West 1988); MASS. ANN. LAWS ch. 267, §§ 12 (bills), 17, 18 (coins), 27 (non-current bills) (Law. Co-op. 1980); MICH. COMP. LAWS ANN. §§ 750.251 (bank or municipal notes), -.254, -.260 (coins) (West 1968); TENN. CODE ANN. §§ 39-3-808 (bank bill, note, check, or other instrument), -817 (coin) (1982). For statutes that punish possession of counterfeiting devices, see, *e.g.*, CAL. PENAL CODE § 480 (West 1988); FLA. STAT. ANN. §§ 831.18 (device for counterfeiting bills), -.19 (device for counterfeiting coins) (West 1976 & Cum. Supp. 1987); MASS. ANN. LAWS ch. 267, § 20 (Law. Co-op. 1980); N.C. GEN. STAT. § 14-14 (1986); N.D. CENT. CODE § 12.1-24-02 (1987).

[83] *See, e.g.*, ALASKA STAT. §§ 11.71.030–.070 (1983); DEL. CODE ANN. tit. 16, §§ 4751–4757 (1983 & Supp. 1986); IND. CODE ANN. §§ 35-48-4-6 (narcotic drugs), -11 (marijuana, hashish oil, or hashish) (Burns 1985 & Cum. Supp. 1987); N.Y. PENAL LAW §§ 220.03–.21 (controlled substances), 221.05–.30 (marijuana) (McKinney 1980 & Supp. 1988).

[84] *See, e.g.*, D.C. CODE ANN. § 33-550 (1988); GA. CODE ANN. § 16-13-32.2 (1988); IND. CODE ANN. § 35-48-4-8.3 (Burns 1985); ME. REV. STAT. ANN. tit. 17-A, §§ 1111 (hypodermic apparatuses), 1111-A (other drug paraphernalia) (1983); MONT. CODE ANN. § 45-10-103 (1987); NEB. REV. STAT. §§ 28-441, -442 (1985).

[85] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3102 (1978 & Cum. Supp. 1987); CONN. GEN. STAT. ANN. §§ 53-202 (possession of machine gun), -206 (carrying concealed weapon) (West 1985 & Cum. Supp. 1988); KY. REV. STAT. ANN. §§ 527.020 (carrying concealed weapon), -.040 (possession of handgun by convicted felon) (Michie/Bobbs-Merrill 1985); N.M. STAT. ANN. §§ 30-7-2 (carrying deadly weapon), -3 (carrying firearm in liquor store), -8 (possession of switchblade), -16 (possession of firearm by felon) (1988).

[86] *See, e.g.*, DEL. CODE ANN. tit. 11, § 1338 (1987); LA. REV. STAT. ANN. §§ 14:54.2 (delayed-action incendiary device), :54.3 (bomb) (West 1986); MO. REV. STAT. § 571.020 (1986); MONT. CODE ANN. §§ 45-8-334 (destructive device), -335 (explosives) (1987); 18 PA. CONS. STAT. ANN. § 6161 (Purdon 1983) (carrying explosives on conveyance).

[87] *See* J. HALL, *supra* note 10, at 584–85.

[88] *See* MODEL PENAL CODE § 5.01 commentary at 342–43 (Proposed Official Draft 1985) (possession of incriminating materials is a "substantial step" toward commission of the completed offense). The Code's drafters noted:

utes penalizing possession of narcotics with intent to distribute erect a legal presumption that the added mental element exists if the defendant was holding a certain controlled substance or more than a specified quantity of the controlled substance.[89] Also, in some jurisdictions, the possession of a controlled firearm such as a sawed-off shotgun or an automatic weapon raises a presumption that the possessor intended to use it for an unlawful purpose.[90]

In addition to possessory crimes, some jurisdictions punish conduct that constitutes only part of the conduct required by a specific completed offense.[91] These substantive offenses are defined in terms of using certain items for a particular purpose,[92] offering to perform an illegal act,[93] attracting an intended victim,[94] or being in a certain place for a bad purpose.[95] This

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> [The existing authorities] show[] a tendency to make criminal the possession of materials to be employed in the commission of a crime when such materials [are] distinctively suited to criminal purposes. The incriminating character of such distinctive materials would usually be apparent to the actor himself, and his possession of them would generally manifest a major commitment to the crime contemplated.

Id.

[89] *See, e.g.*, VT. STAT. ANN. tit. 18, §§ 4224(e)–(f) (1982).

[90] MODEL PENAL CODE § 5.01 commentary at 342 n.193 (Proposed Official Draft 1985); *see, e.g.*, CAL. PENAL CODE § 12023 (West 1982 & Cum. Supp. 1988); WASH. REV. CODE ANN. § 9.41.030 (1988).

[91] Although classifying crimes as "constituent act" offenses or possession offenses is useful analytically, the classifications may overlap. Offenses such as carrying a concealed weapon, for example, arguably fit within both classifications. *See supra* note 85 (listing statutes). In addition, some states use the two approaches to punish the same type of behavior. *Compare infra* note 508 (listing statutes that forbid persons from altering identification numbers on motor vehicles) *with infra* note 519 (listing statutes that punish possession of certain types of property with altered identification numbers).

[92] Some states punish the use of instruments or drugs to induce a miscarriage and not simply individuals who actually induce an abortion. *See, e.g.*, CONN. GEN. STAT. ANN. § 53-31a (West 1985); MISS. CODE ANN. § 97-3-3 (1972); VA. CODE § 18.2-71 (1988); ALA. CODE §§ 13A-12-50 to -58 (1982) (maintenance of electric bells, wire or signals, or dumbwaiters for use in communicating with barricaded rooms in business establishment serves as prima facie evidence of gambling); IDAHO CODE § 18-914 (1987) (administering drugs with felonious intent); OKLA. STAT. ANN. tit. 21, § 986 (West 1983) (installing communications facilities for gamblers); VT. STAT. ANN. tit. 13, § 12 (1974) (use of anesthetics with intent to commit a crime); W. VA. CODE § 61-8-10 (1984) (administering anesthetic to female save in presence of third person).

[93] *See, e.g.*, ARK. STAT. ANN. § 41-3002 (Cum. Supp. 1983); DEL. CODE ANN. tit. 11, § 1342 (1987); IDAHO CODE § 18-5613(1)(a) (1987); KAN. STAT. ANN. § 21-3512 (1981 & Cum. Supp. 1987); ME. REV. STAT. ANN. tit. 17-A, § 853 (1983).

[94] For statutes that punish enticement of a minor for sexual abuse, see, *e.g.*, ALA. CODE § 13A-6-69 (1982) (attempt included); ILL. ANN. STAT. ch. 38, para. 11-6 (Smith-Hurd Cum. Supp. 1988); MICH. COMP. LAWS ANN. § 750.145a (West 1968); N.M. STAT. ANN. § 30-9-1 (1984); WIS. STAT. ANN. §§ 944.12, 948.07 (West 1982 & Cum. Supp. 1988).

[95] Most of the statutes of this type create offenses relating to prostitution. *See, e.g.*, N.J. STAT. ANN. § 2C:34-1(a)(1) (West 1982) (residing in or frequenting a house of prostitution); N.C. GEN. STAT. § 14-204.1 (1986) (loitering for the purpose of engaging

category of offenses shares with the Model Penal Code's definition of attempt the underlying purpose of punishing an actor for those acts that he has already committed, rather than the proximity of his acts to a completed offense.[96] As with the Code's definition of attempt,[97] "these statutes reach conduct that is merely preparatory" as measured by traditional proximity standards and, therefore, "is not encompassed within most jurisdictions' general law of attempts."[98]

C. *Conspiracy*

The modern concept of conspiracy as a separate substantive crime originated in the seventeenth-century English courts.[99] The common law defined conspiracy as a combination of two or more persons to perform an unlawful act or a lawful act by unlawful means.[100] Like burglary, the mental element of conspiracy has a dual aspect: (1) an intent to agree to commit an offense; and (2) the added mental element of an intent to commit a specific target crime.[101] Also as with burglary, the common law does not generally merge the conspiracy into the target

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in prostitution). *But cf.* OR. REV. STAT. § 167.222 (1987) (prohibiting persons from "frequenting a place where controlled substances are used").

[96] *See supra* notes 45–49 and accompanying text (discussing Model Penal Code definition of attempt). An early example of the constituent-act approach is the Waltham Black Act of 1722, 9 Geo. 1, ch. 22. The Act punished persons who went about armed and disguised, or merely disguised. The original intent of the Act was to curb depredations by masked bandits, particularly in Waltham, Hampshire, where the followers of Robin Hood committed their deeds with their faces blackened. The scope of the Act's prohibition against acts of violence, however, allowed more widespread use. On several occasions, it was used to punish undisguised individuals who shot at others. 1 L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW 49–56 (1948).

[97] MODEL PENAL CODE § 5.01 (Proposed Official Draft 1985).

[98] W. LAFAVE & A. SCOTT, *supra* note 11, at 497–98.

[99] *See* Starling's Case, 82 Eng. Rep. 1039 (1664); Poulterers' Case, 77 Eng. Rep. 813 (1611). For detailed accounts of the development of the law of conspiracy, see generally Pollack, *Common Law Conspiracy*, 35 GEO. L.J. 328 (1947); Sayre, *Criminal Conspiracy*, 35 HARV. L. REV. 393 (1922).

[100] *See* Rex v. Jones, 110 Eng. Rep. 485, 487 (1832) (conspiracy indictment must "charge a conspiracy either to do an unlawful act or a lawful act by unlawful means"); Rex v. Journeymen Taylors of Cambridge, 88 Eng. Rep. 9, 10 (1721) ("a conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them, or any of them, to do, if they had not conspired to do it").

[101] W. LAFAVE & A. SCOTT, *supra* note 11, at 525, 535; R. PERKINS & R. BOYCE, *supra* note 13, at 697; A. Harno, *Intent in Criminal Conspiracy*, 89 U. PA. L. REV. 624, 631 (1941).

offense if both are successfully completed.[102] Rather, both the common and statutory law of conspiracy allow the compounding of penalties for conspiracy and its realized object offense.[103] Statutory revision of the offense produced a hierarchy of penalties comparable in relative magnitude to the object crimes.[104] Although some statutes require only the act of agreement, most jurisdictions require an overt act in furtherance of the conspiracy.[105] The common law and many modern statutes require the agreement of two or more parties to constitute the actus reus of conspiracy.[106]

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[102] *See* Pinkerton v. United States, 328 U.S. 640, 641, 643 (1946) (crime of tax fraud did not merge with distinct crime of conspiring to commit tax fraud); Johl v. United States, 370 F.2d 174, 177 (9th Cir. 1966) (because it is possible to make a false statement to immigration agency without conspiring, the crime of conspiring to marry for the sole purpose of upgrading immigration status did not merge with the completed offense); People v. Ormsby, 310 Mich. 291, 297, 17 N.W.2d 187, 189–90 (1945) (court can convict defendant of conspiracy to violate gambling laws even if it does not find substantive offense); People v. Cadle, 202 Misc. 415, 417–19, 114 N.Y.S.2d 451, 452–55 (N.Y. Sup. Ct. 1952) (crime of conspiracy to conduct a lottery constituted a distinct offense for which indictment was proper, even though the prosecution had also charged the completed offense).

[103] *See, e.g.*, People v. Hoyt, 20 Cal. 2d 306, 316–17, 125 P.2d 29, 35 (1942) (conspiracy to rob and robbery); People v. Escobedo, 138 Cal. App. 2d 490, 493, 292 P.2d 230, 232 (1956) (conspiracy to commit abortion and abortion); People v. Havel, 134 Cal. App. 2d 213, 217, 285 P.2d 317, 320 (1955) (conspiracy to escape and attempted escape); People v. Fratianno, 132 Cal. App. 2d 610, 615, 282 P.2d 1002, 1004 (1955) (conspiracy to extort and attempted extortion); People v. Campbell, 132 Cal. App. 2d 262, 267–68, 281 P.2d 912, 915–16 (1955) (conspiracy to commit burglary and burglary); People v. Brown, 131 Cal. App. 2d 643, 645–50, 281 P.2d 319, 322–24 (1955) (conspiracy to murder and assault with intent to murder). *Contra, e.g.*, GA. CODE ANN. § 16-4-2 (1988); ILL. ANN. STAT. ch. 38, para. 8-5 (Smith-Hurd 1972); IDAHO CODE § 18-301 (1987); IOWA CODE ANN. § 706.4 (West 1979); MO. REV. STAT. § 564.016.7 (1986); N.J. STAT. ANN. § 2C:1-8a(2) (West 1982 & Supp. 1988); OR. REV. STAT. § 161.485(3) (1987); WIS. STAT. ANN. § 939.72(2) (West 1982); MODEL PENAL CODE §§ 1.07(1)(b), 5.05(3) (Proposed Official Draft 1985).

[104] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1003 (1978); ARK. STAT. ANN. §§ 5-3-401, -404 (1987); CAL. PENAL CODE § 182 (West 1988); IOWA CODE ANN. §§ 706.1, 706.3 (West 1979); KY. REV. STAT. ANN. § 506.040 (Michie/Bobbs-Merrill 1985); ME. REV. STAT. ANN. tit. 17-A, § 151 (1983).

[105] *See* CONN. GEN. STAT. ANN. § 53a-48 (West 1985); D.C. CODE ANN. § 22-105a (1981); GA. CODE ANN. § 16-4-8 (1988); MINN. STAT. ANN. § 609.175(2) (West 1987); WIS. STAT. ANN. § 939.31 (West 1982 & Cum. Supp. 1987).

The Model Penal Code considers the seriousness of the target crime to determine whether an overt act in furtherance of the agreement is required. MODEL PENAL CODE § 5.03(5) (Proposed Official Draft 1985) ("No person may be convicted of conspiracy to commit a crime, other than a felony of the first or second degree, unless an overt act in pursuance of such conspiracy is alleged and proved to have been done by him or by a person with whom he conspired.").

[106] *See, e.g.*, CAL. PENAL CODE § 182 (West 1988); CONN. GEN. STAT. ANN. § 53a-48 (West 1985); IDAHO CODE § 18-1701 (1987); MISS. CODE ANN. § 97-1-1 (1972 & Cum. Supp. 1988); R.I. GEN. LAWS § 11-1-6 (1981).

The Model Penal Code[107] and many jurisdictions,[108] however, have adopted the notion of *unilateral* conspiracy.[109] This concept limits the defense of impossibility to agree by holding liable any party who believes he has consummated an agreement, even though the other party is incapable of committing the crime, immune to prosecution for it, or only pretending to go along with the importuning party's scheme.[110]

Like burglary, the purpose behind the substantive offense of conspiracy is twofold: (1) preventing a completed offense; and (2) punishing a special danger.[111] While burglary focuses on the violence incident to breach of the dwelling,[112] conspiracy focuses on the additional dangers inherent in group activity.[113] In theory, once an individual reaches an agreement with one or more persons to perform an unlawful act, it becomes more likely that the individual will feel a greater commitment to carry out his original intent, providing a heightened group danger.[114]

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[107] MODEL PENAL CODE §§ 5.03, 5.04 (Proposed Official Draft 1985). Consistent with the Code's emphasis on subjective criminality, its conspiracy provision is phrased in terms of *individual* liability:

> A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime . . . .

Id. § 5.03(1)(a). The unilateral-conspiracy doctrine is evident in the Code's provision pertaining to the doctrine of impossibility as a defense to solicitation and conspiracy: "[I]t is immaterial to the liability of a person who solicits or conspires with another to commit a crime that the person whom he solicits or with whom he conspires is irresponsible or has an immunity to prosecution or conviction for the commission of the crime." *Id.* § 5.04(1)(b).

[108] *See, e.g.*, COLO. REV. STAT. §§ 18-2-201(1), -205 (1986); DEL. CODE ANN. tit. 11, §§ 511–513, 523(b) (1987); N.D. CENT. CODE § 12.1-06-04 (1985); OHIO REV. CODE ANN. § 2923.01 (Anderson 1987); TEXAS PENAL CODE ANN. § 15.02 (Vernon 1974); *see also* ILL. ANN. STAT. ch. 38, para. 8-2 (Smith-Hurd 1972 & Cum. Supp. 1988) (interpreted by Illinois Supreme Court as embodying bilateral-conspiracy approach, People v. Foster, 99 Ill. 2d 48, 457 N.E.2d 405 (1983)).

[109] MODEL PENAL CODE § 5.03(1) commentary at 398–402 (Proposed Official Draft 1985).

[110] *Id.*

[111] *Id.* at 387.

[112] *See supra* notes 66–69 and accompanying text.

[113] *See* MODEL PENAL CODE § 5.03 commentary at 386–91 (Proposed Official Draft 1985).

[114] *See* Callanan v. United States, 364 U.S. 587, 593 (1961) ("concerted action . . . decreases the probability that the individuals involved will depart from their path of criminality"); *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 924 (1959) ("A conspirator who has committed himself to support his associates may be less likely to violate this commitment than he would be to revise a purely private decision.").

Furthermore, the act of involving others in a criminal scheme lessens the individual's

As an inchoate crime, conspiracy allows law-enforcement officials to intervene at a stage far earlier than attempt does.[115] To obtain an attempt conviction, the prosecutor must prove that the actor performed an act beyond mere preparation or took a substantial step toward committing a completed crime. To obtain a conspiracy conviction, however, the prosecutor need only prove that the conspirators agreed to undertake a criminal

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ability to arrest its development if he decides to abandon it. In complex criminal schemes that require the involvement of two or more actors, the division of labor made possible by combined efforts increases the probability of success. W. LAFAVE & A. SCOTT, *supra* note 11, at 531. This group-danger rationale provides an explanation, *inter alia*, for compounding the sentences for conspiracy and its realized object, imposing vicarious liability on co-conspirators for one conspirator's acts, and allowing a concomitant exception to the hearsay rule for co-conspirators' statements. MODEL PENAL CODE § 5.03 commentary at 389 (Proposed Official Draft 1985).

The relaxation of procedural and substantive safeguards in conspiracy prosecutions has made the offense a favorite weapon of prosecutors, but also has made it an object of judicial and academic criticism. *See generally* Krulewitch v. United States, 336 U.S. 440, 452–53 (1949) (Jackson, J., concurring) (arguing that relaxation of procedural safeguards in conspiracy trials infringes on defendants' rights); Goldstein, *The Krulewitch Warning: Guilt by Association*, 54 GEO. L.J. 133 (1965); Klein, *Conspiracy—The Prosecutor's Darling*, 24 BROOKLYN L. REV. 1 (1957); *Developments in the Law—Criminal Conspiracy*, *supra*.

Criticism arises from the dangers of prejudice to individual defendants inherent in the prosecution of criminal organizations—the primary danger being that a defendant will be tarred by the same brush used to mark the guilt of a codefendant. The past use of conspiracy law against labor organizers and political protestors has also emphasized the conflict of conspiracy law's reliance on the group-danger rationale with the freedoms of speech and association guaranteed by the first amendment. *See generally* Nathanson, *Freedom of Association and the Quest for Internal Security: Conspiracy from Dennis to Dr. Spock*, 65 NW. U.L. REV. 153 (1970).

Indeed, critics of the Model Penal Code's unilateral-conspiracy approach rely on the premises of the group-danger rationale. One commentator argued that

> [t]he so-called unilateral approach does make some sense. As the supporters say, the unsuccessful conspirator did try to conspire so his state of mind is clearly a criminal one. True enough, but did he enter into a conspiracy? After all, the conspiracy charge subjects a defendant to criminal liability at a stage earlier than any other inchoate offense and may raise grave procedural problems at the time of trial. And, the reason for such results is that there is a special, added danger, resulting from group planning. Yet, in the unilateral situation there is no conspiracy, no added group danger, for the fact remains that there was not an agreement between two persons. The defendant may have wanted to agree, may have intended to agree, and may have even believed he had agreed; but there was no agreement, no true planning by two or more persons, no meeting of the minds between the parties.

P. MARCUS, PROSECUTION AND DEFENSE OF CRIMINAL CONSPIRACY CASES § 2.04, at 2-11 to 2-12 (1988) (footnotes omitted).

[115] MODEL PENAL CODE § 5.03 commentary at 387–88 (Proposed Official Draft 1985).

scheme or, at most, that they took an overt step in pursuance of the conspiracy.[116] Even an insignificant act may suffice.[117]

D. *Solicitation*

Solicitation, or incitement,[118] is the act of trying to persuade another to commit a crime that the solicitor desires and intends to have committed.[119] The mens rea of solicitation is a specific intent to have someone commit a completed crime.[120] As in common-law conspiracy, disclosure of the criminal scheme to another party constitutes a part of the actus reus of solicitation.[121] But, while the actus reus of a conspiracy is an agreement

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[116] *Id.* at 387. Because most conspiracies are secret, the prosecution can rarely present direct evidence of the agreement. Thus, prosecutors frequently must "rely on inferences drawn from the course of conduct of the alleged conspirators." Interstate Circuit, Inc. v. United States, 306 U.S. 208, 221 (1939); *see also* W. LAFAVE & A. SCOTT, *supra* note 11, at 530, 531 (discussing element of agreement).

[117] MODEL PENAL CODE § 5.03(5) commentary at 454 (Proposed Official Draft 1985). For examples of acts sufficient to establish the existence of a conspiracy, see Yates v. United States, 354 U.S. 298, 333–34 (1957) (attending lawful meeting), *overruled on other grounds*, Burks v. United States, 437 U.S. 1 (1978); United States v. Harris, 409 F.2d 77, 84 (4th Cir.) (delivering stolen goods), *cert. denied*, 396 U.S. 965 (1969); United States v. Fellabaum, 408 F.2d 220, 223–24 (7th Cir.) (making phone call), *cert. denied*, 396 U.S. 858 (1969); Bary v. United States, 248 F.2d 201, 208 (10th Cir. 1957) (attending lawful meeting); Kaplan v. United States, 7 F.2d 594, 595–96 (2d Cir.) (attending interview with lawyer), *cert. denied*, 269 U.S. 582 (1925).

An act by a conspirator is sufficient to implicate all parties to the conspiracy. *See, e.g.*, Blumenthal v. United States, 332 U.S. 539, 556–57, 559 (1947); United States v. Rabinowich, 238 U.S. 78, 86 (1915); Bannon v. United States, 156 U.S. 464, 468 (1895).

The special-danger rationale modifies the standards defining attempt by treating the act of engaging another in a criminal scheme as an act unequivocally manifesting the actor's criminal intent:

> The act of agreeing with another to commit a crime, like the act of soliciting, is concrete and unambiguous; it does not present the infinite degrees and variations possible in the general category of attempts. The danger that truly equivocal behavior may be misinterpreted as preparation to commit a crime is minimized; purpose must be relatively firm before the commitment involved in agreement is assumed.

MODEL PENAL CODE § 5.03 commentary at 388 (Proposed Official Draft 1985). Conspiracy law's focus on the agreement as the harmful act, however, reflects a policy that seeks to minimize the danger of attaching liability to equivocal acts that only appear to further a substantive offense. *Id.*

[118] *See generally* Robbins, *supra* note 19, at 1502 (noting that among the terms used with solicitation are: advising, attempting to persuade another, counseling, encouraging, enticing, entreating, hiring, importuning, inciting, instigating, procuring, requesting, stimulating, and urging).

[119] W. LAFAVE & A. SCOTT, *supra* note 11, at 486; Robbins, *supra* note 19, at 1502.

[120] W. LAFAVE & A. SCOTT, *supra* note 11, at 489–90; *see* 18 U.S.C. § 373 (Supp. IV 1986).

[121] MODEL PENAL CODE § 5.02 explanatory note at 365; *id.* commentary at 368–69 (Proposed Official Draft 1985).

with another to commit a specific completed offense,[122] the actus reus of a solicitation includes an attempt to persuade another to commit a specific offense.[123] A necessary element of solicitation is the solicitant's rejection of the solicitor's request.[124] Thus, solicitation can be viewed as an attempt to conspire.[125]

The view that the judicial system should punish one who unsuccessfully solicits another by reason of the solicitation itself

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[122] *See* Rex v. Sterling, 83 Eng. Rep. 331 (1663) (all but one judge held that no overt act was needed; the remaining judge held the unlawful gathering or combination to be the act required); *see also* Hyde v. United States, 225 U.S. 347, 359 (1912) ("at common law it was not necessary to aver or prove an unlawful act").

[123] *See, e.g.*, People v. Burt, 45 Cal. 2d 311, 314, 288 P.2d 503, 505 (1955) (it is immaterial that the actor neither consummated nor took any steps toward consummating the object of solicitation, because the offense of solicitation is complete when the actor solicits another to commit a crime); People v. Haley, 102 Cal. App. 2d 159, 164–65, 277 P.2d 48, 51 (1951) (person who solicits another to commit or to join in committing an offense is guilty even though the offense solicited is never committed and the other person rejects the importunity); State v. Hampton, 210 N.C. 283, 285, 186 S.E. 251, 252 (1936) (rejecting defendant's contention that interposition of a resisting will between his bare solicitation and the proposed act afforded him the opportunity to withdraw the solicitation, because solicitation was complete before the resisting will refused to assent or cooperate).

The Model Penal Code's drafters explained the rationale behind punishing solicitation:

> Purposeful solicitation presents dangers calling for preventive intervention and is sufficiently indicative of a disposition towards criminal activity to call for liability. Moreover, the fortuity that the person solicited does not agree to commit or attempt to commit the incited crime plainly should not relieve the solicitor of liability, when otherwise he would be a conspirator or an accomplice.

MODEL PENAL CODE § 5.02 commentary at 366 (Proposed Official Draft 1985). Thus, to allow a solicitor to defend on the ground that the solicitant refused to commit the object offense effectively would nullify the crime of solicitation. Illustrating this principle, one commentator explained that,

> [i]f the solicitant agrees to commit the crime, both he and the solicitor are liable for conspiracy; if the solicitant attempts to commit the crime, both are liable for attempt; if the solicitant actually completes the crime, the solicitor is liable, under principles of accomplice liability, for being either an accessory before the fact or a principal in the crime that he solicited. Only when the solicitant rejects the request is the solicitor liable for the crime of solicitation.

Robbins, *supra* note 19, at 1502.

[124] R. PERKINS & R. BOYCE, *supra* note 13, at 649–52. If the party solicited acts on the solicitor's suggestion and goes far enough to incur guilt for a more serious offense, then the solicitor is also guilty of the more serious offense, rather than the solicitation. *See* State v. Jones, 83 N.C. 605, 607 (1881) (woman who advised or procured rape was guilty as principal). If the party solicited goes far enough to incur liability for attempt, then the solicitor is also guilty of attempt. *Id.* at 606–07; Uhl v. Commonwealth, 47 Va. 706, 709–11 (1849). If the solicited party consummates the object crime, then both he and the solicitor are guilty of the completed crime. People v. Harper, 25 Cal. 2d 862, 877, 156 P.2d 249, 257–58 (1945); State v. Primus, 226 N.C. 671, 674–75, 40 S.E.2d 113, 115 (1946).

[125] MODEL PENAL CODE § 5.02 commentary at 365–66 (Proposed Official Draft 1985); *see also* G. WILLIAMS, *supra* note 16, at 669; Scott, *The Common Law Offence of Incitement to Commit Crime*, 4 ANGLO-AM. L. REV. 289, 290 n.11 (1975).

is a recent development in criminal jurisprudence.[126] Viewed solely as an inchoate offense, solicitation appears to impose criminal liability on an act that presents no significant social danger, and approaches punishing evil intent alone.[127] Penalties for solicitation allow the judiciary to punish conduct far back on the continuum of acts leading to a completed crime—conduct that constitutes "mere preparation" by attempt standards.[128]

The rationale for the substantive offense of solicitation is that, like conspiracy, it treats the special hazards posed by potential concerted criminal activity.[129] As with conspiracy, the special-danger rationale modifies the standards of attempt to place liability at a far earlier stage than in an attempt.[130] The act of revealing the criminal scheme to another extends beyond mere preparation because the act is so unequivocal as to make evident the solicitor's criminal intent.[131]

Solicitation developed as a common-law notion,[132] but American jurisdictions increasingly have defined the offense statuto-

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[126] Prior to the nineteenth century, the English common-law courts held indictable two specific forms of solicitation: importuning another to commit either a forgery for use in a trial or perjury, Rex v. Johnson, 89 Eng. Rep. 753, 753, 756, 2 Show. K.B. 1, 1, 3–4 (1679), and offering a bribe to a public official. Rex v. Vaughan, 98 Eng. Rep. 308, 310–11, 4 Burr. 2494, 2499 (1769). Not until the case of Rex v. Higgins, 102 Eng. Rep. 269, 2 East 5 (1801), did the English courts recognize solicitation as a distinct substantive offense. *See* Curran, *Solicitation: A Substantive Crime*, 17 MINN. L. REV. 499 (1933); Robbins, *supra* note 19, at 1502.

[127] *See* 1 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, WORKING PAPERS 370 (1970) ("[D]espite the earnestness of the solicitation, the actor is merely engaging in talk which may never be taken seriously."). By placing an independent actor between the potential crime and himself, the solicitor has both reduced the likelihood of success in the ultimate criminal object and manifested an unwillingness to commit the crime himself. *See* State v. Davis, 319 Mo. 1222, 1236, 6 S.W.2d 609, 615 (1928) (White, J., concurring) (solicitor is not significant menace since he has manifested his reluctance to commit the crime himself); People v. Werblow, 241 N.Y. 55, 64–65, 148 N.E. 786, 790 (1925) (solicitor is not dangerous because he has placed the will of an independent moral agent between him and the commission of the offense).

[128] *See* Gervin v. State, 212 Tenn. 653, 658, 371 S.W.2d 449, 451 (1963) (solicitation requires less proximity to success than does attempt).

[129] MODEL PENAL CODE § 5.02 commentary at 365–66 (Proposed Official Draft 1985). The Code's drafters reasoned that

> a solicitation is, if anything, more dangerous than a direct attempt, because it may give rise to the special hazard of cooperation among criminals . . . . Moreover, the solicitor, working his will through one or more agents, manifests an approach to crime more intelligent and masterful than the efforts of his hireling.

Id.

[130] *See* 1 J. TURNER, RUSSELL ON CRIME 201–02 (12th ed. 1964).

[131] MODEL PENAL CODE § 5.02 commentary at 366 (Proposed Official Draft 1985).

[132] *See, e.g.*, Meyer v. State, 47 Md. App. 679, 686 n.5, 425 A.2d 664, 668 n.5 (solicitation is a common-law offense in Maryland, but it is unclear whether it is limited to felonies), *cert. denied*, 454 U.S. 865 (1981); State v. Furr, 292 N.C. 711, 720, 235 S.E.2d 193, 199 (solicitation of another to commit a felony is an indictable offense under

rily.[133] Unlike the common law, which generally and vaguely described the object crimes that solicitation covered as those that breached the public peace, current state statutes define the offense's coverage to restrict judicial discretion.[134] Most states impose penalties for soliciting the commission of any crime,[135] but some states and the federal government apply solicitation only to felonies.[136] Others specifically enumerate the particular object felonies subject to solicitation charges.[137]

The Model Penal Code's solicitation provisions[138] broaden the scope of solicitation statutes to reach more behavior, in three

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common law in North Carolina), *cert. denied*, 434 U.S. 924 (1977); *see also* United States v. MacCloskey, 682 F.2d 468, 474 n.12 (4th Cir. 1982) (noting North Carolina's recognition of solicitation of felony as a common-law offense).

[133] Thirty-three states and the United States currently catalogue solicitation as a general substantive crime. *See, e.g.*, 18 U.S.C. § 373 (Supp. IV 1986); CAL. PENAL CODE § 653f (West 1988); DEL. CODE ANN. tit. 11, §§ 501–503 (1987); GA. CODE ANN. § 16-4-7 (1988); ILL. ANN. STAT. ch. 38, para. 8-1 (Smith-Hurd 1972 & Cum. Supp. 1988).

Some statutes punish the attempt to solicit. *See* HAW. REV. STAT. § 705-510(2) (1985); *see also* 18 U.S.C. § 373 (Supp. IV 1986) (punishing one who solicits another to commit a felony in violation of federal statutes that have as an element the use or attempted or threatened use of physical force against the person or property of another).

[134] For discussion of the common-law scope of solicitation, see W. LAFAVE & A. SCOTT, *supra* note 11, at 486; R. PERKINS & R. BOYCE, *supra* note 13, at 649–54. For examples of the scope of solicitation in American jurisdictions, see *infra* notes 135–137 and accompanying text.

In both England and the United States, solicitation of another to commit a felony or a misdemeanor that would breach the peace, obstruct justice, or otherwise disturb the public welfare was a misdemeanor at common law. *See, e.g.*, State v. Avery, 7 Conn. 266, 270–71 (1828); Commonwealth v. Flagg, 135 Mass. 545, 549 (1883); State v. Hampton, 210 N.C. 283, 284–85, 186 S.E. 251, 252 (1936); State v. Blechman, 135 N.J.L. 99, 101, 50 A.2d 152, 153–54 (1946); Regina v. Gregory, 10 Cox Crim. Cas. 459, 461–62 (1867). In the United States, there is no reported decision that holds that solicitation of *any* misdemeanor is a common-law offense. W. LAFAVE & A. SCOTT, *supra* note 11, at 487.

[135] *See, e.g.*, ALASKA STAT. § 11.31.110 (1983); ARK. STAT. ANN. § 5-3-301 (1987); ILL. ANN. STAT. ch. 38, para. 8-1 (Smith-Hurd 1972 & Cum. Supp. 1988); KY. REV. STAT. ANN. § 506.030 (Michie/Bobbs-Merrill 1985); N.H. REV. STAT. ANN. § 629:2 (1986).

[136] *See, e.g.*, COLO. REV. STAT. § 18-2-301 (1986); GA. CODE ANN. § 16-4-7 (1988); IOWA CODE ANN. § 705.1 (West 1979) (also aggravated misdemeanors); LA. REV. STAT. ANN. § 14:28 (West 1986); ME. REV. STAT. ANN. tit. 17-A, § 153 (1983) (only crimes with maximum penalties exceeding five years); VA. CODE ANN. § 18.2-29 (1988).

[137] *See, e.g.*, CAL. PENAL CODE §§ 653f, 653l, 1203.046 (West 1988); MICH. COMP. LAWS ANN. § 750.157(b) (West Cum. Supp. 1988); NEV. REV. STAT. § 199.500 (Michie 1986 & Cum. Supp. 1987); VT. STAT. ANN. tit. 13, § 7 (1974 & Cum. Supp. 1988). The federal statute is a good example. It provides:

> Whoever, with intent that another person engage in conduct constituting a felony that has as an element the use, attempted use, or threatened use of physical force against the person or property of another in violation of the laws of the United States, and under circumstances strongly corroborative of that intent, solicits, commands, induces, or otherwise endeavors to persuade such other person to engage in such conduct, [shall be guilty of a crime].

18 U.S.C. § 373 (Supp. IV 1986).

[138] MODEL PENAL CODE § 5.02 (Proposed Official Draft 1985).

ways. First, the Code imposes liability for the solicitation of *any* crime.[139] Second, the Code incorporates the double inchoate offense of attempt to solicit by making the solicitor's failure to communicate the criminal scheme immaterial as long as he acted on his intent to effect such communication.[140] Third, the Code defines the actus reus of solicitation as acting "with the purpose of promoting or facilitating" the commission of a crime.[141] This language incorporates the crime of facilitation into the solicitation provision.[142] Facilitation, viewed as both a lower level of complicity and as an inchoate crime, punishes the individual who knowingly provides assistance to another who intends to commit a crime.[143]

The Code's solicitation provisions appear to have influenced some states to penalize solicitation as harshly or almost as harshly as the completed object crime.[144] The common-law courts traditionally treated solicitation as a less serious offense than the object crime or an attempt to commit it.[145] Most states with solicitation statutes continue this pattern by providing penalties either less stringent than those for attempt or one grade lower than the range of sanctions for the object crime.[146] Several states, however, following the Model Penal Code, have enacted

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[139] *Id.* § 5.02(1).

[140] *Id.* § 5.02(2). For one example of such a situation, see Regina v. Banks, 12 Cox Crim. Cas. 393 (Wor. Sp. Assizes 1873), in which the defendant was convicted of attempted solicitation where he had mailed an inciting letter to a prospective solicitee but the letter was never received. A modern-day analog might be leaving a soliciting message on the prospective solicitee's telephone-answering machine but the tape is intercepted, or the solicitee never hears it, or the machine malfunctions and the recording is never made.

Another possible double inchoate construction with regard to solicitation is soliciting a solicitation. *See* State v. Davis, 319 Mo. 1222, 6 S.W.2d 609 (1928) (*A* solicited *B* to solicit *C* to commit a killing; court suggested that defendants would be guilty of solicitation); *see also* Regina v. Bodin and Bodin, [1979] Crim. L.R. 176 (dismissing incitement prosecution in similar situation).

[141] MODEL PENAL CODE § 5.02(1) (Proposed Official Draft 1985). Thus, the Code establishes liability for a solicitant's conduct under a complicity approach as well as under an inchoate-crime approach. *See also id.* § 2.06(3)(a) (parallel language in Code's complicity provision).

[142] *Id.* § 5.02(1). The Code also uses this language in its conspiracy provision. *Id.* § 5.03(1).

[143] For further discussion of facilitation, see *infra* note 578 and accompanying text.

[144] *See infra* notes 146–147 and accompanying text (discussing state statutory penalties for solicitation).

[145] *See supra* note 132 and accompanying text (discussing cases that held that soliciting a felony was only a common-law misdemeanor).

[146] *See, e.g.*, FLA. STAT. ANN. § 777.04 (West 1976 & Cum. Supp. 1988); HAW. REV. STAT. § 705-512 (1985); ILL. ANN. STAT. ch. 38, paras. 8-1, 8-4 (Smith-Hurd 1972 & Cum. Supp. 1988); KY. REV. STAT. ANN. § 506.030 (Michie/Bobbs-Merrill 1985); WASH. REV. CODE ANN. § 9A.28.030 (1988).

penalties for solicitation that correspond to the most serious offense solicited.[147]

II. THE PERCEIVED NEED FOR DOUBLE INCHOATE CRIMES

In the last century, the balance in substantive criminal law has tilted toward subjective criminality.[148] The movement to

[147] *See* MODEL PENAL CODE § 5.05(1) (Proposed Official Draft 1985) (penalty for solicitation equals that for crime solicited, except for capital crimes and first-degree felonies); MICH. COMP. LAWS ANN. § 750.92(2) (West 1968) (penalty for inciting, inducing, or exhorting another to commit a felony or misdemeanor likely to endanger life same as if offense committed); MONT. CODE ANN. § 45-4-101(2) (1987) (maximum penalty for solicitation not to exceed that for the offense solicited); N.H. REV. STAT. ANN. § 629:2(IV) (1986) (sentence for solicitation equals that for crime solicited, except for murder); 18 PA. CONS. STAT. ANN. § 905 (Purdon 1983) (penalty for solicitation same as for offense solicited, except for murder or first-degree felonies, though mitigation is possible if completion of object offense is unlikely); WYO. STAT. § 6-1-304 (1988) (solicitation punished in same manner as offense solicited, except if punishable by death). *But see* R.I. GEN. LAWS § 11-1-9 (1981) (penalty for solicitation limited to maximum of 10 years). Pennsylvania allows for mitigation if completion of the object offense is unlikely. 18 PA. CONS. STAT. ANN. § 905(b) (Purdon 1983).

The Model Penal Code departs from this pattern of corresponding sanctions only in its treatment of solicitation of a first-degree felony, which solicitation it treats as a second-degree felony. MODEL PENAL CODE § 5.05(1) (Proposed Official Draft 1985). The Code, however, does allow some judicial discretion in reducing the degree of the offense. *Id.* § 5.05(2).

[148] G. FLETCHER, RETHINKING CRIMINAL LAW 115–22, 166–74 (1978). Professor Fletcher contends that much of contemporary American criminal law reflects a tension between two contrasting theories of liability—the manifest and the subjective. The pattern of manifest criminality requires that the commission of a crime be objectively discernible at the time that it occurs. Thus, in the objective analysis, the criminal law punishes those *acts* that the community deems dangerous, and looks to the actor's intent only to determine if he understands the likely result of and the circumstances surrounding his act. The prohibited act is the focus of the law, and the intent informing the act is a subsidiary issue. The law functions by means of behavioral standards preannounced by statute or decisional law, and interpreted and applied in particular cases.

By contrast, the theory of subjective criminality focuses on the individual's *intention* to violate a legally protected interest. As applied to inchoate offenses, the subjective theory establishes no preannounced standards for acts that violate the law of attempts. Although the subjective theory does not dispense with the requirement of an act toward execution of the completed offense, acts not incriminating in themselves are sufficient to satisfy the requirement. The primary function of the act is to demonstrate the firmness, rather than the content, of the actor's intent. Intent is proven not only by the act, but also by evidence such as confessions, admissions against interest, and testimony concerning the actor's prior and subsequent conduct.

Under the objective theory, only those acts toward the commission of a crime that are so unequivocal as to arouse apprehension among witnesses—*i.e.*, acts usually in close proximity to consummation of the crime—invoke liability. The subjective approach, however, allows imposition of punishment for acts that are more remote from completion. Although Professor Fletcher criticizes the objective approach's heavy reliance on community standards of behavior to determine the dangerousness, and thus the punishability, of certain acts, he is more critical of the subjective approach's focus on dangerous persons rather than on dangerous acts.

Admitting that the confinement of dangerous persons is a valid goal of the criminal-

define inchoate liability in subjective terms reflects the more general movement toward legislatively defining criminal law and the quest for earlier points of intervention.[149] The trend toward subjectively defining attempts and other inchoate offenses permits earlier intervention and thus enhances the preventive work of the police.[150] Proponents of the subjective approach, including the drafters of the Model Penal Code, stress that the great value of their approach is the emphasis on identifying and convicting dangerous persons, rather than on preventing dangerous acts.[151]

Against the backdrop of a theory of inchoate liability that focuses on an actor's criminal intent, some courts have expanded the range of acts that incur liability and thus permit intervention, and have authorized indictments and convictions for double inchoate offenses. The inchoate acts of attempt, conspiracy, and solicitation are relational in nature, as they exist in relation to object offenses, most usually completed crimes.[152] Modern criminal codes, however, rarely address the question of whether one inchoate crime can be the object of another.[153]

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justice system, Professor Fletcher nonetheless argues that the function of the criminal law is to give notice of objective standards of behavior. The elevation of the systemic goal of confinement that has accompanied the rise of the subjective approach blurs the distinction between judicial and administrative means of isolating dangerous people from society. The subjective theory, as embodied in the Model Penal Code's reliance on confessions and other undefined instances of conduct to establish attempt liability, provides insufficient guidance in determining when an actor should be held criminally liable.

For criticism of the Model Penal Code's substantial-step test, see *supra* notes 48–49. On objective and subjective views of inchoate liability, see generally Robbins, *supra* note 11, at 397–419.

[149] *See* G. FLETCHER, *supra* note 148, at 115–22, 166–74.

[150] MODEL PENAL CODE § 5.01 commentary at 329–31 (Proposed Official Draft 1985).

[151] *Id.* at 298. The Code's drafters stated:

> The literature and the decisions dealing with the definition of a criminal attempt reflect ambivalence as to how far the governing criterion should focus on the dangerousness of the actor's conduct, measured by objective standards, and how far it should focus on the dangerousness of the actor, as a person manifesting a firm disposition to commit a crime. Both criteria may lead, of course, to the same disposition of a concrete case. When they do not, the proper focus of attention is the actor's disposition.

Id. See generally Robbins, *supra* note 11, *passim.*

[152] *See* J. HALL, *supra* note 10, at 575 ("it seems preferable . . . to designate criminal attempts, solicitations and conspiracies as 'relational' crimes which are defined by reference to the intended 'ultimate' crimes").

[153] *Contra* ME. REV. STAT. ANN. tit. 17-A, § 154(1) (1983) ("It shall not be a crime to conspire to commit, or to attempt, or solicit, any crime set forth in this chapter [concerning inchoate crimes]."); TEX. PENAL CODE ANN. § 15.05 (Vernon 1974) ("Attempt or conspiracy to commit, or solicitation of, a preparatory offense defined in this chapter is not an offense."); *see also* LA. REV. STAT. ANN. § 14:27 (West 1986). The Practice Commentary accompanying Louisiana's general attempt provision asserts that, "if the definition of another crime includes the attempt to do something, this section cannot be employed, for then a defendant would be charged with an attempt to attempt to do an illegal act." *Id.* commentary at 138.

This statutory void in defining inchoate-crime concepts has allowed courts to "pyramid" inchoate crimes to fill the gaps left in penal codes. Such gaps may include, for example, the omission of solicitation as a statutory offense or the lack of a unilateral-conspiracy provision. A statute also may create lacunae if it narrowly defines a crime with a substantive inchoate element such as burglary and the various forms of assault.

In creating double inchoate crimes, the courts exercise an authority, analogous to that of earlier courts that created common-law crimes,[154] to extend liability to actors whose criminal intent the courts consider sufficiently dangerous or heinous to warrant judicial intervention. Although the pyramiding of the three traditional inchoate offenses could theoretically result in nine double inchoate offenses, only three categories have been the subject of extensive criminal litigation: (1) attempt to attempt; (2) attempt to conspire; and (3) conspiracy to attempt. Each of these three formulations will be discussed in turn.

A. *Attempt to Attempt*

The inchoate crime of attempt exists only in relation to the substantive crime attempted.[155] When the object of an attempt is a substantive offense that does not itself contain an attempt provision, a court will apply its jurisdiction's general attempt provision to impose liability for the defendant's acts.[156] Defendants have not successfully challenged this procedure when trial courts have applied it to "completed" offenses, such as murder. Some defendants, however, have successfully raised the issue of whether the law can punish an attempt to commit an offense

[154] *See* Note, *Common Law Crimes in the United States*, 47 COLUM. L. REV. 1332, 1336–37 (1947) (arguing that the advantages of codifying the entire field of criminal law outweigh the advantages of retaining the common-law system of misdemeanors as a substratum to statutory coverage); *cf.* Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 YALE L.J. 53, 74–76 (1930) (the common-law offense of attempt allowed courts to fill gaps left in a criminal code without distorting the language of the completed offense involved).

[155] *See supra* note 10 and accompanying text (conceptualizing inchoate offenses as "relational" crimes); *supra* notes 15 and accompanying text (discussing specific intent required to prove attempt).

[156] *See* W. LAFAVE & A. SCOTT, *supra* note 11, at 497 (with few exceptions, general attempt statutes in American jurisdictions cover attempts to commit any felony or misdemeanor); *see also supra* note 25 (listing general attempt statutes).

with substantial inchoate elements, such as assault.[157] Courts are involved in a fundamental debate: whether an attempt to attempt can exist.

Viewed as an abstract principle, the construction of attempt to attempt presents the possibility of regression *ad infinitum*,[158] with the concomitant distortion of the attempt concept's protections against punishment for equivocal behavior.[159] An indictment for the attempt to attempt a substantive crime would ask a court to punish the defendant for acts that would not qualify under the jurisdiction's definition of attempt.[160] No American court, however, has faced the issue raised by such an indictment.[161]

Instead, the courts have considered challenges to indictments for and convictions of attempts to commit substantive crimes that contain major inchoate elements. Some, such as assault and burglary, are defined as attempts to commit other, more serious, offenses. Others, such as possession of proscribed materials, are defined in terms of acts indicating that the possessor is likely to commit more serious offenses. Crimes such as subornation of perjury punish the act whether or not the actor achieves his desired result.[162] Although "incomplete" in some sense, all of these crimes are complete in that they involve discernible harms that the law seeks to prevent.[163]

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[157] *See, e.g., In re* M., 9 Cal. 3d 517, 521–22, 510 P.2d 33, 35–36, 108 Cal. Rptr. 89, 92 (1973) (legislature did not contemplate the crime of attempted assault, whether simple or aggravated); Allen v. People, 175 Colo. 113, 118, 485 P.2d 886, 888 (1971) (offense of attempted assault with a deadly weapon did not exist); Wilson v. State, 53 Ga. 205, 206 (1874) (courts cannot punish "attempt to make an assault").

[158] *See* Wilson v. State, 53 Ga. 205, 206 (1874) (considering the concept of attempt to attempt "is like conceiving of the beginning of eternity or the starting place of infinity").

[159] *See* People v. Schwimmer, 66 A.D.2d 91, 105, 411 N.Y.S.2d 922, 931–32 (1978) (Titone, J., dissenting) (warning that the concept of attempt to attempt "would render illegal acts which, in themselves, are insufficient even to constitute an anticipatory crime"), *aff'd*, 47 N.Y.2d 1004, 394 N.E.2d 288, 420 N.Y.S.2d 218 (1979).

[160] *See* E. MEEHAN, THE LAW OF CRIMINAL ATTEMPT 201 (1984).

[161] *But cf. infra* notes 259–269 and accompanying text (discussing reversal of Florida trial court that gave attempt instructions for crimes that already included attempt provisions).

[162] *See infra* notes 250–258 and accompanying text (discussing offenses of this type, such as uttering a forged instrument, embracery (influencing or attempting to influence a juror), bribery, solicitation of a bribe, and extortion).

[163] J. HALL, *supra* note 10, at 586. Hall, who contended that attempts represent a harm distinct from the ultimate crimes at which they aim, stated:

> On the premise that criminal attempts are not harms, it would seem necessary to hold likewise regarding many other crimes: *e.g.*, the possession of burglars' tools, counterfeit dies or money, solicitation, the conspiracies, burglary, reckless driving, bribery, subornation, and other offenses which "tend toward" the commission of various ultimate crimes. Indeed, since there is nothing in nature

Thus, by including such crimes within the statutory definition of attempt, a court can punish an individual for actions that are not in themselves substantive offenses.[164] Absent manifested legislative intent either to limit explicitly those substantive offenses that an individual can attempt or to prohibit judicial use of double inchoate offenses, the judiciary must make the policy decision of whether to punish preparatory acts done toward the commission of a crime.[165]

The debate over the validity of the "attempt to attempt" construction has developed almost exclusively at the state level. Until recently, no case in federal court had raised the issue.[166] Most state courts continue to reject the attempt-to-attempt construction because it is either a logical absurdity[167] or contrary to legislative intent.[168] Many courts, however, have begun to look beyond the debate engendered by the semantical abstraction of attempting to attempt and have imposed liability for acts tending toward the commission of crimes with substantial inchoate elements.

1. Attempt to Assault

The question of whether courts can punish an attempt to attempt has arisen primarily in the context of prosecutions for

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> which distinguishes the presently designated "ultimate" crimes as actually ultimate, it is possible to arrange the entire catalogue of crimes in a series in which only a very few crimes would be "ultimate" harms and the rest would merely tend toward the commission of those harms.

Id.

[164] Arnold, *supra* note 154, at 76.

[165] *See infra* notes 369–398 and accompanying text (discussing cases that decline to recognize double inchoate crimes despite the absence of an explicit legislative prohibition).

[166] Although the United States Code does not contain a general attempt statute, it does include several attempt provisions related to specific substantive crimes. *See, e.g.*, 18 U.S.C. §§ 546 (smuggling goods into foreign countries), 594 (intimidation of voters), 1113 (homicide within federal maritime and territorial jurisdiction), 1657 (corrupting a seaman to confederate with pirates), 1751 (assassinating or kidnapping President or presidential staff person) (1982).

Indeed, there is no comprehensive statutory definition of attempt in federal law. United States v. Heng Awkak Roman, 356 F. Supp. 434, 437 (S.D.N.Y.), *aff'd*, 484 F.2d 1271 (2d Cir. 1973), *cert. denied*, 415 U.S. 978 (1974). *But see infra* notes 183–192 and accompanying text (discussing Army Court of Military Review's application of general attempt statute in Military Code of Justice).

[167] *See infra* notes 313–368 and accompanying text.

[168] *See infra* notes 369–398 and accompanying text.

attempted assault.[169] Although no jurisdiction recognizes the crime of attempted *simple* assault,[170] an increasing number of state courts have convicted defendants of attempted aggravated assaults.[171]

The rationales for punishing attempted assault vary with the definitions of assault that the states employ. The types of assault statutes include those that define the offense as: (1) an attempt to injure another violently (or, more simply, an attempt to commit a battery); (2) an attempt, coupled with present ability, to injure another violently; and (3) an unlawful threat by word or deed to do violence to another, coupled with an apparent present ability, that creates a reasonable apprehension of imminent violence in that other person. Almost every American jurisdiction today combines category (3) with either category (1) or (2), or with a redefined assault offense that, like the Model Penal Code, merges traditional battery and assault.[172] The following discussion, therefore, applies only to those states that do not redefine assault as battery.

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[169] *See, e.g.*, Wilson v. State, 53 Ga. 205, 206 (1874); People v. Patskan, 29 Mich. App. 354, 357, 185 N.W.2d 398, 400–01 (1971) (attempted assault is not a crime because assault itself is an attempt), *rev'd on other grounds*, 387 Mich. 701, 199 N.W.2d 458 (1972); State v. Wilson, 218 Or. 575, 585–86, 346 P.2d 115, 120 (1959) (crime of attempted assault exists because assault is not merely an attempted battery but also is a distinct harm) (superseded by statute as stated in State v. Garcias, 296 Or. 688, 679 P.2d 1354 (1984)).

[170] *Contra* Annotation, *Attempt to Commit Assault as a Criminal Offense*, 79 A.L.R.2D 597 (Supp. 1988) (suggesting that Pennsylvania court in Commonwealth v. Barnett, 253 Pa. Super. 39, 384 A.2d 965 (1978), held valid the offense of attempted simple assault). This commentator misanalyzed the *Barnett* decision. The court in *Barnett* merely upheld a conviction for simple assault by arguing that, because the defendant actually inflicted bodily injury on one victim and physically menaced another, he had "at least *attempted* a simple assault" on both. 253 Pa. Super. at 44, 384 A.2d at 968 (emphasis added).

[171] *See, e.g.*, Miller v. State, 37 Ala. App. 470, 472–73, 70 So. 2d 811, 813 (1954) (attempt to assault by shooting .22-caliber rifle); State v. Merseal, 167 Mont. 412, 416, 538 P.2d 1366, 1368 (1975) (attempted assault with a deadly weapon); State v. Skillings, 98 N.H. 203, 210, 97 A.2d 202, 207 (1953) (attempted aggravated assault by means of harmful drugs); People v. O'Connell, 67 N.Y. Sup. Ct. 109, 113–14, 14 N.Y.S. 485, 486 (1891) (attempted assault with a deadly weapon, with intent to kill); State v. Wilson, 218 Or. 575, 585–92, 346 P.2d 115, 120–23 (1959) (attempted assault with a dangerous weapon) (superseded by statute, as stated in State v. Garcias, 296 Or. 688, 678 P.2d 1354 (1984)).

Several state courts, however, have explicitly rejected the offense of attempted assault. *See, e.g.*, *In re* M., 9 Cal. 3d 517, 521–22, 510 P.2d 33, 35–36, 108 Cal. Rptr. 89, 91–92 (1973); Green v. State, 82 Ga. App. 402, 405, 61 S.E.2d 291, 293 (1950); People v. Maxwell, 36 Mich. App. 127, 128, 193 N.W.2d 176, 177 (1971); State v. Currence, 14 N.C. App. 263, 265, 188 S.E.2d 10, 12 (1972); State v. Hewett, 158 N.C. 627, 629, 74 S.E. 356, 357 (1912); White v. State, 22 Tex. 608, 608 (1858); Brown v. State, 7 Tex. App. 569, 569 (1880).

[172] *See supra* notes 57–60 and accompanying text (discussing different states' approaches to defining assault).

a. *Assault as attempted battery.* The first category—assault as attempted battery—poses the most obvious conceptual problems for courts seeking to attach attempt liability to assault. Given this definition, a charge of attempted assault can be characterized as an attempt to attempt to commit a battery. Nevertheless, since 1891, some courts have recognized the crime of attempted assault by reasoning that an effort to commit a battery that goes beyond preparation, but which lacks the proximity to completion to constitute an assault, is punishable as an attempt to commit an assault.

A New York intermediate appellate court first stated this principle in *People v. O'Connell.*[173] In *O'Connell*, the defendant attacked and wounded his victim with an ax.[174] Charged with assault in the first and second degrees,[175] the defendant pled guilty to attempted assault in the first degree, which the statute defined as assault with a deadly weapon with an intent to kill the person assaulted.[176] Subsequently, the defendant challenged his conviction on the ground that no such crime as attempted assault existed.[177]

Rather than uphold O'Connell's conviction by arguing that he was estopped by his guilty plea from later challenging his conviction on a technical point of law, as the concurring judge suggested, the majority in *O'Connell* sought to establish the existence of the crime of attempted assault. The court framed its analysis in terms of spatial and temporal proximity, ruling that the crime of assault imposes liability only if the actor struck at a victim within reaching distance. The court concluded that an actor who approached his victim with a weapon that he intended to use, but who was intercepted before reaching the victim or failed to come within reaching distance because the victim fled after becoming aware of the imminent attack, was guilty of an attempted assault with a deadly weapon.[178]

The *O'Connell* court's reasoning provided the basis for subsequent convictions by other state courts—not only for assaults

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[173] 67 N.Y. Sup. Ct. 109, 14 N.Y.S. 485 (1891).
[174] *Id.* at 110, 112–13, 14 N.Y.S. at 485, 487.
[175] *Id.* at 110, 14 N.Y.S. at 487 (Lawrence, J., concurring).
[176] *Id.* at 110, 113, 14 N.Y.S. at 485, 487.
[177] *Id.*
[178] *Id.* at 110–15, 14 N.Y.S. at 486–88.

with deadly weapons,[179] but also for other forms of aggravated assault.[180]

b. *Assault as attempt, coupled with present ability, to injure another violently.* Extensions of attempt liability to the second category of assault—assault as an attempt, coupled with present ability, to injure another violently—provides a lesser conceptual difficulty. Courts have found attempts to assault in those cases in which the defendant attempted to commit a battery, but lacked present ability.[181] Although liability may not attach under the present-ability requirement unless the actor is sufficiently proximate to his intended victim, as in the hypothetical raised in *O'Connell*,[182] the concept of present ability is still broader than that of proximity.

Both the breadth of the concept of present ability and the courts' increasing reliance on subjective intent to expand attempt liability are illustrated in *United States v. Locke*,[183] a 1983

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[179] *See* Miller v. State, 37 Ala. App. 470, 472–73, 70 So. 2d 811, 813 (1954) (defendant fired .22-caliber rifle at policeman hidden in bushes 75 yards away); State v. Wilson, 213 Or. 575, 580–92, 346 P.2d 115, 118–23 (1959) (intended victim had barricaded herself in a room, thus thwarting husband who had shotgun) (superseded by statute, as stated in State v. Garcias, 296 Or. 688, 679 P.2d 1354 (1984)); State v. Music, 40 Wash. App. 423, 432, 698 P.2d 1087, 1092–93 (1985) (holding that attempted assault is implausible when assault is defined as attempted battery, but not when assault is defined as placing another in fear of imminent harm). *Compare* State v. Zackery, 31 Ohio App. 3d 264, 265, 511 N.E.2d 135, 137 (1987) (affirming conviction of attempted-battery type of assault where defendant merely brandished a knife) *with* McGee v. United States, 533 A.2d 1268, 1269–70 (D.C. 1987) (reversing conviction of attempted-battery type of assault where defendant brandished a gun).

[180] *See* McQuirter v. State, 36 Ala. App. 707, 709, 63 So. 2d 388, 389–90 (1953) (in attempted assault with intent to rape, defendant came no closer than two or three feet from intended victim); Morris v. State, 32 Ala. App. 278, 280, 25 So. 2d 54, 55 (1946) (in attempted assault with intent to rape, defendant chased prosecutrix but never got closer than five feet); Burton v. State, 8 Ala. App. 295, 299, 62 So. 394, 395–96 (1913) (in attempted assault with intent to rape, defendant chased intended victim for 100 yards, but never got close enough to touch her); *see also* Young v. State, 353 S.E.2d 82, 83 (Ga. App. 1987) (attempted aggravated assault with intent to rape); State v. Weinberger, 671 P.2d 567, 569, 578 (Or. App. 1983) (recognizing attempted aggravated assault as proper predicate felony for crime of felony murder, but finding insufficient evidence to establish attempted aggravated assault).

[181] State v. Wilson, 218 Or. 575, 590, 346 P.2d 115, 122 (1959) (superseded by statute, as stated in State v. Garcias, 296 Or. 688, 679 P.2d 1354 (1984)). The court in *Wilson* grounded its upholding of a conviction for attempted assault with a deadly weapon on the defendant's clearly expressed intent to shoot his wife, coupled with his lack of access to her in a locked office. *Id.* at 578–79, 588–90, 346 P.2d at 117, 121–22. Thus, *Wilson* demonstrates the idea of proximity as a component of present ability.

[182] *See* text accompanying *supra* note 178 (discussing proximity as it relates to present-ability requirement).

[183] 16 M.J. 763 (A.C.M.R. 1983).

case from the United States Army Court of Military Review. The defendant, during a struggle with military police, attempted to remove a loaded revolver from an officer's holster.[184] As the defendant attempted to seize the weapon, he exclaimed, "If I get that gun I will kill you all"—or words to that effect.[185] Relying heavily on this verbal expression of intent combined with the attempt to seize the gun, the court applied the general attempt statute of the Uniform Code of Military Justice[186] to its aggravated assault statute,[187] and upheld the defendant's conviction for attempted aggravated assault.[188]

The court recognized that the defendant lacked present ability because he had never even obtained the weapon necessary to commit the charged assault with a deadly weapon.[189] Nevertheless, the court held that the charge of attempted assault was valid because the defendant's act toward a battery against the officers went beyond preparation.[190] The decision gave greater emphasis to the serious consequences of the defendant's expressed intent than to the proximity of his acts to the completed crime.

Some courts will attach attempt liability to this second category of assault, therefore, in those cases in which the defendant's acts were insufficiently proximate to a completed battery.[191]

c. *Assault as intentional frightening.* The third category—assault as intentional frightening—poses the fewest conceptual problems for courts seeking to attach attempt liability to assault. This form of assault punishes intentional frightening rather than an attempt to injure a victim physically; it clearly establishes an

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[184] *Id.* at 764.

[185] *Id.*

[186] 10 U.S.C. § 880 (1982). Subsection (a) of the statute provides: "An act, done with specific intent to commit an offense under this chapter, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense." *Id.* § 880(a).

[187] *Id.* § 928.

[188] United States v. Locke, 16 M.J. 763, 765–66 (A.C.M.R. 1983).

[189] *Id.* at 765.

[190] *Id.*

[191] *See* State v. Wilson, 218 Or. 575, 590, 346 P.2d 115, 122 (1959) (defendant was guilty of attempted aggravated assault on his wife even though he did not have the present ability to injure her because she was barricaded in a room) (superseded by statute, as stated in State v. Garcias, 296 Or. 688, 679 P.2d 1354 (1984)).

independent substantive offense and not an inchoate offense with a specified object.[192]

Most jurisdictions punish this form of assault by statute.[193] In addition, courts in jurisdictions that do not explicitly punish intentional frightening have interpreted statutes defining assault as an "attempt or offer" to injure another physically to include the tort concept of intentional menacing.[194] Those courts, however, have attached attempt liability only to those assaults that threaten serious bodily harm.[195]

The addition of intentional frightening expands the range of acts defined as assault by eliminating the strict proximity and present-ability requirements of the older categories.[196] The requirement of apprehension by the victim, however, creates a new problem, which the courts have sought to mitigate by the use of attempt liability. If the victim is unaware of the imminent attack upon him, then no liability for assault attaches—even if the attacker nearly succeeds in committing the completed battery.

In *State v. White*,[197] for example, the defendant threw a large glass jug at a police officer, striking him in the back of the head and neck. The officer was unaware of the attack prior to absorbing the blow, and therefore was not placed in apprehension of imminent violence by the defendant.[198] Although Florida's assault statute did not define the elements of the offense,[199] the court defined the prohibited act as the creation of "the victim's well-founded fear that violence is imminent."[200] Consequently, the court used the state's general attempt statute to extend

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[192] *See* United States v. Locke, 16 M.J. 763, 765 (A.C.M.R. 1983) (justifying conviction for attempted assault with a deadly weapon on intentional-frightening theory).

[193] *See supra* note 59 (listing statutes).

[194] United States v. Locke, 16 M.J. 763, 765 (A.C.M.R. 1983); *see* State v. Wilson, 218 Or. 575, 582–84, 346 P.2d 115, 119–20 (1959) (treating assault as intentional frightening despite case law that defined assault as attempted battery) (superseded by statute, as stated in State v. Garcias, 296 Or. 688, 695 P.2d 1354 (1984)). *But see* R. PERKINS & R. BOYCE, *supra* note 13, at 163; Perkins, *An Analysis of Assault and Attempts to Assault*, 47 MINN. L. REV. 71, 75–76 (1962) (criticizing this approach because the term "to offer," as originally used, meant no more than "to attempt").

[195] *See supra* notes 170–171 and accompanying text (discussing cases).

[196] *See supra* notes 183–190 and accompanying text (discussing United States v. Locke, 16 M.J. 763 (A.C.M.R. 1983), in which the court used intentional-frightening theory to attach liability to a crime that would go unpunished under the common-law definition of assault).

[197] 324 So. 2d 630 (Fla. 1975).

[198] *Id.* at 631.

[199] FLA. STAT. ANN. § 784.02 (West 1973), *now codified at* FLA. STAT. ANN. § 784.011 (West 1976).

[200] State v. White, 324 So. 2d 630, 631 (Fla. 1975).

liability to the defendant's actions.[201] Implicit in the ruling was the assumption that the court would have found the defendant guilty of attempted assault even if his weapon had missed its mark.[202]

The expanding law of attempted assault signals a trend by courts and legislatures to treat assault as a separate substantive crime, rather than as an attempted battery, to avoid the conceptual difficulties of double inchoate constructions. As several commentators have suggested, this approach is valid because aggravated assaults were unknown at common law.[203] Thus, it is unnecessary to define these forms of assault in relation to the common-law notion of assault as attempted battery.

2. Attempted Sexual Assault of Minors

Courts have found it easier to attach derivative attempt liability to statutes proscribing sexual assault or enticement of minors.[204] The statutes involved in these cases have treated sexual enticement of minors as a completed substantive offense,[205] and have avoided the language of attempt found in

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[201] *Id.*

[202] *See id.* (dictum) (general attempt statute applies to persons who unsuccessfully attempt to injure violently persons who are unaware of the attack). The court stated:

> The State argues for a definition of assault which does not include victim awareness, on the ground that "bushwackers" and "backstabbers" would escape punishment if they were unsuccessful in their attempt to inflict injury. The Legislature did not intend to allow such acts to go unpunished, however. The general "attempt" statute will reach those situations.

Id.

[203] *See supra* note 62 (providing citations). *But cf.* J. HALL, *supra* note 10, at 573 (contending that development of the "consummated" crime of aggravated assault in the period immediately prior to cases recognizing attempt as a substantive offense retarded development of the doctrine of criminal intent).

[204] *See* Donovan v. State, 47 Ala. App. 18, 20, 249 So. 2d 635, 636 (1971) (upholding conviction for attempt to entice a child under 16 years of age to enter a place to commit sodomy); People v. Martinez, 42 Colo. App. 257, 257, 592 P.2d 1358, 1359 (1979) (crime of attempt to commit sexual assault on a child existed because, unlike an ordinary assault statute, the statute at issue defined sexual assault on a child as a substantive offense rather than as an attempted battery); Huebner v. State, 33 Wis. 2d 505, 513, 147 N.W.2d 646, 650 (1967) (legislature's placement of the crime of attempt to entice or persuade a child under 18 years of age into a place with intent to commit a crime against sexual morality among substantive rather than inchoate crimes evinced its intent that the general attempt statute apply to such a crime). *Compare* People v. Martinez, 42 Colo. App. 257, 257, 592 P.2d 1358, 1359 (1979) (allowing the offense of attempted sexual assault on a child) *with* People v. Gordon, 178 Colo. 406, 407–08, 498 P.2d 341, 342 (1972) (the crime of attempted assault did not exist where assault was defined as an unlawful attempt to commit violent injury) *and* Allen v. People, 175 Colo. 113, 115–18, 485 P.2d 886, 887–89 (1971) (same).

[205] Donovan v. State, 47 Ala. App. 18, 20, 249 So. 2d 635, 636–37 (1974) (citing Huebner v. State, 33 Wis. 2d 505, 512–13, 147 N.W.2d 646, 650 (1967)).

many ordinary assault statutes.[206] It is likely, however, that the repulsion that such crimes arouse gives a court a sense that there is greater leeway to punish an actor based on revealed intent even if the acts have not progressed so far as to meet the requirements of the substantive offense.[207]

In *Huebner v. State*,[208] for example, the defendant challenged his conviction for "attempt to entice a child under the age of 18 years into an automobile for immoral purposes."[209] The defendant contended that the law against enticement was itself an attempt statute, and that to combine this statute with the state's general attempt statute was to charge the defendant with an attempt to attempt a crime against sexual morality.[210] Although the enticement statute defined the crime's mens rea as an intent to commit a "crime against sexual morality," it did not define the actus reus in terms of sexual activity.[211] Instead, it defined sexual assault of a minor in terms of a component part of the ultimate harm. The actus reus was the persuading or enticing of any child under 18 "into any vehicle, building, room or secluded place."[212]

The defendant, a male, had invited a seventeen-year-old boy into his car for a ride.[213] When the boy declined the offer, the defendant "in unmistakable layman's language asked [the boy] to commit sodomy" and offered him money and drink in con-

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[206] *See* People v. Martinez, 42 Colo. App. 257, 257, 592 P.2d 1358, 1359 (1979) (the crime of attempt to commit sexual assault on a child exists because, unlike an ordinary assault statute, the statute at issue defined sexual assault on a child as a substantive offense, rather than as attempted battery).

[207] Both the Alabama and Wisconsin sexual-assault statutes at issue reflect the objective theory of liability. *See* Donovan v. State, 47 Ala. App. 18, 20, 249 So. 2d 635, 635–36 (1971) (quoting Act No. 387, 1967 Ala. Acts (*now codified at* ALA. CODE § 13A-6-69 (1982)); Huebner v. State, 33 Wis. 2d 505, 512 n.1, 147 N.W.2d 646, 650 n.1 (1967) (quoting WIS. STAT. § 944.12, *amended by* § 948.07 (Supp. 1988)). In both statutes, enticing or persuading a minor to enter a secluded place suffices to meet the act requirement. The defendant need not tell his intended victim the purpose of the assignation. The imposition of liability on acts earlier in the preparatory continuum than those that are prohibited by the enticement statutes, however, requires the court to focus more narrowly on the actor's intent. For a discussion of the objective and subjective theories of liability, see *supra* notes 148–151 and accompanying text.

[208] 33 Wis. 2d 505, 147 N.W.2d 646 (1967).

[209] *Id.* at 512, 147 N.W.2d at 649–50. This issue was only one of six raised on appeal. *Id.*

[210] *Id.* at 513, 147 N.W.2d at 650.

[211] *Id. But see* People v. Martinez, 42 Colo. App. 257, 258, 592 P.2d 1358, 1359 (1979) (quoting COLO. REV. STAT. § 18-3-405 (1979), which requires "sexual contact" between a child under 15 years of age and a defendant at least four years his or her senior).

[212] WIS. STAT. ANN. § 944.12, *amended by* WIS. STAT. ANN. § 948.07 (Supp. 1988).

[213] Huebner v. State, 33 Wis. 2d 505, 513, 147 N.W.2d 646, 649 (1967).

sideration.[214] The victim fled and notified the police.[215] Because the victim had not entered the defendant's car, the defendant did not meet the act requirement of the enticement statute.[216] The Wisconsin Supreme Court, however, upheld the application of the state's general attempt statute to the enticement statute and affirmed the defendant's conviction.[217]

Noting that Wisconsin had abolished common-law crimes,[218] the court focused on the legislative intent behind the applicable statutes. The court concluded that the legislature evidenced its intent by including the enticement statute among those offenses denoted as "completed" rather than "inchoate" offenses.[219] Moreover, the court contended that the gravamen of the enticement statute was the *successful* persuasion of a child into one of the listed enclosures.[220] Thus, the victim's entry into a secluded place completed the crime of enticement if the defendant had the intent to engage in sexual activity therein.[221] The court reasoned that "the *attempt* of this crime is completed when the defendant with the necessary intent tries to persuade or entice the child to get into the vehicle or secluded place."[222]

Underlying the court's discussion of legislative intent, however, was its concern with protecting society from persons who commit dangerous sex crimes and providing treatment for the dangerous sex offender. The existence of the state's "sex deviate law,"[223] affording specialized treatment to sex offenders, attests

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[214] *Id.*

[215] *Id.*

[216] *See id.*, 147 N.W.2d at 650 (gravamen of the substantive offense is in *succeeding* in getting a minor to enter a vehicle, building, or other secluded place); *see also* Donovan v. State, 47 Ala. App. 18, 20, 249 So. 2d 635, 636 (1974) (jurisdiction defined sexual assault of a minor as enticing or persuading a minor to enter a secluded place to propose the act of sodomy; the court held that the defendant did not commit a substantive offense because the intended victim resisted the defendant's importunings to enter the defendant's car).

[217] *Huebner*, 33 Wis. 2d at 513, 519, 147 N.W.2d at 649, 653–54.

[218] *Id.* at 514, 147 N.W.2d at 650.

[219] *Id.*

[220] *Id.* at 513, 147 N.W.2d at 650 (emphasis added).

[221] *Id.*

[222] *Id.* at 513–14, 147 N.W.2d at 650 (emphasis added). The court ruled in dicta that no constitutional prohibition forbade the legislature from creating a crime of an attempt to attempt a substantive offense. *Id.* Nevertheless, the court held that the enticement statute was not an attempt statute. *Id.*; *cf.* People v. Martinez, 42 Colo. App. 257, 258, 592 P.2d 1358, 1359 (1979) (noting that, where assault is defined in terms of "attempt," attempted assault is "an attempt to attempt to act," a construction that is too indefinite for a specific-intent crime).

[223] *See* Huebner v. State, 33 Wis. 2d 505, 521, 147 N.W.2d 646, 654 (1967). For a discussion of the provisions of Wisconsin's Sex Crimes Act, also known as the "sex deviate law," see generally Note, *Criminal Law—Wisconsin Sexual Deviate Act*, 1954 WIS. L. REV. 324.

to the grave concerns that sexual crimes arouse. Furthermore, the statute may have made it simpler for the court to focus on the defendant's criminal intent in order to commit him to administrative, rather than penal, processes.[224]

Although other courts that have affirmed the validity of attempted sexual assault against minors have not discussed administrative treatment of the offender, the cases suggest that the seriousness with which society views the substantive crime of sexual assault of minors induces courts to focus on the intent that the defendant displayed rather than on the limitation of the doctrine that every criminal should have fair warning of what the law prohibits.

3. Attempted Burglary

Although the courts remain divided over the existence of the offense of attempt to assault,[225] no court has ever reversed a conviction of attempted burglary on the ground that such a conviction punishes an attempt to attempt. Every jurisdiction continues to define burglary as an act—usually an unauthorized entry—with intent to commit some other crime.[226] Nevertheless, the courts have treated burglary as a separate substantive crime rather than as an anticipatory offense.

In *DeGidio v. State*,[227] for example, the defendant contended, among other things, that, because the applicable statute defined burglary in terms of doing an act with the intent to commit some other crime, the offense was a specific form of attempt.[228] Relying on the comments to the Model Penal Code's section on attempt, the court responded that courts traditionally have

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[224] *See* Huebner v. State, 33 Wis. 2d 505, 521, 147 N.W.2d 646, 654 (1967) (discussing operation of Wisconsin's Sex Crimes Act). After convicting the defendant of attempted sexual assault, the trial court, within the discretion accorded to it by the Wisconsin Sex Crimes Act, had ordered the defendant to undergo presentencing tests by the State Department of Public Welfare, to determine if, as a sex offender, he was a continuing danger to society. *Id.* The state agency, exercising its authority under the Act, determined that the defendant was a dangerous offender and committed him to its "sex deviate facility," instead of sending him back to the court for criminal sentencing. *Id.* at 522–24, 147 N.W.2d at 655. For a discussion of the confusion of administrative and penal procedures that is inherent in the subjective theory of liability, see G. FLETCHER, *supra* note 148, at 170–74.

[225] For a survey of cases addressing the issue of whether the crime of attempted assault exists, see *supra* note 171.

[226] For a discussion of current burglary statutes, see *supra* notes 71–75 and accompanying text.

[227] 289 N.W.2d 135 (Minn. 1980).

[228] *Id.* at 136.

treated burglary as a separate substantive offense to which attempt liability attaches.[229] The Code's drafters noted other "substantive offenses" that contain more pronounced inchoate elements than burglary, but to which courts nevertheless have applied attempt liability.[230] Moreover, the commentary suggests that questions of attempt liability are better decided on the basis of a policy decision regarding where to draw the line in punishing preliminary acts rather than an abstract argument over whether an individual can attempt to attempt a crime.[231]

The *DeGidio* court noted that the state legislature treated burglary as a separate substantive offense instead of as an inchoate crime, and did not explicitly limit the offenses to which the general attempt statute could apply.[232] Consequently, the court invoked the doctrine of implied legislative intent to hold that the legislature intended the general attempt statute to apply to the crime of burglary.[233] Other decisions upholding convictions for attempted burglary have not discussed the double inchoate issue.[234]

4. Attempted Possession of Proscribed Materials

The primary function of attempt law is to allow authorities to intervene and convict before the consummation of a crime.[235] Society's need to protect itself, however, is offset by the need

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[229] *Id.* at 136–37.

[230] MODEL PENAL CODE § 5.01 commentary at 75 (Tent. Draft No. 10, 1960). The court quoted the following passage from the comments to the Model Penal Code:

> [T]here has been no difficulty in sustaining charges of attempted burglary. Nor has there been difficulty generally in finding attempt liablity where the "substantive offense" is even more clearly an attempt: possessing burglar's tools with intent to commit burglary; conveying tools into prison with intent to facilitate an escape; offering a bribe; exploding a substance with intent to cause personal injury; employing a drug or instrument with intent to procure a miscarriage; procuring a noxious drug with intent to supply it to another for use in committing abortion. In each case attempt liability has been sustained.

Id. (footnotes omitted); *see* DeGidio v. State, 289 N.W.2d 135, 137 (Minn. 1980).

[231] MODEL PENAL CODE § 5.01 commentary at 363–64 (Proposed Official Draft 1985); DeGidio v. State, 289 N.W.2d 135, 136–37 (Minn. 1980).

[232] 289 N.W.2d at 137.

[233] *Id.*

[234] *See, e.g.*, State v. Echols, 742 S.W.2d 220, 220 (Mo. Ct. App. 1987) (affirming conviction of attempted first-degree burglary and addressing only intent to commit specific crime once in building and presence of another person in building); *cf.* Popwell v. State, No. 6 Div. 624 (Ala. Crim. App. Nov. 10, 1987) (LEXIS, States library, Ala file) (reversing conviction of attempted second-degree burglary because mere looking in window was insufficient act to establish intent, but not discussing burglary as itself a crime in the nature of attempt).

[235] *See supra* notes 34–36 and accompanying text (discussing principle).

to protect individuals from prosecution for equivocal acts—*i.e.*, acts as likely informed by a lawful intent as by an unlawful one.

An alternative to the use of attempt law to facilitate intervention is to break crimes down into constituent acts and separately prohibit those acts. Crimes that proscribe possession of materials presumably used to commit completed crimes exemplify this approach.[236] The rationale for these crimes is the positivist contention that experience has shown that an individual would not possess such materials unless he intended to use them as tools or means of a specific crime. Because the possessor of certain materials is likely to use them for illegal ends, intervention is justified at least to force their possessor to explain why he has them. This rationale is not far removed from the objective theory of criminality, which requires that an act unequivocally manifest its criminality.[237]

The most heavily legislated proscription of this kind is the possession of burglary tools.[238] The *DeGidio* decision makes it clear that attempted burglary and possession of burglary tools are separate substantive offenses.[239] Indeed, the decision and the Model Penal Code commentary on which it relied suggest that attempt liability can attach even to the possession of burglary tools.[240] The single state supreme court to address this contention has rejected it following its brief espousal by an intermediate appellate court.[241]

Generally, courts have not addressed this issue with regard to other possessory offenses—*e.g.*, possession of explosives, unlawful weapons, or forged instruments. Some courts, how-

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[236] *See supra* notes 81–98 and accompanying text (discussing constituent-element approach).

[237] *See* G. FLETCHER, *supra* note 148, at 204–05. *See generally* Robbins, *supra* note 11, at 398–419 (discussing differences between the objective and subjective approaches to criminality, in the context of the impossibility defense to attempt crimes).

[238] For a listing of state statutes prohibiting possession of burglary tools, see *supra* note 81.

[239] DeGidio v. State, 289 N.W.2d 135, 137 (Minn. 1980).

[240] *See supra* notes 229–231 and accompanying text (discussing Model Penal Code comments, approvingly quoted in *DeGidio*, that advocated attaching attempt liability to the crime of possession of burglary tools).

[241] Thomas v. State, 362 So. 2d 1348 (Fla. 1978), *rev'g* 351 So. 2d 77, (Fla. Dist. Ct. App. 1977). The Florida Supreme Court stated:

> Although it may be possible for a person to be convicted of an attempt to possess items which are contraband per se, burglary tools are not contraband per se, and it is only the actual possession of burglary tools along with a criminal intent or usage that constitutes a punishable offense. Possession of otherwise "innocent" items, coupled with a use or intended use of such tools in a burglary, is unlawful.

362 So. 2d at 1350; *accord* Vogel v. State, 365 So. 2d 1079 (Fla. Dist. Ct. App. 1979).

ever, have held that the crime of attempted possession of narcotics does exist.[242] But narcotics possession is distinguishable from other possessory offenses in that many drugs have no lawful uses at all, and the remainder have only medicinal purposes. In addition, narcotics addicts are likely to commit other crimes to support their habits.

5. Crimes in Which the Attempt Is Subsumed Within the Definition of the Completed Crime

Within this category of crimes possessing substantial inchoate elements exist three subcategories: (1) statutory offenses defined as constituent acts within completed crimes; (2) long-recognized offenses in which attainment of the criminal intent is unimportant to liability; and (3) statutory provisions that punish the attempt as well as the completed offense.

The primary examples of the first subcategory of offenses are abortion statutes phrased in terms of supplying or administering any substance or instrument to a woman with the intent to produce a miscarriage.[243] In a California decision, *People v. Berger*,[244] the court upheld a conviction for an attempt to commit an offense thus defined.[245] Police had arrested one of the defendants while she was sterilizing the instruments for an abortion, but before she had begun the surgical procedure on the investigating agent ostensibly seeking the abortion.

The court found no indication that the state legislature intended to exclude the offense of abortion, despite its inchoate nature as defined, from the scope of the state's general attempt statute.[246] Instead, the court focused on the issue of whether

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[242] *See, e.g.*, Silvestri v. State, 332 So. 2d 351, 354–55 (Fla. Dist. Ct. App.) (attempted possession of cocaine), *aff'd*, 340 So. 2d 928 (Fla. 1976); Nichols v. State, 248 So. 2d 199, 199–200 (Fla. Dist. Ct. App. 1971) (attempted possession of marijuana).

[243] For a listing of such statutes, see *supra* note 92.

[244] 131 Cal. App. 2d 127, 280 P.2d 136 (1955).

[245] *But see* Commonwealth v. Willard, 179 Pa. Super. 368, 369–70, 116 A.2d 751, 752 (1955) (reversing conviction for attempt to administer instruments or drugs with intent to induce a miscarriage, even though the defendant had prepared the instruments).

[246] People v. Berger, 131 Cal. App. 2d 127, 129, 280 P.2d 136, 137 (1955). The court also noted that other state courts had recognized the crime of attempt to commit abortion as defined by California statute. *Id.* at 129–31, 280 P.2d at 137–39; *see* People v. Gallardo, 41 Cal. 2d 57, 66, 257 P.2d 29, 35 (1953) (arranging for abortions and accepting money for those operations is not sufficient to establish an attempt to commit abortion); People v. Buffum, 40 Cal. 2d 709, 718, 256 P.2d 317, 321–22 (1953) (arranging abortions in Mexico and transporting patients to Mexico for that purpose are merely acts of preparation); People v. Reed, 128 Cal. App. 2d 499, 502, 275 P.2d 633, 635 (1954) (rinsing speculum in cold water after boiling it was a sufficient act toward commission of the offense, even though the patient was still fully clothed).

the acts of the defendants were sufficient to establish an attempt.[247] Reasoning that the acts of sterilizing the instruments and instructing the patient to disrobe belonged to a small class of cases in which the acts of preparation unambiguously indicated the defendant's intent,[248] the court ruled that these acts also satisfied the requirement of a direct movement toward the commission of the substantive offense—the application of the instruments used to induce a miscarriage.[249]

The second subcategory of constituent-act offenses includes such crimes as bribery, perjury, subornation of perjury, embracery, extortion, making a false report of a crime, and uttering a forged instrument. These are crimes in which the courts traditionally have treated the attempt to commit the crime the same as the realized crime itself. For example, most bribery statutes punish a party who offers a bribe to a public official regardless of whether he is successful in soliciting a public officer to do his bidding.[250] Courts have generally held that attempt liability

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[247] People v. Berger, 131 Cal. App. 2d 127, 130–31, 280 P.2d 136, 138–39 (1955). The court in Commonwealth v. Willard, 179 Pa. Super. 368, 116 A.2d 751 (1955), also focused on the question of whether the defendant's acts went beyond mere preparation. Although the defendant had begun to approach the patient with the prepared instruments when she was apprehended, the court in *Willard* held that these acts merely constituted preparation. *Id.* at 372, 116 A.2d at 753. The Pennsylvania court's categorization of its abortion statute as one prohibiting the attempt to commit an abortion, however, determined this result. *Id.* at 374, 116 A.2d at 754. *Contra* State v. Goddard, 74 Wash. 2d 848, 851–52, 447 P.2d 180, 182–83 (1969) (preparing abortifacient and examining the police agent were sufficient overt acts to sustain a conviction for attempt to administer drugs or instruments to produce a miscarriage).

[248] People v. Berger, 131 Cal. App. 2d 127, 130–31, 280 P.2d 136, 138–39 (1955). The court in *Willard*, however, ruled that, although Willard's actions manifested an unequivocal intent, she was not guilty of attempting to procure an abortion because her acts did not move directly toward consummation of the offense. Commonwealth v. Willard, 179 Pa. Super. 368, 372–73, 116 A.2d 751, 753 (1955). Note that, although the court in *Berger* used the language of both objective and subjective theories of criminality, it conceded that there are few attempts in which the act speaks for itself, thus emphasizing the subjective approach.

[249] People v. Berger, 131 Cal. App. 2d 127, 132, 280 P.2d 136, 139 (1955). The court viewed its holding as an extension of that in People v. Reed, 128 Cal. App. 2d 499, 275 P.2d 633 (1954), in which the defendant had picked up the already-sterilized instrument. *See also* Greenwood v. United States, 225 A.2d 878 (D.C. 1967). In *Greenwood*, the court upheld a conviction for attempted unauthorized use of a motor vehicle despite the defendant's claim that such an offense was, in effect, an attempt to attempt to commit larceny. *Id.* at 279–80. The court, however, viewed the unauthorized-use statute not as a lesser included offense of car theft, but rather as a separate substantive offense. *Id.* at 880. Consequently, the unauthorized-use statute can be viewed as prohibiting a component act of car theft—the unauthorized taking of another's car—but not requiring the more serious offense's specific intent—the intent to deprive the owner of his property permanently or for an unreasonable amount of time.

[250] *See* United States v. Rosner, 485 F.2d 1213, 1229 (2d Cir. 1973) (upholding conviction under federal bribery statute, even though the defendant did not attain object of bribe because the offeree was undercover agent), *cert. denied*, 417 U.S. 950 (1974). *See*

does not attach to these crimes because they are proved as fully by evidence of attempt to commit them as by evidence that they were accomplished.[251]

This proposition, however, is an over-generalization as it applies to those crimes in which the communication of a solicitation or a threat is an essential element. In *State v. Hansford*,[252] for example, a Washington court upheld a conviction for attempted extortion.[253] Based on a tip, the defendant had been apprehended while breaking into his intended victim's home with gloves and a sawed-off shotgun.[254] The court imposed attempt liability on the defendant, reasoning that a note in his pocket instructing a family member to pay $350,000 to ensure the family's safety established the defendant's intent and the burglary established the requisite overt act for attempt liability.[255] The court observed, however, that the defendant was not guilty of the substantive crime of extortion, because he never communicated his threat to his victim.[256] Liability for the substantive offense would nevertheless have attached if the defendant had communicated his threat but received no money.[257] Similarly, attempt liability also could attach to bribery or subornation of perjury under the same theory as an attempt to solicit.[258]

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generally R. PERKINS & R. BOYCE, *supra* note 13, at 534–35 (the common law punished soliciting or offering a bribe even if the importuned party promptly rejected the offer).

For judicial treatment of attempted perjury, compare Adams v. Murphy, 394 So. 2d 411, 415 (Fla. 1981) (crime of perjury is fully proven by "attempt" to commit the crime), *cert. denied*, 455 U.S. 920 (1982) with *id.* (Alderman, J., dissenting) (attempted perjury is possible where there is an intent to commit perjury and there is an overt act of falsely testifying, but the crime is not completed because an essential element, such as materiality, is lacking). *Cf.* E. MEEHAN, *supra* note 160, at 199–200 (noting that various Commonwealth courts have attached attempt liability to the crimes of extortion, perverting justice, and suborning perjury).

[251] *See* Pagano v. State, 387 So. 2d 349, 350 (Fla. 1980) (corruption by threat against a public servant); Achin v. State, 387 So. 2d 375, 376 (Fla. Dist. Ct. App. 1980) (extortion), *aff'd*, 436 So. 2d 30 (Fla. 1982); King v. State, 317 So. 2d 852, 853 (Fla. Dist. Ct. App. 1975) (uttering of a forged instrument), *aff'd*, 339 So. 2d 172 (Fla. 1976); Silvestri v. State, 332 So. 2d 351, 354 (Fla. Dist. Ct. App.), *aff'd*, 340 So. 2d 928 (Fla. 1976). For a discussion of the problem that Florida courts have considered in dealing with attempt liability, see *infra* notes 259–269 and accompanying text.

[252] 22 Wash. App. 725, 591 P.2d 482 (1979).

[253] *Id.* at 729, 591 P.2d at 484.

[254] *Id.*

[255] *Id.* at 727, 729, 591 P.2d at 483–84.

[256] *Id.*

[257] *See* WASH. REV. CODE ANN. §§ 9A.56.110–.120 (1977) (extortion).

[258] For a discussion of the double inchoate offense of attempt to solicit, see *supra* note 140.

The third subcategory of offenses that include the attempt within the definition of the completed crime is exemplified in Florida's penal code. Florida's legislature effectively has merged the completed offense and the attempt in its statutes prohibiting theft,[259] dealing in stolen goods,[260] escape from a penal institution,[261] and resisting arrest with violence.[262] Although the practice of directly linking the attempt to the completed crime appears to answer the question of whether attempt liability applies, this practice has created a serious, unexpected problem in the Florida courts.

Florida's rules of criminal procedure require trial judges to grant a defendant's proper request for a jury instruction on attempt if the indictment contains an offense of attempt to commit the substantive crime charged and there is evidence to support such attempt.[263] Indeed, failure to do so is reversible error.[264] If, however, the substantive offense contains the attempt, then conviction for an attempt to commit the substantive offense constitutes conviction of a nonexistent offense.[265] Seeking to comply with the state's procedural rules, several trial judges

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[259] Sykes v. State, 397 So. 2d 991, 992 (Fla. Dist. Ct. App. 1981), *aff'd*, 434 So. 2d 325, 327 (Fla. 1983); Bell v. State, 382 So. 2d 107, 108 (Fla. Dist. Ct. App. 1980); McIntyre v. State, 380 So. 2d 1064, 1065 (Fla. Dist. Ct. App. 1980); Miles v. State, 374 So. 2d 1167, 1168 (Fla. Dist. Ct. App. 1979); *see* FLA. STAT. ANN. § 812.014(1) (West 1976 & Cum. Supp. 1988) ("a person is guilty of theft if he knowingly obtains or uses, *or endeavors to obtain or to use*, the property of another") (emphasis added).

[260] Ervin v. State, 410 So. 2d 510, 510 (Fla. Dist. Ct. App. 1981), *aff'd*, 435 So. 2d 815 (Fla. 1983); *see* FLA. STAT. ANN. § 812.019 (West 1976 & Cum. Supp. 1988) ("[a]ny person who traffics in, *or endeavors to traffic in*, [stolen] property") (emphasis added).

[261] Keel v. State, 438 So. 2d 850, 851 (Fla. Dist. Ct. App.), *appeal dismissed*, 443 So. 2d 979 (Fla. 1983); *see* FLA. STAT. ANN. § 944.40 (West 1985 & Cum. Supp. 1988) ("[a]ny person confined [by state penal authorities] who escapes *or attempts to escape* from such confinement") (emphasis added).

[262] McAbee v. State, 391 So. 2d 373, 374 (Fla. Dist. Ct. App. 1980); *see* FLA. STAT. ANN. § 843.01 (West 1976 & Cum. Supp. 1988) ("[w]hoever knowingly and willfully resists, obstructs, or opposes any . . . municipal police officer . . . in the lawful execution of any legal duty, *by offering* . . . or doing violence to the person of such officer") (emphasis added).

[263] FLA. R. CRIM. P. 3.510.

[264] Brown v. State, 206 So. 2d 377, 383–84 (Fla. 1968) (superseded by statute, as stated in Henry v. State, 445 So. 2d 707, 708 (Fla. Dist. Ct. App. 1984)); Holloway v. State, 362 So. 2d 333, 335 (Fla. Dist. Ct. App. 1978), *cert. denied*, 379 So. 2d 953 (Fla.), *cert. denied*, 449 U.S. 905 (1980).

[265] *See* Pagano v. State, 387 So. 2d 349, 350 (Fla. 1980) (reversing conviction for attempted corruption of a public servant by threat); Vogel v. State, 365 So. 2d 1079, 1080 (Fla. Dist. Ct. App. 1979) (reversing conviction for attempted possession of burglary tools); Silvestri v. State, 332 So. 2d 351, 353–54 (Fla. Dist. Ct. App.) (reversing conviction for attempted making of a false report of a crime), *aff'd*, 340 So. 2d 928 (Fla. 1976); King v. State, 317 So. 2d 852, 853 (Fla. Dist. Ct. App. 1975) (reversing conviction for attempted uttering of a forged instrument), *aff'd*, 339 So. 2d 172 (Fla. 1976).

have instructed juries on attempt when the applicable statute already included the attempt.[266] Under the principle of "jury pardon," appellate courts reversed these convictions and discharged the defendants, rather than remand for retrial.[267]

The Florida Supreme Court partially corrected this situation with its 1983 decision in *State v. Sykes*.[268] The holding in *Sykes* allows appellate courts to remand a case for retrial rather than discharge a defendant who was convicted in a trial in which the judge improperly instructed the jury on the nonexistent crime as a lesser included offense.[269] But the decision failed to clarify when an attempt instruction is appropriate. The Florida legislature's efforts to resolve the controversy concerning double inchoate liability by defining attempt liability more precisely has paradoxically raised the very issues that it sought to resolve.

B. *Attempt to Conspire*

Unlike the attempt-to-attempt construction, the attempt-to-conspire construction has raised little argument. Only a few courts have had to deal with indictments for attempted conspir-

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[266] *See* Ervin v. State, 410 So. 2d 510, 510 (Fla. Dist. Ct. App. 1981), *rev'd in part*, 435 So. 2d 815 (Fla. 1983); Sykes v. State, 397 So. 2d 991, 994 (Fla. Dist. Ct. App.), *aff'd*, 434 So. 2d 325 (Fla. 1983); McAbee v. State, 391 So. 2d 373, 374 (Fla. Dist. Ct. App. 1980).

[267] *See* Ervin v. State, 410 So. 2d 510, 511 (Fla. Dist. Ct. App. 1981), *rev'd in part*, 435 So. 2d 815 (Fla. 1983); Sykes v. State, 397 So. 2d 991, 994 (Fla. Dist. Ct. App. 1981), *aff'd*, 434 So. 2d 325 (Fla. 1983); McAbee v. State, 391 So. 2d 373, 374 (Fla. Dist. Ct. App. 1980); Vogel v. State, 365 So. 2d 1079, 1080 (Fla. Dist. Ct. App. 1979); Silvestri v. State, 332 So. 2d 351, 353–54 (Fla. Dist. Ct. App.), *aff'd*, 340 So. 2d 928 (Fla. 1976).

In *Sykes*, the intermediate appellate court explained and criticized the jury-pardon rule, although it ultimately followed it:

> The defendant can receive a "jury pardon" if the jury decides to convict of a "lesser included offense," even though the offense may or may not not [sic] have been *in fact* committed. Paradoxically, under the "merged attempt" rule, a defendant must be set free by the appellate courts if he is convicted of an attempt to commit the offense, even though the offense of "criminal attempt" was *in fact* committed by the defendant, and the attempt is *by law* the offense.
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> . . . In cases dealing with the failure to give a jury instruction on "attempt," where the attempt is merged with the crime itself, the appellate courts . . . have avoided reversal by employing the "no crime" rationale. When faced with a jury conviction of a similar "attempt" offense, it appears that the courts (probably for the sake of consistency) felt obliged to follow the same "no crime" approach, which of course mandated the discharge of the defendant.

397 So. 2d at 994 (citations omitted; emphasis in original).

[268] 434 So. 2d 325 (Fla. 1983).

[269] *Id.* at 328. For a case that followed the holding in *Sykes*, see State v. Ervin, 435 So. 2d 815 (Fla. 1983).

acy.[270] The only federal appellate court to address such a conviction dismissed the concept.[271] Most of the state appellate courts that have considered the existence of attempted conspiracy have rejected it.[272]

Nevertheless, the crime of attempted conspiracy may be useful in two situations. First, it would allow courts to find a lesser included offense of conspiracy where the required elements of

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[270] *See* United States v. Murrell, 633 F.2d 219 (6th Cir. 1980) (LEXIS, Genfed library, Usapp file), *cert. denied*, 449 U.S. 1084 (1981); Hutchinson v. State, 315 So. 2d 546, 549 (Fla. Dist. Ct. App. 1975) (rejecting attempt-to-conspire construction because no overt act was proven and the behavior already was covered by the conspiracy statute), *overruled on other grounds*, Gentry v. State, 422 So. 2d 1072 (Fla. Dist. Ct. App. 1982); State v. Sexton, 232 Kan. 539, 540, 542–44, 657 P.2d 43, 44, 46–47 (1983) (rejecting attempted-conspiracy construction because cannot convict for crimes that state does not define); People v. Schwimmer, 66 A.D.2d 91, 94–100, 411 N.Y.S.2d 922, 925–28 (N.Y. App. Div. 1978) (noting that unilateral approach to conspiracy makes attempt-to-conspire construction unnecessary), *aff'd*, 47 N.Y.2d 1004, 394 N.E.2d 288, 420 N.Y.S.2d 218 (1979); People v. Lanni, 95 Misc. 2d 4, 17, 406 N.Y.S.2d 1011, 1019 (N.Y. Sup. Ct. 1978) (same).

[271] United States v. Murrell, 633 F.2d 219 (6th Cir. 1980) (unpublished opinion; citation refers to table; full opinion appears in LEXIS, Genfed library, Usapp file), *cert. denied*, 449 U.S. 1084 (1981). In *Murrell*, the defendant was convicted for violating the Hobbs Act's provision against conspiracies to extort, contained in 18 U.S.C. § 1951. The defendant sought to have his conviction overturned on the basis of a faulty jury instruction. The district court had instructed the jury that the government must show that "defendant Murrell had conspired or *attempted to conspire* to induce his victim to part with money" (emphasis added). Agreeing with the defendant, the circuit panel stated: "There is no such thing as 'attempt to conspire.' Conspiracy requires an agreement and one cannot be guilty of conspiracy if one only 'attempts to agree.'" Nevertheless, it held the district court's error to be harmless and upheld the conviction for conspiracy.

See also United States v. Meacham, 626 F.2d 503, 509 n.7 (5th Cir. 1980) (dictum) (rejecting attempt-to-conspire construction). In reversing a conviction for a conspiracy to attempt, the *Meacham* court denigrated the attempted-conspiracy construction:

> It would be even more inane to commit the other crime the government would have us recognize—attempt to conspire. A scenario leading to a prosecution for that offense might read something like this: A suggests to B that they get together to discuss the possibility of violating the criminal code and to select the provisions they will violate. B agrees to meet and talk. While ascending the staircase leading into the room in which they will meet, both slip and fall down the stairs. A dies of his injuries. B, who survives, is prosecuted for an attempt to conspire.

Id. But cf. Llorente v. Commissioner, 649 F.2d 152, 157 (2d Cir. 1981) (mentioning defendant's indictment for conspiracy and his plea of guilty to a charge of attempted conspiracy to criminally possess a controlled substance).

[272] *See* Hutchinson v. State, 315 So. 2d 546, 548–49 (Fla. Dist. Ct. App. 1975) (the crime of attempted conspiracy does not exist because state case law defines attempt as overt action and conspiracy requires criminal intent of at least two parties), *overruled on other grounds*, Gentry v. State, 422 So. 2d 1072 (Fla. Dist. Ct. App. 1982), *aff'd*, 437 So. 2d 1097 (Fla. 1983); State v. Sexton, 232 Kan. 539, 542, 657 P.2d 43, 46 (1983) (rejecting attempted-conspiracy construction because courts cannot convict for crimes that the state does not define); State v. Kihnel, 488 So. 2d 1238, 1239–41 (La. Ct. App. 1986) (holding that, under a bilateral-conspiracy statute, there can be no attempted conspiracy); People v. Schwimmer, 66 A.D.2d 91, 97–100, 411 N.Y.S.2d 922, 926–28 (N.Y. App. Div. 1978) (noting that Model Penal Code's unilateral approach to conspiracy makes attempt-to-conspire construction unnecessary), *aff'd*, 47 N.Y.2d 1004, 394 N.E.2d 288, 420 N.Y.S.2d 218 (1979).

that crime cannot be proved. Many states have not adopted the Model Penal Code's unilateral approach to conspiracy, retaining the traditional bilateral formulation.[273] Thus, their statutes may require the agreement of two or more parties to commit a substantive offense. Liability for conspiracy would not attach under those statutes if an actor requested another's participation in a conspiracy, but, for example, the other party only feigned agreement.

Ironically, the only state court to adopt the attempted-conspiracy approach sits in a state that has adopted the Model Penal Code's unilateral-conspiracy approach.[274] In *People v. DiDominick*,[275] a New York court upheld a conviction for attempted conspiracy to commit murder.[276] The defendant, a policeman on limited assignment who was restricted from carrying a gun, offered to murder for hire two people named by a person with whom he had conversed on several occasions.[277] Unbeknownst to the defendant, his "business" partner was actually an undercover police officer.[278] After the defendant had obtained a pistol and informed the undercover agent that he was ready to commit the two murders that day, the police arrested him.[279] The court cited the unilateral-conspiracy provision to demonstrate that it was unnecessary for both parties to have the required mental state for one to be guilty of conspiracy.[280] Nevertheless, the court relied on the state's attempt statute to treat the defendant's actions as a lesser included offense of conspiracy.[281]

Liability also may attach under the attempt-to-conspire construction in those situations in which one party requests another's participation in a conspiracy, but the second party refuses.

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[273] For a discussion of the unilateral-conspiracy approach, see MODEL PENAL CODE §§ 5.03(1)(a), 5.04(1)(b) (Proposed Official Draft 1985); *supra* notes 107–109 and accompanying text. For a listing of several states that have adopted that approach, see *supra* note 108.

[274] *Compare* N.Y. PENAL LAW § 105.30 (McKinney 1987) (adopting unilateral approach to conspiracy) *with* People v. DiDominick, 94 Misc. 2d 392, 393–94, 406 N.Y.S.2d 420, 422 (N.Y. Sup. Ct. 1978) (relying on general attempt statute to uphold a conspiracy conviction in a case in which the defendant "conspired" with an undercover officer who had only feigned agreement).

[275] 94 Misc. 2d 392, 406 N.Y.S.2d 420 (N.Y. Sup. Ct. 1978).

[276] *Id.* at 393, 406 N.Y.S.2d at 421.

[277] *Id.*

[278] *Id.*

[279] *Id.*

[280] *Id.* at 394–95, 406 N.Y.S.2d at 422.

[281] *Id.* at 393–94, 406 N.Y.S.2d at 421–22. *But cf.* People v. Lanni, 95 Misc. 2d 4, 17, 406 N.Y.S.2d 1011, 1019 (N.Y. Sup. Ct. 1978) (criticizing reasoning in *DiDominick*).

Attempts to conspire are partially covered in the solicitation statutes of some states.[282] Those few remaining states that do not have such a statute and do not recognize the common-law offense of solicitation, however, would find the attempted-conspiracy construction useful.[283] But none of the appellate courts in those states has approved the construction.

The second general use of the attempted-conspiracy construction occurs in plea bargaining. In *People v. Toliver*,[284] for example, the defendant pled guilty to attempted conspiracy to sell narcotics as part of a plea-bargaining arrangement arrived at during the selection of jurors for his trial.[285] Subsequently, he sought to withdraw his plea on the ground that he was not guilty of conspiring to sell narcotics.[286]

The court refused to accept the withdrawal, ruling that he had voluntarily entered into the plea bargain with the full understanding that it was negotiated in compromise of pending charges.[287] The court stated:

> [T]he practice of accepting pleas to lesser crimes is generally intended as a compromise in situations where conviction is uncertain of the crime charged. The judgment entered on the plea in such situation may be based upon no objective state of facts. *It is often a hypothetical crime*, and the procedure—authorized by statute—is justified for the reason that it is in substitution for a charge of crime of a more serious nature which has been charged but perhaps cannot be proved . . . . [H]is plea may relate to a *hypothetical situation without objective basis*.[288]

Moreover, by comparing the charge of attempted conspiracy to that of attempted manslaughter,[289] the court implied that the

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[282] For a listing of several state solicitation statutes, see *supra* note 133.

[283] *But see* State v. Sexton, 232 Kan. 539, 540, 542–44, 657 P.2d 43, 44, 46–47 (1983). In *Sexton*, the court refused a conviction for attempted conspiracy because the state legislature had not manifested any intent to punish such actions. The state legislature, however, enacted a solicitation statute in 1982, after the acts in *Sexton* had been committed. *Id.* at 543, 657 P.2d at 46–47. The court conceded that the defendant's solicitation of an undercover policeman would have fallen within this statute's ambit. *Id.* at 543–44, 657 P.2d at 47.

[284] 29 A.D.2d 210, 287 N.Y.S.2d 735 (N.Y. App. Div.), *cert. denied*, 393 U.S. 892 (1968).

[285] *Id.* at 211, 287 N.Y.S.2d at 736.

[286] *Id.* at 211–12, 287 N.Y.S.2d at 737.

[287] *Id.*

[288] *Id.* at 212, 287 N.Y.S.2d at 737–38 (quoting People v. Griffin, 7 N.Y.2d 511, 516, 166 N.E.2d 684, 686, 199 N.Y.S.2d 674, 677 (1960)) (emphasis in original).

[289] *Id.*, 287 N.Y.S.2d at 738 (citing People v. Foster, 19 N.Y.2d 150, 154, 225 N.E.2d 200, 202, 278 N.Y.S.2d 603, 606 (1967)).

attempted-conspiracy construction is also logically inconsistent. Nevertheless, the court recognized it for plea-bargaining purposes.[290]

C. *Conspiracy to Attempt*

Unlike the attempt-to-conspire and attempt-to-attempt constructions, almost the entire body of case law concerning conspiracy to attempt is at the federal, rather than the state, level.[291] This situation results from the language of the federal criminal code's general conspiracy statute:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof, in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.[292]

Thus, if a separate federal statute expressly proscribes attempt, it is an "offense against the United States," and therefore is an appropriate object of the conspiracy statute.[293]

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[290] *Id.*; *cf.* People v. LeBlanc, 120 Mich. App. 343, 327 N.W.2d 471 (1982) (holding that guilty plea to nonexistent crime of attempted felonious assault was not error requiring reversal). *See also* A. DERSHOWITZ, THE BEST DEFENSE 115 (1982) (discussing impossible-attempt case, settled by plea of guilty to attempted manslaughter); Robbins, *supra* note 11, at 432–33 n.287 (discussing plea of guilty to nonexistent crime).

[291] The only state cases to discuss conspiracy to attempt are People v. Teitelbaum, 163 Cal. App. 2d 184, 329 P.2d 157 (holding conspiracy to attempt grand theft to be a lesser included offense of conspiracy to commit grand theft), *cert. denied*, 359 U.S. 206 (1958), and People v. Travis, 171 Cal. App. 2d 842, 341 P.2d 851 (1959) (holding conspiracy to attempt petty larceny to be a lesser included offense of conspiracy to commit petty larceny).

[292] 18 U.S.C. § 371 (1982).

[293] *See* United States v. Clay, 495 F.2d 700, 710 (7th Cir.) (attempted bank robbery is an appropriate object of a conspiracy charge, as proscribed by 18 U.S.C. § 2113(a)), *cert. denied*, 419 U.S. 937 (1974).

At first glance, it appears that the language of the federal conspiracy statute, 18 U.S.C. § 371 (1982), also allows a conspiracy-to-solicit construction. Indeed, several federal-court decisions have upheld or alluded to convictions for conspiracy to solicit bribes by government officials or trustees of government-regulated pension funds, or conspiracy to solicit perjury. *See, e.g.*, United States v. Borders, 693 F.2d 1318, 1319 (11th Cir. 1982) (upholding convictions both for the substantive offense of soliciting a person who was materially connected with a judicial proceeding, 18 U.S.C. § 1503, and for conspiracy to solicit), *cert. denied*, 461 U.S. 905 (1983); United States v. Hastings, 681 F.2d 706 (11th Cir. 1982) (upholding a conviction for conspiracy to solicit a bribe from a person who was materially connected with a judicial proceeding), *cert. denied*, 459 U.S. 1203 (1983); United States v. Dorfman, 470 F.2d 246, 247 (2d Cir. 1972) (upholding a conviction for conspiracy to commit a violation of 18 U.S.C. § 1954, which prohibits an offer to, acceptance of, or solicitation to influence the operation of an employee-benefit plan by a person who is materially related to the plan), *cert. denied*,

Although conspiracy statutes reach back further in the continuum of preparatory acts to impose liability than do attempt

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411 U.S. 923 (1973); Wilson v. United States, 230 F.2d 521, 522 (4th Cir.) (upholding a conviction for conspiracy to solicit a bribe by an officer or employee of the federal government), *cert. denied*, 351 U.S. 931 (1956); United States v. Hood, 200 F.2d 639, 640–43 (5th Cir.) (reversing the district court's dismissal of a charge alleging conspiracy to violate a federal statute that proscribed soliciting or receiving money in consideration of a promise, support, or use of influence to obtain for any person any federal appointive office), *cert. denied*, 345 U.S. 941 (1953); *see also* Cline v. Brussett, 661 F.2d 108, 112 (9th Cir. 1981) (remanding to the district court a prisoner's two actions alleging that state officials conspired to convict him of groundless charges and denied him right of fair trial in his conviction of conspiring to solicit perjury); United States v. Sposato, 446 F.2d 779, 780 (2d Cir. 1971) (upholding a conviction for perjury against a challenge based on the defendant's inability to impeach chief witness against him, who was subsequently charged with, but not convicted of, conspiracy to solicit a bribe); United States v. Hart, 344 F. Supp. 522, 523–24 (E.D.N.Y. 1971) (declaring a mistrial in the trial of two federal narcotics agents charged with conspiracy to solicit a bribe, where the principal government witness had stated during testimony that he had taken a lie-detector test).

United States v. Arroyo, 581 F.2d 649 (7th Cir. 1978), *cert. denied*, 439 U.S. 1069 (1979), exemplifies the class of offenses that use the conspiracy-to-solicit construction and helps to illustrate why they are not double inchoate crimes. In *Arroyo*, Fernandez had applied for a Small Business Administration (SBA) guaranteed loan through a local model-cities program. Subsequently, Sanchez, a business counselor at the local agency, told Fernandez that, although the bank had approved the loan, the SBA had not yet guaranteed it. Sanchez instructed Fernandez to see Arroyo, a loan officer at the SBA, for help in processing the loan. *Id.* at 651.

Fernandez met with Arroyo, who suggested that the application was pending before him. Arroyo, however, had already recommended authorization of an SBA guarantee. *Id.* at 654. Nevertheless, Fernandez, believing that Arroyo held the power of decision over the loan, asked Arroyo how much Arroyo's approval would cost. *Id.* at 651. Arroyo told Fernandez to talk to Sanchez. Sanchez informed Fernandez that he should pay Arroyo $800.

The SBA, which unbeknownst to Fernandez had processed the loan, finally disbursed it more than five months after his meetings with Sanchez and Arroyo. Shortly thereafter, Sanchez and Arroyo contacted Fernandez to arrange for Arroyo to pick up the $800. Fernandez informed the FBI, which staked out Fernandez' business and arrested Arroyo when he came to collect the bribe. *Id.* at 651–52.

The district court convicted Arroyo of the substantive offense of corruptly soliciting or receiving a bribe, in violation of 18 U.S.C. § 201(c)(1) (1976), and convicted both Arroyo and Sanchez of conspiracy to commit the substantive offense, in violation of 18 U.S.C. § 371 (1976). *Id.* at 650. Both appealed on the ground that Arroyo had solicited a gratuity, in violation of 18 U.S.C. § 201(g) (1976), rather than a bribe, because he had approved the loan prior to the solicitation, and thus no longer had authority to influence its disposition. *Id.* at 653. A divided appellate court rejected the defendants' contention and upheld their convictions. *Id.*

Significantly, none of the defendants in these cases challenged his conspiracy conviction on the ground that it constituted an impermissible double inchoate offense. The reason is that the crimes of soliciting a bribe and soliciting perjury are long-recognized forms of the substantive offenses of bribery and subornation of perjury. *See* R. PERKINS & R. BOYCE, *supra* note 13, at 524–26 (subornation of perjury), 534–35 (solicitation of bribe). Historically, the treatment of solicitation as a general inchoate offense developed from those crimes affecting the administration of government functions. *See supra* note 126 (discussing early English cases from which the substantive crime of solicitation developed). None of the conspiracy charges brought in the cases above made a general solicitation statute its object, nor could they have, as the federal criminal law has no such statute. Accordingly, it is incorrect to view these conspiracies as double inchoate crimes.

statutes,[294] the federal courts' use of the conspiracy-to-attempt construction has not resulted in an extension of liability to more remote acts. Instead, the courts have applied it in instances in which the conspiracy failed to realize an object offense for which the statutory definition of the crime prohibited both the attempt and the substantive crime.[295]

The conspiracy-to-attempt formulation is used most frequently in conjunction with the federal statute prohibiting bank robbery or the attempt to commit it.[296] In *United States v. Dearmore*,[297] for example, an informant, knowing that the defendants had been planning to rob a bank, introduced them to federal agents who pretended to be potential accomplices. The agents assisted the defendants in organizing the crime and accompanied them to the bank on the morning of the planned robbery. The agents arrested the defendants as they entered the bank.[298] Relying on prior federal case law,[299] the United States Court of Appeals for the Ninth Circuit rejected the defendants' contention that the general conspiracy statute did not apply to an attempted bank robbery or any other attempt: "While we think it a poor practice to indict for conspiracy to commit the attempt instead of indicting for conspiracy to commit the substantive offense which is the real object of the perpetrators, we cannot say that the former cannot constitute an indictable offense."[300]

Courts also have applied the conspiracy law to statutes that prohibit the attempt to violate the union members' "bill of

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[294] For a discussion of conspiracy as an inchoate crime that imposes liability at an earlier stage than does attempt, see *supra* notes 115–117 and accompanying text.

[295] *See* United States v. Dearmore, 672 F.2d 738, 739 (9th Cir. 1982) (conspiracy to attempt bank robbery); United States v. Mowad, 641 F.2d 1067, 1068 (2d Cir.) (conspiracy to attempt to export firearms without a license), *cert. denied*, 454 U.S. 817 (1981); United States v. Williams, 624 F.2d 75, 75 (9th Cir. 1980) (conspiracy to attempt to use violence to intimidate a union member from exercising his right to free speech guaranteed by the Labor Management Reporting and Disclosure Act ("Landrum-Griffin" Act)); United States v. Clay, 495 F.2d 700, 703 (7th Cir.) (conspiracy to attempt bank robbery), *cert. denied*, 419 U.S. 937 (1974); United States v. Baum, 435 F.2d 1197 (7th Cir. 1970) (conspiracy to attempt to evade federal income taxes); United States v. Chambers, 515 F. Supp. 1, 3 (N.D. Ohio 1981) (conspiracy to attempt to maliciously destroy property by explosion).

[296] 18 U.S.C. § 2113(a) (1982).

[297] 672 F.2d 738 (9th Cir. 1982).

[298] *Id.* at 739.

[299] *See* United States v. Clay, 495 F.2d 700, 710 (7th Cir.) (rejecting the contention that conspiracy to attempt to rob a bank is not a crime), *cert. denied*, 419 U.S. 937 (1974); United States v. Chambers, 515 F. Supp. 1, 3 (N.D. Ohio 1981) (holding that conspiracy can have as its object crime the attempt to maliciously destroy property).

[300] 672 F.2d at 740 (Kennedy, J.).

rights,"[301] to maliciously destroy property by explosion,[302] and to evade federal income taxes.[303] One court has applied the conspiracy statute to a Treasury Department regulation that expanded the scope of a substantive statute proscribing the export of firearms without a license by making the attempt to do so a violation.[304] Another court has upheld the application of conspiracy to a statute prohibiting a form of burglary—the breaking and entering of a post office.[305]

The only decision to reject a conspiracy to attempt implicitly strengthened the principle that the inchoate "offense against the United States" to which the conspiracy statute can apply must be a separate, specific statute. In *United States v. Meacham*,[306] the United States Court of Appeals for the Fifth Circuit reversed conspiracy-to-attempt convictions based on conspiracy and attempt provisions that were contained in the same statute. Because federal narcotics laws contain their own conspiracy provisions, the general conspiracy statute is inapposite.[307] Thus, federal prosecutors sought to bring the conspiracy-to-attempt charges based on the two narcotics statutes, both of which read:

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[301] *See* United States v. Williams, 624 F.2d 75, 75–77 (9th Cir. 1980) (upholding application of 18 U.S.C. § 371 to 29 U.S.C. § 530).

[302] *See* United States v. Chambers, 515 F. Supp. 1, 3 (N.D. Ohio 1981) (upholding application of 18 U.S.C. § 371 to 18 U.S.C. § 844(i)).

[303] *See* United States v. Baum, 435 F.2d 1197, 1200–01 (7th Cir. 1970) (upholding application of 18 U.S.C. § 371 to 26 U.S.C. § 7201), *cert. denied*, 402 U.S. 907 (1971). The meaning of "attempt" under the tax code, however, is different from that which has traditionally been used in the criminal law. The elements of attempted tax evasion are the same as those for tax evasion itself, combined only with the fact that the actor was caught. The statute provides: "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall . . . be guilty of a felony . . . ." 26 U.S.C. § 7201 (1982). For other cases upholding the validity of conspiracy to attempt to evade taxes, see, *e.g.*, Forman v. United States, 361 U.S. 416, 417–18 (1960), *overruled on other grounds*, Burks v. United States, 437 U.S. 1 (1978); United States v. Wenger, 455 F.2d 308, 310 (2d Cir.), *cert. denied*, 407 U.S. 920 (1972); Giardano v. United States, 257 F.2d 109, 111–12 (8th Cir.), *cert. denied*, 357 U.S. 944 (1958); Yoffe v. United States, 153 F.2d 570, 571, 576 (1st Cir. 1946).

[304] *See* United States v. Mowad, 641 F.2d 1067, 1074–75 n.15 (2d Cir.) (upholding application of 18 U.S.C. § 371 to 22 C.F.R. §§ 123.01, 127.03, implementing the mandate of 22 U.S.C. § 2778(c)), *cert. denied*, 454 U.S. 817 (1981). The *Mowad* court stated:

> Although it is probable that the "conspiracy to attempt" charge against Mowad was the result of careless indictment drafting and not innovative legal reasoning, the Government's charge contains all elements necessary to prosecute a conspiracy: a provision making the act of conspiring a crime and a provision making the object of the conspiracy a crime.

Id. at 1074.

[305] *See* Wangrow v. United States, 399 F.2d 106, 108 (8th Cir.) (upholding application of 18 U.S.C. § 371 to 18 U.S.C. § 2115), *cert. denied*, 393 U.S. 933 (1968).

[306] 626 F.2d 503 (5th Cir. 1980), *cert. denied*, 459 U.S. 1040 (1982).

[307] United States v. Mori, 444 F.2d 240, 244–45 (5th Cir.), *cert. denied*, 404 U.S. 913 (1971).

"Any person who attempts *or* conspires to commit any offense defined in this subchapter is punishable . . . ."[308] The court overturned the convictions not on the ground that a conspiracy to attempt is a "conceptually bizarre crime,"[309] but rather on its reading of congressional intent that the statute be used only to charge either an attempt or a conspiracy.[310]

Despite criticisms of the statutory construction,[311] federal law clearly makes valid the double inchoate crime of a conspiracy to attempt.

III. Criticism of Double Inchoate Crimes

Despite the use of double inchoate concepts by many federal and state courts, the majority of jurisdictions have not adopted this practice. Decisions of the nineteenth and early twentieth centuries that criticize convictions for attempts to attempt as "logical absurdities" remain influential, as evidenced by many courts' citation of them, with and without further analysis.

The abstract and semantical nature of the logical-absurdity argument, however, has come under criticism in recent years by scholars and jurists. Consequently, some recent decisions declining to recognize double inchoate offenses have referred to the absence of express legislative intent to allow courts the essentially common-law authority to create crimes by combining statutory inchoate offenses. This argument implies a violation of due process caused by lack of notice to the defendant. In addition, several recent decisions and commentaries have criticized the use of double inchoate crimes as cumbersome and unnecessary.

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[308] 21 U.S.C. § 846 (1982) (distribution of marijuana) (emphasis added); *id.* § 963 (importation of marijuana) (emphasis added).

[309] 626 F.2d at 509. The court observed that "it would be the height of absurdity to conspire to commit an attempt, an inchoate offense, and simultaneously conspire to fail at the effort." *Id.* at 509 n.7; *see also supra* note 271 (quoting court's comments on attempt to conspire). The court continued:

> The propriety of applying conspiracy statutes "through" attempt statutes is not before us in this case. We note the possibilities such an application could cause merely to highlight our belief that, had Congress intended that there be prosecutions for conspiracies to attempt to violate the drug laws, it would have so provided in terms less ambiguous . . . . Congress is as much aware as we are of the venerable maxim that penal statutes are to be strictly construed.

626 F.2d at 509 n.7.

[310] 626 F.2d at 508–09.

[311] *See infra* notes 422–428 and accompanying text (noting judicial criticism of the conspiracy-to-attempt construction).

In summary, the case law generally reflects a progression from a conceptual approach, which concentrates on the use of abstract concepts and their analysis by pure logic, to a functional approach, which emphasizes the purposes of the law. Although the logical-absurdity approach appears to offer greater predictability and certainty, it may fail to achieve the social policies that the legislatures intended to further through inchoate liability.[312] Both the manifested-legislative-intent approach and the evaluation of the necessity for specific double inchoate crimes reflect a more functional, policy-based approach. The former, however, emphasizes notions of separation of powers and individual freedom from criminal process, and thus still partakes of a conceptual approach. The latter, along with those decisions that accept double inchoate offenses, represents a truly functional approach.

A. *The Logical Absurdity of Double Inchoate Crimes*

1. The Origins of the Logical-Absurdity Approach

Perhaps the most influential decision to denigrate the concept of double inchoate offenses is *Wilson v. State*,[313] decided by the Georgia Supreme Court in 1874. *Wilson*, which involved a conviction for "an attempt to make an assault,"[314] is the most often cited and quoted decision regarding double inchoate crimes. Despite criticism of the court's analysis in *Wilson*,[315] several subsequent decisions have invalidated double inchoate convictions by condensing its sweeping rhetoric into the shorthand premise, "logical absurdity."[316]

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[312] Meehan, *supra* note 12, at 218.

[313] 53 Ga. 205 (1874).

[314] *Id.* at 206. The state had indicted Wilson for assault with intent to murder, but the jury found Wilson guilty of what it believed to be a lesser included offense. *Id.*

[315] Arnold, *supra* note 154, at 64–65; Perkins, *supra* note 194, at 81–87; *see* R. PERKINS & R. BOYCE, *supra* note 13, at 159–73 (noting modern courts' tendency to move away from *Wilson*'s logical-absurdity argument); MODEL PENAL CODE § 5.01 commentary at 363–64 (Proposed Official Draft 1985) (suggesting that courts should decide whether attempt liability attaches to particular behavior based on public policy, rather than on semantic niceties).

[316] *See* Allen v. People, 175 Colo. 113, 115, 485 P.2d 886, 888–89 (1971) (invalidating the charge of attempted assault with a deadly weapon); Hutchinson v. State, 315 So. 2d 546, 549 (Fla. Dist. Ct. App. 1975) ("attempted conspiracy as an abstract concept would be a logical absurdity"), *overruled on other grounds*, Gentry v. State, 422 So. 2d 1072 (Fla. App. 1982), *aff'd*, 437 So. 2d 1097 (Fla. 1983); Green v. State, 82 Ga. App. 402, 405, 61 S.E.2d 291, 293 (1950) (the offense of attempted assault with intent to rape

In *Wilson*, the defendant had used a gun to threaten a person who sought to enter the defendant's premises. The defendant, however, made clear that he would shoot only if the other party attempted to enter his house. (The court noted that the intended victim appeared to have no right to enter the defendant's house.[317]) On this evidence, the defendant was convicted of attempted assault with intent to murder.[318]

The Georgia Supreme Court used the logical-absurdity argument when it reversed the conviction.[319] Noting that the state code defined an assault as "an attempt to commit a violent injury on the person of another,"[320] the court stated:

> As an assault is itself an attempt to commit a crime, an attempt to make an assault can only be an attempt to attempt to do it, or to state the matter more definitely, it is to do any act towards doing an act towards the commission of the offense. This is simply absurd. As soon as any act is done towards committing a violent injury on the person of another, the party doing the act is guilty of an assault, and he is not guilty until he has done the act. Yet it is claimed that he may be guilty of an attempt to make an assault, when, under the law, he must do an act before the attempt is complete. The refinement and metaphysical acumen that can see a tangible idea in the words an attempt to attempt to act is too great for practical use. It is like conceiving of the beginning of eternity or the starting place of infinity.[321]

This analysis presents two bases for criticism of attempt to attempt as a logical absurdity. First, the court suggested that the attempt-to-attempt concept would give courts unlimited discretion to punish acts further removed from a completed offense than an attempt statute does.[322] As the attempt statute did in *Wilson*, general attempt statutes require an overt act done with the intent to commit a completed crime.[323] The act must go

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does not exist); People v. Banks, 51 Mich. App. 685, 690, 216 N.W.2d 461, 463 (1974) (there is no such crime as attempted felonious assault); *cf.* People v. LeBlanc, 120 Mich. App. 343, 327 N.W.2d 471 (1982) (holding that, although attempted felonious assault is a nonexistent crime, for policy reasons a defendant may still plead guilty to such a crime).

[317] 53 Ga. at 206. The court doubted, based on the conditional nature of Wilson's threat and his right to protect his abode, whether the evidence was sufficient to establish "even an assault." *Id.*

[318] *Id.*

[319] *Id.*

[320] *Id.*

[321] *Id.*

[322] *Id.*

[323] *See supra* notes 32–49 and accompanying text (discussing actus reus of attempt).

beyond mere preparation, but may fall short of consummation of the completed offense. Consequently, the court in *Wilson* viewed an attempted attempt as "the doing of an act towards the doing of an act" toward completing an offense defining a tangible harm.[324] The court indicated that allowing a conviction for attempt to attempt would be impractical at best and might lead to the judicial use of further regressions.[325] This practice would impart criminal liability to acts so removed from the ultimate offense as to qualify as mere preparation—that is, acts to which a court cannot impute a fully formed intent.[326]

Second, the court in *Wilson* suggested that individuals do not attempt to attempt a crime, but instead attempt to commit a completed offense.[327] Even if an inchoate crime can have as its object another inchoate crime, the second inchoate crime must have as its object some completed substantive offense meeting a statutory test of liability.[328] In most states, failure to consummate the completed offense is an element of attempt.[329] Thus, in those jurisdictions, attempt to attempt suggests within the same construction both an attempt to commit some ultimate offense and an attempt to fail at that same offense.[330]

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[324] 53 Ga. at 206.

[325] *Id.*

[326] This implication in the *Wilson* analysis is elaborated on in the dissent in People v. Schwimmer, 66 A.D.2d 91, 105, 411 N.Y.S.2d 922, 931–32 (N.Y. App. Div. 1978) (Titone, J., dissenting), *aff'd*, 47 N.Y.2d 1004, 394 N.E.2d 288, 420 N.Y.S.2d 218 (1979), which criticized an indictment that the state claimed set out a charge of attempted conspiracy as a lesser included offense of conspiracy. The dissent argued as follows:

> [C]onspiracy is an inchoate, or anticipatory, crime. It is "anticipatory in the sense that there exists an 'object' or substantive crime yet to be committed." Because of the very nature of conspiracy as an inchoate crime there cannot be an attempt to commit it since you would then have an attempt on an attempt. To establish a conspiracy proof is required that the plot or scheme is being acted upon and not resting in the minds of the plotters. Conspiracy is a completed crime only when the agreement is effectuated by an overt act toward fruition of the substantive crime. Thus, even when the conspiracy is established, it is inchoate. To hold that acts which have not reached the minimal level required for an inchoate crime are sufficient to warrant a conviction for attempted conspiracy is untenable. It would render illegal acts which, in themselves, are insufficient even to constitute an anticipatory crime.

Id. (citing Sobel, *The Anticipatory Offenses in New Penal Law*, 32 BROOKLYN L. REV. 257 (1966)).

[327] 53 Ga. at 206.

[328] MODEL PENAL CODE § 5.01 commentary at 363 (Proposed Official Draft 1985).

[329] *See supra* notes 23–27 and accompanying text (listing the elements of attempt).

[330] A Colorado court developed this implication of *Wilson*'s rationale further. *See* Allen v. People, 175 Colo. 113, 115, 485 P.2d 886, 888 (1971) ("Perhaps philosophers or metaphysicians can intend to attempt to act, but ordinary people intend to act, not to attempt to act."); *cf.* United States v. Dearmore, 672 F.2d 738, 740 (9th Cir. 1982) (dictum) ("We think it a poor practice to indict for conspiracy to commit the attempt instead of indicting for conspiracy to commit the substantive offense which is the real

Several other roughly contemporaneous decisions concerning convictions for attempt to commit a crime that is itself in the nature of attempt buttressed the rationale of *Wilson*.[331] These decisions, however, merely held without analysis that the crime of an attempt to commit an assault did not exist[332] or that the state could not indict a person for an attempt to commit a crime that is itself in the nature of an attempt.[333]

In *State v. Hewett*,[334] for example, the North Carolina Supreme Court rejected a conviction for a felonious "attempt to ravish and carnally know" the victim.[335] The court held that the indictment made out a charge of assault with intent to rape. The court treated this crime as a lesser included offense of rape, holding that no such crime as attempt to commit rape existed.[336]

The *Hewett* court then stated the general proposition that "one cannot be indicted for an attempt to commit a crime where the crime attempted is in its very nature an attempt,"[337] citing as authority the decision in *People v. Thomas*,[338] a case that had overturned a conviction for attempted subornation of perjury.[339] Several other cases involving attempt to commit embracery stated the proposition in the same way.[340]

As previously discussed, however, the nature of subornation of perjury and embracery as forms of attempt are different from that of assault.[341] In embracery and subornation, the attempt establishes the crime; it is irrelevant whether the actor realizes his intent—*i.e.*, solicits another to do his bidding. In assault,

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objective of the perpetrators . . . ."); United States v. Meacham, 626 F.2d 503, 509 n.7 (5th Cir. 1980) ("[I]t would be the height of absurdity to conspire to commit an attempt, an inchoate offense, and simultaneously conspire to fail at the effort.").

[331] *See, e.g.*, People v. Thomas, 63 Cal. 482, 482–83 (1883); State v. Davis, 112 Mo. App. 346, 348, 87 S.W. 33, 33 (1905); State v. Sales, 2 Nev. 268, 270 (1866); State v. Hewett, 158 N.C. 627, 629, 74 S.E. 356, 357 (1912); White v. State, 22 Tex. 608, 608 (1858); Brown v. State, 7 Tex. Crim. 569, 569 (1880); Wiseman v. Commonwealth, 143 Va. 631, 636, 130 S.E. 249, 251 (1925).

[332] *See* White v. State, 22 Tex. 608 (1858) (assault with intent to murder); Brown v. State, 7 Tex. Crim. 569 (1880) (assault with intent to rape).

[333] State v. Hewett, 158 N.C. 627, 629, 74 S.E. 356, 357 (1912).

[334] 158 N.C. 627, 74 S.E. 356 (1912).

[335] *Id.* at 629, 74 S.E. at 357.

[336] *Id.*

[337] *Id.*

[338] 63 Cal. 482 (1883).

[339] *Id.* at 482–83.

[340] State v. Taylor, 345 Mo. 325, 333–34, 133 S.W.2d 336, 341 (1939); State v. Davis, 112 Mo. App. 346, 348, 87 S.W. 33, 33 (1905); State v. Sales, 2 Nev. 268, 270 (1866); Wiseman v. Commonwealth, 143 Va. 631, 636, 130 S.E. 249, 251 (1925).

[341] *See supra* notes 250–251 and accompanying text (discussing differing judicial treatment of subornation of perjury and embracery).

however, guilt or innocence depends on how close the defendant comes to realizing his intent. Accordingly, the extension of a principle of some validity for embracery and subornation of perjury to assault without further analysis merits closer attention.

2. The Move Away from Logical Absurdity

The appeal of the logical-absurdity argument as the most valid criticism of attempts to attempt diminished with the publication of an article by Thurman Arnold in 1930.[342] Arnold implicitly criticized *Wilson*'s broad generalization by attacking the overemphasis on abstract concepts in substantive inchoate crimes:

> One way of treating cases arising under [criminal attempt] statutes is to determine whether the policy of the statute can be said to include the conduct of the defendant and whether the penalty seems appropriate to the offense. If we do this we can confine our attention to the particular prohibition under discussion, and decide to what conduct we wish to extend it. Another method is to forget the particular statute which the defendant is alleged to have violated or the particular crime which he has almost consummated, and put our emphasis on words in the statute such as "assault" and "attempt." When we do this every other statute, no matter how different in policy or penalty, and attempts at every other crime no matter how dissimilar immediately become relevant. We are thereupon forced to create numerous fine distinctions and abstract concepts.[343]

Using the concept of attempt to assault, from which most of the discussion of attempt to attempt has arisen, Arnold illustrated the validity of policy-based distinctions. He noted that, although the courts had not punished attempts at ordinary assault, two courts had made attempts at aggravated assault punishable.[344] He believed that this distinction, based on the relative seriousness of the completed offenses, made good common sense, although it appeared incorrect when analyzed in terms

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[342] Arnold, *supra* note 154.

[343] *Id.* at 62.

[344] *Id.* at 65 (citing Burton v. State, 8 Ala. App. 295, 62 So. 394 (1913) (attempted assault with intent to commit rape), and State v. Herron, 12 Mont. 230, 29 P. 819 (1892) (attempted assault with a deadly weapon)).

of the applicable statutes' definitions.[345] Arnold concluded that "the generalization that there can be no attempt at a crime in the nature of attempt tells us nothing and tends merely to divert the court's mind from the real issue."[346]

Arnold's criticisms of the logical-absurdity approach make a valid point: By focusing on the definitions of attempt in modern general attempt statutes, courts that fail to recognize attempts to commit crimes in the nature of attempt have obscured the

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[345] *Id.* Professor Arnold stated:

> The court is confronted with the alternative of either discharging the accused or modifying the penalty to make it more nearly fit his conduct. An easy way to accomplish this is by making attempts at aggravated assaults punishable, and this is frequently done. It is academic to call such cases "wrong" because assault is in the nature of an attempt and hence cannot be attempted, particularly when a common sense result is reached.

Id. (footnote omitted).

[346] *Id.*; *accord* MODEL PENAL CODE § 5.01 commentary at 363–64 (Proposed Official Draft 1985). The Code's drafters reasoned that:

> One of the questions frequently litigated is whether there can be an attempt to attempt. As an abstract proposition of law the construction has been condemned by the majority of cases considering the issue, and it seems as a matter of sound analysis that the construction is not necessary. An attempt to attempt can always be considered a more remote attempt to commit the same substantive crime, provided, of course, that the conduct is sufficient to meet the basic test of liability. Thus, if an assault is an attempt to commit a battery, an attempt to assault can more properly be charged as itself an attempt to commit a battery and its sufficiency determined on that basis. In any case, convictions have been sustained for attempts to assault.
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> The situation is somewhat different when the attempt is not described as such, but is defined as an act done with intent to commit some other crime. Among the traditional offenses burglary is such an attempt—a breaking and entering under certain circumstances with intent to commit a felony. But there has been no difficulty in sustaining charges of attempted burglary. Nor has there been difficulty generally in finding attempt liability when the "substantive offense" is even more clearly an attempt: possessing burglar's tools with intent to commit burglary; conveying tools into prison with intent to facilitate an escape; offering a bribe; exploding a substance with intent to cause personal injury; employing a drug or instrument with intent to procure a miscarriage; procuring a noxious drug with intent to supply it to another for the use in committing abortion. For each attempt liability has been sustained. It would be possible to treat each of these acts as an attempt to commit the more remote substantive crime, but this is unduly cumbersome; the existing approach seems preferable. If a preliminary act is prominent enough to serve as the basis of substantive liability, it should also provide a sufficient foundation for attempt liability . . . .

Id. (citations omitted).

In addition, several courts have noted two short scholarly works on attempt to assault as influential in eroding the unquestioning acceptance of the proposition that one cannot attempt an offense in the nature of an attempt. *See, e.g.*, *In re* M., 9 Cal. 3d 517, 521, 510 P.2d 33, 35, 108 Cal. Rptr. 89, 91 (1973) (citing Perkins, *supra* note 194); Hutchinson v. State, 315 So. 2d 546, 548 (Fla. Dist. Ct. App. 1975) (citing Annotation, *Attempt to Commit Assault as Criminal Offense*, 79 A.L.R.2D 597 (1961)), *overruled on other grounds*, Gentry v. State, 422 So. 2d 1072 (Fla. Dist. Ct. App. 1982), *aff'd*, 437 So. 2d 1097 (Fla. 1983); People v. Banks, 51 Mich. App. 685, 689 n.6, 216 N.W.2d 461, 463 n.6 (1974) (citing the same Annotation as *Hutchinson*).

necessary relationship between an attempt and an object crime.[347] In *Allen v. People*,[348] for example, the Colorado Supreme Court reversed a conviction for attempt to commit an assault with a deadly weapon, holding that the crime of attempted assault did not exist under the laws of Colorado. Two police officers had stopped the defendant's car because it displayed an expired temporary permit. When one of the officers approached the car and asked for his driver's license, the defendant pulled a gun out of his right rear pocket. Although the defendant actually dropped the gun as he drew, his arm came across as if he intended to point the gun at the officer. The defendant tried to pick up the gun, but was dissuaded by the officer, who had trained his gun on the defendant.[349]

The court's analysis focused exclusively on the statutory definitions of attempt and assault, the latter of which it characterized as an attempt with present ability to commit a battery.[350] Ironically, the court noted the importance behind policy considerations:

> When a person is charged with an assault, it is clear that "present ability" must be construed in the light of the particular situation. The policy behind criminal statutes is to safeguard the public from harm from individuals. In construing the criminal assault statute, therefore, factors such as the gravity of the potential harm and the uncertainty of the result are to be included in appraising the actor's "present ability."[351]

In the sentence that immediately followed, however, the court concluded: "In view of our determination that the offense with which the defendant was charged is non-existent in Colorado, the judgment of the trial court must be reversed . . . ."[352]

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[347] The approach of some courts validating attempts to assault, however, is also open to criticism. One court has found the construction valid by simply declaring that assault is a "separate substantive crime," even though assault was defined statutorily as attempted battery. State v. Wilson, 218 Or. 575, 581–90, 346 P.2d 115, 118–22 (1959) (superseded by statute, as stated in State v. Garcias, 296 Or. 688, 679 P.2d 1354 (1984)). Other decisions have broadened traditional definitions of assault by reading into them the requirement that the necessary act be one that instills a fear of imminent bodily harm in the victim. *See, e.g.*, United States v. Locke, 16 M.J. 763, 765 (A.C.M.R. 1983); State v. White, 324 So. 2d 630, 631 (Fla. 1975). This interpretation serves to make assault a substantive offense, rather than an attempted battery.

[348] 175 Colo. 113, 485 P.2d 886 (1971).

[349] *Id.* at 115, 485 P.2d at 887.

[350] *Id.* at 116, 485 P.2d at 888.

[351] *Id.* at 117–18, 485 P.2d at 888 (citation omitted).

[352] *Id.* at 118, 485 P.2d at 888–89.

3. Analysis of the Logical-Absurdity Approach

The idea of making a general attempt statute the object of another general attempt statute *is* logically absurd. General attempt statutes, because of their broad applicability to various types and degrees of crimes, must rely on such abstract concepts as "proximity," "preparation," or "substantial step" as general rules to define in specific instances the preparatory acts that create culpability.[353] A continuing regression of "general attempt" to commit a "general attempt" to commit a crime would circumvent the measures, however vaguely defined, with which legislatures draw the line for attempt liability.

Crimes in the nature of attempt, however, are not merely abstract attempts. Rather, they are substantive offenses combining elements of a completed offense with the attempt to commit that specific offense.[354] Consequently, courts can evaluate the danger posed by preparatory acts and decide whether the danger warrants punishment, albeit of a lesser severity than that for the completed object offense.[355] The application of attempt liability to serious offenses such as burglary,[356] aggravated

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[353] Arnold, *supra* note 154, at 65–66.

[354] *See supra* notes 162–163 and accompanying text (discussing crimes in the nature of attempt). Even assault, which stirs the greatest controversy as the object of an attempt, is usually defined as an unlawful attempt coupled with the present ability to commit a violent injury. Thus, assault seems to be an attempt plus another element. Arnold, *supra* note 154, at 65. This reasoning is even stronger in cases of assault with a deadly weapon and assault with intent to commit another crime. Accordingly, this argument is used to justify the treatment of aggravated assault as a separate substantive crime. Burton v. State, 8 Ala. App. 295, 298–99, 62 So. 394, 395–96 (1913); State v. Wilson, 218 Or. 575, 585, 346 P.2d 115, 120 (1959) (superseded by statute, as stated in State v. Garcias, 296 Or. 688, 679 P.2d 1354 (1984)); *see also* Perkins, *supra* note 194, at 87 (because the crime of assault with a deadly weapon was unknown at common law, "it [is] a separate substantive offense and not an uncommitted battery").

[355] Arnold, *supra* note 154, at 75:

> The law of criminal attempts . . . [c]onsidered apart from any particular crime . . . simply means that courts are permitted to fill in the gaps which a set of definitions inevitably leave when applied to human conduct. The power to interpret statutes performs a similar function, but the rules of statutory interpretation of criminal statutes are never considered as definitions of crimes. The power to punish for criminal attempts gives the court power to extend a criminal statute without distorting its language. It is necessary to our criminal system. To treat this power as the definition of a substantive crime is either to destroy it or hopelessly to confuse it.

Id.

[356] *See supra* notes 225–234 and accompanying text (discussing attempted-burglary constructions).

assault,[357] and sexual assault of minors[358] indicates growing acceptance of a policy-based analysis.

Nevertheless, several recent decisions have characterized double inchoate constructions as invalid without further analysis[359] or as logical absurdities.[360] These courts have not only rejected convictions for attempts to commit crimes in the nature of attempt—most notably assaults—but also have re-

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[357] *See supra* notes 169–224 and accompanying text (discussing the debate over the attempt-to-assault construction).

[358] *See supra* notes 192–224 and accompanying text (noting the modern courts' characterization of assault as a substantive offense, to justify attempt liability).

[359] *See, e.g.*, People v. Duens, 64 Cal. App. 3d 310, 314, 134 Cal. Rptr. 341, 343 (1976) (assault with intent to commit rape); People v. Gordon, 178 Colo. 406, 407–08, 498 P.2d 341, 342 (1972) (assault with a deadly weapon); People v. Banks, 51 Mich. App. 685, 689, 216 N.W.2d 461, 463 (1974) (felonious assault); People v. Maxwell, 36 Mich. App. 127, 128, 193 N.W.2d 176, 177 (1971) (assault with intent to commit armed robbery); People v. Patskan, 29 Mich. App. 354, 357, 185 N.W.2d 398, 400–01 (1971) (assault with intent to rob while armed), *rev'd on other grounds*, 387 Mich. 701, 199 N.W.2d 458 (1972); State v. Currence, 14 N.C. App. 263, 265, 188 S.E.2d 10, 12 (1972) (assault with a deadly weapon); Commonwealth v. Willard, 179 Pa. Super. 368, 374–75, 116 A.2d 751, 754 (1955) (use of drugs or instruments with intent to induce an abortion); *see also* People v. LeBlanc, 120 Mich. App. 343, 327 N.W.2d 471 (1983) (holding that felonious assault was a nonexistent crime, but that a plea of guilty to such a crime was not reversible error).

An analogous case is State v. Davis, 108 N.H. 158, 229 A.2d 842 (1967). In *Davis*, the court upheld a conviction for attempted statutory rape against the defendant's contention that such a charge is, in essence, an attempted assault with intent to rape. *Id.* at 162, 229 A.2d at 845. The court, while conceding that there could be no crime of an attempt to commit an attempt, rejected the argument, holding that attempted rape is a lesser included offense of rape. *Id.* The court supported this proposition by citing cases rejecting attempts to commit embracery and to induce prostitution. *Id.*

Offenses such as embracery and inducing prostitution punish the attempt as the completed offense. Thus, the general proposition that there is no offense of attempt to attempt a crime has greater validity for them than it does for attempt to assault. For cases that reject the attempt-to-attempt construction for crimes that punish the attempt as the completed offense, see Pagano v. State, 387 So. 2d 349, 350 (Fla. 1980) (corruption of a public servant by threat); Silvestri v. State, 332 So. 2d 351, 354 (Fla. Dist. Ct. App.) (making a false report of a crime), *aff'd*, 340 So. 2d 928 (Fla. 1976); King v. State, 317 So. 2d 852, 853 (Fla. Dist. Ct. App. 1975) (uttering a forged instrument), *aff'd in relevant part*, 339 So. 2d 172 (Fla. 1976).

Several courts, particularly those in Florida, have discussed this general proposition in those cases in which the legislature has included the attempt with the completed offense in a single statute punishing both with the same penalty. *See, e.g.*, State v. Eames, 365 So. 2d 1361, 1363–64 (La. 1978) (reversing a conviction for attempt to incite a riot, because the offense was defined as "endeavor by any person to incite or procure any other person to create or participate in a riot"); *supra* notes 263–266 (listing Florida cases that discuss the principle).

[360] *See In re* M., 9 Cal. 3d 517, 522, 510 P.2d 33, 36, 108 Cal. Rptr. 89, 92 (1973); Allen v. People, 175 Colo. 113, 117, 485 P.2d 886, 888 (1971); Hutchinson v. State, 315 So. 2d 546, 549 (Fla. Dist. Ct. App. 1975), *overruled on other grounds*, Gentry v. State, 422 So. 2d 1072 (Fla. Dist. Ct. App. 1982), *aff'd*, 437 So. 2d 1097 (Fla. 1983); Milazzo v. State, 359 So. 2d 923, 924–25 (Fla. Dist. Ct. App. 1978) ("to hold that attempted sale is a crime distinct from sale would result in an absurdity"), *aff'd in relevant part*, 377 So. 2d 1161 (Fla. 1979).

jected convictions for attempt to conspire and criticized the use of conspiracy to attempt.

In their functions as inchoate crimes, both conspiracy and solicitation are offenses that punish acts further removed from the completed offense than attempt does.[361] Consequently, courts can analyze constructions such as conspiracy to attempt and solicitation to attempt as forms of attempt to attempt.[362] These constructions raise the most valid criticism inherent in the logical-absurdity approach—defendants do not conspire or solicit another to *attempt* to commit a crime; rather, they act with the intention of committing the completed offense itself.[363]

These constructions also raise the possibility of regression of liability to merely preparatory acts.[364] As previously demonstrated, however, the federal courts consistently have recognized the crime of conspiracy to attempt.[365] This construction has raised no regression problem because the courts have applied it only to conspiracies to commit completed crimes that have failed.[366]

By contrast, it appears that double inchoate constructions such as attempt to conspire or attempt to solicit raise less of a logical-absurdity problem than does conspiracy to attempt. In

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[361] *E.g.*, Hutchinson v. State, 315 So. 2d 546, 548 (Fla. Dist. Ct. App. 1975), *overruled on other grounds*, Gentry v. State, 422 So. 2d 1072 (Fla. Dist. Ct. App. 1982), *aff'd*, 437 So. 2d 1097 (Fla. 1983); *accord* People v. Schwimmer, 66 A.D.2d 91, 95, 411 N.Y.S.2d 922, 925 (1978), *aff'd*, 47 N.Y.2d 1004, 394 N.E.2d 288, 420 N.Y.S.2d 218 (N.Y. App. Div. 1979).

[362] United States v. Meacham, 626 F.2d 503, 509 n.7 (5th Cir. 1980), *cert. denied*, 459 U.S. 1040 (1982); People v. Schwimmer, 66 A.D.2d 91, 105, 411 N.Y.S.2d 922, 931–32 (N.Y. App. Div. 1978) (Titone, J., dissenting), *aff'd*, 47 N.Y.2d 1004, 394 N.E.2d 288, 420 N.Y.S.2d 218 (1979).

[363] *See* United States v. Dearmore, 672 F.2d 738, 740 (9th Cir. 1982) (noting that it is a poor practice to indict for conspiracy to attempt, because the real object of perpetrators is to commit the substantive offense); Allen v. People, 175 Colo. 113, 115, 485 P.2d 886, 888 (1971) ("Perhaps philosophers or metaphysicians can intend to attempt to act, but ordinary people intend to act, not attempt to act.").

[364] People v. Schwimmer, 66 A.D.2d 91, 105, 411 N.Y.S.2d 922, 931–32 (N.Y. App. Div. 1978) (Titone, J., dissenting), *aff'd*, 47 N.Y.2d 1004, 394 N.E.2d 288, 420 N.Y.S.2d 218 (1979). *But see* MODEL PENAL CODE § 5.03(1)(a) (Proposed Official Draft 1985) (allowing the application of the law of conspiracy to attempt and solicitation as object crimes):

> A person is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission he agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime *or an attempt or solicitation to commit such crime* . . . .

Id. (emphasis added).

[365] *See supra* notes 291–311 and accompanying text (listing cases discussing the principle).

[366] *See supra* note 295 (listing cases).

such constructions, the additional harm of potential group activity toward an ultimate offense makes it difficult to analyze conspiracy and solicitation as merely forms of attempt.[367] Nevertheless, most courts have rejected attempt to conspire, several on the ground that it is a logical absurdity.[368]

B. *The Problems of Notice to Offenders and Manifested Legislative Intent*

1. The Role of Due Process in Inchoate Liability

The development of the due process concept of notice has resulted in the increasing codification of the criminal law.[369] Notice requires not only that the legislature explicitly make an act resulting in certain consequences a crime, but also that the scope and penalty of the criminal statute be phrased in explicit terms.[370] Most states have abolished the common law of

[367] For discussion of the non-inchoate elements of conspiracy and solicitation, see *supra* notes 115–117, 129–131 and accompanying text.

[368] *See supra* notes 270–272 and accompanying text (discussing cases that have rejected attempt-to-conspire constructions). For cases referring to the attempt-to-conspire construction as a logical absurdity, see, *e.g.*, United States v. Meacham, 626 F.2d 503, 509 n.7 (5th Cir. 1980), *cert. denied*, 459 U.S. 1040 (1982); Hutchinson v. State, 315 So. 2d 546, 549 (Fla. Dist. Ct. App. 1975), *overruled on other grounds*, Gentry v. State, 422 So. 2d 1072 (Fla. Dist. Ct. App. 1982), *aff'd*, 437 So. 2d 1097 (Fla. 1983).

[369] Cass, *Ignorance of the Law: A Maxim Reexamined*, 17 WM. & MARY L. REV. 671, 686 (1976); Note, *Common Law Crimes in the United States*, 47 COLUM. L. REV. 1332, 1337 (1947).

[370] *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (invalidating a municipal vagrancy ordinance as "void for vagueness," because the ordinance failed to give a person of ordinary intelligence fair notice that the statute forbade his contemplated behavior and encouraged arbitrary and erratic arrests and convictions). For cases on which the *Papachristou* Court relied, see United States v. Harriss, 347 U.S. 612, 617 (1954); Lanzetta v. New Jersey, 306 U.S. 451, 453, 458 (1939); United States v. Cohen Grocery Co., 255 U.S. 81, 89 (1921).

For decisions adopting and refining the rule in *Papachristou* in the area of economic regulation, see, *e.g.*, Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498–500 (1982) (upholding local ordinance requiring licensing of the sale of drug paraphernalia); City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289–91 (1982) (validating licensing ordinance allowing the police chief to consider whether coin-operated amusement establishments had any "connections with criminal elements"); West Virginia Mfrs. Ass'n v. West Virginia, 714 F.2d 308, 314 (4th Cir. 1983) (upholding state OSHA's notice and posting requirements for manufacturers of toxic substances against a void-for-vagueness challenge).

In addition, the courts have recognized that a scienter requirement may mitigate a statute's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed. *See* Colautti v. Franklin, 439 U.S. 379, 390–96 (1979) (invalidating "viability determination" provision of Pennsylvania's Abortion Control Act); United States v. Curcio, 712 F.2d 1532, 1543–44 (2d Cir. 1983) (upholding a federal statute prohibiting the extortionate extension of credit, even though it did not use the terms "knowingly" or "wilfully").

crimes.[371] Consequently, judicial discretion to punish crimes is circumscribed by legislative intent to proscribe an act as manifested by a statute.[372]

But the comparatively recent separation of inchoate crimes into substantive statutes requires judicial discretion in the application of general principles to specific instances of conduct.[373] In particular, the crime of attempt has permitted courts to fill a gap in a definition of criminal conduct by giving them the authority to extend a statute punishing a completed crime without distorting the legislative intent expressed by the statute's language.[374]

The use of double inchoate concepts allows courts to exercise an even more extensive common-law type of discretion to punish acts that are not covered by general inchoate statutes. The doctrine of "no punishment without a statute" generally requires an explicit legislative directive or manifested legislative intent to punish conduct.[375] The doctrine of manifested legislative intent is a variation of the constitutional prohibition against legislative enactment of ex post facto laws. One can view judicial "creation" of double inchoate crimes as judicial enactment of

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For further discussion of the requirement of notice in the context of void-for-vagueness challenges, see generally Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985); Note, *Vagueness Doctrine in the Federal Courts*, 26 STAN. L. REV. 855 (1974); Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960); Annotation, *Supreme Court's Views Regarding Validity of Criminal Disorderly Conduct Statutes Under Void-for-Vagueness Doctrine*, 75 L. ED. 2D 1049 (1985); *cf.* Robbins, *supra* note 11, at 392–94 (discussing concept of pure legal impossibility).

[371] *See, e.g.*, CAL. PENAL CODE § 4 (West 1970); GA. CODE ANN. § 16-1-4 (1988); MINN. STAT. ANN. § 609.015 (West 1987); N.J. STAT. ANN. § 2C:1-5 (1982); 18 PA. CONS. STAT. ANN. § 107(b) (Purdon 1983).

[372] Most states abolishing common-law crimes make no explicit provision for judicial interpretation of common-law terms within penal statutes. *But cf.* KAN. STAT. ANN. § 21-3102(1) (1981). The statute provides:

> No conduct constitutes a crime against the state of Kansas unless it is made criminal in this code or in another statute of this state, but where a crime is denounced by any statute of this state, but not defined, the definition of such crime at common law shall be applied.

Id.

[373] W. LAFAVE & A. SCOTT, *supra* note 11, at 61–62. Many states rejecting common law crimes, for example, establish inchoate crimes defining the offense or its elements in common-law terms, necessitating resort to the common law for guidance. *See supra* note 372 (discussing Kansas statute that directs courts to apply the common-law definition of crime in the absence of a statutory definition).

[374] Arnold, *supra* note 154, at 65.

[375] Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 415 (1958).

criminal law to fit an act already committed.[376] Thus, a court's use of a double inchoate offense raises a significant question of due process.

The application of due process analysis to the criminal law requires an assessment of the proper purposes of the criminal law.[377] Today, a major purpose of the criminal law is the prevention of harmful conduct. This is particularly true for inchoate offenses.[378] The judicial system seeks to prevent crime not only through intervention, but also through the secondary purposes of retribution, deterrence, rehabilitation, and incapacitation.[379]

Due process analysis also requires a determination of whether the means chosen to implement such purposes are related to the ends sought in a constitutionally permissible way. Under due process means-ends analysis, a court must decide whether a given set of facts justifies a finding of criminality and the imposition of a criminal sanction in light of the proper purposes of the criminal law.[380]

One can argue that the use of double inchoate crimes is inconsistent with the principles of retribution and deterrence. Both concepts are based on the notion of culpability—that is, that an individual has the choice of doing good or committing a harmful act.[381] The element of choice, however, is effaced if the individual cannot determine whether an intended act is criminal. Although it is by no means certain that an actor would realize the criminality of his act even with reference to a written statute, the argument in favor of explicit notice is buttressed by the nature of the criminal sanction.

Because the imposition of a criminal sanction results in an individual's involuntary loss of liberty and in stigmatization, substantial procedural protections are required to surround the process by which criminality is determined in the individual case. Thus, in the absence of a statute explicitly punishing a defendant's conduct, a court must resolve in the defendant's

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[376] *See supra* note 154 and accompanying text (discussing the effect that the doctrine of common-law crimes has on judicial power to create and define crimes).

[377] *See, e.g.*, Angel, *Substantive Due Process and the Criminal Law*, 9 LOY. U. CHI. L.J. 61, 79–80 (1977).

[378] MODEL PENAL CODE art. 5 commentary at 293–94 (Proposed Official Draft 1985).

[379] Angel, *supra* note 377, at 79–80. It would not be incorrect to add to this list public education, although the term is somewhat more nebulous than the others. *See* Robbins, Book Review, 94 HARV. L. REV. 918 (1981) (reviewing J. GORECKI, A THEORY OF CRIMINAL JUSTICE (1979)).

[380] Angel, *supra* note 377, at 79–80.

[381] *Id.*

favor the issue of whether he knew or should have known of the criminality of his actions.[382]

2. The Manifested-Legislative-Intent Approach

Courts that have sanctioned double inchoate offenses necessarily have assumed that courts can construe a state's criminal code so that one inchoate crime is the object of another inchoate crime unless the legislature specifically manifests a contrary intent.[383] This doctrine of manifested legislative intent is too narrowly positivistic. Common-law jurisdictions have never taken the rigid position that the criminal law is purely the command of the sovereign. Instead, courts have had greater or lesser discretion in distinguishing criminal from noncriminal conduct. Because the statutory language of inchoate offenses relies heavily on common-law concepts, inchoate liability is still an area in which substantial judicial discretion is proper.[384]

By contrast, several states explicitly preclude judicial discretion to create double inchoate offenses.[385] In addition, several state courts have exercised judicial restraint by citing a lack of manifested legislative intent to allow judicial pyramiding of inchoate offenses.[386] The California Supreme Court, for example,

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[382] *Id.* at 65, 79–81.

[383] Only a few courts, however, have stated this proposition explicitly. *See* United States v. Mowad, 641 F.2d 1067, 1074 (2d Cir.) (conspiracy to attempt), *cert. denied*, 454 U.S. 817 (1981); United States v. Clay, 495 F.2d 700, 710 (7th Cir.) (conspiracy to attempt), *cert. denied*, 419 U.S. 937 (1974). The assumption of legislative intent to allow double inchoate offenses in these cases, however, derives from the unique language of the federal conspiracy statute. *See supra* notes 293–310 and accompanying text (listing cases that construe the federal conspiracy statute).

[384] Professor Hart stated that "most American legislatures have been content to make use of familiar words and phrases of the common law, relying upon the courts to fill in their meaning . . . ." Hart, *supra* note 375, at 415. Hart concluded that, as long as courts continue to reflect the community's understanding of blameworthiness in their elaboration of statutes, "judgments of conviction are not subject to the reproach of being, even in spirit, ex post facto." *Id.*

[385] *See supra* note 153 (quoting statutes and commentary that reveal the principle); *see also* State v. Stevens, 452 So. 2d 289, 291 (La. Ct. App. 1984) (upholding trial court's vacating of guilty plea to the nonexistent crime of attempted conspiracy to distribute marijuana).

[386] *See In re* M., 9 Cal. 3d 517, 522, 510 P.2d 33, 35, 108 Cal. Rptr. 89, 91 (1973) (observing that the legislature did not recognize the crime of attempt to assault with a deadly weapon); People v. Duens, 64 Cal. App. 3d 310, 314, 134 Cal. Rptr. 341, 343 (1976) (the crime of attempted assault with intent to rape does not exist, because there is no enactment manifesting legislative intent to create the crime of attempt to commit battery without present ability); Hutchinson v. State, 315 So. 2d 546, 547–48 (Fla. Dist. Ct. App. 1975) (rejecting the attempt-to-conspire construction, despite a lack of express limiting language in the attempt statute indicating the crimes to which it applies, because the definition of attempt indicated that the legislature intended to limit liability to

has held that attempted assault is not a crime in that state. In *In re M.*,[387] a minor had been charged with assaulting a police officer with a deadly weapon after hurling an unidentified projectile that missed the officer. The juvenile court declined to find the defendant guilty of the aggravated assault because he had missed his target. Instead of finding the minor guilty of the lesser included offense of simple assault, however, the court convicted him of attempted aggravated assault.[388]

The supreme court, after noting the division of opinion over the validity of attempt to assault, conceded the effacement of the logical-absurdity argument:

> Whether or not the foregoing theories are entirely tenable, it is apparent that the abstract concept of an attempted assault is not necessarily a logical absurdity. Yet to concede, in an academic sense, the possibility that there can be an attempted assault is not the equivalent of declaring it to be a punishable offense under the laws of this state.[389]

Noting that the penal code had abolished common-law crimes, the court acknowledged that the legislature statutorily defined assault as an attempt to commit a battery with present ability.[390] The court also noted that no such crime as attempt to assault was recognized at the time the legislature adopted its definition of assault.[391] Accordingly, the court ruled that the legislature's omission of attempt to assault from the penal code demonstrated its intent not to punish such an offense, whether characterized as an attempted assault or as an attempt to commit a battery without present ability.[392]

The same criticism applies to the lack-of-legislative-intent approach as to the logical-absurdity approach: By focusing on the legislative definitions of general inchoate offenses, a court fails

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physical acts carried beyond preparation toward the proximate accomplishment of the complete crime), *overruled on other grounds*, Gentry v. State, 422 So. 2d 1072 (Fla. Dist. Ct. App. 1982), *aff'd*, 437 So. 2d 1097 (Fla. 1983); State v. Sexton, 232 Kan. 539, 543, 657 P.2d 43, 46 (1983) (the crime of attempt to conspire does not exist because the state prohibits conviction for crimes that are not statutorily defined); People v. Banks, 51 Mich. App. 685, 688–90, 216 N.W.2d 461, 462–63 (1974) (because the general attempt statute applies only "when no express provision is made by law for the punishment of such attempt," it does not apply to felonious assault, which is an attempted battery).

[387] 9 Cal. 3d 517, 510 P.2d 33, 108 Cal. Rptr. 89 (1973).

[388] *Id.* at 519–20, 510 P.2d at 34, 108 Cal. Rptr. at 90.

[389] *Id.* at 521, 510 P.2d at 35, 108 Cal. Rptr. at 91.

[390] *Id.* at 521–22, 510 P.2d at 35, 108 Cal. Rptr. at 91; *see supra* notes 52–65, 169–180 and accompanying text (discussing definitions of assault and their applications).

[391] 9 Cal. 3d at 521–22, 510 P.2d at 35, 108 Cal. Rptr. at 91.

[392] *Id.* at 522, 510 P.2d at 35, 108 Cal. Rptr. at 91–92.

to engage in valuable policy analysis concerning how far back courts should extend liability for attempts to commit specific crimes.[393] The court's reliance in *In re M.* on a reworked version of the logical-absurdity argument demonstrates the superficiality of its analysis.[394]

The lack-of-legislative-intent approach, however, raises two valid policy criticisms of double inchoate offenses. First, because the common law creates double inchoate crimes, the case-by-case nature of their development will likely result in inconsistent and arbitrary results.[395] Decisions may vary within jurisdictions concerning how far back in the preparation/perpetration continuum a court will impose liability for the same offense.[396] Second, a factfinder may improperly base its finding of guilt on its subjective belief about an individual actor's dangerousness, rather than on the seriousness of the defendant's intended crime or his actions toward it. This inclusion of subjective elements in the determination of liability makes it more difficult to establish settled rules of law.

These notions, combined with the infrequent use of double inchoate crimes, also lessen the deterrent value of double in-

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[393] *See supra* notes 342–358 and accompanying text (criticizing the logical-absurdity approach).

[394] The court in *In re* M. commented:

> [W]e foresee serious pragmatic difficulties if attempted assault were judicially established as a punishable crime. Trial courts must instruct on lesser included offenses if the evidence raises questions as to whether all the elements of the charged crime are present . . . . If it were a crime trial courts would be required to instruct on attempted assault in every prosecution for a crime involving any type of assault, whether simple or aggravated, when the proof of one of the elements of the underlying crime is unclear or contested. The injection of an additional issue into such trials, with attendant likelihood of confusion of the jury and unwarranted reversals, does not seem justified, particularly since the lack of seriousness of a mere attempted assault has been evidenced by consistent legislative omission since 1850 to provide for any such crime. Juries should not be required to engage in fruitless metaphysical speculation as to differing degrees of proximity between an assault and a general attempt, nor as to the logical possibility of attempting to commit any crime of assault, either simple or aggravated, the basic nature of which is an attempt in itself.

9 Cal. 3d at 522, 510 P.2d at 36, 108 Cal. Rptr. at 92 (citations omitted).

The California court thus hoped to demonstrate its aversion to double inchoate concepts by illustrating the practical difficulties in their use. The jury example, however, is somewhat disingenuous, in that the conceptual complexity faced by a jury would be largely a function of the quality of the court's instructions to it.

[395] Note, *supra* note 154, at 1337.

[396] In addition, because there are no express terms of punishment for these crimes, there is little to guide a court in setting sentence other than its perception of a defendant's dangerousness to society. One can argue that such a subjective criterion is more properly a factor in determining punishment than it is in determining liability for an act. Nevertheless, this approach creates the potential for widely disparate sentencing for similar offenses.

choate concepts. It is unclear whether general inchoate crimes provide any deterrent effect beyond that which is provided by the object crime. The Model Penal Code's commentary suggests that inchoate-crime statutes do little to deter crimes, because most individuals base their calculations, if any, on whether to commit a crime on the penalty for the successful, rather than the failed, commission of that crime.[397] The manifested-legislative-intent approach, however, implies that notice is the essential basis of deterrence and assumes some deterrent value in statutory inchoate crimes.[398] Consequently, the approach emphasizes the danger in degrading whatever quantum of additional deterrence general inchoate offenses provide.

The importance of the predictive and preventive policies behind inchoate liability, however, has received short shrift in the manifested-legislative-intent approach. Requiring acts on the part of the accused before inchoate liability will attach satisfies the interests of individual liberty.[399] The statutory harm of these acts not only justifies punishment for what the accused has actually done, but also for what he intended to do had he not been prevented.[400]

C. *The Cumbersome Nature of and Lack of Need for Double Inchoate Crimes*

Despite the partial validity of the constitutional and policy-based arguments in the manifested-legislative-intent doctrine, an expanding number of American courts have found that other policy considerations outweigh those arguments. At the same time, American jurisdictions increasingly have codified inchoate offenses in a manner similar to that suggested by the Model

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[397] *See supra* notes 34–37 and accompanying text (discussing rationales behind imposing attempt liability).

[398] The rationale behind the approach of *nullum pene sine crimen* is that, although potential criminals are unlikely to peruse penal codes in deciding whether to commit a crime, it is even less likely that they will look to court decisions establishing the common law of a crime. Thus, it is assumed that the framing of a criminal offense in a statute is a much more effective means of making the public aware of prohibited acts and their penal consequences. *See* McBoyle v. United States, 283 U.S. 25, 27 (1931); *see also* United States v. Dotterweich, 320 U.S. 277, 292–93 (1943) (Murphy, J., dissenting).

For two good, recent articles on the subject, see Allen, *The Erosion of Legality in American Criminal Justice: Some Latter-Day Adventures of the Nulla Poena Principle*, 29 ARIZ. L. REV. 385 (1987); Jeffries, *supra* note 370.

[399] Meehan, *supra* note 12, at 218–20.

[400] For discussion of legal or statutory harm, see *supra* note 14 and accompanying text.

Penal Code.[401] Consequently, substantive inchoate provisions now cover more acts that tend toward commission of a completed crime. This trend is reflected by several recent decisions holding that indictments for double inchoate offenses are unnecessary.[402]

1. Attempt to Conspire

Some of these cases have arisen in the context of indictments for attempt to conspire. Prosecutors have charged attempted conspiracies in two situations: (1) where the actus reus requires the actual agreement of another party and the importuned party has no intent to act on the agreement but pretends that he does;[403] and (2) where the importuned party simply refuses to join the conspiracy.[404]

The first type of attempt-to-conspire construction usually arises when a party discusses a proposed crime with an undercover police agent.[405] It also includes situations in which the party seeks the aid of another private citizen who subsequently becomes a police informant,[406] or in which a person is incapable of carrying out the agreement due to some incapacity unbeknownst to the solicitor.[407]

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[401] *See supra* notes 104–109 (listing attempt statutes); *supra* notes 107–109 (listing conspiracy statutes); *supra* note 133 (listing solicitation statutes).

[402] *See* Hutchinson v. State, 315 So. 2d 546, 549 (Fla. Dist. Ct. App. 1975) (attempted-conspiracy construction is not necessary because solicitation statute reaches the same behavior), *overruled on other grounds*, Gentry v. State, 422 So. 2d 1072 (Fla. Dist. Ct. App. 1982), *aff'd*, 437 So. 2d 1097 (Fla. 1983); People v. Lanni, 95 Misc. 2d 4, 9–17, 406 N.Y.S.2d 1011, 1014–19 (N.Y. Sup. Ct. 1978) (the unilateral approach to conspiracy makes the attempted-conspiracy construction unnecessary); *cf.* State v. Sexton, 232 Kan. 539, 543–44, 657 P.2d 43, 46–47 (1983) (although the defendant's actions would have come within the solicitation statute that was enacted subsequently, no statute prohibited his conduct at time he performed the acts at issue).

[403] *See* People v. DiDominick, 94 Misc. 2d 392, 393–94, 406 N.Y.S.2d 420, 421 (N.Y. Sup. Ct. 1978) (murder); *supra* note 273 and accompanying text (suggesting that the attempt-to-conspire construction is more useful in states that have not adopted the unilateral approach to conspiracy).

[404] *See supra* note 283 and accompanying text (discussing Kansas' rejection of indictment for attempted conspiracy).

[405] *See DiDominick*, 94 Misc. 2d 392, 393–94, 406 N.Y.S.2d 420, 421 (N.Y. Sup. Ct. 1978) (involving an undercover police officer who hired the defendant to kill two people).

[406] *See* Hutchinson v. State, 315 So. 2d 546, 547 (Fla. Dist. Ct. App. 1975) (involving a solicitee who reported to police the defendant's offer to pay to have someone killed), *overruled on other grounds*, Gentry v. State, 422 So. 2d 1072 (Fla. Dist. Ct. App. 1982), *aff'd*, 437 So. 2d 1097 (Fla. 1983).

[407] *But see* People v. Berkowitz, 50 N.Y.2d 333, 342–43, 406 N.E.2d 783, 788, 428 N.Y.S.2d 927, 932 (1980) (holding that the unilateral theory of conspiracy allowed the court to convict the defendant of conspiracy even though all of the other parties to the illicit agreement were not criminally liable due to their minority or similar incapacity).

In the past, prosecutions for conspiracy in these circumstances were overturned due to the doctrine of impossibility.[408] The Model Penal Code's unilateral-conspiracy approach, however, removes impossibility as a defense in conspiracy prosecutions.[409] In *People v. Lanni*,[410] for instance, a New York appellate court upheld a conspiracy conviction against such a challenge. The defendant had approached another party to commit a crime (unspecified by the court), and the other had feigned agreement and become a police informant.[411] The defendant, but not the informer, committed overt acts in furtherance of the conspiracy, as required by the statute.[412] The court held that criminal liability for conspiracy attaches regardless of the culpability of the importuned party[413] because New York's conspiracy statute adopted the Model Penal Code's unilateral approach to conspiracy.[414] In so holding, the court criticized the attempt-to-conspire construction that other state courts had used to uphold conspiracy indictments.[415]

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[408] *See, e.g.*, King v. State, 104 So. 2d 730, 733 (Fla. 1957) (police officers who agreed with an undercover agent that he pay them in return for protection of his phony bookmaking operation were not guilty of conspiracy); Archbold v. State, 397 N.E.2d 1071, 1073 (Ind. 1979) (defendant was not guilty of conspiracy because the named co-conspirator was an undercover officer acting within scope of his duties and feigning participation in the criminal enterprise); People v. Atley, 392 Mich. 298, 303, 220 N.W.2d 465, 467 (1974) (feigned agreement of a police informant was not considered admissible as proof of conspiracy); Delaney v. State, 164 Tenn. 432, 433–35, 51 S.W.2d 485, 486–87 (1932) (because the co-conspirator in a murder scheme merely feigned agreement and later informed police of the scheme, there was no conspiracy); *see also* Robbins, *supra* note 11, at 411–12 n.189 (discussing the relationship between conspiracy and the impossibility defense).

[409] *See supra* notes 107–109 and accompanying text (discussing unilateral approach to conspiracy and listing states that have adopted approach).

[410] 95 Misc. 2d 4, 406 N.Y.S.2d 1011 (N.Y. Sup. Ct. 1978).

[411] *Id.* at 5–6, 406 N.Y.S.2d at 1011.

[412] *Id.*

[413] *Id.* at 12–17, 406 N.Y.S.2d at 1016–19.

[414] *Compare* MODEL PENAL CODE § 5.04(1) (Proposed Official Draft 1985) (quoted at *supra* note 107) *with* N.Y. PENAL LAW § 105.30 (McKinney 1975); *see also* Robbins, *supra* note 11, at 419–42 (discussing differences between the Model Penal Code and New York approaches to impossible attempts).

For a discussion of the influence of the Model Penal Code on state conspiracy law, see Note, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122 (1975).

[415] 95 Misc. 2d at 17, 406 N.Y.S.2d at 1019. The court noted that

> [s]ince the advent of our present Penal Law, it would appear that habit, not necessarily logic, has fashioned an unremitting dogma in its insistence that change in our law has brought no change. It has bound down a functionally appropriate approach, as it deals with individual dispositions to criminality, in the iron grip of outdated precedents and, at times, ill-traced legal genealogies. It has restrained our acceptance of the modern unilateral aspect of conspiracy as directed and defined in [the new conspiracy statute], which provisions are supportive of social interests and address individual criminal responsibility.

Similarly, a court in Florida overturned a conviction for attempt to conspire because the court found that the legislature did not intend to punish that offense, and that the state's law of solicitation covered the indicted behavior. In *Hutchinson v. State*,[416] the defendant asked another to find someone to murder a bothersome union business agent. The solicitant requested a few days to think over the proposition, but never actually agreed to it. Instead, he informed the police of the defendant's re-

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Id. The court particularly criticized the reasoning of another New York state court in *People v. DiDominick*. *Id.* (citing People v. DiDominick, 94 Misc. 2d 392, 406 N.Y.S.2d 420 (N.Y. Sup. Ct. 1978)). In *DiDominick*, the court held that the general attempt statute applied to the crime of conspiracy. 94 Misc. 2d at 394, 406 N.Y.S.2d at 421. Therefore, the court reasoned that a grand jury could indict the defendant for attempted conspiracy even though the "co-conspirator" (an undercover police officer who did not intend to execute the planned crime) was not criminally culpable. *Id.* The court in *Lanni*, however, held that because New York had adopted the unilateral approach to conspiracy, a grand jury could indict someone for conspiracy without regard to the criminal culpability of the person with whom the actor intended to conspire. 95 Misc. 2d at 6, 406 N.Y.S.2d at 1012.

Lanni thus imposed liability on the unsuccessful conspirator by construing the definition of conspiracy to include situations in which the importuned party does not intend to act on the agreement. *Id.* at 12–17, 406 N.Y.S.2d at 1016–19. The court in *DiDominick*, however, avoided resolving the issue of whether the impossibility defense applied to the crime of conspiracy by deciding that, even if a conspiracy does not exist unless both actors have the necessary mens rea, a grand jury still could indict an unsuccessful conspirator for attempted conspiracy. People v. DiDominick, 94 Misc. 2d 392, 394, 406 N.Y.S.2d 420, 421 (N.Y. Sup. Ct. 1978). Because the court in *Lanni* believed that the reasoning in *DiDominick* "begs our question," it criticized the manner in which the court in *DiDominick* resolved this issue. *Lanni*, 95 Misc. 2d at 17, 406 N.Y.S.2d at 1019.

For examples of other courts that have followed the unilateral approach to conspiracy, see, *e.g.*, Saienni v. State, 346 A.2d 152, 154 (Del. 1975); State v. St. Christopher, 305 Minn. 226, 234, 232 N.W.2d 798, 803 (1975); People v. Schwimmer, 66 A.D.2d 91, 96–100, 411 N.Y.S.2d 922, 926–28 (N.Y. App. Div. 1978), *aff'd*, 47 N.Y.2d 1004, 394 N.E.2d 288, 420 N.Y.S.2d 218 (1979); People v. Cardosanto, 84 Misc. 2d 275, 276–77, 375 N.Y.S.2d 834, 835–36 (N.Y. Sup. Ct. 1975); *cf.* State v. Lavary, 152 N.J. Super. 413, 433–34, 377 A.2d 1255, 1261 (N.J. Super. Ct. Law Div. 1977) (premising its decision on the unilateral approach, even though the conspiracy statute indicated a need for bilateral agreement), *rev'd*, 163 N.J. Super. 576, 395 A.2d 524 (N.J. Super. Ct. App. Div. 1978). The lower court in *Lavary* relied on the decision in State v. Moretti, 52 N.J. 182, 244 A.2d 499, *cert. denied*, 393 U.S. 952 (1968). In *Moretti*, the court affirmed a conviction for conspiracy to commit unlawful abortion, even though the "patient" was a police agent who was not pregnant. *Id.* at 185–86, 244 A.2d at 501. The court held that it was no defense that the defendant's criminal goal was impossible to attain because of circumstances unknown to him. *Id.* at 190, 244 A.2d at 502.

A subsequent New Jersey appellate decision criticized the lower court's holding in *Lavary*. In State v. Mazur, 158 N.J. Super. 89, 385 A.2d 878 (N.J. Super. Ct. App. Div. 1978), the court stated that *Moretti* held only that, even though the object of a criminal conspiracy is unattainable, this form of factual impossibility provides no defense to those who have agreed to commit the crime. *Id.* at 99, 385 A.2d at 883. Thus, the court argued, *Moretti* emphasized, rather than downplayed, the need for concerted intent. *Id.*

[416] 315 So. 2d 546 (Fla. Dist. Ct. App. 1975), *overruled on other grounds*, Gentry v. State, 422 So. 2d 1072 (Fla. Dist. Ct. App. 1982), *aff'd*, 437 So. 2d 1097 (Fla. 1983).

quest.[417] Having noted that the state legislature had not manifested an intent to punish attempted conspiracy, the court reasoned that the prosecutor should have indicted the defendant for the common-law crime of solicitation.[418]

The double inchoate crime of attempt to solicit is unnecessary in those states that have adopted a solicitation provision similar to that of the Model Penal Code.[419] Such statutes punish the attempt to solicit to the same degree that they punish the completed solicitation.[420] Thus, a failure to communicate the request for criminal activity to the intended solicitant is no bar to prosecution for solicitation.[421]

2. Conspiracy to Attempt

In contrast to the diminishing need to use the attempted-conspiracy construction, the crime of conspiracy to attempt is not and has never been necessary. Because the crux of a conspiracy is the agreement to commit a crime,[422] liability for conspiracy attaches regardless of whether the actor completed the object crime.[423]

In *People v. Travis*,[424] a California appellate court emphasized these points in a challenge to a conviction for attempted theft. The defendants had been indicted for conspiracy to commit theft, but the court found them guilty of attempted theft instead. The appellate court reversed the convictions, holding that at-

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[417] *Id.* at 547–48.

[418] *Id.* at 548–49. A Florida statute allows Florida's courts to apply the common law of England where no statute covers the offense. FLA. STAT. § 775.01 (West 1973). The court also noted that the new Florida solicitation statute that was not yet in effect would have covered the defendant's behavior. 315 So. 2d at 549 (citing FLA. STAT. § 777.04); *see also* State v. Sexton, 232 Kan. 539, 543–44, 657 P.2d 43, 46 (1983) (noting that the solicitation statute that had been passed subsequent to the acts at issue would have attached liability).

[419] MODEL PENAL CODE § 5.02 (Proposed Official Draft 1985). For an example of an attempted-solicitation conviction, see Regina v. Banks, 12 Cox Crim. Cas. 393 (Wor. Sp. Assizes 1873); *see also* State v. Davis, 319 Mo. 1222, 6 S.W.2d 609 (1928).

[420] MODEL PENAL CODE §§ 5.02(1), 5.05(1) (Proposed Official Draft 1985); *id.* § 5.05 commentary at 487–88, 489–90.

[421] This approach, like the concept of unilateral conspiracy, reflects the Model Penal Code's emphasis on individual intent to complete the object crime rather than on the enhanced danger of group activity. Thus, a court following this approach would view the importuning of another to join in a criminal scheme merely as a "substantial step" in an attempt to commit the object crime. *Id.* § 5.01(2)(g).

[422] On agreement as the essence of the crime of conspiracy, see *supra* notes 100, 106 and accompanying text.

[423] For discussion of the irrelevance of attaining the object offense in a conviction for conspiracy, see *supra* notes 115–117 and accompanying text.

[424] 171 Cal. App. 2d 842, 341 P.2d 851 (1959).

tempted theft is a lesser included offense of theft, but not of conspiracy to commit theft.[425]

In dicta, the court also suggested that there is no such crime as conspiracy to attempt theft:

> Conspiracy imports an agreement to commit a crime and it seems doubtful, to say the least, that persons would agree to merely *attempt* to commit a crime as distinguished from agreeing to commit it. Moreover, if persons conspire to commit a particular crime, they would be guilty of the conspiracy regardless of whether the substantive crime was actually consummated or not.[426]

Although the federal courts continue to recognize the offense,[427] one court has noted the unwieldy nature of the charge and suggested that it is "a poor practice to indict for conspiracy to commit the attempt instead of indicting for conspiracy to commit the substantive offense which is the real objective of the perpetrators."[428]

The manner in which the courts have considered conspiracy to attempt illustrates that it is unnecessary. Rather than as a means to fill gaps in the criminal code by extending attempt liability, the courts have employed the construction merely as a means of categorizing the criminal action based on an after-the-fact assessment of the defendant's success or failure in completing the object crime.[429] The success or failure of the object crime, however, is irrelevant in determining conspiracy liability.[430] Instead, it should serve only to determine an actor's liability for the completed crime.[431]

3. Policy-Based Analysis

Recent developments in the criminal law have demonstrated the lack of necessity for double inchoate crimes such as con-

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[425] *Id.* at 843–44, 341 P.2d at 852–53.

[426] *Id.* at 846 n.1, 341 P.2d at 853–54 n.1 (emphasis in original).

[427] *See supra* notes 291–311 and accompanying text (discussing federal cases that uphold the conspiracy-to-attempt construction).

[428] United States v. Dearmore, 672 F.2d 738, 740 (9th Cir. 1982). Nevertheless, the court concluded that the conspiracy-to-attempt indictment was valid. *Id.*

[429] For discussion of the limited nature of the conspiracy-to-attempt construction in the federal law, see *supra* notes 294–295 and accompanying text.

[430] *See supra* notes 115–117 and accompanying text (discussing actus reus of conspiracy).

[431] For discussion of the lack of merger in conspiracy, see *supra* notes 102–103 and accompanying text.

spiracy to attempt and, to a lesser degree, attempt to conspire. Courts instead should analyze double inchoate crimes in terms of their necessity for realizing the policies of the criminal law, rather than in terms of logical absurdity or manifested legislative intent. Although the modern trend in criminal law is toward restricting the discretion of courts to punish individuals for actions that are not specifically covered by criminal codes, the need remains for limited judicial discretion to extend liability for unsuccessfully attempting to complete a crime through the use of inchoate offenses.

The balancing tests of policy analysis provide no easy answers regarding whether attempts to commit inchoate crimes are necessary. Courts have avoided significant consideration of this issue by relying on logical-absurdity[432] and manifested-legislative-intent[433] analyses. The arguments that assault can be treated as a substantive offense[434] or that present ability can be redefined in light of the seriousness of the intended consequences[435] ignore the unique development of assault law and its received legal tradition—a collection of concepts that is not easily altered by efforts to impose a uniform approach.

Courts that criticize the validity of double inchoate offenses generally have framed the issue in terms of whether an inchoate offense can have as its object another inchoate offense.[436] This conceptual approach has resulted in resort to the intellectually

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[432] For analysis and criticism of the logical-absurdity approach, see *supra* notes 313–368 and accompanying text.

[433] For analysis and criticism of the manifested-legislative-intent approach, see *supra* notes 383–400 and accompanying text.

[434] State v. Wilson, 218 Or. 575, 585–86, 346 P.2d 115, 120 (1959) (superseded by statute, as stated in State v. Garcias, 296 Or. 688, 679 P.2d 1354 (1984)).

[435] Allen v. People, 175 Colo. 113, 116, 485 P.2d 886, 888 (1971).

[436] *See, e.g., id.* at 116–17, 485 P.2d at 888 (stating that "as to [certain crimes] it is true as argued by defendant that 'there can be no crime of an attempt to commit an attempt'") (quoting State v. Davis, 108 N.H. 158, 162, 229 A.2d 842, 845 (1967)); Milazzo v. State, 359 So. 2d 923, 924–25 (Fla. Dist. Ct. App. 1978) (reversing conviction for attempted sale of cocaine because the crime of "attempt to attempt to transfer for consideration" does not exist), *aff'd in relevant part*, 377 So. 2d 1161 (Fla. 1979); State v. Eames, 365 So. 2d 1361, 1363 (La. 1978) (holding that the attempt statute does not apply to a crime that is itself an attempt because the resulting indictment would charge the defendant with attempting to attempt to do illegal act); State v. Taylor, 345 Mo. 325, 334, 133 S.W.2d 336, 341 (1939) ("to convict defendant of *attempting to attempt* to corrupt the alleged juror" would allow the state "to sort of 'pyramid' attempts") (emphasis in original); State v. Currence, 14 N.C. App. 263, 266, 188 S.E.2d 10, 12 (1972) (reversing conviction for attempted aggravated assault because the effect of such a verdict was to find the defendant guilty of attempt to attempt); Commonwealth v. Willard, 179 Pa. Super. 368, 373, 116 A.2d 751, 754 (1955) (the attempt-to-attempt construction impermissibly allows a prosecutor to indict for acts that are not sufficiently proximate to the completed crime to hold the defendant criminally responsible).

arid doctrines of logical absurdity and manifested legislative intent.[437] Although sometimes logically awkward, double inchoate constructions have provided a flexible mechanism for courts to use in filling the gaps left in necessarily general inchoate statutes.[438] Indeed, double inchoate constructions have allowed courts to retain a consistent approach to inchoate culpability. Courts have used these constructions rather than stretch or distort the established definitions of single inchoate offenses and their elements.[439]

Despite efforts to codify all-encompassing substantive inchoate offenses, double inchoate concepts such as attempted assault are of value to courts in their efforts to elaborate on and rationalize inchoate statutes. This argument assumes a substantial role for the judiciary in interpreting not only the specific provisions of the criminal law, but also the policies behind it.[440]

This proposition is particularly valid for statutory inchoate offenses that leave many issues of interpretation unresolved because they are necessarily defined in general terms. Consequently, the courts must "collaborate with the legislature in

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[437] *See supra* notes 313–400 and accompanying text (discussing approaches).

[438] For survey and analysis of useful double inchoate constructions, see *supra* notes 155–203 and accompanying text (attempt to commit crimes in the nature of attempt); *supra* notes 270–290 and accompanying text (attempt to conspire in the absence of a unilateral-conspiracy or solicitation statute).

[439] A comparison of two cases with nearly identical facts illustrates this point. In United States v. Locke, 16 M.J. 763 (A.C.M.R. 1983), the defendant, while fighting with a military police officer, verbally threatened to kill him and unsuccessfully attempted to remove the officer's gun from his holster. *Id.* at 764. The court held that, although the defendant lacked the present ability to commit a battery on the officer, he nevertheless was guilty of an attempt to commit aggravated assault. Contrastingly, in People v. Gordon, 178 Colo. 406, 498 P.2d 341 (1972), the court found, under almost identical facts, that the defendant was guilty of assault and specifically ruled that he had not committed only an attempted assault. *Id.* at 408, 498 P.2d at 342. Relying on the earlier decision of Allen v. People, 175 Colo. 113, 485 P.2d 886 (1971), the court held that the crime of attempted assault did not exist in Colorado. The court cited *Allen* for the proposition that courts must construe the concept of present ability in light of "the gravity of the potential harm and the uncertainty of the result." *Id.* Accepting the police officer's testimony that the defendant had gotten both of his hands on the gun, the court ruled that the gun, though still in its holster, could have fired and hit the officer in the leg. *Id.* Thus, the court found that the defendant was guilty of assault because he possessed the present ability to commit a battery. *Id.*

[440] Hart, *supra* note 375, at 429. Hart posited that

> [c]ourts look both backward and forward in the application of law. They look backward to the relevant general directions of the Constitution and the statutes, as interpreted and applied in prior judicial decisions. They look backward to the historical facts of the litigation. But when the facts raise issues with respect to which the existing general directions are indeterminate, they are bound to look forward to the ends which the law seeks to serve and to resolve the issues as best they can in a way which will serve them.

Id.

discerning and expressing the unifying principles and aims of the criminal law,"[441] particularly inchoate offenses.

As Professor Hart noted, few American courts have recognized, much less exercised, this obligation to shape their legislature's criminal code into a rational and coherent body of law. If courts do not interpret the criminal code according to "principles and policies rationally related to the ultimate purposes of the social order," it will become "a wasteland of arbitrary distinctions and meaningless detail."[442] Certainly, this criticism applies to those courts that have applied only logical-absurdity and manifested-legislative-intent analyses to double inchoate constructions.

In accepting the role for the judiciary suggested by Professor Hart, it follows that a court faced with a question of double inchoate liability first should ask whether the defendant's acts are sufficiently dangerous to society to warrant judicial intervention and punishment. Only then should the court decide whether a double inchoate construction is necessary because taken alone, the jurisdiction's attempt, conspiracy, or solicitation statutes do not already cover those acts.[443]

With the advent of the legal-realist movement, the judiciary has enjoyed more freedom to interpret legislation according to its social purpose and policy.[444] Although constitutional doctrine requires courts to interpret criminal laws more strictly than other laws, the vagueness and abstraction of inchoate offenses require a judicial balancing of policies.

In this context, the courts that have declined to adopt double inchoate concepts in the absence of manifested legislative intent have emphasized the conceptual argument of separation of powers over the policy argument regarding protection of individual freedom. The decisions that have rejected or criticized double inchoate crimes as unnecessary, however, have examined in more depth the function of inchoate offenses.

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[441] *Id.* at 435–36.

[442] *Id.* at 435.

[443] *See* Arnold, *supra* note 154, at 62; *supra* notes 353–358 and accompanying text (applying this principle to attempt).

[444] Meehan, *supra* note 12, at 218.

IV. Recommendations for Revision of Inchoate-Crime Statutes to Minimize the Need for Double Inchoate Offenses

The proper criterion for determining the validity of a double inchoate offense is whether it is necessary to fulfill the policies underlying inchoate liability—the prevention of the socially harmful acts that are proscribed by the substantive criminal law.[445] The failure of courts that have relied on the logical-absurdity and legislative-intent arguments is that they have neglected the threshold inquiry of whether the acts before them warranted punishment.[446] Instead, they have begun with an analysis of whether their jurisdictions' substantive inchoate statutes allowed punishment for these acts.[447]

Some of the courts that have accepted the validity of double inchoate crimes, however, have done so without adequate analysis of their necessity in light of extant attempt, conspiracy, and solicitation statutes. Although there are areas in which double inchoate crimes are a useful judicial tool, there are others in which they are unnecessary.[448]

A. *Practical Limitations on Statutory Revision*

Wherever possible, legislatures should expand existing inchoate concepts rather than cause prosecutors to resort by de-

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[445] *See supra* note 12 and accompanying text (discussing the rationale behind imposing liability for inchoate crimes).

[446] *Cf. supra* notes 376–379 and accompanying text (noting the due process considerations that are present when a judge "creates" double inchoate crimes).

[447] *See In re* M., 9 Cal. 3d 517, 519–20, 510 P.2d 33, 34, 108 Cal. Rptr. 89, 90 (1973) (juvenile threw an object at a policeman but missed him and struck a patrol car); People v. Duens, 64 Cal. App. 3d 310, 312, 134 Cal. Rptr. 341, 342–43 (1976) (defendant accosted a woman he did not know, attempted to kiss her, and tore her dress as she tried to escape); Allen v. People, 175 Colo. 113, 115–18, 485 P.2d 886, 887 (1971) (defendant dropped his gun after unsuccessfully trying to pull it on an officer who had stopped him for a vehicular offense); Hutchinson v. State, 315 So. 2d 546, 547 (Fla. Dist. Ct. App. 1975) (defendant offered an informant money to find someone to kill a union business agent), *overruled on other grounds*, Gentry v. State, 422 So. 2d 1072 (Fla. Dist. Ct. App. 1982), *aff'd*, 437 So. 2d 1097 (Fla. 1983); State v. Sexton, 232 Kan. 539, 539–40, 657 P.2d 43, 44 (1983) (defendant planned with undercover federal agents to murder his wife for hire); People v. Banks, 51 Mich. App. 685, 689, 216 N.W.2d 461, 461–62 (1974) (defendant pointed a shotgun at pursuing policemen, then dropped it and attempted to hide).

[448] For a discussion of the complete lack of need for the offense of conspiracy to attempt, see *supra* notes 422–431 and accompanying text. For discussion of the need for the crime of attempted conspiracy only in those jurisdictions that do not have solicitation or unilateral-conspiracy statutes, see *supra* notes 402–419 and accompanying text.

fault to indictments for double inchoate offenses. Despite an increasing judicial[449] and scholarly[450] acceptance of double inchoate constructions, significant obstacles to their widespread use remain. Most jurisdictions do not employ double inchoate offenses either because they have not considered their use[451] or because they have considered it and rejected the idea.[452] Furthermore, the cumbersomeness of these constructions draws attention, and thus makes double inchoate convictions more readily subject to appellate challenge.[453] Consequently, courts uncomfortable with the conceptual oddity of the double inchoate constructions are likely to continue to reject them.

1. Conspiracy to Attempt (or Solicit)

The double inchoate crime of conspiracy to attempt is unnecessary. The essence of conspiracy is the communication of a criminal scheme by one party to another to gain the other's support.[454] The success or failure of the target crime is irrelevant in determining conspiratorial liability.[455] Although the federal courts have upheld convictions for conspiracy to attempt,[456] the increasing criticism of this construction suggests that at least some courts are likely to reject it in the future.[457]

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[449] *See supra* notes 148–312 and accompanying text (discussing cases that adopt the double inchoate construction).

[450] *See supra* notes 342–346 and accompanying text (discussing commentary that advocates a policy-based approach to determining whether to attach inchoate liability to particular behavior).

[451] In the following jurisdictions, neither the legislature nor the appellate courts have addressed explicitly the validity of double inchoate crimes: Alaska, Arizona, Arkansas, Delaware, District of Columbia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Nebraska, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, and Wyoming.

[452] The following states reject double inchoate crimes: California, Colorado, Connecticut, Florida, Georgia, Kansas, Louisiana, Michigan, Missouri, Nevada, North Carolina, Pennsylvania, Texas, Virginia, and Wisconsin. *See* MODEL PENAL CODE § 5.01 commentary at 363 n.294 (Proposed Official Draft 1985) (listing states that reject attempt to attempt as an abstract proposition).

[453] *See supra* notes 401–436 and accompanying text (noting judicial criticism of double inchoate constructions).

[454] MODEL PENAL CODE § 5.03 commentary at 394, 398–402 (Proposed Official Draft 1985).

[455] *See supra* notes 102–103 and accompanying text (listing cases and statutes that state the principle).

[456] For a survey of the federal-court decisions approving the use of conspiracy to attempt, see *supra* notes 291–311 and accompanying text.

[457] *See supra* note 311.

As evidenced by the fact that only one state court has upheld its use, states apparently have recognized the lack of need for the conspiracy-to-attempt construction.[458] In most states, however, the language of the conspiracy statute leaves it unclear whether a conspiracy can have an inchoate crime as its object.[459] These state legislatures should ensure that conspiracy cannot have another inchoate offense as its object by adding the following commentary:

> The legislature intends that the offense of conspiracy, defined above in [enumerated code section(s)], will apply only to completed criminal offenses, and not to attempts or solicitations to perform such completed offenses.

This language would manifest legislative intent adequately without requiring the legislature to amend inchoate statutory provisions in an unnecessarily restrictive manner.

The general federal conspiracy statute,[460] making any "offense against the United States" a proper object of conspiracy, has allowed the needless use of conspiracy-to-attempt indictments in the federal courts.[461] Because congressional intent is derived from lengthy and complicated legislative history rather than from relatively short commentaries by state legislative drafting committees, clear expression of intent requires statutory revision. Thus, the conspiracy statute should be amended to exclude attempts and solicitations as applicable object offenses.[462] The amended statute might read:

> **If two or more persons conspire either to commit any *completed* offense against the United States, or to defraud the United States, or any agency thereof, in any manner or for**

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[458] People v. Teitelbaum, 163 Cal. App. 2d 184, 220, 329 P.2d 157, 180 (Cal. Dist. Ct. App. 1958), *cert. denied and appeal dismissed*, 359 U.S. 206 (1959). The court reasoned that "[a] conspiracy to commit grand theft is inherently one to attempt that crime. If the conspirators are successful in accomplishing the object of the conspiracy, they have committed grand theft. If they are not successful, they have committed the crime of attempted grand theft." *Id. Contra* People v. Travis, 171 Cal. App. 2d 842, 846 n.1, 341 P.2d 851, 852–53 n.1 (Cal. Dist. Ct. App. 1959) (dictum) (suggesting the lack of need for a charge of conspiracy to attempt to commit theft).

[459] *See supra* note 104 (listing conspiracy statutes). Except for the conspiracy statutes of Louisiana, Maine, and Texas, none of the statutes listed in footnote 104 expressly indicates whether conspiracy can have an inchoate crime as its object.

[460] For quotation and analysis of the general federal conspiracy statute, see *supra* notes 292–293 and accompanying text.

[461] *See supra* note 428 (discussing a federal case that criticizes a conspiracy-to-attempt indictment due to a lack of need for it).

[462] This proposed amendment does not address the desirability of punishing unilateral conspiracy. For a model conspiracy statute that addresses both the double inchoate and unilateral-conspiracy issues, see *infra* notes 572–579 and accompanying text.

> **any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.** ***This provision shall not apply to any attempt or solicitation to commit any completed offense, except the attempt to evade taxes [26 U.S.C. § 7201].***[463]

2. Attempt to Conspire

The double inchoate offense of attempt to conspire is unnecessary in those jurisdictions that have adopted either a solicitation statute, a conspiracy statute that embodies the unilateral theory of conspiracy, or both. Although only thirty-three states punish solicitation as a statutory offense,[464] several others recognize it as a common-law crime.[465] Thus, solicitation—a form of attempt to conspire—is a well-established offense in American criminal law. Its statutory enactment in the remaining American jurisdictions would allow states to avoid problems like that faced by Kansas in *State v. Sexton*.[466]

In *Sexton*, local police had received a tip that the defendant was seeking someone to kill his estranged wife. Armed with this information, two undercover federal agents made contact with the defendant. Over the course of several meetings between the defendant and the agents, the defendant offered a price for the murder and outlined a plan for its commission based on his knowledge of his wife's whereabouts.[467]

The prosecutor charged the defendant with attempt to conspire to commit the murder of his wife. The prosecutor did not bring charges of either attempted murder or conspiracy to commit murder because of the state-law definitions of attempt and conspiracy. The trial court dismissed the charge of attempted conspiracy, holding that the defendant's actions—essentially a solicitation—did not constitute a crime at state law.[468]

Although the Kansas Supreme Court found these facts "morally reprehensible," it upheld the lower court's dismissal.[469] The

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[463] The amending language is italicized. *Cf.* 18 U.S.C. § 371 (1982) (general federal conspiracy statute). For a discussion of the exception for tax cases, see *supra* note 303.

[464] For a listing of states that have solicitation statutes, see *supra* note 133.

[465] For a listing of states that punish solicitation as a common-law offense, see *supra* note 132.

[466] 232 Kan. 539, 657 P.2d 43 (1983).

[467] *Id.* at 539–40, 657 P.2d at 44.

[468] *Id.* at 541, 657 P.2d at 44.

[469] *Id.* at 544, 657 P.2d at 47.

court ruled that the crimes of conspiracy and attempt, categorized in the state's penal code as "anticipatory crimes," could not "be stacked or added to another anticipatory crime in order to arrive at a new crime."[470] The court declined to recognize solicitation as a common-law offense because the penal code had abolished common-law crimes. Ironically, the court relied on the legislature's enactment of a solicitation statute subsequent to defendant's arrest to demonstrate legislative intent not to punish solicitation at the time defendant sought to hire someone to murder his wife.[471]

Fewer states have adopted unilateral-conspiracy statutes than have adopted solicitation statutes.[472] This may reflect the fact that unilateral conspiracy is a more recent development in Anglo-American jurisprudence than is solicitation.[473] The states that have adopted the unilateral-conspiracy approach have done so since the publication of the Model Penal Code's provisions on inchoate offenses.[474] The rationale for this approach is sound, because the communication of a criminal scheme to another is a substantial manifestation of a firm intent to commit that crime.[475]

Adoption of a unilateral-conspiracy statute alone, however, does not ensure that courts will permit a conspiracy charge in cases in which the actor believes that he has formed a conspiracy, but the importuned party either cannot or does not intend to complete the object crime. *People v. Foster*[476] demonstrates the need for firm indicia of legislative intent that a unilateral theory apply. In *Foster*, a party approached by the defendant to aid in a robbery feigned agreement and informed the police of the impending crime. Despite the Illinois conspiracy statute

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[470] *Id.* at 541, 657 P.2d at 45.

[471] *Id.*

[472] For a listing of states that have enacted unilateral-conspiracy statutes, see *supra* note 108.

[473] Anglo-American courts have recognized solicitation as a separate offense since the early nineteenth century. *See supra* note 126 and accompanying text (tracing the history of the common-law crime of solicitation). By contrast, the notion of unilateral conspiracy first attracted wide notice with the publication of the Model Penal Code's tentative draft on inchoate offenses. *See* MODEL PENAL CODE art. 5 (Tent. Draft No. 10, 1960).

[474] For discussion of the influence of the Model Penal Code's conspiracy provision on subsequently promulgated state provisions, see Burgman, *Unilateral Conspiracy: Three Critical Perspectives*, 29 DE PAUL L. REV. 75, 75–76 n.3 (1979).

[475] MODEL PENAL CODE § 5.03 commentary at 388 (Proposed Official Draft 1985).

[476] 99 Ill. 2d 48, 457 N.E.2d 405 (1983).

being patterned after the Model Penal Code provision,[477] an appellate court reversed the conviction of conspiracy to commit robbery, interpreting the state conspiracy statute to require an actual agreement between at least two persons. The state supreme court sustained the reversal.[478]

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[477] *Compare* ILL. ANN. STAT. ch. 38, para. 8-2(a) (Smith-Hurd 1972) ("[*a*] *person* commits conspiracy when, with intent that an offense be committed, *he agrees* with another to the commission of that offense") (emphasis added) *with* MODEL PENAL CODE § 5.03(1)(a) (Proposed Official Draft 1985):

> [*a*] *person* is guilty of conspiracy with another person or persons to commit a crime if with the purpose of promoting or facilitating its commission *he*: (a) *agrees* with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime or an attempt or solicitation to commit such crime . . . .

Id. (emphasis added). The Illinois legislature also adopted a provision eliminating the impossibility defense for conspiracy, which provision was similar to the Model Penal Code provision. *Compare* ILL. ANN. STAT. ch. 38, para. 8-2(b) (Smith-Hurd 1972) *with* MODEL PENAL CODE § 5.04 (Proposed Official Draft 1962).

In *Foster*, the Illinois Attorney General argued that the fact that the state statute's language amended previous language that required "two or more persons" to "conspire or agree together" evinced the legislature's intent to adopt the unilateral-conspiracy approach. 99 Ill. 2d at 51, 457 N.E.2d at 407. *Compare* ILL. REV. STAT. ch. 38, para. 139 (1961) (requiring "two or more persons" to "conspire or agree together") *with* ILL. ANN. STAT. ch. 38, para. 8-2(a) (Smith-Hurd 1972) (imposing liability for conspiracy if only "[a] person . . . agrees" to commit a crime). He supported his position with the committee comments to the conspiracy statute that demonstrated the legislators' awareness of the new Model Penal Code provisions. *Foster*, 99 Ill. 2d at 52, 457 N.E.2d at 407; *see* ILL. ANN. STAT. ch. 38, para. 8-2, Committee Comments, at 458–60 (Smith-Hurd 1972) (citing Model Penal Code provisions and commentary).

[478] *Foster*, 99 Ill. 2d at 52–53, 457 N.E.2d at 407. The court stated:

> While impressed with the logic of the state's interpretation of section 8-2(a), we are troubled by the committee's failure to explain the reason for deleting the words "two or more persons" from the statute. The committee comments to section 8-2 detail the several changes in the law of conspiracy that were intended by the 1961 amendment. The comments simply do not address the unilateral/bilateral issue. The state suggests that the new language was so clear on its face that it did not warrant additional discussion. We doubt, however, that the drafters could have intended what represents a rather profound change in the law of conspiracy without mentioning it in the comments to section 8-2.

Id. The court also dismissed the state's argument that section 8-2(b)'s elimination of the impossibility defense supported a unilateral interpretation. *Id.* at 54, 457 N.E.2d at 408. In conclusion, the court relied on the legislature's failure to amend the statute after intermediate appellate decisions had held for a bilateral interpretation as persuasive evidence that the legislature intended a bilateral-conspiracy provision. *Id.* at 54–55, 457 N.E.2d at 408 (citing People v. Hill, 108 Ill. App. 3d 716, 439 N.E.2d 549 (1982), and People v. Ambrose, 28 Ill. App. 3d 627, 329 N.E.2d 11 (1975)). *But see* Garcia v. State, 271 Ind. 510, 516–17, 394 N.E.2d 106, 110 (1979) (upholding a unilateral interpretation of the Indiana conspiracy statute even though committee comments accompanying the proposed final draft stated that the legislature did not seek to change the prior conspiracy statute with its amendment adopting the Model Penal Code's language). The *Garcia* court commented:

> We are unable to determine with certainty what the commission intended by this comment, i.e. whether the enactment would merely restate the definition, without changing the result, or whether the law relative to the offense, except for the elimination of enumerated defenses, would remain unchanged. If the former were intended by the commentor, it can only be viewed as a mental

To avoid this situation, legislatures should ensure that commentary accompanying the statute make its purpose clear. The commentary accompanying Delaware's statute eliminating the impossibility defense for conspiracy provides an appropriate example:

> [This section] takes what the Model Penal Code calls a "unilateral approach." That is, attention is focused on each individual's culpability. He has no defense which rests solely on another party's incapacity, irresponsibility, or obedience to law. Thus, if he solicits a person to commit an offense, his crime is complete at that point, and it is irrelevant to his own liability that the person solicited does not commit the offense because of some legal incapacity or irresponsibility, or because he did not know that the conduct solicited was criminal.[479]

3. Attempt to Commit Crimes in the Nature of Attempt

In contrast to conspiracy to attempt (or solicit) and attempt to conspire, complete elimination of the attempt-to-attempt construction is not desirable. American jurisdictions have recognized the validity of offenses such as attempted burglary,[480] attempt to entice minors with intent to commit sexual assault,[481] and, to an increasing extent in those states with traditionally

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lapse and proofreading oversight; as it is clear upon the face of the act that defenses available under the multilateral concept were to be eliminated.

Id. For other state-court decisions interpreting conspiracy statutes to embody the unilateral approach, despite the failure of legislatures to address the issue directly in accompanying commentary, see People v. Schwimmer, 66 A.D.2d 91, 96–100, 411 N.Y.S.2d 922, 926–28 (N.Y. App. Div. 1978), *aff'd*, 47 N.Y.2d 1004, 394 N.E.2d 288, 420 N.Y.S.2d 218 (1979); People v. Lanni, 95 Misc. 2d 4, 6–17, 406 N.Y.S.2d 1011, 1013–19 (N.Y. Sup. Ct. 1978); State v. Marian, 62 Ohio St. 2d 250, 253–54, 405 N.E.2d 267, 270 (1980); State v. St. Christopher, 305 Minn. 226, 231–35, 232 N.W.2d 798, 801–03 (1975).

[479] Commentary to 58 Del. Laws, ch. 497, § 1, *now codified at* DEL. CODE ANN. tit. 11, § 523 (1987) (quoted in Saienni v. State, 346 A.2d 152, 154 (Del. 1975)). Section 523(b) states:

> It is no defense to a prosecution for criminal conspiracy that, because of irresponsibility or other legal incapacity or exemption, or because of unawareness of the criminal nature of the agreement or the conduct contemplated or of the defendant's criminal purpose or because of other factors precluding the mental state required for commission of the conspiracy or the crime contemplated, one or more of the defendant's coconspirators could not be guilty of the conspiracy or the crime contemplated.

DEL. CODE ANN. tit. 11, § 523(b) (1987). Section 523(a) eliminates the impossibility defense for solicitation. *Id.* § 523(a).

[480] *See supra* notes 227–233 and accompanying text (discussing a case that rejected a challenge to the attempted-burglary construction because it was an attempt to attempt).

[481] *See supra* notes 204–224 and accompanying text (discussing cases that uphold the attempted-sexual-assault construction).

defined assault, attempted aggravated assault.[482] To minimize the inchoate nature of these object offenses, legislatures have narrowly defined them as substantive offenses.[483] The two constituent-element approaches used are proscription of constituent acts toward the object offense and proscription of means (possession) offenses.

a. *Constituent-element approaches applied to burglary.* Crimes that are derived from the long-established offense of burglary follow both approaches.[484] In its modern phase, burglary generally has been defined as the unauthorized entry of a structure with the intent to commit a crime therein.[485] In addition, most jurisdictions treat both criminal trespass[486] and possession of burglary tools as substantive offenses.[487]

Criminal trespass can be viewed as burglary rendered free of its inchoate element, the intent to commit another crime.[488] This substantive offense serves at least two functions. First, it allows the courts to punish illegal entry without proving an intent to commit another crime.[489] The basis of punishment, however, is not only that the illegal entry represents a harm, but also that

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[482] *See supra* notes 169–203 and accompanying text (discussing the judicial debate over the validity of the attempted-assault construction).

[483] For discussion of statutes employing an essential-element approach, see *supra* notes 81–98 and accompanying text. The rationale behind this approach is similar to that of the unequivocality approach to attempt. *See supra* note 44 (explaining the standard).

[484] For discussion of the common-law origins of burglary, see *supra* notes 66–69 and accompanying text.

[485] For discussion of the modern definition of burglary, see *supra* notes 71–75 and accompanying text.

[486] *Cf.* MODEL PENAL CODE § 221.2 (Proposed Official Draft 1980). The Model Penal Code section that most state criminal-trespass statutes follow provides that one who knowingly enters or remains in a building without license or privilege, or who enters or remains in a place as to which notice against trespass is given, is guilty of the substantive offense of criminal trespass. *Id.*

[487] For a listing of statutes prohibiting the possession of burglary tools, see *supra* note 81.

[488] In modern criminal codes, illegal entry frequently is included as a subsection of a criminal-trespass statute. *E.g.*, N.Y. PENAL LAW §§ 140.05–.17 (McKinney 1987); 18 PA. CONS. STAT. ANN. § 3503(a)(1) (Purdon 1983). Criminal-trespass statutes have a broader purpose than the prevention of burglary. Many are intended to apply to tenants who refuse to move after notice of eviction, itinerants who occupy private buildings for shelter, and estranged spouses who defy court orders to stay away from their spouses' premises.

[489] *See* MODEL PENAL CODE § 221.2(1) (Proposed Official Draft 1980) (punishing knowing trespass in a building or occupied structure); *see also* MODEL PENAL CODE § 221.2 commentary at 92 (Proposed Official Draft 1980) (noting that such conduct, in effect a lesser included offense of burglary, is properly treated as the most serious form of criminal trespass because the fear or apprehension may still remain).

the perpetrator likely had another criminal purpose for his entry.[490] Second, the offense of criminal trespass allows the courts, in jurisdictions that define burglary as breaking and entering with the intent to commit a felony, to punish those who perform an illegal entry to commit a misdemeanor.[491]

Criminal sanctions for possession of burglary tools exemplify the proscription-of-means approach. Like criminal trespass, such sanctions punish the commission of an essential element of the parent crime.[492] Possession of burglary tools, however, is an act that is clearly more preparatory than is illegal entry, which at least constitutes an element of the offense of burglary.[493] Viewed as the gathering of the means to effect an illegal entry to commit another crime, possession of burglary tools can be conceived as representing an attempt to attempt to attempt to commit larceny, robbery, murder, or some other ultimate offense.

Nevertheless, the rationale behind treating both criminal trespass and possession of burglary tools as separate substantive offenses is sound. In either case, it is highly probable that the actor intends to commit a burglary.[494] This conclusion reflects

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[490] 2 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAW, WORKING PAPERS 899 (1970) (noting that an intruder's presence may cause a property holder to fear for the safety of his person or property even though the intruder cannot be shown to have intended anything more than the illegal entry).

[491] For a list of burglary statutes that apply only to felonies and specific misdemeanors, see *supra* note 75.

[492] The possession of burglary tools is not strictly essential, in that many entries can be made and burglaries consummated without the use of special tools. Most entries of commercial properties that are wired with alarms, however, require special equipment. DANGEROUS OFFENDERS, *supra* note 36, at 27.

[493] Possessional offenses usually merely evince a preparatory status that the law designates as a substantive offense rather than as an actual harm in itself. Possessional prohibitions have been justified by one court as "the practical necessity of punishing in certain circumstances a person against whom nothing can be proved except possession." Regina v. Grant, [1975] 2 N.Z.L.R. 165, 179 n.3.

[494] Hall, *Criminal Attempt—A Study of Foundations of Criminal Liability*, 49 YALE L.J. 789, 816 (1940). In discussing possession of burglary tools as an example of essential-element offenses, Professor Hall stated:

> Certain harmful consequences do not appear in the inchoate crimes, but it is plain that the existence of the anti-social situation greatly increases the probability of their occurring. Inchoate crimes are not a lesser *degree* of the relevant major harms; possession of burglar's tools is not a lesser degree of burglary. Nor is the relationship causal; it depends rather upon insight into social phenomena. If we know the harm which it is sought to effect, we recognize the inchoate crime as representing the necessary, preliminary pattern of behavior; hence we segregate such specific fact-clusters and penalize the doer. Such an anti-social situation regardless of how it may be distinguished sociologically from "ultimate" harmful consequences is, of course, independently criminal, legally.

Id. (emphasis in original).

judicial and other observation of human behavior; it is so commonly held as to merit the description "common sense."[495]

Thus, the basis for liability is experiential rather than merely positivist.[496] Illegal entry and possession of burglary tools are crimes not only because the state has made them crimes, but also because common experience has indicated that they are preparatory acts that frequently lead to burglaries.[497] Thus, they fulfill a major purpose of the criminal law—the prevention of social harm.[498] The prohibited acts are sufficiently dangerous to justify intervention and to shift the burden to the actor to justify his behavior as legally permissible.[499] Any perceived unfairness in the imposition of liability can be addressed by adjusting the sentence within the range of punishment prescribed for the crime.

b. *Proscription of constituent acts.* Other examples of the proscription-of-constituent-acts approach include sanctions against the use of instruments or other means to induce a

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[495] *But see* Benton v. United States, 232 F.2d 341, 344–45 (D.C. Cir. 1956) (overturning a statute that punished possession of burglary tools because it lacked a mens rea requirement); G. FLETCHER, *supra* note 148, at 198 (warning that possession offenses that require only possession and knowledge raise the possibility that courts could convict without proof that the individual intended to harm anyone with the materials that he possessed).

[496] *Compare* Regina v. Grant, [1975] 2 N.Z.L.R. 165, 179 n.3 (characterizing possession offense as an attempt-like prohibition attributable to the "practical necessity of punishing in certain circumstances a person against whom nothing can be proved except possession") *with* G. FLETCHER, *supra* note 148, at 197–202 (categorizing possession crimes without mens rea requirements as positivist, because they reflect policy decisions that are based on the concept of fair warning).

[497] *See* Dawkins, *Attempting to Have in Possession*, 5 OTAGO L. REV. 172, 176–77 (1981) (possessory offenses are directed at incipient or inchoate criminality).

[498] Hart, *supra* note 375, at 402–03.

[499] The outer limit of this approach is exemplified by the Model Penal Code's loitering provision, which makes it a crime if one "loiters or prowls in a place, at a time, or in a manner not usual for law-abiding individuals under circumstances that warrant alarm for the safety of persons or property in the vicinity." MODEL PENAL CODE § 250.6 (Proposed Official Draft 1980). *Compare, e.g.*, Kolender v. Lawson, 461 U.S. 352, 358–62 (1983) (holding unconstitutionally vague a loitering statute that required a suspect to provide "credible and reliable identification" to satisfy an inquiring police officer) *with* Porta v. Mayor, City of Omaha, 593 F. Supp. 863, 866–70 (D. Neb. 1984) (distinguishing the statute in *Kolender* from Omaha, Nebraska ordinance based on the Model Penal Code provision, and upholding the Omaha ordinance because it gave less discretion to police officers). The ordinance in *Porta* allowed a suspect to identify and explain himself to an inquiring police officer, and allowed the explanation to serve as a basis for dismissal of criminal prosecution if the court found the explanation sufficient to dispel the officer's concerns for nearby persons or property. *But see* Fields v. City of Omaha, 810 F.2d 830, 834 (8th Cir. 1987) (holding same ordinance as that at issue in *Porta* unconstitutionally vague because ambiguity of provision for suspect identification and lack of guidelines for police officer's assessment of suspect's explanation would not prevent arbitrary law enforcement).

miscarriage[500] and the enticement of minors into a structure to engage in sexual activity.[501] Although the criminalization of abortion is controversial, sexual assault of minors draws both universal public condemnation and a growing concern.[502] The Wisconsin enticement statute that was relied on in *Huebner v. State*[503] illustrates the constituent-act approach: "Any person 18 years of age or over, who, with intent to commit a crime against sexual morality, persuades or entices any child under 18 years of age into any vehicle, building, room or secluded place is guilty of a class C felony."[504] This statute defines the prohibited act in terms not of sexual activity but of persuading a minor to enter a vehicle or structure with the intent to use the child sexually.[505] Because such an act must occur in a secluded place, the enticement of the minor to such a place is an essential act toward the culmination of a sexual assault.[506]

In recent years, state legislatures have applied this approach to a variety of traditional completed crimes, such as auto theft,[507]

[500] For a listing of statutes punishing abortion in terms of the use of instruments or drugs to induce a miscarriage, see *supra* note 92.

[501] For a listing of statutes punishing the sexual enticement of minors, see *supra* note 94. For discussion of constituent-element crimes, see *supra* notes 91–98 and accompanying text.

[502] *See, e.g.*, ATTORNEY GENERAL'S COMMISSION ON PORNOGRAPHY, FINAL REPORT 405–18 (1986) (discussing legal developments aimed at halting child pornography); ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE, FINAL REPORT 102–07 (1984) (presenting recommendations for state legislative action to protect children from sexual abuse, including extended statutes of limitations in cases of sexual assault of minors and increased public access to arrest and conviction records of those charged with sex offenses against children); S. GOLDSTEIN, THE SEXUAL EXPLOITATION OF CHILDREN 1–14, 31–33 (1987) (outlining difficulties faced by law-enforcement agencies in investigating sexual exploitation of children and noting that, although underreported, sexual abuse is alarmingly common); Chaze, *Now, Nationwide Drive to Cure Child Abuse*, U.S. NEWS & WORLD REP., Oct. 1, 1984, at 73–74.

[503] 33 Wis. 2d 505, 147 N.W.2d 646 (1967).

[504] WIS. STAT. ANN. § 944.12.

[505] 33 Wis. 2d at 513, 147 N.W.2d at 650.

[506] *Id.* at 513–14, 147 N.W.2d at 650. For discussion of *Huebner v. State*, see *supra* notes 208–224 and accompanying text.

[507] For statutes that punish the unauthorized use of a motor vehicle, see, *e.g.*, CAL. PENAL CODE § 499b (West 1988); NEB. REV. STAT. § 28-516 (1985); N.Y. PENAL LAW §§ 165.05–.06, .08 (McKinney 1987); TEX. PENAL CODE ANN. § 31.07 (Vernon 1974); WASH. REV. CODE ANN. § 9A.56.070 (1988).

For statutes that punish people who obscure the identity of a vehicle, see, *e.g.*, ALA. CODE § 13A-8-22 (1985); N.J. STAT. ANN. § 2C:17-6 (West Cum. Supp. 1988); OKLA. STAT. ANN. tit 21, § 1841 (West 1983) (farm machinery); WASH. REV. CODE ANN. § 9A.56.180 (1988).

For statutes that punish the unlawful failure to return rented property, see, *e.g.*, ARIZ. REV. STAT. ANN. § 13-1806 (1978 & Cum. Supp. 1988); CONN. GEN. STAT. ANN. § 53a-129 (West 1985) (property covered under this section may be rented or borrowed; the property is protected against both failure to return and encumbrance); N.H. REV. STAT. ANN. § 637:9 (1986); S.C. CODE ANN. § 16-13-420 (Law. Co-op. 1985); S.D. CODIFIED LAWS ANN. § 22-30A-13 (1988).

larceny,[508] and shoplifting.[509] The increasingly used constituent-act approach parallels the Model Penal Code's substantial-step approach, which allows a court to punish behavior in its list of illustrative actions through use of a general attempt statute.[510]

c. *Possession offenses.* Possession offenses are more widely used than are constituent-element statutes. Along with possession of burglary tools, American legislatures most frequently punish possession of: illegal firearms (such as automatic weapons and sawed-off shotguns),[511] explosives,[512] forged and counterfeit articles and devices for making them,[513] gambling devices and records,[514] obscene materials with intent to distribute,[515] devices for theft of telecommunications services,[516] bootleg sound recordings with intent to sell,[517] eavesdropping devices,[518]

[508] For statutes that punish the removal or altering of identification numbers, see, *e.g.*, ALASKA STAT. § 11.46.260 (1983); COLO. REV. STAT. § 18-5-305 (1986); FLA. STAT. ANN. § 817.235 (West 1976); MASS. ANN. LAWS ch. 269, § 11c (Law. Co-op. 1980); NEB. REV. STAT. § 28-616 (1985).

[509] For statutes that punish the concealment of merchandise, see, *e.g.*, IDAHO CODE § 18-4626 (1987); MISS. CODE ANN. § 97-23-49 (1972); N.M. STAT. ANN. § 30-16-20(A)(2) (1988); UTAH CODE ANN. § 76-6-602(1) (Cum. Supp. 1988); VA. CODE § 18.2-103 (1988).

[510] For the text of the Model Penal Code's illustrative listings of substantial steps, see *supra* note 46.

[511] *See supra* note 85 (listing statutes).

[512] *See supra* note 86 (listing statutes).

[513] *See supra* note 82 (listing statutes).

[514] For statutes that punish possession of gambling devices, see, *e.g.*, CAL. PENAL CODE §§ 330a, 330b, 330.1, 330.4 (West 1988) (slot machines); COLO. REV. STAT. § 18-10-105 (1986); GA. CODE ANN. § 16-12-24 (1988); IND. CODE ANN. § 35-45-5-4 (Burns 1985 & Cum. Supp. 1988); N.J. STAT. ANN. § 2C:37-7 (West 1982).

For statutes that punish possession of gambling records, see, *e.g.*, HAW. REV. STAT. §§ 712-1224, -1225 (1985); ME. REV. STAT. ANN. tit. 17-A, § 955 (1983); MO. ANN. STAT. §§ 572.050, -.060 (Vernon 1979 & Cum. Supp. 1988); N.Y. PENAL LAW §§ 225.15, -.20 (McKinney 1987); OR. REV. STAT. §§ 167.132, -.137 (1985).

For statutes that punish possession of lottery tickets, see, *e.g.*, DEL. CODE ANN. tit. 11, § 1401 (1987); IOWA CODE ANN. § 725.12 (West 1979); MICH. COMP. LAWS ANN. § 750.373 (1968); N.J. STAT. ANN. § 2C:37-6 (West 1982); W. VA. CODE § 61-10-11b (1984).

[515] *See, e.g.*, CAL. PENAL CODE § 311.2 (West 1988); MINN. STAT. ANN. § 617.247 (West 1987) (obscene pictorial representations of minors); R.I. GEN. LAWS § 11-31-10 (1981 & Cum. Supp. 1988) (with intent to sell to minors); S.D. CODIFIED LAWS ANN. § 22-24-29 (1988) (with intent to disseminate to minors); WYO. STAT. § 6-4-302(a)(ii) (1988).

[516] *See, e.g.*, DEL. CODE ANN. tit. 11, § 850 (1987); ME. REV. STAT. ANN. tit. 17-A, § 907 (1983); MD. ANN. CODE art. 27, § 557A (1987); N.C. GEN. STAT. § 14-113.5 (1986); UTAH CODE ANN. § 76-6-409.1 (Cum. Supp. 1988) (includes devices for theft of other services).

[517] See, e.g., ALA. CODE § 13A-8-82 (1985); COLO. REV. STAT. §§ 18-4-603, -604 (1986); NEB. REV. STAT. §§ 28-1323, -1324 (1985); TENN. CODE ANN. § 39-3-1129 (1982); W. VA. CODE § 61-3-50 (1984).

[518] *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3008 (1978); CAL. PENAL CODE § 635 (West 1988); FLA. STAT. ANN. § 934.04 (West 1985); IDAHO CODE § 18-6703 (1987); N.Y. PENAL LAW § 250.10 (McKinney 1987).

and goods with altered or removed identifications.[519] Other jurisdictions have made more creative use of the possession offense by criminalizing, for example, possession of "stink bombs," cockfighting implements, and medical prescription blanks.[520]

By most standards of proximity, none of these offenses would constitute an attempt to commit a specific completed crime.[521] The act of obtaining one of these instruments comes at least a step prior to the act of using it to commit a crime.[522] Nevertheless, there is a great likelihood that the holder of these materials will use them in the commission of a completed crime, even if he does not manifest a specific intent to commit a crime such as murder, bank robbery, or extortion.[523]

As with the constituent-acts approach, however, there are limitations to the proper use of possession offenses. Only a few materials have unequivocally criminal uses.[524] Statutes regulating the possession of firearms and explosives take into account the legal uses of these articles by requiring that those who purchase them register the purpose for which they will be used.[525] Thus, the presumption behind punishment of unauthorized possession is that a person who fails to follow regulatory

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[519] *See, e.g.*, ALASKA STAT. § 11.46.270 (1983); MONT. CODE ANN. §§ 45-6-326(1)(b) to -326(3) (1987); N.H. REV. STAT. ANN. § 637:7-a (1986); TENN. CODE ANN. §§ 39-3-941 to -943 (1982 & Cum. Supp. 1988); TEX. PENAL CODE ANN. § 31.11 (Vernon Cum. Supp. 1988).

[520] *See, e.g.*, ALA. CODE § 13A-7-28 (1985) (proscribing possession of noxious substances, including "stink bombs"); CAL. PENAL CODE §§ 337g (prohibiting possession of horse-racing drugs within a racing enclosure), 597(c) (forbidding possession of cockfighting implements) (West 1988); S.D. CODIFIED LAWS ANN. § 22-24-8 (1988) (punishing possession of a prophylactic vending machine in a place lawfully accessible to minors); TENN. CODE ANN. § 39-6-918 (1982) (forbidding possession of a whiskey still).

[521] For a discussion of the various proximity standards, see *supra* note 43 and accompanying text.

[522] Some of these offenses, however, such as possession of goods with altered identification, raise a presumption that the possessor has completed a crime, although the authorities cannot prove all of the elements of the completed crime.

[523] For a recent discussion of the validity of criminalizing the attempt to possess prohibited articles, see Dawkins, *supra* note 497. The article, however, generalizes from New Zealand cases concerning attempts to possess illegal narcotics.

[524] A legislature can create an offense regarding an object with equivocal uses by adding an extra condition that is indicative of criminal intent. *See, e.g.*, N.D. CENT. CODE § 12.1-23-08.4 (1985) (forbidding duplication of keys that are marked with legends such as "do not duplicate" but preserving the affirmative defense that such duplication was authorized). *See generally* Robbins, *supra* note 11, at 398–419 (discussing the importance of an objective check on subjective intent to avoid convictions for equivocal, ambiguous, or neutral acts).

[525] *See, e.g.*, S.D. CODIFIED LAWS ANN. §§ 22-14-9 to -11 (1988) (proscribing, with exceptions, possession of unlicensed firearms).

channels to obtain dangerous materials intends to use them for an illegal purpose.[526]

In the context of fully operational weapons, this presumption is sound. A related offense, such as possession of unassembled bomb paraphernalia, however, would criminalize a more equivocal act. Many of the materials used to construct bombs have other legal purposes. Consequently, the government does not regulate their sale. Unless these materials have little or no other use except in explosive devices, judicial intervention is not justified. It is as likely, or almost as likely, that their possessor had a legitimate use for them as an illegitimate one. Although proscribing the possession of unassembled bomb paraphernalia could aid in preventing completed crimes, a broadly drawn statute might infringe too greatly on the rights of innocent individuals.[527]

d. *The applications of attempt to constituent-element offenses and other crimes in the nature of attempt.* The constituent-act and proscription-of-means statutes have substantial inchoate elements, as compared with the completed crimes from which they are derived. Thus, prosecutors' attachment of inchoate liability to them has resulted in appellate challenge as attempts to attempt.[528] The Model Penal Code's drafters sought to resolve

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[526] *See* N.Y. PENAL LAW § 265.15(4) (McKinney 1987) (establishing a presumption of unlawful intent if weapons or explosives are not registered).

[527] Nevertheless, South Dakota and Texas specifically punish the unauthorized possession of components for explosive or destructive devices. *Compare* S.D. CODIFIED LAWS ANN. § 22-14A-13 (1988) ("Any person who possesses any substance, material, or any combination of substances or materials, with the intent to make a destructive device without first obtaining a permit from the Department of Public Safety to make such device, is guilty of a class 5 felony.") *with* TEX. PENAL CODE ANN. § 46.10(a) (Vernon Cum. Supp. 1988) ("A person commits an offense if the person knowingly possesses components of an explosive weapon with the intent to combine the components into an explosive weapon for use in a criminal endeavor."). Although both statutes include a mens rea requirement, it is questionable whether these requirements clarify what materials the statute proscribes. Furthermore, the intent requirement merely makes the statutes' construction circular, because the intent to make an explosive device is inferred from possession of materials that remain undefined.

[528] *See* People v. Berger, 131 Cal. App. 2d 127, 127, 132, 280 P.2d 136, 137, 139 (1955) (upholding a conviction for attempted use of means to induce a miscarriage); Greenwood v. United States, 225 A.2d 878, 880 (D.C. 1967) (upholding a conviction for attempted unauthorized use of a motor vehicle); Thomas v. State, 351 So. 2d 77, 79 (Fla. Dist. Ct. App. 1977) (requiring a jury instruction on attempted possession of burglary tools), *rev'd*, 362 So. 2d 1348 (Fla. 1978) (attempted possession of burglary tools is not a crime); Vogel v. State, 365 So. 2d 1079, 1080 (Fla. Dist. Ct. App. 1979) (reversing a conviction for attempted possession of burglary tools); Silvestri v. State, 332 So. 2d 351, 354–55 (Fla. Dist. Ct. App.) (holding that the crime of attempted possession of cocaine does exist), *aff'd*, 340 So. 2d 928 (Fla. 1976); Nichols v. State, 248 So. 2d 199, 199–200 (Fla.

this problem by arguing that an act is a proper object of inchoate liability if it is of sufficient gravity to constitute a substantive offense.[529] Yet, jurisdictions have declined to recognize the crimes of attempted possession of burglary tools[530] and attempted use of medical instruments to induce a miscarriage.[531]

The rule stated by the Code's drafters is an over-generalization. The varying natures and potential harms of the constituent-act and possession offenses require separate determinations of whether inchoate liability should attach to them. This is an area of the criminal law in which judicial discretion is necessary to effectuate the public policies underlying inchoate liability.

Legislatures, however, should provide guidance to the courts by indicating which of the essential-element offenses are properly the objects of attempt liability. Legislatures can best provide this guidance by including attempt provisions within the statute that punishes the substantive constituent-act or possession offense.[532] To avoid the situation that plagued the Florida courts in the late 1970's,[533] legislatures should adopt a statutory provision similar to that of Alaska:

> [A] person may not be charged under [the general attempt provision] if the crime allegedly attempted by the defendant is defined in such a way that an attempt to engage in the proscribed conduct constitutes commission of the crime itself.[534]

At the same time, however, the legislature should not preclude application of the general attempt statute to the remaining essential-element statutes. This approach would retain some dis-

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Dist. Ct. App. 1971) (holding that the crime of attempted possession of marijuana does exist); Commonwealth v. Willard, 179 Pa. Super. 368, 369, 116 A.2d 751, 752 (1955) (reversing a conviction for attempted use of means to induce a miscarriage).

[529] *See supra* note 230 (quoting commentary to the Model Penal Code).

[530] Thomas v. State, 362 So. 2d 1348, 1349 (Fla. 1978); Vogel v. State, 365 So. 2d 1079, 1080 (Fla. Dist. Ct. App. 1979).

[531] *E.g.*, Commonwealth v. Willard, 179 Pa. Super. 368, 369, 374–75, 116 A.2d 751, 752, 754 (1955) (holding that the general attempt statute did not apply to a provision that forbade the use of an instrument to procure an abortion, because that provision itself dealt with an attempt).

[532] *See, e.g.*, ALA. CODE § 13A-6-69 (1985) (sexual enticement). The provision states: "It shall be unlawful for any person with lascivious intent to entice, allure, persuade or invite, *or attempt to* entice, allure, persuade or invite, any child under 16 years of age to enter any vehicle, room, house, office or other place for the purpose of [sexually abusing the child]." *Id.* (emphasis added).

[533] For a review of Florida's problem, occasioned by the inclusion of attempt liability in some criminal statutes, see *supra* notes 259–269 and accompanying text.

[534] ALASKA STAT. § 11.31.150(1) (1983).

cretion in the judiciary to extend liability to reflect changes in public policy.[535]

4. Attempt to Assault

Attempt to assault, the subcategory of double inchoate crimes that has engendered the most analysis and controversy, merits separate consideration. Simply to treat the crimes of assault or aggravated assault as separate substantive offenses fails to resolve the controversy.[536] Such an approach merely glosses over the fact that, even for aggravated assaults, the definition of assault as an attempt to commit a battery lies at the core of the offense.[537] Almost half of the states, however, have eliminated the double inchoate dilemma by redefining assault as battery, and eliminating the latter offense.[538]

Several states, however, retain traditional definitions of assault. Despite the logical awkwardness of the attempted-assault construction, the treatment of aggravated assaults as substantive offenses presents the least burdensome means to extend crimi-

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[535] Certainly, attempt liability should not be attached to such offenses as frequenting or residing in a house of prostitution. Not only do these offenses lack sufficient seriousness, as many contend about the offense of simple assault, but they are merely forms of attempt to commit prostitution. For a discussion of the benefits of circumscribing judicial discretion to create double inchoate crimes, see *supra* notes 440–444 and accompanying text.

[536] *See* State v. Wilson, 218 Or. 575, 584–85, 346 P.2d 115, 120 (1959) (treating assault with a deadly weapon as a separate substantive offense, even though the definition of assault at common law was attempted battery with present ability) (superseded by statute, as stated in State v. Garcias, 296 Or. 688, 679 P.2d 1354 (1984)).

[537] *See* Perkins, *supra* note 194, at 84, 87 (criticizing the approach taken in *State v. Wilson*, in which the court treated assault as a substantive offense). *But see* United States v. Locke, 16 M.J. 763, 765 (A.C.M.R. 1983) (treating assault as a substantive crime by redefining it to include intentional threatening).

[538] *See, e.g.*, ALASKA STAT. §§ 11.41.200, -.230 (1983); DEL. CODE ANN. tit. 11, §§ 611–613 (1987); MISS. CODE ANN. § 97-3-7 (1972 & Cum. Supp. 1987); N.Y. PENAL LAW §§ 120.00, -.10 (McKinney 1987); OHIO REV. CODE ANN. § 2903.13 (Page 1987).

These provisions are based on the Model Penal Code's assault provision. *See* MODEL PENAL CODE § 211.1 (Proposed Official Draft 1980). The section defines simple assault—a misdemeanor offense—to include: attempts to cause, or knowingly or recklessly causing, injury; negligently causing injury with a deadly weapon; and attempts to cause fear of injury by physical menace. The section defines aggravated assault—a felony offense—to include: attempts to cause, or knowingly or recklessly causing, serious bodily injury under circumstances manifesting extreme indifference to the value of human life; and attempts to cause or knowingly causing bodily injury with a deadly weapon. Among the twenty-three states that have merged assault and battery into a single assault offense, fifteen have eliminated traditional assault from its definition. These states are Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, Hawaii, Kentucky, Maine, Montana, Nebraska, New York, North Dakota, Oregon, and Texas. This approach reflects a policy decision to treat the new crime of assault like the old crime of battery and to treat the attempt to commit assault as the old crime of assault.

nal liability to those acts that present the greatest potential harm to the public. The other approach—the redefinition of "present ability" or "proximity" in relation to the danger inherent in an actor's intention and the nature of his acts in the individual case[539]—presents too great a potential for distortion of these concepts and, consequently, inconsistent decisions.[540]

The redefinition of assault as intentional frightening also fails to resolve the attempted-assault problem adequately. This definition imposes liability on an actor only if he causes his victim to fear bodily harm.[541] Thus, as in the Florida case of *State v. White*,[542] many acts that were formerly punished as attempts to commit battery are now punished as attempted assaults, because the victim is unaware of the threat to his person.[543] This approach resolves the question of whether assault is a substantive crime by removing its inchoate elements.[544] The approach results, however, in the treatment of acts that were formerly categorized as assault as the lesser included offense of attempt to assault.[545] Thus, the definition of assault as intentional frightening should serve only as an adjunct to the traditional definitions.[546]

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[539] *See supra* note 435 and accompanying text (discussing a Colorado Supreme Court case that suggests this approach).

[540] *See supra* note 439 and accompanying text (discussing a case in which the court distorted the concept of present ability to impose assault liability on the defendant).

[541] FLA. STAT. ANN. § 784.011 (West 1976). The section provides: "An 'assault' is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent." *Id.* Florida is currently the only American jurisdiction to define assault solely in terms of intentional threatening.

[542] 324 So. 2d 630 (Fla. 1975). For discussion of *State v. White*, see *supra* notes 197–202 and accompanying text.

[543] *See* 324 So. 2d at 631 (stating that it is unnecessary to expand the definition of assault to include attempts to injure victims who are unaware of attack, because the general attempt statute will reach those situations). Under the Florida statute's definition of assault, for example, a sniper who misses his intended victim would be guilty not of assault, but of attempted assault. *Id.*

[544] *See* United States v. Locke, 16 M.J. 763, 765 (A.C.M.R. 1983) (holding that the general attempt statute applies to assault because the definition of assault includes the concept of intentional frightening); State v. White, 324 So. 2d 630, 631 (Fla. 1975) (holding that the general attempt statute applied to the aggravated-assault statute, which was defined in terms of intentional frightening, because the legislature did not intend to exempt "bushwackers" from punishment).

[545] *See White*, 324 So. 2d at 631 (reversing a conviction under the aggravated-assault statute, which was defined in terms of intentional frightening, and holding that the defendant was guilty only of attempted aggravated assault because his victim was unaware of his attack).

[546] For a listing of states that punish intentional frightening, see *supra* note 59. Another useful adjunct to generalized assault statutes is the constituent-act approach. The most common example of this approach is a statute punishing one who points a firearm at

As with other attempts to commit crimes in the nature of attempt, legislatures should denote those forms of assault to which attempt liability should attach by including the attempt in the definition of the substantive offense. Again, the reason for this approach is to provide the courts with guidance concerning public policy without eliminating judicial discretion.

To the extent that a limitation on judicial discretion in this area is necessary, legislatures can provide that simple assault is an improper object of attempt liability.[547] Although it may appear to be inconsistent with the treatment of aggravated assaults as substantive offenses, this approach has sound policy bases. Opening simple assault to attempt liability, particularly where assault is defined as intentional frightening, would burden the criminal-law courts, since prosecutors would charge persons whose acts do not constitute a substantial danger to the public.[548] Because the different levels of the criminal-justice system would dispose of many of these cases before they got to trial (because they were not worth the time and effort),[549] those that did reach trial would place an undue burden on their defendants, and punishment would take on an arbitrary aspect.[550]

B. *Proposed Inchoate-Crime Statutes*

To a great extent, the attempt, conspiracy, and solicitation statutes proposed in the American Law Institute's Model Penal

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another. *E.g.*, GA. CODE ANN. § 16-11-102 (1988); IDAHO CODE § 18-3304 (1987); N.C. GEN. STAT. § 14-34 (1986); OKLA. STAT. ANN. tit. 21, § 1289.16 (West 1983).

[547] If a legislature eliminates attempt language from the assault statute, it will require courts to apply a general attempt statute to punish one who purposely attempts to cause another bodily injury. *Cf.* State v. Laurie, 56 Haw. 664, 673–74 & n.5, 548 P.2d 271, 278 & n.5 (1976) (holding that, although the defendant may not have violated the assault statute that required him to cause "serious bodily injury" because the victim's injuries were not major, he nevertheless was guilty of attempted assault). This approach eliminates the possibility that courts will apply a general inchoate statute to an attempt provision included within the assault statute.

[548] *See* Arnold, *supra* note 154, at 65 (asserting that it is unwise to "punish attempts at ordinary assaults which carry light penalties").

[549] *See* Perkins, *supra* note 194, at 86 (arguing that, if criminal assault were defined as intentional threatening, the offense "would include any number of futile attempts to frighten or startle that are too insignificant to be added to the category of crime").

[550] It is unlikely, however, that such convictions are constitutionally suspect. Because convictions would stem from assault and attempt statutes, a defendant probably could not successfully challenge these statutes on void-for-vagueness grounds. Although the general language of most attempt and assault statutes gives courts broad discretion to decide whether they will punish particular behavior, both types of statutes give courts some guidance concerning the limits of their discretion and give notice to potential offenders.

Code mitigated the need to use double inchoate constructions. The attempt statute's extension of liability to acts earlier in the preparatory continuum, the conspiracy statute's adoption of the unilateral approach, and the inclusion of a solicitation statute removed many of the gaps that were left by previous and some existing codifications of inchoate crimes in American jurisdictions.

The Code provisions still need some refinement, however. The definitional provisions are unnecessarily verbose or overly complex, or both. This over-written quality detracts from the salient policy considerations of each inchoate crime. Accordingly, the final section of this Article surveys the strengths and weaknesses of the Code's three major inchoate provisions and recommends revisions of those provisions.

1. Attempt

The central source of disagreement over what constitutes an acceptable definition of attempt focuses not so much on the mens rea, or guilty mind, but on the actus reus, or overt act:

> The mens rea of an attempt is the same as that of the substantive crime, but the actus reus of an attempt has not been defined with the same precision; there is merely a general principle that an actus reus is constituted when steps have been taken toward the commission of the substantive crime which are "sufficiently proximate."[551]

The acts tending toward commission of different completed crimes will vary as the nature of the crimes differs. Even within a single category of completed crimes, actors will employ different means to achieve their ends. Hence, the argument that courts should treat attempt as an adjunct of each completed crime rather than as an overly refined rule with general application has a great deal of merit.[552] Most American jurisdictions have accepted this premise not by attaching an attempt provision to each completed crime statute, but instead by adopting

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[551] Smith, *Two Problems in Criminal Attempts*, 70 HARV. L. REV. 422, 447 (1957).
[552] *See supra* note 355 (discussing the need for judicial flexibility to extend crimes).

constituent-element offenses that criminalize preparatory acts toward a broad range of specific crimes.[553]

Nevertheless, every criminal code needs a general attempt statute. Such statutes give the courts discretion to apply the principles of attempt liability where the legislature has failed, through oversight or lack of foresight, to provide a basis for intervention and punishment of preparatory acts that manifest potential societal harm.[554] Such statutes can also set the necessary limits on judicial discretion.

Accordingly, a general attempt statute must balance two conflicting factors: (1) the community's need for effective crime prevention; and (2) the need to draft criminal statutes that eliminate or, at least, minimize interference with innocent, neutral, or ambiguous conduct.[555] The Model Penal Code's attempt provision takes a different approach from most previous attempt formulations in that it shifts emphasis from the second factor to the first.[556]

The drafters suggested that the primary difference between the Model Penal Code formulation and that of previous attempt formulations was its definition of the required act as "an act or omission constituting a substantial step in a course of conduct planned to culminate in [the] commission of the crime."[557] They contended that the substantial-step formulation "shifts the emphasis from what remains to be done, the chief concern of the proximity tests, to what the actor *has already done*. That further major steps must be taken before the crime can be completed does not preclude a finding that the steps already undertaken are substantial."[558]

The term "substantial step" alone adds little precision to an attempt definition. Courts in states that have adopted the substantial-step language often continue to rely on pre-existing com-

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[553] For discussion of the increasing use of possession offenses and constituent-act offenses, see *supra* notes 81–95, 487–535 and accompanying text. *See also* MODEL PENAL CODE § 5.06 (Proposed Official Draft 1985) (proscribing possession of instruments of crime, such as weapons); *id.* § 5.07 (prohibiting offensive weapons).

[554] *See supra* note 355 (quoting Thurman Arnold's view that the law of attempt is necessary to give courts the discretion to extend crimes, without distorting statutory language, to the myriad of factual situations they confront).

[555] Note, *Effects of the New Illinois Code on Prosecutions for Inchoate Crimes*, 1963 WASH. U.L.Q. 508, 518–19.

[556] *See supra* notes 45–49 and accompanying text (discussing the Model Penal Code's attempt provision).

[557] MODEL PENAL CODE § 5.01 commentary at 329–31 (Proposed Official Draft 1985).

[558] *Id.* at 329 (emphasis added).

mon-law formulations of proximity.[559] In this respect, the Model Penal Code language is no more precise than that of New York's attempt statute, which provides for the punishment of a person who, with intent to commit a crime, "engages in conduct which tends to effect the commission of such crime."[560]

The crux of the Model Penal Code's attempt statute is its nonexhaustive list of instances of conduct exemplifying a substantial step.[561] The denoted acts serve as an objective basis for discovering something about a person's intentions and character.[562] The listing suggests that the basis of attempt liability is a probability estimate that an observed mode of conduct will more often than not lead to completed criminality.[563]

Consequently, the inclusion of the list of examples is essential to the definition of attempt.[564] Not only does it make clear that this definition of attempt encompasses acts theretofore treated as mere preparation, but it also provides, through practical example, an objective basis for finding attempt liability. The statement that "[c]onduct shall not be held to constitute a substantial step . . . unless it is strongly corroborative of the actor's crim-

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[559] *See, e.g.*, State v. Fish, 621 P.2d 1072, 1077 (Mont. 1980) ("[I]t is a well-established principle that an attempt must consist of more than mere preparation and that there must be some overt act in furtherance of the offense charged."). Conversely, at least two courts have adopted the Model Penal Code formulation even though the relevant statute used a common-law definition. United States v. Jackson, 560 F.2d 112, 117–20 (2d Cir.), *cert. denied*, 434 U.S. 941 (1977); State v. Woods, 48 Ohio St. 2d 127, 132, 357 N.E.2d 1059, 1063 (1976), *vacated on other grounds*, 438 U.S. 910 (1978).

[560] N.Y. PENAL LAW § 105.00 (McKinney 1987); *see* ARIZ. REV. STAT. ANN. § 13-1001 (1978) (dropping the word "substantial" from the "substantial step" requirement); R. PERKINS & R. BOYCE, *supra* note 13, at 611 (defining criminal attempt as a "step towards a criminal offense with specific intent to commit that particular crime"). Indeed, the drafters of the Code stated that "[w]hether a particular act is a substantial step is obviously a matter of degree. To this extent, the Code retains the element of imprecision found in most of the other approaches to the preparation-attempt problem." MODEL PENAL CODE § 5.01 commentary at 329 (Proposed Official Draft 1985); *see* Robbins, *supra* note 11, at 419–39 (comparing New York and Model Penal Code formulations).

[561] MODEL PENAL CODE § 5.01(2) (Proposed Official Draft 1985); *see supra* note 46 (discussing § 5.01(2)).

[562] DANGEROUS OFFENDERS, *supra* note 36, at 29.

[563] *But see* Katz, *Dangerousness: A Theoretical Reconstruction of the Criminal Law*, 19 BUFFALO L. REV. 1, 5 n.6 (1969) (criticizing the Model Penal Code's implicit use of probability estimates in reliance on conduct to prove criminal purpose and dangerousness).

[564] *See* Note, *Attempt, Solicitation, and Conspiracy Under the Proposed California Criminal Code*, 19 UCLA L. REV. 603, 609–10 (1972) (arguing that omission of the substantial-step examples would have served to retain much of the existing body of case law and would have done little to alleviate problems that the common-law approach created).

inal purpose" may appear to be tautological to some.[565] It is unclear whether the drafters of the Code thought it unwise to make more explicit the experiential basis of their approach. Also, the commentators' insistence on the importance of the substantiality and corroboration requirements in the definition[566] has led most states to adopt only the general parts of the definition.[567] However, there is no real harm in retaining the substantial-step language, if only to emphasize the need to protect individuals from liability for equivocal conduct.[568]

As argued earlier, the Code's tripartite definition of attempt is unnecessary because the clause containing the substantial-step language is sufficiently inclusive.[569] Thus, the definition of attempt should read as follows:

> **(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.[570]**

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[565] Katz, *supra* note 563, at 5 n.6. Katz stated:

> The [Model Penal Code] formulation requires that the act be "a substantial step in a course of conduct" and be "strongly corroborative" of criminal purpose. I cannot see how this formulation avoids tautology. If the act (taken as a unit) is a substantial step in a course of conduct which is clearly criminal, it is necessarily strongly corroborative of a criminal purpose. If an act is strongly corroborative then it is, by definition, a substantial step. The all-important criminal purpose is established by inference from conduct which is a substantial step, *i.e.*, conduct which is strongly corroborative. Thus the [Code's] formulation, while appearing to be defining two distinct elements which are established by independent data, really only requires a single element: conduct which is relatively unambiguous in its relation to completed criminality. Lack of ambiguity entails the conclusion that the conduct is a substantial step, and clears the way for an inference of criminal purpose.

Id.

[566] MODEL PENAL CODE § 5.01 commentary at 329–31 (Proposed Official Draft 1985).

[567] Only one state includes the examples in its statute. CONN. GEN. STAT. ANN. § 53a-49 (West 1985). Three other states, however, include the examples in their official commentaries. ARK. STAT. ANN. § 41-701 (1977); HAW. REV. STAT. § 705-500 (1985); OR. REV. STAT. § 161.405 (1985). For a discussion of the ambiguities in the impossibility provisions of the Model Penal Code, see Robbins, *supra* note 11, at 422–30.

[568] Further, the strongly-corroborative language is also necessary to support a recommended view of the impossibility defense. *See* Robbins, *supra* note 11, at 419–43.

[569] *See supra* note 46; *see also* Robbins, *supra* note 11, at 441–42 (recommended attempt statute).

[570] *Cf.* MODEL PENAL CODE § 5.01(1) (Proposed Official Draft 1985). For reasons that I argue elsewhere, *see* Robbins, *supra* note 11, at 419–43, the Model Penal Code provisions for the impossibility defense to crimes of attempt are flawed, and should be replaced by the following provision:

The advantage of the substantial-step reification over a formula that punishes an act that "tends to effect" or "tends toward" a completed crime is in its amenability to further definition. Thus, the definition should continue:

> **(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 in 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 in the circumstances;**
>
> **(g) soliciting an innocent agent to engage in conduct constituting an element of the crime.**[571]

Those jurisdictions that have codified a broad spectrum of possession offenses might opt to exclude subsections (e) and (f). Their inclusion, however, might prove to be beneficial in closing statutory gaps.

(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.

Other features of an attempt statute, such as renunciation of criminal purpose, are beyond the scope of this Article. *See* MODEL PENAL CODE §§ 5.01(3), (4) (Proposed Official Draft 1985).

[571] *Cf.* MODEL PENAL CODE § 5.01(2) (Proposed Official Draft 1985) (corresponding Model Penal Code language).

2. Conspiracy

Although it has been widely criticized, the unilateral theory of conspiracy embodied in the Model Penal Code provision is a valid approach in a penal law that emphasizes the prevention of crime. The theory is prefigured in the Code's attempt provision, which treats the solicitation of an innocent agent as a substantial step toward commission of a crime.[572] The act of soliciting another to aid in commission of a crime is sufficiently dangerous to justify judicial intervention.[573] In addition, the Code's inclusion of an overt-act provision ensures the need for extrinsic corroboration.[574] More important to the discussion of double inchoate crimes, the unilateral theory of conspiracy eliminates much of the need for charges of attempt to conspire.[575]

The language of the Model Penal Code's conspiracy provision, however, inadvertently opens itself to use in other double inchoate constructions. The provision suggests that one is guilty of conspiracy if he agrees with his co-conspirators to "engage in conduct that constitutes such crime or *an attempt or solicitation to commit such crime*."[576] The thrust of this section is that one may be found guilty of conspiracy even if the object crime is not completed. The imprecision of the language, however, suggests the appropriateness of the constructions of conspiracy to attempt and conspiracy to solicit. A charge of conspiracy to commit the completed crime is logically preferable to either of these constructions.[577]

Furthermore, the incorporation of the language of facilitation in the conspiracy statute broadens the scope of conspiracy lia-

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[572] *Id.* § 5.01(2)(g).

[573] *Id.* § 5.03 commentary at 388. The drafters reasoned that

> [t]he act of agreeing with another to commit a crime, like the act of soliciting, is concrete and unambiguous; it does not present the infinite degrees and variations possible in the general category of attempts. The danger that truly equivocal behavior may be misinterpreted as preparation to commit a crime is minimized; purpose must be relatively firm before the commitment involved in agreement is assumed.

Id.

[574] *Id.* § 5.03(5).

[575] *See supra* notes 422–431 and accompanying text (discussing the lack of need for the conspiracy-to-attempt construction).

[576] MODEL PENAL CODE § 5.03(1)(a) (Proposed Official Draft 1985) (emphasis added). The section also proscribes an agreement "to aid . . . in the planning or commission of such crime *or of an attempt or solicitation to commit such crime*." *Id.* § 5.03(1)(b) (emphasis added).

[577] *See supra* notes 422–431 and accompanying text (noting judicial criticism of the conspiracy-to-attempt construction).

bility to people who lack the specific intent to participate in the conspiracy.[578] Such an extension of liability based more on a complicity rationale than on an inchoate-crime policy belongs

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[578] Facilitation addresses the kind of accessorial conduct in which the actor aids the commission of a crime with knowledge that he is doing so, but without any specific intent to participate therein or to benefit therefrom. MODEL PENAL CODE § 2.04(3) commentary at 30 (Tent. Draft No. 1, 1953). The drafters of the Model Penal Code used as an example the defendants in United States v. Falcone, 109 F.2d 579 (2d Cir.), *aff'd*, 311 U.S. 205 (1940). In *Falcone*, a group of sugar and yeast merchants sold their products over a period of time to persons engaged in the manufacture of moonshine liquor. *Id.* at 580. On the basis of the merchants' probable knowledge of their products' illegal use, the government unsuccessfully sought to prove the merchants' complicity in a conspiracy. *Id.* at 581–82.

Thus, the original draft of the Model Penal Code sought to punish both those who performed an act tending toward the commission of a crime, but who did not specifically intend to assist in its commission, and those who acted with a specific intent. The drafters stated:

> Conduct which knowingly facilitates the commission of a crime is by hypothesis a proper object of preventive effort by the penal law unless, of course, it is affirmatively justifiable. It is important in that effort to safeguard the innocent but the requirement of guilty knowledge serves that end—knowledge that there is a purpose to commit the crime and that one's behavior renders aid.

MODEL PENAL CODE § 2.04(3) commentary at 30 (Tent. Draft No. 1, 1953).

The drafters eliminated the language incorporating the facilitation standard from its complicity provision. MODEL PENAL CODE § 2.06 commentary at 34 (Proposed Official Draft 1962). Nevertheless, the National Commission on Reform of Federal Criminal Laws included a general facilitation provision in its proposed Federal Criminal Code. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, PROPOSED NEW FEDERAL CRIMINAL CODE § 1002 (1971); 1 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, *supra* note 127, at 160. At present, only four states codify facilitation. ARIZ. REV. STAT. ANN. § 13-1004 (Cum. Supp. 1987); KY. REV. STAT. ANN. § 506.080 (Michie/Bobbs-Merrill 1985); N.Y. PENAL LAW § 115.00 (McKinney 1987); N.D. CENT. CODE § 12.1-06-02 (1985). The Kentucky statute is typical:

> A person is guilty of criminal facilitation when, acting with knowledge that another person is committing or intends to commit a crime, he engages in conduct which knowingly provides such a person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime.

KY. REV. STAT. ANN. § 506.080 (Michie/Bobbs-Merrill 1985). For a discussion of the New York statute, which punishes one who, "believing it probable that he is rendering aid," facilitates a crime, see Sobel, *The Anticipatory Offenses in the New Penal Law: Solicitation, Conspiracy, Attempt and Facilitation*, 32 BROOKLYN L. REV. 257, 269–73 (1966).

Facilitation is generally regarded as a lesser included offense of an accomplice statute, but not of statutes punishing substantive offenses, even where the defendant is prosecuted as an accomplice. *See* State v. Politte, 136 Ariz. 117, 121, 664 P.2d 661, 665 (1982); People v. Glover, 57 N.Y.2d 61, 64–65, 439 N.E.2d 376, 377–78, 453 N.Y.S.2d 660, 661–62 (1982). *But see* Luttrell v. Commonwealth, 554 S.W.2d 75, 79 (Ky. 1977) (on remand, defendant was held to be entitled to instructions on criminal facilitation of attempted murder and assault in the second degree); Recent Decision, *Facilitation: Should It Be Regarded As a Lesser Included Substantive Offense When Prosecution Is Based on the Defendant's Complicity?*, 25 ARIZ. L. REV. 1047, 1051, 1054–56 (1983) (arguing that it should). Several commentators have noted the importance of the crime for plea-bargaining purposes. Sobel, *supra*, at 271; Comment, *A New Crime: Criminal Facilitation*, 18 LOY. L. REV. 103, 114 (1971); Recent Decision, *supra*, at 1055–56.

in a separate statute. Consequently, the Model Penal Code's definition of conspiracy should be amended to read as follows:

> **A person is guilty of conspiracy with another person or persons to commit a crime if he agrees with such other person or persons that they or one or more of them will engage in a course of conduct that constitutes such crime or is planned to culminate in the commission of the crime.**[579]

The "course of conduct" language, derived from the attempt provision, serves the same purpose as the "attempt or solicitation" language without creating its attendant confusion.

3. Solicitation

The language of the Code's solicitation provision, like that of its conspiracy provision, is overly complicated. The solicitation statute punishes one who "with the purpose of promoting or facilitating [the commission of a crime] commands, encourages or requests another person to engage in specific conduct that would constitute such crime *or an attempt to commit such crime* or would establish his complicity in its commission *or attempted commission.*"[580] This language raises the possibility of a solicitation-to-attempt construction. As with conspiracy to attempt, one does not solicit another to *attempt* to commit a crime.[581] Indeed, the relevance of the attempt's failure or success to the solicitation is even less than is its relevance to a conspiracy charge: in a solicitation, the importuned party is not required to perform any act toward the object crime.[582] Thus, the attempt language is superfluous.

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[579] *Cf.* MODEL PENAL CODE § 5.03(1) (Proposed Official Draft 1985). Other features of a conspiracy statute, such as scope of the conspiracy, multiple objectives, joinder, venue, renunciation of criminal purpose, and duration of the conspiracy, *see id.* §§ 5.03(2)–(7), are beyond the scope of this Article.

[580] *Id.* § 5.02(1) (emphasis added); *see also* 18 U.S.C. § 373 (Supp. IV 1986), *quoted in supra* note 137.

[581] *See supra* note 363 and accompanying text (suggesting that people conspire or solicit to commit the ultimate offense and do not conspire or solicit to attempt to do so).

[582] The intent of the Code's drafters is made somewhat clearer by the accompanying commentary:

> It ordinarily should not be necessary to charge an actor with soliciting another to attempt to commit a crime, since a rational solicitation would seek not an unsuccessful effort but the completed crime; the charge, therefore, should be one of solicitation to commit the completed crime. But in some cases the actor may solicit conduct that he and the party solicited believe would constitute the completed crime, but that, for reasons discussed in connection with the defense of impossibility in attempts, does not in fact constitute the crime. Such conduct

Further, as with the conspiracy provision, the solicitation provision incorporates the language of facilitation.[583] Again, this language should be eliminated. The statute should read as follows:

> **(1) A person is guilty of solicitation to commit a crime if he commands, encourages, or requests another person to engage in a course of conduct designed to culminate in the commission of the crime or that would establish his complicity in its commission.[584]**

In addition, the second subsection of the Code's solicitation provision should be adopted:

> **(2) It is immaterial under [the first section] that the actor fails to communicate with the person he solicits to commit a crime if his conduct was designed to effect such communication.[585]**

This paragraph incorporates the double inchoate crime of attempt to solicit within the definition of solicitation. Although only two states currently prohibit such actions by statute,[586] this practice is consistent with a subjective theory of inchoate criminality. The attempt to communicate a solicitation manifests a criminal intent as surely as does a communicated solicitation.[587] In addition, it permits intervention prior to the completion of

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> by the person solicited would constitute an attempt . . . , and the actor would therefore be liable . . . for having solicited conduct that would constitute an attempt if performed.

MODEL PENAL CODE § 5.02 commentary at 373–74 (Proposed Official Draft 1985) (footnotes omitted). The reasoning of the Code's drafters is fallacious. If the act solicited is not a crime, then the solicitant is not guilty of an attempt, nor is the solicitor guilty of criminal solicitation.

[583] For a discussion of facilitation, see *supra* note 578 and accompanying text.

[584] *Cf.* MODEL PENAL CODE § 5.02(1) (Proposed Official Draft 1985).

[585] *Id.* § 5.02(2). Other features of the crime of solicitation, such as renunciation of criminal purpose, *see id.* § 5.02(3), are beyond the scope of this Article.

[586] HAW. REV. STAT. § 705-510(2) (1985); KAN. STAT. ANN. § 21-3303(b) (Vernon Cum. Supp. 1987).

[587] MODEL PENAL CODE § 5.02 commentary at 381–82 (Proposed Official Draft 1985). The commentary states:

> [T]he last proximate act to effect communication with the party whom the actor intends to solicit should be required before liability attaches on this ground. Conduct falling short of the last act should be excluded because it is too remote from the completed crime to manifest sufficient firmness of purpose by the actor. The crucial manifestation of dangerousness lies in the endeavor to communicate the incriminating message to another person, it being wholly fortuitous whether the message was actually received. Liability should attach, therefore, even though the message is not received by the contemplated recipient, and should also attach even though further conduct might be required on the solicitor's part before the party solicited could proceed to the crime.

Id.

the object offense in the event that an uncommunicated solicitation is intercepted before it is presented to a willing solicitant.

CONCLUSION

Criminal attempt, conspiracy, and solicitation punish inchoate criminality—conduct falling short of the completed object offense. Because the inchoate offenses are aimed at actors who specifically intend to commit another offense and who, by hypothesis, ignore the sanction for the object offense, they provide no significant general deterrence. They do, however, permit law-enforcement personnel to intervene and prevent the intended harm. Moreover, inchoate crimes perform other important penological functions by permitting punishment of those who demonstrate a disposition toward criminality before they do any real harm—particularly when the failure to complete the offense is fortuitous, as when the bullet misses its intended victim.

Most American jurisdictions punish inchoate offenses on the basis of relatively short attempt, conspiracy, and solicitation statutes that contain abstract conceptual terms with universal application. This practice confronts courts with the task of determining, in each of the infinite number of fact situations that may arise, the precise point at which inchoate liability attaches. Because general inchoate statutes are abstract and vague, courts in the past have used a rigid conceptual approach to analyze those offenses' abstract concepts logically.

Not only has this conceptual approach failed to achieve the predictability and certainty of result that is ostensibly its greatest value, it has also failed to promote the purposes and policies behind inchoate liability, principally the prevention of social harm. Thus, courts in recent years have taken a more functional, policy-oriented approach to inchoate liability. These courts look first to whether the policy of the criminal law indicates that an individual's acts are sufficiently dangerous to society to warrant judicial intervention and punishment. Only then do they address the issue that the conceptual approach takes up first—whether the particular jurisdiction's definition of attempt, conspiracy, or solicitation allows a court to punish those acts. One result of this functional approach is that an increasing number of courts have created double inchoate crimes during the last hundred years.

Critics of this approach suggest that these courts have, in effect, created common-law crimes, an authority denied them by statute in most states. A strong argument can be made that the due process concept of notice outweighs the necessity for courts to prevent harm to society through double inchoate crimes. But inchoate crimes, despite their recent treatment as separate, generalized categories, are very different from substantive crimes. Their abstract nature requires a higher degree of judicial interpretation and discretion than substantive offenses do. The court that fails to analyze a double inchoate indictment in terms of the predictive and preventive purposes of inchoate liability shirks its duty to shape its legislature's criminal code into a rational and coherent body of law.

This Article is not a call for untrammeled judicial discretion in the area of inchoate liability. Indeed, with the above historical survey and model statutes, it suggests an integrated legislative policy toward inchoate liability that would eliminate the need for conspiracy-to-attempt and attempted-conspiracy formulations. This proposal entails the adoption of unilateral-conspiracy and solicitation statutes similar to those of the Model Penal Code.

The Article demonstrates, however, that there is no simple formulation that will eliminate entirely the need for indictments for attempts to commit crimes in the nature of attempt. Partial solutions that have already been accepted in some jurisdictions include the adoption of various constituent-element offenses and redefined assault provisions that merge assault and battery. But the need still remains for courts to decide in individual cases whether the predictive and preventive purposes of attempt liability require their application to substantive offenses with significant inchoate elements. For a realistic rationalization of this area of the law, I submit that they do.

ARTICLE

WELCOME TO THE FUNHOUSE: THE INCREDIBLE MAZE OF MODERN DIVORCE TAXATION

BEVERLY I. MORAN*

The divorce tax laws affect thousands of American taxpayers. The complexity of the current divorce tax system makes it difficult for couples negotiating divorce or separation agreements to account for the tax consequences of their settlements. In addition, the current divorce tax laws intensify the economic hardship generally suffered by women after divorce or separation.

In this Article, Professor Moran evaluates each system of divorce taxation employed in the United States since 1913 and proposes a departure from the existing scheme. She begins by reviewing the substantive provisions of the various systems, focussing on how each system reflected the lawmakers' views of women in marriage. Next she discusses the complications that arise from the existence of multiple systems. Professor Moran then analyzes the roots of complexity and inequity in the various systems and concludes by proposing a unitary divorce tax system that would be more sensitive to the economic plight of alimony recipients.

As of 1986, for every two marriages, there was one divorce.[1] But, while divorce may end a couple's marital relationship, it rarely terminates their economic relationship. Instead, the divorce settlement agreement may dictate that support payments and property distributions continue for years. The tax conse-

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[1] BUREAU OF THE CENSUS, U.S. DEP'T OF COMM., U.S.A. STATISTICS IN BRIEF 1988, at 81, table 124 (107th ed.).

quences of these payments must be taken into account when structuring a settlement in order to achieve the economic distribution intended by the couple—a difficult proposition given the current divorce tax framework.

The current divorce tax system is a confusing conglomeration of four different models. Congress has modified the divorce tax system four times since the inception of the modern income tax in 1913. Each wave of reform reflected society's changing views of marriage as an institution and of spousal roles within marriage. With three of the four revisions, however, Congress allowed previous systems to remain intact by grandfathering prior terminations under old law.[2] As a result, four different sets of provisions remain in effect today.

Each of the four statutory systems includes alimony in the payee's income, allowing the payor a corresponding deduction. Because most other distributions incident to divorce or separation are not included in the recipient's taxable income,[3] Congress created a legion of complicated rules to distinguish spouse maintenance payments from property distributions and child support. These rules can be a trap for the unwary and, in many instances, conflict with current trends in divorce law. A more straightforward system of divorce taxation rules would enable divorcing couples, many of whom have no tax sophistication, to understand the tax consequences of their divorce settlements and to negotiate settlements without expensive legal advice.[4]

This Article examines the four systems of divorce taxation and proposes a more equitable and straightforward system. Part I discusses the basic requirements for each system, emphasizing those requirements that reflect American society's changing view of women in marriage. Part II explains which system applies to particular alimony and support payments. Part III evaluates the current multi-system approach in light of trends in divorce law and concludes that a single unified system that shifts the alimony tax burden to payors is preferable.

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[2] *See infra* Part II.

[3] *See infra* Part I(B)(1)(c).

[4] For a discussion of the trend toward "do-it-yourself" divorce, see J. GREEN, J. LONG & R. MURAWSKI, DISSOLUTION OF MARRIAGE 185–86 (1986).

I. SYSTEM AFTER SYSTEM—A REVIEW OF THE ALIMONY RULES

A. *Till Death Do Us Part: The Early Years—1913 to 1942*

The sixteenth amendment[5] ended controversy regarding the constitutionality of the income tax.[6] However, new issues soon replaced the old ones. The question changed from whether Congress could tax income to how income should be defined for purposes of the tax. One of the first Supreme Court cases to address this concern was *Gould v. Gould*.[7]

The Goulds were legally separated before the institution of the modern income tax. The separation decree awarded Mrs. Gould alimony. After the enactment of the new income tax, Mr. Gould suspected that the alimony arrangement had tax consequences. Accordingly, he wrote to the Commissioner of Internal Revenue to discover which rules applied.

The Commissioner responded that "alimony paid under final decree, or under a decree of separation, is fixed and determinable annual income, and . . . the person paying such alimony is required to withhold the normal tax on same."[8] In other words, the Commissioner believed that alimony was income to the recipient and was therefore subject to the federal income tax. Further, the Commissioner opined that "the amount of alimony

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[5] The sixteenth amendment provides: "The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration." U.S. CONST. amend. XVI.

[6] The first federal income tax appeared during the Civil War to offset an enormous national debt. Act of Aug. 5, 1861, ch. 45, 12 Stat. 292, 309–11. Almost a year later, Congress redesigned the tax, adopting a progressive rate structure. Act of July 1, 1862, ch. 119, 12 Stat. 432, 473–75. Postwar agitation eventually led to the tax's repeal in 1872. Act of June 6, 1872, ch. 315, 17 Stat. 230. In response to populist pressures from the emerging western states, the tax was revived in 1894 as a means of forcing the wealthy to contribute more to the public fisc. Act of Aug. 27, 1894, ch. 349, 28 Stat. 509. However, the constitutionality of this tax was successfully challenged in Pollack v. Farmers' Loan and Trust Company, 158 U.S. 601 (1895). The Supreme Court held that an income tax violated Article I, Section 2, Clause 3 and Article I, Section 9, Clause 4 of the U.S. Constitution, which required direct taxes to be apportioned among the states in accordance with the population. The income tax did not appear again until the passage of the sixteenth amendment in 1913. *See* J. WITTE, THE POLITICS AND DEVELOPMENT OF THE FEDERAL INCOME TAX 67–70 (1985); see generally D. POSIN, FEDERAL INCOME TAXATION OF INDIVIDUALS 1–8 (1983), for a brief history of federal income taxation.

[7] 245 U.S. 151 (1917).

[8] Record at 4, *Gould* (No. 702) (Affidavit of Owen N. Brown, Commissioner of Internal Revenue).

paid cannot be deducted . . . [by] . . . a person paying such alimony."[9]

Under the Commissioner's analysis, alimony results in two taxes. First, there is a tax on the husband because he earned the income. Then, after a portion of those earnings is transferred to his ex-wife, the government imposes a second tax based on her receipt of "fixed and determinable annual income." This is a two transfer/two tax system, because each transfer (first by a third party to the payor and then by the payor to the payee) is viewed as creating income subject to tax.

In accordance with the Commissioner's opinion, Mr. Gould withheld taxes from Mrs. Gould's monthly payments. That withholding reduced the net amount of each payment. In response, Mrs. Gould sued Mr. Gould for alimony arrears. Because there were no arrears if Mrs. Gould's alimony was subject to tax, as the Commissioner suggested, the New York courts had to decide whether alimony was income for purposes of the new federal income tax.

Theoretically, the Commissioner's analysis had merit, because the receipt of alimony increases the wife's wealth and is, therefore, income to her.[10] Furthermore, the cost of alimony is a personal expense and therefore should not be deducted by the husband.[11] Despite the theoretical purity of this approach, however, the New York courts rejected the Commissioner's position and instead determined that alimony was not income to the payee, because "it is the duty of a husband to support his wife."[12] Accordingly, the courts reasoned, if support was not income to the wife during marriage, it did not become income

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[9] *Id.*

[10] *Cf.* I.R.C. § 61 (1986) (subjects all income "from whatever source derived" to the federal income tax).

[11] *Cf.* I.R.C. § 262 (1986) ("no deduction shall be allowed for personal, living, or family expenses").

An example of how the tax rules normally apply to compensation income will clarify their application to the alimony case. Assume Homeowner earns $150 from her job. She then hires John to help clean her house, paying him $75. The government taxes Homeowner on her full $150 salary, not allowing her to deduct her payments to John because they are considered personal expenses. In addition, the government taxes John on his $75 (compensation income).

Alimony resembles the payment to John; it is not a gift, and it is made outside of the family relationship, because the marriage has been legally dissolved. Thus, alimony could reasonably be treated identically, that is, as income to the payee and no deduction for the payor.

[12] Record at 10, *Gould* (No. 702). This opinion was later affirmed in 168 A.D. 900, 152 N.Y.S. 1114 (1915).

after dissolution, because the right to support continued even if the marriage did not.[13]

The U.S. Supreme Court accepted the New York courts' view that Mrs. Gould was not subject to tax but did not decide whether the payments were income to her under the sixteenth amendment.[14] In addition, the Court approved the denial of a deduction to Mr. Gould, because it believed that alimony is founded on "the natural and legal duty of the husband to support the wife."[15] Thus, the Court rejected the two transfer/two tax system supported by the Commissioner in favor of a two transfer/single tax model, which placed the entire tax burden on the payor,[16] even when he was forced to pay over a portion of his income as a result of the divorce decree.

Husbands reacted to the *Gould* ruling by developing schemes to circumvent the holding. The most popular invention was the alimony trust.[17] In *Douglas v. Willcuts*,[18] the Supreme Court eliminated the tax benefits of the alimony trust by holding that husbands should be taxed on the income generated by the trust property. The Court reasoned that the husband who was obligated to pay alimony had income to the same extent when the trust paid his alimony obligation as he would if he had received the money directly and then paid it over to his ex-wife.[19]

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[13] *Id.* at 11.

[14] Instead, the Court held that the federal tax statute did not apply to alimony, because such receipts are not encompassed by the phrase "gains or profits and income derived from any source whatever" as used in the Income Tax Act of Oct. 3, 1913, 38 Stat. 114, 166. *Gould*, 245 U.S. at 153. Although the *Gould* decision did not explicitly state that Congress lacked the power to tax alimony, it was often understood to imply that alimony did not constitute "income" within the meaning of the sixteenth amendment. The Supreme Court reinforced this belief when it held in Eisner v. Macomber, 252 U.S. 189, 207 (1920), that the sixteenth amendment applied only to "gain derived from capital, from labor, or from both combined."

[15] *Gould*, 245 U.S. at 153.

[16] In most cases the payor is the husband. Without loss of generality, the payor will be assumed to be the husband.

[17] This device was based on the principle that income from property is taxed to that property's owner. For example, if a husband owned stock that paid dividends, and he used those dividends to pay alimony, he was taxed on this dividend income under *Gould*. *See Gould*, 245 U.S. at 153. But, the taxpayers reasoned, if the same stock was placed in a trust, and the wife was the trust beneficiary, those dividends would then be taxed to her, because she was the equitable owner of the trust property.

[18] 296 U.S. 1 (1935).

[19] The Court based its conclusion on its prior decision in Old Colony Trust Co. v. Commissioner, 279 U.S. 716 (1929). *Old Colony* concerned a taxpayer whose employer paid his income tax as part of his compensation package. In that case the Supreme Court held that the discharge of the taxpayer's obligation by a third party was income to him to the same extent as if he had received the payment directly and then used the proceeds to pay the tax himself.

For a discussion of alimony trusts under the Tax Reform Act of 1984, see Hjorth,

Gould was the controlling precedent for twenty-five years. The ruling comported well with a legal system that viewed marriage as a permanent institution and which attempted to discourage divorce by predicating all divorce decrees on proof that one spouse was at fault for the dissolution of the marriage.[20] Until Congress enacted the Revenue Act of 1942, the courts and the Internal Revenue Code treated couples as if they remained married forever with husbands retaining a lifelong obligation to support their wives. A couple might be divorced under state law, but, under federal tax law, the watchword remained "till death do us part."

B. *If They Can Work in Factories: Alimony Rules from 1942 to 1984*

As the United States entered World War II, the nation's need for revenues increased dramatically. Accordingly, the main aim of the Revenue Act of 1942 was to substantially enlarge the public coffers. Representative Doughton (D-N.C.), who opened hearings on the Act, set the tone by stating:

> We are faced with revenue needs and a tax program of a magnitude unthought of in modern times, and we all realize it is necessary to raise every dollar of additional revenue that can be raised without seriously disturbing or shattering our national economy. Sacrifices never known before will be required of every American citizen if we are to carry on successfully our war effort and our national defense program, which, of course, we all are determined to do.[21]

In the midst of this fund raising frenzy, when the need to "raise every dollar" was paramount, one might expect that the Treasury would advocate the Commissioner's original assertion to Mr. Gould that alimony was subject to a two transfer/two tax system.[22] Given the desperate situation, a two tax system would have served many worthy goals: first, it is a sure way to either increase tax receipts or discourage divorce; second, it is theo-

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Divorce Taxes and the 1984 Tax Reform Act: An Inadequate Response to an Old Problem, 61 WASH. L. REV. 151, 181–84 (1986).

[20] For a discussion of the history of the fault-based divorce system, see J. GREEN, J. LONG & R. MURAWSKI, *supra* note 4, at 15–35.

[21] *Revenue Revision of 1942: Hearings Before the House Ways and Means Committee*, 77th Cong., 2d Sess. 1 (1942) (statement of Rep. Doughton, committee chairman).

[22] *See supra* text accompanying notes 8–11.

retically correct;[23] and third, it would address the concern of some representatives that *Gould* rewarded heartless Jezebels who roamed the country looking for alimony.[24]

In these ways, the Commissioner's long-dormant position presented an ideal solution: tax both sides of the transaction and benefit the war effort as well.[25] However, the Treasury neither suggested such a system to Congress[26] nor recommended preservation of the status quo. Instead, the Treasury proposed that alimony be taxed to recipients with payors receiving a corresponding deduction.[27]

This proposal presented several problems. First, the compelling need to increase taxes would be thwarted by rejecting the *Gould* approach in favor of the Treasury's proposed income splitting. Under the Treasury proposal, the taxable income—and therefore the tax liability—is shared between the former spouses. Although both parties pay tax under this system, when the progressive rate structure is combined with income splitting between the former husband and wife, the total tax liability declines.[28] This change was inconsistent with the revenue raising thrust of the rest of the Revenue Act of 1942.

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[23] *See supra* note 11.

[24] As Rep. Dingell (D-Mich.) opined while examining a witness:

> He [the husband] is not only stuck for the alimony, but she might have been an unscrupulous, scheming woman, who figured him out as being a sucker worth that much in alimony before she ever married him, and then after she gets the alimony it is just so much velvet for her, and she pays no income tax on it. You say it is not income. Well, what is it? It is not outgo, is it?

Revenue Revision of 1942: Hearings on H.R. 7378 Before the House Ways and Means Committee, 77th Cong., 2d Sess. 2164 (1942).

[25] The following example illustrates how efficiently the two transfer/two tax system would raise revenues. Compare the results when a husband with $30,000 a year of taxable income pays his ex-wife alimony of $12,000 a year. Assuming a 25% tax rate on all taxable income, the total tax liability under the *Gould* system is $7,500 ($30,000 x 25% = $7,500). The entire $30,000 is taxed to the husband, while the wife gets a complete exclusion of the $12,000 alimony. This is a two transfer/one tax system, because, although each transfer (third party to payor and payor to payee) generates income, there is only one tax.

Applying the same tax rate to a two transfer/two tax system, the total tax liability jumps to $10,500 ([$30,000 x 25% = $7,500] + [$12,000 x 25% = $3,000] = $10,500). The husband is taxed on his $30,000 earnings, and the wife is taxed on the receipt of the $12,000 alimony.

[26] *See generally* S. SURREY, P. MCDANIEL, H. AULT & S. KOPPELMAN, FEDERAL INCOME TAXATION CASES AND MATERIALS 17–19 (3d ed. 1986) (hearings on tax legislation begin in the House Ways and Means Committee, with the Treasury Secretary reporting the Administration's recommendations.).

[27] *Revenue Revision of 1942: Hearings Before the House Ways and Means Committee*, 77th Cong., 2d Sess. 92 (1942) (testimony of Randolph Paul, Assistant to the Secretary of the Treasury).

[28] Consider the situation in which the husband with $30,000 income pays his ex-wife $12,000 alimony, but there are two tax rates: 25% on the first $10,000 of taxable income and 50% on each additional dollar.

Second, the fairness of the tax treatment of both parties was questionable. From the husbands' perspective, the higher wartime tax rates caused undue hardship.[29] Many congressmen thought it unfair to force husbands to pay these higher wartime taxes on money they no longer controlled.[30] However, when combined with the progressive rate structure, the new provisions upset the prior order to the detriment of both divorced women and married couples.[31] Moreover, some critics claimed, husbands did not need the benefits provided by the proposal because judges already considered federal taxes when making alimony awards.[32] Thus, any change would discriminate against women who had negotiated awards under the old system. Finally, there was some concern that a tax on alimony was unconstitutional.[33]

Against this background of revenue needs, competing interests, and constitutional concerns, Congress might have post-

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Under the *Gould* system, the husband is taxed on the full $30,000 without any deduction for alimony paid, and the wife receives the full $12,000 alimony without incurring any tax. Therefore, the total tax liability is $12,500, all of which is paid by the husband ([25% x $10,000 = $2,500] + [50% x $20,000 = $10,000] = $12,500).

Under the 1942 Treasury proposal, the husband's tax base is only $18,000 because his $30,000 income is reduced by the $12,000 deduction he receives for alimony paid. His tax liability is therefore reduced to $6,500 ([25% x $10,000 = $2,500] + [50% x $8,000 = $4,000] = $6,500). Although the proposal makes the wife liable for tax on alimony received, her tax on the $12,000 is only $3,500 ([25% x $10,000 = $2,500] + [50% x $2,000 = $1,000] = $3,500). Therefore, the total tax liability declines to $10,000 ($6,500 + $3,500 = $10,000). Although both spouses pay tax under this system, the proposal is still a two transfer/single tax model because the total amount taxed remains $30,000. Under a two transfer/two tax model as originally proposed by the Commissioner, the total amount taxed would be $42,000, which is made up of the $30,000 earned by the husband plus the $12,000 received by the wife.

[29] *See* H.R. REP. No. 2333, 77th Cong., 2d Sess. 46 (1942), *reprinted in* 1942-2 C.B. 372, 409–10 (increased surtax rates would leave some divorced husbands unable to meet tax obligations after paying alimony).

[30] During the floor debate on the 1942 provisions, Congress was told: "The amount of a husband's income which goes to the wife as alimony under a court order is in reality not income to him at all since he has no control over it as the use to which it is to be put." 88 CONG. REC. 6377 (1942) (statement of Rep. Disney (D-Okla.)).

[31] If a husband and wife remained married and the wife had no independent source of income, all the family proceeds were taxed to the husband, who was subject to the progressive rates. From a tax standpoint, divorced couples did better than married couples under the new law. *See infra* text accompanying notes 40–41.

[32] *See, e.g., Revenue Revision of 1942: Hearings on H.R. 7378 Before the House Ways and Means Committee*, 77th Cong., 2d Sess. 2157 (1942) (statement of Benjamin A. Javits, witness) (courts consider taxes when setting alimony payments; proposal provides relief in excess of hardship).

[33] The proposal raised a constitutional question as to whether alimony is income and therefore taxable under the sixteenth amendment. It was not until 1950 that a court determined that alimony is income under the sixteenth amendment. Mahana v. United States, 88 F. Supp. 285 (Ct. Cl.), *cert. denied*, 339 U.S. 978, *reh'g denied*, 340 U.S. 847 (1950).

poned any major reforms until after the war. Instead, Congress was swayed by arguments that taxing husbands on income enjoyed by their ex-wives was unduly burdensome,[34] and the legislation based on the Treasury's proposal passed.[35] Further, Congress ensured the statute a broad impact by making the legislation retroactive. Thus, Mrs. Gould and all women similarly situated became subject to this new scheme even if the

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[34] *See* H.R. REP. No. 2333, *supra* note 29, at 409–10; S. REP. No. 1631, 77th Cong., 2d Sess. 83 (1942), *reprinted in* 1942-2 C.B. 504, 568–70.

[35] The amendment requiring the payee to include alimony payments in income was contained in Revenue Act of 1942, Pub. L. No. 77-753, § 120(a), 56 Stat. 798, 816 (current version I.R.C. § 71 (1986)) and provided that a new section be added to § 22 of the Code:

> (k) ALIMONY, ETC., INCOME. — In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband. In case any such periodic payment is less than the amount specified in the decree or written instrument, for the purpose of applying the preceding sentence, such payment, to the extent of such sum payable for such support, shall be considered a payment for such support. Installment payments discharging a part of an obligation the principal sum of which is, in terms of money or property, specified in the decree or instrument shall not be considered periodic payments for the purposes of this subsection; except that an installment payment shall be considered a periodic payment for the purposes of this subsection if such principal sum, by the terms of the decree or instrument, may be or is to be paid within a period ending more than 10 years from the date of such decree or instrument, but only to the extent that such installment payment for the taxable year of the wife (or if more than one such installment payment for such taxable year is received during such taxable year, the aggregate of such installment payments) does not exceed 10 per centum of such principal sum. For the purposes of the preceding sentence, the portion of a payment of the principal sum which is allocable to a period after the taxable year of the wife in which it is received shall be considered an installment payment for the taxable year in which it is received. (In cases where such periodic payments are attributable to property of an estate or property held in trust, see section 171(b).)

The amendment giving the payor a corresponding deduction was contained in Revenue Act of 1942, Pub. L. No. 77-753, § 120, 56 Stat. 798, 817 (current version I.R.C. § 215 (1986)) and provided that Code § 23(u) read as follows:

> (u) ALIMONY, ETC., PAYMENTS. — In the case of a husband described in section 22(k), amounts includible under section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payments is, under section 22(k) or section 171, stated to be not includible in such husband's gross income, no deduction shall be allowed with respect to such payment under this subsection.

alimony payments they received stemmed from divorces that took place long before the enactment of the income tax.

The *Gould* system painted a portrait of women attached to men, of women who could not support themselves and could not even be expected to pay taxes on the support they received. From this perspective, the 1942 legislation might be viewed as democratic—a reflection of the independence women had achieved in the workplace during the war. Yet, on reflection, the legislation seems more to disregard divorced women's situations than to sincerely acknowledge their new place in American society. For example, although Congress was explicitly concerned with the harsh effect of wartime tax rates on men, Congress never considered the harsher effect of these same rates on women who presumably had received smaller alimony awards from courts due to the payee exclusion under *Gould*.[36]

Rather than reflecting a respect for women, the 1942 legislation instead gave women an Orwellian equality under the taxing statutes. They were no longer treated like children who could exclude their mandated support from income whether the marriage survived or not.[37] Instead, Rosie the Riveter took her place beside men in the factories and at the Treasury.

1. The 1942 Act's Statutory Scheme

Once Congress decided to shift from the single taxpayer approach of *Gould* (in which the payor bore the entire tax burden) to the forced sharing of tax liability between former spouses, it had to decide which husbands would qualify for the alimony deduction and what type of payments wives would have to include in income. The 1942 alimony system provides that payments are taxed to the payee and deducted by the payor where the payments: (1) are formalized by a decree of divorce or separate maintenance or a written instrument incident to such a decree; (2) serve to discharge the payor's obligation of support (as contrasted with gifts and payments settling the payee's property rights); (3) constitute "periodic payments" (as contrasted with a lump-sum settlement); and, (4) are not earmarked for

[36] *See supra* text accompanying notes 29–32.

[37] Under the 1942 Act, child support is taxed to the payor. 1942 Act § 22(k). This treatment continues today under I.R.C. § 71 (1986).

support of the payor's minor children.[38] Although some of these requirements were simply technical means of dealing with the payor deduction/payee inclusion system, others continued to reflect Congress' view of women.

a. *Can this marriage be saved? The decree requirement.* The first issue facing Congress in 1942 was who would qualify for the alimony deduction. The question proved difficult, because income splitting was not widely available to married couples until the joint return was authorized in 1948.[39] Before the 1942 Act, all taxpayers, whether married, divorced, or single, filed separate returns and were taxed separately on their individual incomes.[40] The enactment of the new alimony rules, however, gave the divorced the opportunity to income split. Because the former husband's income was reported on two returns instead of one, it was subject to lower marginal rates, and the overall tax liability decreased. As a result, under the 1942 Act, couples were better off for tax purposes if divorced instead of married.[41]

To prevent exploitation of this opportunity to split income, Congress limited the 1942 legislation to payments received after an actual decree of divorce or legal separation.[42] Payments made under a private separation agreement or pursuant to a court-

[38] 1942 Act § 22(k). For the text of section 22(k), see *supra* note 35. Under the Internal Revenue Code of 1954 the section of the statute dealing with child support payments was renumbered as Internal Revenue Code of 1954, ch. 736, § 71(b), 68 A Stat. 19, which provided:

> (b) PAYMENTS TO SUPPORT MINOR CHILDREN. — Subsection (a) shall not apply to that part of any payment which the terms of the decree, instrument, or agreement fix, in terms of an amount of money or a part of the payment, as a sum which is payable for the support of minor children of the husband. For purposes of the preceding sentence, if any payment is less than the amount specified in the decree, instrument, or agreement, then so much of such payment as does not exceed the sum payable for support shall be considered a payment for such support.

[39] Revenue Act of 1948, Pub. L. No. 80-471, §§ 301–05, 62 Stat. 110, 114–16 (1948).

[40] Although payees did not include marital support in income whether those payments were made as a result of marriage or divorce, other types of income had to be reported. Until 1948, these income items appeared on separate returns whether the earner was married, single, or divorced.

[41] Couples with two working partners had less incentive to divorce for tax purposes, because they already split income due to the requirement that each person make an individual return as opposed to the joint returns available today. For a discussion of the joint return, see *infra* text accompanying notes 72–76.

[42] The relevant language contained in 1942 Act § 22(k) provided:

> In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments . . . received subsequent to such decree . . . shall be includible in the gross income of such wife, and such amounts . . . shall not be includible in the gross income of such husband.

ordered support decree (for example, in the case of abandonment without an accompanying divorce or legal separation) remained subject to the *Gould* inclusion-by-payor/exclusion-by-payee rules.[43]

There were clearly alternative solutions to the problem of tax-motivated divorce. For example, rather than limiting the alimony deduction to court-ordered divorces and separations, Congress could have allowed married couples to use joint returns. This would have reduced the appeal of divorce as a tax planning device. At the same time, the joint return would have continued Congress' tradition of treating divorced and married couples similarly, although single people would have received different treatment for the first time. Furthermore, if Congress had wanted to encourage marriage, as opposed to simply maintaining equality between divorce and marriage, it could have applied the *Gould* system to divorced couples and limited income splitting to married people through the privilege of filing a joint return. In this way, all the tax benefits would flow to marriage, thereby completely eliminating the problem of tax-motivated divorce.

Another alternative would have been to allow couples to make their own decisions on reporting their income by extending the income splitting alimony rules to informal support agreements. For example, if it wanted to increase the bargaining power of women within the marital relationship, Congress could have extended the payor deduction/payee inclusion rules to payments made under written separation agreements. These agreements would have allowed wives to negotiate for fixed levels of support, which their husbands could then deduct.

By limiting income splitting to alimony payments resulting from a court-ordered decree of divorce or separation, Congress provided an economic underpinning for the stereotype that men want divorces and women want to remain married. When the benefits of income splitting are limited to the legally divorced or separated, tax conscious payors are motivated to seek the benefits of divorce, while tax conscious payees ask themselves: "Can this marriage be saved?"

b. *The net widens.* Even after Congress approved income splitting for divorced (but not married) couples, there was still

[43] For an examination of which payments are still subject to this restriction, see *infra* Part II.

the question of whether the new system would be retroactive or merely prospective. If the changes were made prospective, couples could bargain around the tax results of alimony payments. By making the payor deduction/payee inclusion system retroactive, however, Congress took this power away from couples.[44] Payors, who were not forced to give up anything in exchange for a valuable deduction, benefited from this system, while payees lost income to taxes without receiving any other form of compensation.

c. *Jumping hurdles: getting in and staying in the system.* Another question raised by the new legislation was what type of payments would fall under the deduction-to-payor/inclusion-by-payee rules of the 1942 Act. After all, in addition to spouse support, former spouses often make payments to an ex-spouse as a result of gifts, sales, debts, child support, and divisions of marital property. Congress could have allowed all of these payments to fall under the new alimony rules, thereby placing the entire tax burden on payees. Alternatively, Congress could have allowed couples to choose which payments would be taxed to the payor and which would be taxed to the payee.[45] Instead, Congress decided to limit the new payor deduction/payee inclusion rules to spouse support payments. As a result of this decision, the prior treatment for all other transactions remained intact.[46]

Once Congress decided to limit alimony treatment to spouse support payments, the question of how to distinguish these transfers from all others arose. Because it decided to maintain as much control as possible over the payor deduction/payee inclusion system rather than allowing couples to shape their own tax treatment, Congress had to develop detailed standards to distinguish alimony payments from other types of disbursements.[47]

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[44] 1942 Act § 22(k). For the text of section 22(k), see *supra* note 35.

[45] To a certain extent, this is the approach that Congress finally adopted in 1984. *See infra* Section I(D)(1).

[46] Specifically, divisions of marital property did not subject either spouse to the income tax, child support was still taxed to the payor, gifts were excluded from the payee's income, and sales produced gain or loss for the seller. The treatment of these payments is discussed below. *See infra* notes 68–69 and accompanying text.

[47] Congress changed this prohibitive attitude in 1984 when it decided to create a divorce tax system in which most of the decisions about how to label payments are made by the couple. *See, e.g.*, STAFF OF JOINT COMMITTEE ON TAXATION, 98TH CONG., 2D SESS., GENERAL EXPLANATION OF THE REVENUE PROVISIONS OF THE DEFICIT

Instead, Congress tried to increase its control by limiting the alimony rules to spouse support and then enforced this limitation by requiring payments to result from an "obligation to support."[48] In addition to the decree requirement noted above, the legal obligation imposed on the payor had to arise "under the decree or under a written instrument incident to such divorce or separation."[49] This requirement served as a reminder that the payor deduction/payee inclusion rules of the 1942 Act presup-

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REDUCTION ACT OF 1984 714–15 (Comm. Print 1984) (purpose of 1984 Act is to make rules more objective and easier to apply so self planning is encouraged).

[48] Under the 1942 Act (and its 1954 amendments), payments cannot fall under the payor deduction/payee inclusion provisions unless made in recognition of an obligation of support. Except in the case of court-ordered support decrees, the statute does not explicitly use the term "support," but it does require payments to be made "because of the marital or family relationship," 1942 Act § 22(k), a phrase interpreted by the regulations to refer to "the general obligation to support" and not to payments settling the couple's property rights, such as the repayment of funds lent by one to the other. Treas. Reg. §§ 1.71-1(b)(4), 1.71-1(c)(4) (1957) (1954 Code §§ 71(a)(1) and 71(a)(2) not applicable to property originally owned by wife unless received in contemplation of divorce or separation for less than adequate consideration); *see* Warnack v. Commissioner, 71 T.C. 541, 550 (1979) (focus is not on support alone, but on "whether payments are for support in contradistinction to being in exchange for the wife's release of some property interest;" extensive review of facts and cases).

See also Hoffman v. Commissioner, 54 T.C. 1607 (1970) (acq.), *aff'd per curiam*, 455 F.2d 161 (7th Cir. 1972) (wife not taxed on payments for period after remarriage, since husband's legal support obligation had terminated under Illinois law). *But see* Mass v. Commissioner, 81 T.C. 112 (1983) (distinguishing *Hoffman* in situation involving Illinois law and holding payments deductible by husband and includible in gross income of remarried wife; payment agreement was made with both parties when both parties knew of wife's intended remarriage, and Illinois law recognized husband's continuing payment obligations despite general rule denying alimony to remarried spouse). Rev. Rul. 81-8, 1981-1 C.B. 42 (payments after legal obligation ceases are not alimony, but, rather, are includible in ex-spouse's gross income under I.R.C. § 61); Rev. Rul. 82-155, 1982-2 C.B. 36 (support agreement was incorporated into divorce decree, which was sole source of payor's obligation; pursuant to state law, legal obligation to make payments ceased upon remarriage of payee; held, no deduction under I.R.C. § 215 for payments after payee's remarriage; payments not includible in payee's gross income if payor knew that obligation had ceased and facts otherwise indicate payments to be gifts; but if payor was unaware of payee's remarriage, payments remain taxable to payee under I.R.C. § 61 despite payee's potential obligation to repay; Rev. Rul. 81-8 amplified and superseded; disallowance of deduction under I.R.C. § 215 pursuant to ruling will not apply to payments made on or before January 12, 1981). Rev. Proc. 82-53, 1982-2 C.B. 842 (guidelines for determining whether payments pursuant to decree of divorce or separate maintenance are includible in gross income of payee and deductible by payor under I.R.C. §§ 71(a)(1) and 215, with sample clauses for inclusion in written instruments; revenue procedure is effective September 7, 1982); *see generally* Regan & Erbacher, *When is "Alimony" Not Alimony Under Kansas Law?*, 20 WASHBURN L.J. 495 (1981).

[49] 1954 Code § 71(a)(1). For the text of this provision, see *infra* note 76.

This "incident to" the divorce mandate causes problems, however, for payments that continue to fall under the 1942 rules. For example, the Service has ruled that a post-divorce agreement for support payments does not qualify for the payor deduction/payee inclusion rules if no obligation to support survives the dissolution of the marriage. Rev. Rul. 60-142, 1960-1 C.B. 34.

posed legal compulsion and did not embrace voluntary arrangements.[50]

Next, Congress devised a means of distinguishing property settlements from payments of untaxed income. These provisions ensured the integrity of the single taxpayer model, first propounded by *Gould* and then continued by the 1942 legislation, by guaranteeing that income would not be taxed twice.[51] In order to preserve the single taxpayer approach, the statute included rules to distinguish payments of already taxed property (presumably part of a property settlement) from payments of never taxed current income (presumably alimony). Because it is often difficult to distinguish between property settlements and payments of future income, Congress adopted the periodic payment rule—a device that created irrebuttable presumptions. If a payment was not "periodic," it could not qualify for alimony treatment.[52]

The periodic payment rule is designed to separate divisions of property from spouse support. The rule operates by taxing the payee on transfers that qualify as periodic payments.[53] Conversely, if the transfer is not a periodic payment, the income splitting rules of the 1942 Act do not apply. In order to qualify

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[50] *See* Baker v. Commissioner, 37 T.C.M. (CCH) 475 (1978) (deduction denied absent evidence of legal compulsion).

[51] To understand the concern, consider Rosie the Riveter who earns $100 in year 1. Rosie is taxed on that $100 income in the year it is received. If Rosie then takes her after-tax income and places it in a bank account, she should not be taxed again when she withdraws her principal in year 10. The principal is not taxed in year 10, because Rosie has already paid a tax in year 1.

If Rosie withdraws her principal in year 10 and transfers the funds to Spouse *X*, however, *X* should be taxed on the receipt because he has never paid a tax on the income generated to him by the transfer. *See supra* note 11. This is the two transfer/two tax result that the Commissioner asserted when first considering the Gould alimony payments. *See supra* text accompanying notes 8–10.

Using the two transfer/one tax model, *X* will avoid any tax in year 10 when he receives Rosie's transferred principal, because Rosie has already paid the single tax due in year 1. The transfer from Rosie to *X* in year 10 is treated as a part of a property settlement incident to the divorce. Still under the single taxpayer model, a different result occurs if Rosie transfers income earned in year 10 to *X* in that year. The reason for different tax treatment is that Rosie has never paid a tax on these earnings, because income is usually earned before a tax is due. When neither Rosie nor *X* has ever paid tax on the income, the issue under a single tax model is whether to tax the payor (as under the *Gould* model) or the payee (as in the modern approach). Since 1942, the Code has imposed this tax on the payee and provided the payor with a corresponding deduction.

[52] The periodic payment rule, as enacted in 1942, did not clearly define the term "periodic payment," though the rule did give examples of payments that would not qualify as periodic payments. 1942 Act § 22(k), *supra* note 35. The 1954 Act included a "periodic payment" definition. 1954 Code § 71(a), *supra* note 76.

[53] The relevant language is contained at 1954 Code § 71(a)(1)–(3). *See infra* notes 76–78.

as spouse support, payments must be periodic, although they need not be paid at regular intervals. A series of payments are not considered to be periodic if they are merely installments on a larger amount specified in the decree or instrument. The fact that the decree requires a lump sum payment in a fixed amount leads to the conclusion that the payments really constitute a property settlement paid over time. Lump sum payments do not qualify as periodic payments because they simply look too much like property settlements.

However, the rule prohibiting deductions for lump sum payments is subject to an interesting exception. Even if the decree requires a lump sum payment and even if the payment is characterized as a property settlement by both husband and wife, the payor is allowed a deduction if he transfers the property through a series of payments that stretch over a decade or more.[54] Thus, husbands are rewarded with a deduction that circumvents the underlying policies of the statute when they arrange to support their ex-wives for a long period of time rather than for a few years. This perpetuates the original view under *Gould* that a husband's duty to support his wife continues forever. The difference is that Congress preferred to use the carrot of a deduction rather than the stick supplied by the *Gould* Court.

On the other side of the support versus property question is the problem of how to deal with transfers of property that are actually sales rather than mere divisions of marital property. At the same time that the new divorce tax system was introduced in 1942, the courts were grappling with the question of whether transfers of appreciated property between divorcing spouses should be considered taxable events. After some initial uncer-

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[54] The major wrinkle in the periodic payment scheme comes when these installment payments are treated as periodic even though they amortize a principal sum. The exception is known as the ten year/10% rule.

The ten year/10% rule starts with the directive that "installment payments discharging a part of an obligation the principal sum of which is, in terms of money or property, specified in the decree or instrument, shall not be considered periodic payments." 1942 Act § 22(k). The statute then provides an exception if the decree allows the payor to fulfill his obligation over a ten-year period. The presumption shifts, and the formerly excluded payments are brought back into the payor deduction/payee inclusion rules, provided that no one payment exceeds 10% of the total amount due. *Id.*

For example, if the divorce decree requires a total payment of $100,000, five payments of $20,000 each will not qualify as periodic because the total payments are to be completed before expiration of the required ten-year period. If, however, the same $100,000 is paid at a rate of $15,000 annually for four years and $5,000 annually for the following eight years, $10,000 (10% of the principal sum) of each of the first four payments and all of the remaining eight payments are periodic under the ten year/10% rule. Treas. Reg. § 1.71-1(d)(2) (1957).

tainty, at least two courts of appeals concluded that, despite claims that such transfers were nontaxable divisions of marital property, gain to the transferor was subject to tax.[55] This issue remained resolved until 1960, when the Sixth Circuit Court of Appeals held that transfers of appreciated property in exchange for a release of marital rights did not subject the transferor to tax.[56] This decision led the Supreme Court to take its first look at this issue in *United States v. Davis*.[57]

Davis upheld the tax on transfers of property in exchange for marital rights in states where the transferee had no vested interest in the transferred property.[58] This decision created a conflict in the treatment of these transfers, because community property states gave a wife a vested interest in her husband's property, while common law states did not.[59]

The *Davis* decision to tax exchanges of appreciated property for marital rights supports the view held by the Court and by Congress that spouses should be treated as a single unit for tax purposes. Outside of the divorce context, this transaction would result in two taxes.[60] The person transferring the property would have a taxable gain of the difference between the amount realized and his adjusted basis, and the person transferring the marital rights would have a taxable gain on the fair market value of the property received.[61] This is the classic two transfer/two tax approach first suggested by the Commissioner to Mr. Gould but rejected by the Supreme Court and Congress. Under *Davis*, however, only the spouse transferring appreciated property is subject to a tax on the gain; the spouse transferring the marital

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[55] *See, e.g.*, Halliwell v. Commissioner, 44 B.T.A. 740 (1941) (transfer of appreciated property between divorcing spouses was not a taxable event, because the transfer represented a nontaxable division of property), *rev'd per curiam on this issue*, 131 F.2d 642 (2d Cir. 1942), *cert. denied*, 319 U.S. 741 (1943); Mesta v. Commissioner, 42 B.T.A. 933 (1940) (same) *rev'd on this issue* 123 F.2d 986 (3d Cir. 1941), *cert. denied*, 316 U.S. 695 (1942), *reh'g denied*, 317 U.S. 704 (1942).

[56] Commissioner v. Marshman, 279 F.2d 27 (6th Cir. 1960), *cert. denied*, 364 U.S. 918 (1960) (transferor could not be taxed because the value of his receipt—the release of marital rights—could not be valued).

[57] 370 U.S. 65 (1962).

[58] *Id.* at 68–71.

[59] The Supreme Court recognized this problem but refused to change its position. *Id.* at 71. In fact, as the Court itself noted, there were other occasions when it had treated couples differently under the federal tax laws depending on whether or not they lived in a community property state. *See, e.g.*, Lucas v. Earl, 281 U.S. 111 (1930) and Poe v. Seaborn, 282 U.S. 101 (1930).

[60] *See* Rev. Rul. 59-47, 1959-1 C.B. 198.

[61] The basis for marital rights would be zero.

rights avoids tax liability.[62] This spouse also receives a fair market value basis in the property received, thereby ensuring that there will never be more than one tax on the exchange.[63]

The *Davis* ruling incorporates the two transfer/one tax approach that the Supreme Court created in *Gould* and that Congress continued in the 1942 Act. However, as opposed to the 1942 Act, *Davis*, like *Gould*, places the tax burden on the transferor rather than the transferee. In this way, *Davis* is at odds with the congressionally created divorce tax system, which places the tax burden on the transferee.[64]

As a result of its decision to limit the use of the alimony deduction, Congress also had to decide how to treat child support payments. On the one hand, the point of the 1942 Act was to shift the tax burden of payments from the payor to the recipient.[65] Given that child support payments are actually received by payees rather than the supported children, there is some foundation for the position that child support and spouse support should receive the same tax treatment. On the other hand, divorce does not terminate the personal relationship between the supporting parent and child as it does the personal relationship between the husband and wife. Thus, child support remains a personal obligation of the payor and therefore should not be deductible.[66] If one accepts that divorce does not end parents' personal obligations to support their children, child support should have the same tax treatment regardless of whether the parents are married or divorced.

Congress decided to continue to treat married and divorced parents equally by denying payors a deduction for child support payments and allowing payees a corresponding exclusion.[67]

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[62] Following the *Davis* decision, the Service issued Rev. Rul. 67-221, 1967-2 C.B. 63, which opined that, where the wife receives property in exchange equal in value to her marital rights, she is subject to no gain or loss and her basis in the property received in the exchange is its fair market value.

[63] If the spouse transferring the marital rights kept her zero basis, then there would be a mere deferral of gain rather than a complete exclusion of the gain.

[64] Despite this conflict, it was not until 1984 that Congress finally rejected *Davis* and decided that the tax burden should be placed on the transferee. *See* I.R.C. § 1041 (1986); *see also infra* text accompanying notes 168–177.

[65] *See* H.R. REP. No. 2333, *supra* note 29, at 409; S. REP. No. 1631, *supra* note 34, at 568–70.

[66] The disallowance results from the general prohibition of I.R.C. § 262 (1986) and its precursors, which disallow deductions for personal, living, or family expenses. Married parents have never received a deduction for child support.

[67] For the text of the Code's child support provision, see *supra* note 38 (1942 Act and 1954 Code) and *infra* note 147 (1984 Act).

Consequently, from a tax standpoint, payees are better off if they receive large child support awards and smaller alimony payments. Of course, this advantage ends when the children come of age and the payments are reduced.

Under the 1942 Act, child support is defined as payments fixed in the decree or written instrument for the support of minor children.[68] The 1942 Act also protects the payee from a tax standpoint in the case of incomplete payments; if the payor transfers less than the full amount of alimony and child support due in any given period, the amount actually paid is first attributed to child support.[69]

Alimony trusts were also covered by the 1942 legislation;[70] the rules are fairly straightforward. Income from the trusts is taxed to the beneficiaries even when the payments relieve a former spouse of an obligation to pay alimony. Thus, the alimony trust rules equalize treatment between payors who use current earnings to pay alimony and wealthier taxpayers who can set aside income producing property to satisfy their obligations.[71]

C. *"I'm Lucky, You're Lucky, We're All Lucky." — Expansion of the Alimony Rules in 1954*

From 1942 until 1954 the divorce tax system remained stable. Couples who divorced or legally separated split their income under the payor deduction/payee inclusion rules of the 1942 Act.[72] Couples who terminated their marriages without benefit

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[68] *See* 1942 Act § 22(k).

[69] *Id.* For example, if the decree requires $100 monthly alimony and $200 child support and only $250 is paid, the first $200 is attributed to child support and only $50 is treated as alimony.

[70] *See* Revenue Act of 1942, Pub. L. No. 77-753, § 171, 56 Stat. 798, 817, which states in relevant part:

> There shall be included in the gross income of a wife who is divorced or legally separated under a decree of divorce or of separate maintenance the amount of the income of any trust which such wife is entitled to receive and which, except for the provisions of this section, would be includible in the gross income of her husband . . . .

The alimony trust rules are now contained at I.R.C. § 682 (1986).

For a discussion of alimony trusts under the Tax Reform Act of 1984, see Hjorth, *supra* note 19, at 181–84.

[71] Because income is attributed directly to the payee, the trust income is never included in the payor's gross income. This eliminates the need to give the payor a deduction.

[72] For a discussion of the provisions of the 1942 Act, see *supra* text accompanying notes 21–38.

of a decree continued the payor inclusion/payee exclusion pattern first established by *Gould*. Until 1948, however, all married couples who were not legally separated were taxed in a manner consistent with *Gould*: married couples were not allowed to reduce their tax liability through income splitting,[73] whereas divorced couples could reduce their overall tax liability by using alimony payments to split their income. As a result, from a tax standpoint, divorce was better than marriage.

In 1948, this anamoly was eliminated when the joint return became available to all married couples.[74] From a tax standpoint, the joint return makes the choice of marriage versus divorce almost tax neutral because married couples receive benefits similar to the alimony deduction.[75] Further, the tax benefits of the joint return are not limited to the happily married—a husband and wife can hate one another or live apart and still take advantage of statutory income splitting.

The joint return eliminated the 1942 Act's major inequity of greater tax benefits for divorced couples than for married couples. Legally separated and divorced couples could split their income through the payor deduction/payee inclusion rules of the 1942 Act while married couples could use the joint return. Yet, when Congress adopted the Internal Revenue Code of 1954, it broadened the payor deduction/payee inclusion rules in the new section 71 to include informal marital terminations within the alimony tax rules.[76]

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[73] *See, e.g.*, Lucas v. Earl, 281 U.S. 111 (1930) (husband could not contractually shift income to his wife for tax purposes). *But see* Poe v. Seaborn, 282 U.S. 101 (1930) (income splitting allowed when it resulted from community property laws).

[74] *Revenue Act of 1948*, Pub. L. No. 80-471, §§ 301–05, 62 Stat. 114 (1948) which was codified at I.R.C. § 51(b) (1948). With limited exceptions, the joint return remains available to all married couples. *See* I.R.C. § 6013 (1986).

[75] In many cases, even with the higher rates for married people filing joint returns, the payor will be better off with the joint return than with the alimony deduction. The greater tax benefit flows from the fact that, as opposed to the alimony deduction, the joint return is not limited by actual payments. For example, an ex-husband who pays no alimony cannot get the benefit of the alimony paid deduction. Further, his ex-wife will not include any phantom payments in income. But, provided that his wife signs the return, a husband who leaves his wife to starve can get the benefit of a joint filing.

[76] The Internal Revenue Code of 1954 renumbered every section in the statute, even where a substantive provision remained completely intact. With the 1954 Code the sections changed in the following manner:

1. The decree requirement originally contained in 1942 Act § 22(k) and discussed *supra* text accompanying notes 39-43 became 1954 Code § 71(a)(1), which provides:

> If a wife is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such decree in discharge of (or attributable to the propery transferred, in trust or otherwise, in discharge of) a legal obligation which, because of the marital or family

1. Expansion of the Alimony Paid Deduction under the 1954 Code.

Under the 1954 Code, payments made under a written separation agreement,[77] or pursuant to a court ordered decree of support,[78] became eligible for the payor deduction/payee inclusion rules previously restricted to payments made under a decree of divorce or separate maintenance provided that the other requirements of the divorce tax law were met. Accordingly, payments in abandonment cases, temporary alimony, and separate maintenance payments, which did not qualify before 1954

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relationship, is imposed on or incurred by the husband under the decree or under a written instrument incident to such divorce or separation.

2. The provisions excepting child support from the payor deduction/payee inclusion rules originally contained in 1942 Act § 22(k) and discussed *supra* text accompanying notes 63–69 became 1954 Code § 71(b).

3. The ten year/10% rule originally contained in 1942 Act § 22(k) and discussed *supra* note 54 became 1954 Code § 71(c)(2). Section 71(c)(2) of the 1954 Code provides:

(c) PRINCIPAL SUM PAID IN INSTALLMENTS —

(2) WHERE PERIOD FOR PAYMENT IS MORE THAN 10 YEARS — If, by the terms of the decree, instrument, or agreement, the principal sum referred to in paragraph (1) is to be paid or may be paid over a period ending more than 10 years from the date of such decree, instrument, or agreement, then (notwithstanding paragraph (1)) the installment payments shall be treated as periodic payments for purposes of subsection (a), but (in the case of any one taxable year of the wife) only to the extent of 10 percent of the principal sum. For purposes of the preceding sentence, the part of any principal sum which is allocable to a period after the taxable year of the wife in which it is received shall be treated as an installment payment for the taxable year in which it is received.

4. The deduction for alimony paid originally contained in 1942 Act § 23(u) was included in Internal Rev. Code of 1954, ch. 736, § 215, 68A Stat. 71.

5. The provisions for alimony trusts originally contained in 1942 Act § 171 was transferred to Internal Rev. Code of 1954, ch. 736, § 682, 68A Stat. 234.

[77] 1954 Code § 71(a)(2) provided:

If a wife is separated from her husband and there is a written separation agreement executed after the date of the enactment of this title, the wife's gross income includes periodic payments (whether or not made at regular intervals) received after such agreement is executed which are made under such agreement and because of the marital or family relationship (or which are attributable to property transferred, in trust or otherwise, under such agreement and because of such relationship). This paragraph shall not apply if the husband and wife make a single return jointly.

[78] 1954 Code § 71(a)(3) provided:

If a wife is separated from her husband, the wife's gross income includes periodic payments (whether or not made at regular intervals) received by her after the date of the enactment of this title from her husband under a decree entered after March 1, 1954, requiring the husband to make the payments for her support or maintenance. This paragraph shall not apply if the husband and wife make a single return jointly.

because they did not entail a divorce or legal separation, were now subject to the original 1942 rules.[79]

Congress' stated intention in expanding the alimony paid deduction to include payments made as a result of separation and abandonment was to end the perceived discrimination between judicially divorced couples and those whose marriages terminated informally.[80] In operation however, the benefit ran exclusively to payors rather than to the couple as a unit. Though Congress limited the benefit to prospective agreements "to prevent the upsetting of arrangements . . . already . . . worked out with the understanding that the wife would not include the payments in her income,"[81] the bulk of these changes benefitted men at the expense of women by taking away a woman's power to refuse to sign a joint return. Understanding this result requires a review of the 1948 Act and the impact of the joint return upon married couples.

Prior to 1954, couples who terminated their relationships without a formal divorce or separation were not entitled to reduce their tax burden by splitting income.[82] However, after 1948, couples who lacked a divorce decree could use the joint return which provided the desired income split. These couples were not denied the benefits of income splitting when Congress expanded coverage of the alimony rules in 1954. Clearly, the expansion of the alimony rules to cover informal terminations was not needed by most taxpayers. Instead, it only benefitted those payors who could not convince their ex-spouses to sign a joint return.

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[79] *See, e.g.*, Korman v. Commissioner, 36 T.C. 654 (1961), *aff'd per curiam*, 298 F.2d 444 (2d Cir. 1962) (temporary alimony taxable to the wife although no decree of divorce or legal separation); *but see* Boettiger v. Commissioner, 31 T.C. 477 (1958) (acq.) (New Jersey separate maintenance order not legal separation and payment not deductible by husband).

[80] Under 1954 Code § 71(a)(2), payments made under written separation agreements could fall under the payor-deduction/payee-inclusion rules of 1954 Code §§ 71 and 215 provided that the separation agreement was executed after the 1954 Act's enactment date which was August 16, 1954. *See infra* text accompanying notes 208–209. Under 1954 Code § 71(a)(3) however, payments made pursuant to a court ordered support decree could take advantage of 1954 Code § 71 so long as the decree was entered after March 1, 1954 and the payments were received after the 1954 Code's enactment date.

Both the House and the Senate Reports on this matter state that the reason for expanding the scope of the alimony rules is that restricting benefits to payments made under judicial decrees of divorce or separation "discriminates against husbands and wives who have separated although not under a court decree." H.R. REP. No. 1337, 83d Cong., 2d Sess. 10 (1954); S. REP. No. 1622, 83d Cong., 2d Sess. 10 (1954).

[81] S. REP. No. 1622, *supra* note 80, at 10.

[82] H.R. REP. No. 1337, *supra* note 80, at 10.

Joint returns must be signed by both spouses. If one spouse refused to sign, either out of spite or due to fear of liability, neither could use the income splitting joint return. In those cases, absent the amendments to the alimony rules introduced as part of the 1954 Code, payors in informally terminated marriages could not take advantage of either the joint return or the divorce tax rules to reduce their income tax. Thus, the entire thrust of the expansion was to help payors who could not help themselves.

In the expansion of the alimony rules, Congress once again focused on the problems of predominantly male payors rather than on those of predominantly female payees. The major power conferred on women by the 1948 joint return—that is, the power to reduce the payor's tax burden or not by either giving or withholding a signature—was eliminated by the 1954 amendments.

Congress appears to have been more even-handed in its decision to restrict the new rules to prospective separations rather than apply them to all divorced couples. In 1954, Congress provided that payments made as a result of separations or court ordered support decrees entered into prior to the change were grandfathered in order to protect women whose arrangements were based on tax-free alimony.[83] The decision to grandfather is not as sensitive to the needs of women as it first appears however because a couple automatically brings its arrangement under the payor-deduction/payee-inclusion rules by materially altering a separation agreement after August 16, 1954[84] or by modifying a court ordered support decree made after March 1, 1954.[85]

According to the 1954 Code, any material change will bring a pre-1954 separation agreement or support decree under the 1942 rules.[86] Therefore, any increase in a payee's award will automatically make all alimony subject to tax because a change in the amount of an award is material.[87] Given that awards tend to

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[83] S. REP. NO. 1622, *supra* note 80, at 10.

[84] Treas. Reg. § 1.71-1(b)(2)(ii) (1960).

[85] Treas. Reg. § 1.71-1(b)(3)(ii) (1960).

[86] 1954 Code § 71(a)(2).

[87] *See* Rev. Rul. 59-248, 1959-2 C.B. 31, 32 (a court's refusal to increase a provisional alimony award does not constitute a modification of the original order and the the amounts paid under that order are not includible in the wife's gross income under section 71 because the court order was entered prior to March 1, 1954). *See also* Rev. Rul. 56-418, 1956-2 C.B. 27 (where a written separation agreement was entered into before August 17, 1954, but was materially revised after that date, the revised agreement

increase only modestly, the negotiating position left to the payee is to fight to preserve the status quo. But this position becomes untenable as inflation makes prior awards paltry compared to the cost of living. Given the conflict between the parties, the effect of the rule is to give payors more power at the expense of payees because time and economic pressures will eventually force payees under pre-1954 arrangements to agree either to the alimony rules or the use of a joint return.

2. Requirements of the 1954 Code Regarding Income Splitting

Under the 1954 amendments, income splitting is triggered when payments are made under three types of decrees or written instruments. These are: (1) a judicial decree of divorce or separate maintenance; 83d Cong., 2d Sess. 10 (1954);[88] (2) a written separation agreement;[89] or, (3) a court ordered decree for support.[90] Thus, as opposed to the system which existed from 1942 to 1953, a decree of divorce or separation is no longer needed for sections 71 and 215 to apply.[91]

For these purposes, a husband and wife are "separated" if they live apart. There is no requirement of a formalized divorce or separation.[92] In fact, the Court of Appeals for the Eighth Circuit held that a couple was separated for purposes of former section 71(a)(3)[93] although they were living in the same house;[94]

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will fall under the payor-deduction/payee-inclusion scheme). For the treatment of this issue under Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 422, 98 Stat. 494, 795 (amending 1954 Code § 71), see Temp. Treas. Reg. § 1.71-1T Answer 26 (1984) which provides in part that a change in the amount of alimony, an addition or deletion of a contingency, or a change in the time for which the payments are to continue are material.

[88] 1954 Code § 71(a)(1) (current version at I.R.C. § 71(b)(2)(A) (1986)).

[89] 1954 Code § 71(a)(2) (current version at I.R.C. § 71(b)(2)(B) (1986)).

[90] 1954 Code § 71(a)(3) (current version at I.R.C. § 71(b)(2)(C) (1986)).

[91] 1954 Code § 215 replaced that portion of 1942 Act § 22(k) which provided for the alimony paid deduction. 1954 Code § 215 provides in relevant part:

> ALIMONY, ETC., PAYMENTS: (a) GENERAL RULE. — In the case of a husband described in section 71, there shall be allowed as a deduction amounts includible under section 71 in the gross income of his wife, payment of which is made within the husband's taxable year. No deduction shall be allowed under the preceding sentence with respect to any payment if, by reason of section 71(d) or 682, the amount thereof is not includible in the husband's gross income.

[92] Treas. Reg. § 1.71-1(b)(3) (1960).

[93] The use of the designation "former" as applied to the cited Internal Revenue Code sections under the 1954 Act should not be read to imply that a particular code section is no longer applicable to payments received in 1988 and beyond. Rather, as pointed out in the text, these provisions may still apply depending on the original execution date of the underlying instrument as well as any subsequent modifications.

[94] Sydnes v. Commissioner, 577 F.2d 60 (8th Cir. 1978). *But see* Lyddan v. United States, 721 F.2d 873 (2d Cir. 1983) *cert. denied* 467 U.S. 1214, *reh'g denied* 468 U.S.

the record showed that this couple had managed their separation by virtually never meeting face-to-face within their shared home.[95]

The "decree for support" requirement is satisfied by any type of court order or decree which requires that a spouse make payments for support or maintenance. This includes an interlocutory decree of divorce, a decree of alimony pendente lite, a nonsupport decree in case of abandonment, and a decree of separate maintenance based on extreme cruelty.[96]

The purpose of the 1954 amendments concerning income splitting was to sidestep the decree requirement of the 1942 Act. However, even under the 1984 and 1986 divorce tax systems, a decree remains a prerequisite for alimony treatment where spouse support payments are made despite the lack of a written separation agreement or court-ordered support decree.[97]

1224 (1984) (rejecting conclusion of Eighth Circuit in *Sydnes*; phrase "separated and living apart" requires geographical separation and "means living in separate residences"); Hertsch v. Commissioner, 43 T.C.M. (CCH) 703 (1982) (husband and wife are not "separated and living apart" for purposes of Treas. Reg. § 1.71-1(b)(3) (1960) if both live under same roof; even if Eighth Circuit holding in *Sydnes* that a geographical separation is not required should be followed, it does not apply when parties share common areas of house, do not anticipate divorce, and plan to remain in same house); Washington v. Commissioner, 77 T.C. 601 (1981), (Tax Court adhered to *Sydnes* with seven judges dissenting despite reversal by the Court of Appeals for Eighth Circuit); Del Vecchio v. Commissioner, 32 T.C.M. (CCH) 1153 (1973) (deduction denied where taxpayer and wife lived under same roof, because state courts would not hold them "separated and living apart.").

[95] Sydnes v. Commissioner, 577 F.2d 60 (8th Cir. 1978). This odd result is now precluded for agreements executed after December 31, 1984, by I.R.C. § 71(b)(1)(C) (1986), which requires that legally divorced or separated spouses reside in different households.

[96] Treas. Reg. § 1.71-1(b)(3) (1960); Korman v. Commissioner, 36 T.C. 654 (1961), *aff'd per curiam* 298 F.2d 444 (2d Cir. 1962) (payments under an "order" rather than a "decree" qualified); Rev. Rul. 58-321, 1958-1 C.B. 35 (abandonment); Capodanno v. Commissioner, 602 F.2d 64 (3d Cir. 1979) (separate maintenance). *But see* Healey v. Commissioner, 54 T.C. 1702 (1970), *aff'd per curiam*, 28 A.F.T.R.2d ¶ 71-5217 (4th Cir. 1971) (not officially reported) (deduction denied for payments made pursuant to state law obligation to support family, where judicial restraining order required taxpayer to live apart from his wife but did not refer explicitly to support); Schaer v. Commissioner, 38 T.C.M. (CCH) 1191 (1979) (payments under a written separation agreement and support order was taxable to the payee as alimony even though divorce terminated support obligation under Pennsylvania law; under state law, order remains in effect until spouse petitions to vacate it and obligations under separation agreement were contractual in nature).

[97] In practice, the decree requirement rarely creates controversy except when one spouse challenges the status of an ex parte decree. For example, in Estate of Borax v. Commissioner, the Court of Appeals for the Second Circuit ruled that a Mexican divorce satisfied the decree requirement even though the non-party wife had obtained a declaratory judgment in New York, where her husband was domiciled, holding that the divorce and his later marriage were invalid. Estate of Borax v. Commissioner, 349 F.2d 666 (2d Cir. 1965), *cert. denied*, 383 U.S. 935 (1966) *acq.in result*, 1968-1 C.B. 2,3 n.4 (acquiescence with respect to taxability of wife on amounts deducted by husband).

3. Problems Created by the 1942 and 1954 Rules

The need to distinguish support payments from other types of payments made the 1942 and 1954 rules difficult to apply.[98] Courts attempting to separate support payments from property settlements must consider a variety of factors and may not rely upon labels affixed by the parties or used by state law.[99] No one factor is conclusive. On occasion, the courts have found that payments were for support even though they had earmarks of a property settlement such as a specified dollar ceiling and an absence of contingencies.[100] Conversely, some courts have characterized payments resembling an ordinary support arrangement as a property settlement.[101] The periodic payment requirement

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The Internal Revenue Service announced in 1967 that it will not follow the *Borax* case as to a divorce decree held invalid by a state court of competent jurisdiction but that it generally would not initiate the question of the validity of a divorce. Rev. Rul. 67-442, 1967-2 C.B. 65. *But see* Gersten v. Commissioner, 267 F.2d 195 (9th Cir. 1959) (husband obtained ex parte Mexican divorce and remarried; held, joint return with new wife not permissible, because former wife could annul divorce in California, where all parties resided); Rev. Rul. 76-255, 1976-2 C.B. 40 (divorce to avoid taxes, followed by prompt remarriage, disregarded as sham).

This issue is moot as to the decree requirement because the ability to fall under the divorce tax rules through the use of a written separation agreement ordinarily comes into play even if 1954 Code § 71(a)(1) or its 1984 counterpart, I.R.C. § 71(b)(2)(A) (1986), are inapplicable for want of a judicial decree.

For cases where the Internal Revenue Service questioned the validity of a divorce in which the issue was filing status, see *Gersten v. Commissioner*; Rev. Rul. 76-255; Boyter v. Commissioner, 668 F.2d 1382 (4th Cir. 1981) (remanding "sham divorce" question to Tax Court).

[98] *See* Lynch, *I.R.C. Section 71: Breaking Up is Hard to Do*, 20 DUQ. L. REV. 173, 198–223 (1982).

[99] *See, e.g.*, Taylor v. Campbell, 335 F.2d 841 (5th Cir. 1964) ("It is clear that the labels attached to an agreement by the parties are not controlling.").

[100] Schottenstein v. Commissioner, 75 T.C. 451 (1980) (acq.) (although periodic payments to ex-wife were characterized and intended as property settlement, she had no property interests that were not accounted for by other parts of agreement, and payments bore no relationship to husband's wealth or net worth increase during marriage; held, payments constitute taxable support to wife and are deductible by husband); Hesse v. Commissioner, 60 T.C. 685, 693 (1973) (acq.), *aff'd without published opinion*, 511 F.2d 1393 (3d Cir.), *cert. denied*, 423 U.S. 834 (1975) (specified principal sum, absence of contingencies, and security provisions, though ordinarily evidence of a property settlement, are not always controlling, because they may merely indicate that wife's bargaining position was stronger than husband's); West v. United States, 332 F. Supp. 1102 (S.D. Tex. 1971), *aff'd per curiam*, 477 F.2d 563 (5th Cir. 1973) (support despite fixed amount and duty to pay regardless of his death or wife's remarriage).

[101] Bolza v. Commissioner, 42 T.C.M. (CCH) 1138 (1981) (husband's payments to discharge mortgage on house, originally in his name but transferred to wife as part of divorce settlement, constituted nondeductible property settlement even though obligation would have terminated on her remarriage); Weiner v. Commissioner, 61 T.C. 155 (1973) (payments allocable to property settlement even though terminable on wife's death and subject to reduction if husband's income declined or ability to support children would be impaired).

might have reduced confusion in this area by providing an objective standard with which to test the property/support distinction.[102] Instead, it created its own set of problems.

For example, if a principal sum is not specified, the periodic payment requirement is readily satisfied by arrangements that call for payments at intervals until the payee's death or remarriage.[103] Indeed, following an important series of litigated cases, the Treasury promulgated a "contingency" standard under which payments qualify as periodic if they terminate upon any one of several contingencies—death of either spouse, the payee's remarriage, or a change in either spouse's economic status.[104] But the contingency standard is fraught with its own complications.[105] Even when the contingency standard helps to reduce the confusion, the periodic payment requirement remains too difficult for the ordinary citizen to apply in a number of typical situations. Thus the periodic payment standard is an obstacle to the majority of divorced people who do not have access to sophisticated tax advice.

As an illustration, consider the uncertainty caused by the periodic payment requirement as it affects the marital home. During many divorce proceedings, one spouse leaves the marital home but retains title to the property. Is the fair market value of the other spouse's rent free occupancy a periodic payment subject to the payor-deduction/payee-inclusion rules? What about mortgage or utility payments? Should all these transfers be treated similarly?

Under both the 1942 and the 1954 rules, rent-free occupancy does not satisfy the periodic payment rules because it involves a single transfer of the right to occupy the property for the stipulated period as opposed to a series of payments.[106] In con-

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[102] For a discussion of the periodic payment requirement under the 1942 Act, see *supra* text accompanying notes 53–54. For the text of 1954 Code § 71(a)(1) (3), see *supra* notes 76–78.

[103] Where a principal sum is specified the payments may still be periodic but only if they meet the 10 year/10% rule discussed *supra* note 54.

[104] Treas. Reg. § 1.71-1(d)(3) (1960) (payments for a period of ten years or less); Treas. Reg. § 1.71-1(d)(4) (1960) (payments for more than ten years). For the origin of the contingency test, see Baker v. Commissioner, 205 F.2d 369 (2d Cir. 1953).

[105] For a discussion of problems created by the contingency standard see Note, *Alimony Taxation—The Contingency Doctrine Challenged*, 9 HARV. J. ON LEGIS. 156 (1971) (contingency doctrine has not promoted uniformity in the application of federal income tax laws because it has not avoided state law variations or granted relief to husbands paying alimony out of their current income).

[106] *See* Pappenheimer v. Allen, 164 F.2d 428 (5th Cir. 1947). *But see* Marinello v. Commissioner, 54 T.C. 577 (1970) (holding payments are periodic where husband con-

trast, payments of utility bills and current repairs during a former spouse's occupancy qualify as periodic payments.[107] When the payor retains title to the home, payments of mortgage principal, property taxes, insurance premiums, and payments for home improvements do not qualify as periodic payments because they protect the owner's interest in the property and because the payments are made to third parties and not to the occupant.[108]

If the occupying spouse retains or receives ownership of the family residence, mortgage payments by the other spouse are treated as alimony if those payments are not part of a property settlement.[109] If, however, the occupying spouse receives the family residence in trust for the couple's children, the mortgage payments increase the children's equity in the house. Accordingly, any incidental benefit to the occupant will not qualify as a taxable payment to the occupying spouse.[110] When the husband and wife retain joint ownership of their home, the treatment of mortgage payments depends on the nature of the joint ownership. Where the spouses hold the property as tenants in common, payments on the mortgage are probably taxable to the payee to the extent of his ownership interest in the property if those payments meet all the other requirements of the divorce tax system.[111] When spouses hold property as joint tenants with a right of survivorship, one spouse ordinarily escapes taxation if the other makes payments on a mortgage for which the payor alone is liable; but, if both are liable, one half of the payments may be taxed to the payee.[112]

Another complication arises regarding the treatment of life insurance. Often a payor will purchase or maintain a policy for the benefit of the payee. One might expect that, if the payee is both the owner and the irrevocable beneficiary, the premiums paid on these policies would be treated as periodic payments.

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trolled the corporation-owned home which the wife resided in and husband made rental payments on the home to the corporation).

[107] Rothschild v. Commissioner, 78 T.C. 149,153 (1982) (repair costs paid by husband on cooperative apartment owned by husband are includible in the wife's income); Rev. Rul. 62-39, 1962-1 C.B. 17,19 (where the wife is in possession of the property, utility bills paid by the husband are periodic payments includible in the wife's income).

[108] Bradley v. Commissioner, 30 T.C. 701 (1958); Gentry v. United States, 283 F.2d 702 (Ct. Cl. 1960).

[109] *See* Rev. Rul. 62-39, 1962-1 C.B. 17.

[110] *See* Isaacson v. Commissioner, 58 T.C. 659 (1972).

[111] *See* Rev. Rul. 62-39, 1962-1 C.B. 17.

[112] *See* Rev. Rul. 67-420, 1967-2 C.B. 63.

Rather surprisingly, one court reached a contrary result in cases involving term insurance policies.[113] The court noted that the policy lacked any cash surrender or loan value and that the wife's rights, though exclusive, were limited to the right to collect the proceeds if her husband predeceased her during the period in which he was required to pay premiums.[114] Further, if the payor continues to own the policy, he receives no deduction for the premiums paid on the theory that the premiums increase the value of the payor's retained rights.[115]

Other typical divorce payments are medical expenses, taxes, and legal fees. If one spouse is obligated to defray the other's future medical expenses or medical and hospitalization insurance premiums, the payments may qualify as alimony.[116] The same is true of tax payments. Where one spouse is obligated to pay the other's income taxes on the basic alimony payments (so as to assure a net amount after taxes) the payments are taxable to the payee and deductible by the payor.[117] In contrast, the payor's defrayal of the payee's legal expenses are not periodic and so the payee need not include those amounts in income.[118]

A not so typical payment is one made by the payor to support the payee's relatives. Nevertheless, the regulations under the 1954 Act provide that "periodic payments described in section 71(a) received by the wife for herself and any other person or persons [except their minor children] are includible in whole in the wife's income, whether or not the amount or portion for

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[113] Wright v. Commissioner, 62 T.C. 377 (1974), *aff'd*, 543 F.2d 593 (7th Cir. 1976). *But see* Stevens v. Commissioner, 439 F.2d 69 (2d Cir. 1971) (economic benefit conferred upon wife even though wife could only exercise rights with approval of divorce court); Turpin v. United States, 240 F. Supp. 171 (W.D. Mo. 1965) (husband allowed to deduct premiums on both whole-life and term policies).

[114] *Wright*, 62 T.C. at 398.

[115] Kiesling v. United States, 349 F.2d 110 (3d Cir. 1965), *cert. denied*, 382 U.S. 939 (1965).

[116] *See* Rev. Rul. 62-106, 1962-2 C.B. 21 (payment of spouse's medical and dental expenses was a periodic under the 1954 Act).

[117] Mahana v. United States, 88 F. Supp. 285 (Ct. Cl. 1950) *cert. denied*, 339 U.S. 978 (1950); Rev. Rul. 58-100, 1958-1 C.B. 31.

[118] Baer v. Commissioner, 196 F.2d 646, 649 (8th Cir. 1952); United States v. Davis, 370 U.S. 65, 74-75 (1962).

As for the payor's legal expenses, the Supreme Court held in United States v. Gilmore, 372 U.S. 39 (1963) that legal expenses incurred in a divorce action are personal or living expenses that cannot be deducted even though the husband's overriding concern was to protect his income-producing assets against the wife's claims rather than to forestall the divorce itself. *But see* Gilmore v. United States, 245 F. Supp. 383 (N.D. Cal. 1965) (husband allowed to add legal expenses to cost of stock in determining basis on later sale).

The cost of tax advice sought by the payor in connection with a divorce or separation, however, is deductible. Rev. Rul. 72 545, 1972-2 C.B. 179.

such other person or persons is designated."[119] Construing this provision, the Tax Court held that if the husband was required to make payments to the wife for the support of her relatives, the wife was taxed as long as she was under a legal or moral obligation to provide for the beneficiaries of the payments.[120]

Child support payments are yet another area of controversy under the 1942 provisions and the 1954 amendments. Under those divorce tax systems, the payee is not taxed on any payment that is fixed as child support by the decree, instrument, or agreement.[121] In *Commissioner v. Lester*,[122] the Supreme Court held that a divorce agreement reducing the amount payable by the husband to the wife when their children married, were emancipated, or died, did not "fix" an amount for child support even where the allocation could be inferred from the arrangement and state law might compel the wife to use that portion for the support of the children.[123] Instead, the Court read the provision as "in effect giving the husband and wife the power to shift a portion of the tax burden from the wife to the husband by the use of a simple provision in the settlement agreement," but only if the agreement *explicitly* earmarked a specific portion of the periodic payment for child support.[124] The court's determination comports with Congressional intent to retain control over the use of the alimony system.

D. *"Starting All Over Again"*

1. The 1984 Reform

By the time Congress seriously reexamined divorce taxation in 1984, tax law in the divorce area was in a state of confusion.[125]

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[119] Treas. Reg. § 1.71-1(e) (1960) (last sentence). During this period the regulations and Code used the terms "wife" to refer to the alimony payee and "husband" to refer to the alimony payor. This terminology was eliminated in the 1984 Act and replaced with payor and payee.

[120] Christiansen v. Commissioner, 60 T.C. 456 (1973) (acq.); Faber v. Commissioner, 264 F.2d 127 (3d Cir. 1959). *But see* Emmons v. Commissioner, 36 T.C. 728 (1961) *aff'd*, 311 F.2d 223 (6th Cir. 1962) (payment to the wife on behalf of her adult daughters is neither includible in her income nor deductible by the husband).

[121] 1942 Act § 22(k); 1954 Code § 71(b).

[122] 366 U.S. 299 (1961).

[123] *Id. See also* Treas. Reg. § 1.71-1(e) (1960) (amount paid to support minor children must be "specifically designated").

[124] *Lester*, 366 U.S. at 304.

[125] *See, e.g.*, H.R. REP. No. 861, 98th Cong., 2d Sess. 1116 (1984). *See also Tax Law Simplification and Improvement Act of 1983: Hearings on H.R. 3475 Before the House*

Congress concluded that the alimony tax rules should be simplified in order to make it easier for the parties to a divorce to apply the rules and to reduce litigation.[126] Congress therefore began its next round of reform with the intention of making the alimony tax rules more objective.[127]

The intent of the 1984 divorce tax reforms, introduced as part of the Deficit Reduction Act of 1984,[128] was consistent with substantive divorce law reforms which assume a laissez-faire stance toward divorce.[129] The major development in substantive divorce law was the shift from a fault based to a no-fault based divorce system. In 1971, the National Conference of Commissioners on Uniform State Laws ammended the Uniform Marriage and Divorce Act to eliminate the fault grounds for divorce.[130] In 1972, California became the first state to provide "irreconcilable differences" as a grounds for divorce.[131] By 1984, all states had provided for some form of no-fault divorce,[132] although many states also retained fault grounds.[133] The shift from a fault-based to a no-fault divorce system made divorces easier to obtain while the 1984 tax reforms simplified the settlement negotiation process.

In addition to making the divorce tax rules simpler and more objective, Congress wanted to give couples greater control over the settlement negotiation process.[134] However, the Treasury asked Congress to maintain prior distinctions,[135] fearing that unfettered taxpayer discretion would lead to abuse such as re-

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Ways and Means Committee, 98th Cong., 1st Sess. 203, 263 (1983) (hereinafter *1983 Hearings*) (statements of M. Bernard Aidinoff, Chairman of the Taxation Section of the ABA and Marjorie A. O'Connell, Domestic Relations and Tax Attorney).

[126] H.R. REP. No. 432, Part II, 98th Cong., 2d Sess. 1025, 1495, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 697, 1137.

[127] *Id.*

[128] Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 (1984).

[129] As author Lenore Weitzman states: "The new divorce laws adopt a laissez-faire attitude toward both marriage and divorce. They leave both the terms of the marriage contract—and the option to terminate it—squarely in the hands of the individual parties." L. WEITZMAN, THE DIVORCE REVOLUTION 368 (1985).

[130] UNIF. MARRIAGE AND DIVORCE ACT § 305, 9A U.L.A. 96 (1971). According to this section, "irretrievable breakdown" is sufficient grounds for divorce.

[131] CAL. CIV. CODE § 4566 (Deering 1972).

[132] Freed & Walker, *Family Law in the Fifty States: An Overview*, 219 FAM. L.Q. 417, 440 (1988).

[133] *E.g.*, ALA. CODE § 30-2-1 (1983); MASS. GEN. LAWS ANN. ch. 208, § 1 (West 1987); N.J. STAT. ANN. § 2A:34-2 (West 1987); W. VA. CODE § 48-2-4 (1986). Common fault grounds include: adultery, abandonment, cruel and inhumane treatment, and habitual drunkenness.

[134] *1983 Hearings*, *supra* note 125 at 163–64.

[135] The Treasury was unwilling to abandon either the periodic payment approach or the 10 year/10% rule which had added so much complexity to the 1942 Act. *Id.* at 153.

characterization of child support payments or property settlements as alimony.[136] This conflict between returning control to taxpayers and restricting the use of taxpayer discretion became the theme of the 1984 divorce tax reform. Over and over again, the 1984 reform shows: (1) an increased emphasis on couples engaging in taxplanning as a unit; and (2) a series of restrictions that keep taxpayers from going "too far" in making their own decisions.

For example, under prior alimony systems payments must be periodic in order to fall under the alimony rules.[137] As a result, a single cash payment can never fall within the payor-deduction/payee-inclusion scheme. In contrast, under the 1984 system, all cash payments are alimony unless the couple specifically designates that the payments are not alimony.[138] By making all cash payments alimony, the 1984 system fulfills its mission in a number of ways. First, it reduces a fair amount of complexity; almost everyone has a sense of the differences between cash and property. Second, it gives control to the couple because the rule is easier to apply than the periodic payment standard and because both parties have to decide how to handle the payment. If a couple chooses to transfer property, they know that the alimony rules will not apply. If they negotiate a cash payment schedule, they know it will fall under the alimony rules. This emphasis on the couple negotiating its tax results is very different from the older systems where choices were limited and often made by only one spouse. Finally, consistent with the cash payment rule, a transfer of property no longer qualifies as alimony under sections 71 and 215. The payor does not have to pay tax on the appreciation and the payee takes a carryover in basis.[139]

Congress tempered the discretion conveyed by the cash payment rule by adopting the complex front-loading rule of section 71(f).[140] The front loading rule is designed to catch property settlements disguised as alimony payments. It is analogous to the lump sum distribution and 10 year/10% rules of the earlier

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[136] *1983 Hearings*, *supra* note 125 at 163–64.

[137] *See supra* text accompanying notes 53–54.

[138] Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 422 98 Stat. 494, 795 (amending 1954 Code § 71(b)(1)(B)).

[139] *1983 Hearings*, *supra* note 125, at 163–64.

[140] Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 422 98 Stat. 494, 795 (amending 1954 Code § 71(f)) was itself revised as part of the Tax Reform Act of 1986. Accordingly, there are two front loading rules to contend with depending on the date of the divorce or separation instrument under which the payments are made. *See infra* text at Section II.

systems.[141] The front loading rule prohibits alimony treatment when cash payments are large in the early years but decrease dramatically in later years. The rule is based on the same view that supported the lump sum distribution and 10 year/10% rules—that property settlements are made in large payments over a short period of time while alimony is made in smaller payments over a longer period of time. Today, however, alimony is viewed as a short term means of getting women back on their feet rather than as a life time support measure.[142] Diminishing payments to the dependent spouse is consistent with the modern view. Consequently, the front loading rule is anachronistic.

The 1984 reforms contain two other vital divorce taxation provisions. First, the *Davis*[143] rule, which allowed taxpayers to whipsaw the government by failing to report transfers until it became attractive to do so,[144] was repealed so that all transfers between spouses (and former spouses when incident to divorce) were treated as gifts resulting in a transferred tax basis.[145] Second, Congress continued its practice of grandfathering prior terminations under old law by allowing couples living under the 1942 and 1954 Acts to move into the 1984 system.[146]

In sum, the 1984 reforms maintain the basic structure of the 1942 and 1954 systems while making the rules more objective and easier to apply. Where a marital termination falls under the 1984 divorce tax system all "alimony and separate maintenance payments" are included in the payee's gross income.[147] As under

[141] For a discussion of the lump sum distribution rules and the 10 year/10%, rule see *supra* text accompanying notes 53–54 (lump sum distributions) and note 54 (10 year/10% rule).

[142] *See generally* Malman, *Unfinished Reform: The Tax Consequences of Divorce*, 61 N.Y.U. L. REV. 363 (1986) (under modern concepts of alimony, spousal support is designed to enable the recently divorced recipient to aquire new skills, revive old ones and to reassimilate into the working world).

[143] United States v. Davis, 370 U.S. 65 (1962).

[144] *1983 Hearings*, *supra* note 125, at 162–63. For example, assume that *W* transfers stock she purchased for $5 to *H* at a time when the property's fair market value is $100. Under *United States v. Davis*, *W* should pay tax on $95 of income in the year of the transfer. H now receives a $100 basis in the property received in the exchange. Therefore, if *H* then sells the stock for $100 he will not have a gain or loss. This remains true for *H* even if *W* has avoided a tax on her gain by failing to report the transaction.

[145] Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 421, 98 Stat. 494, 793 (amending 1954 Code § 1041).

[146] *Id.*

[147] Unlike the 1954 Act, the Deficit Reduction Act of 1984 did not change the numbering of Internal Revenue Code sections. However, as noted in the text, many provisions were substantially changed despite the fact that they share the same section number with an earlier provision. Further, even when a rule remained the same, its place within the section was often changed. For example, the decree requirement which was contained in 1954 Code § 71(a)(1) became 1984 Act § 71 (b)(2)(A). 1984 Act § 71 provides:

prior systems, the payor receives a corresponding alimony paid

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SEC. 71. ALIMONY AND SEPARATE MAINTENANCE PAYMENTS.
(a) GENERAL RULE. — Gross income includes amounts received as alimony or separate maintenance payments.
(b) ALIMONY OR SEPARATE MAINTENANCE PAYMENTS DEFINED. — For purposes of this section —
(1) IN GENERAL. The term "alimony or separate maintenance payment" means any payment in cash if —
(A) such payment is received by (or on behalf of) a spouse under a divorce or separation instrument,
(B) the divorce or separation instrument does not designate such payment as a payment which is not includible in gross income under this section and not allowable as a deduction under section 215,
(C) in the case of an individual legally separated from his spouse under a decree of divorce or of separate maintenance, the payee spouse and the payor spouse are not members of the same household at the time such payment is made, and
(D) there is no liability to make any such payment for any period after the death of the payee spouse and there is no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse (and the divorce or separation instrument states that there is no such liability).
(2) DIVORCE OR SEPARATION INSTRUMENT. — The term "divorce or separation instrument" means —
(A) a decree of divorce or separate maintenance or a written instrument incident to such a decree,
(B) a written separation agreement, or
(C) a decree (not described in subparagraph (A)) requiring a spouse to make payments for the support or maintenance of the other spouse.
(c) PAYMENTS TO SUPPORT CHILDREN. —
(1) IN GENERAL. — Subsection (a) shall not apply to that part of any payment which the terms of the divorce or separation instrument fix (in terms of an amount of money or a part of the payment) as a sum which is payable for the support of children of the payor spouse.
(2) TREATMENT OF CERTAIN REDUCTIONS RELATED TO CONTINGENCIES INVOLVING CHILD — For purposes of paragraph (1), if any amount specified in the instrument will be reduced —
(A) on the happening of a contingency specified in the instrument relating to a child (such as attaining a specified age, marrying, dying, leaving school, or a similar contingency), or
(B) at a time which can clearly be associated with a contingency of a kind specified in paragraph (1), an amount equal to the amount of such reduction will be treated as an amount fixed as payable for the support of children of the payor spouse.
(3) SPECIAL RULE WHERE PAYMENT IS LESS THAN AMOUNT SPECIFIED IN INSTRUMENT. — For purposes of this subsection, if any payment is less than the amount specified in the instrument, then so much of such payment as does not exceed the sum payable for support shall be considered a payment for such support.
(d) SPOUSE. — For purposes of this section, the term "spouse" includes a former spouse.
(e) EXCEPTION FOR JOINT RETURNS. — This section and section 215 shall not apply if the spouses make a joint return with each other.
(f) SPECIAL RULES TO PREVENT EXCESS FRONT-LOADING OF ALIMONY PAYMENTS. —
(1) REQUIREMENT THAT PAYMENTS BE FOR MORE THAN 6 YEARS. — Ali-

deduction.[148] The term "alimony or separate maintenance payments" is limited to *cash* payments which meet four require-

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mony or separate maintenance payments (in excess of $10,000 during any calendar year) paid by the payor spouse to the payee spouse shall not be treated as alimony or separate maintenance payments unless such payments are to be made by the payor spouse to the payee spouse in each of the 6 post-separation years (not taking into account any termination contingent on the death of either spouse or the remarriage of the payee spouse).

(2) RECOMPUTATION WHERE PAYMENTS DECREASE BY MORE THAN $10,000 — If there is an excess amount determined under paragraph (3) for any computation year —

(A) the payor spouse shall include such excess amount in gross income for the payor spouse's taxable year beginning in the computation year, and

(B) the payee spouse shall be allowed a deduction in computing adjusted gross income for such excess amount for the payee spouse's taxable year beginning in the computation year.

(3) DETERMINATION OF EXCESS AMOUNT. — The excess amount determined under this paragraph for any computation year is the sum of —

(A) the excess (if any) of —

(i) the amount of alimony or separate maintenance payments paid by the payor spouse during the immediately preceding post-separation year, over

(ii) the amount of the alimony or separate maintenance payments paid by the payor spouse during the computation year increased by $10,000, plus

(B) a like excess for each of the other preceding post-separation years.

In determining the amount of the alimony or separate maintenance payments paid by the payor spouse during any preceding post-separation year, the amount paid during such year shall be reduced by any excess previously determined in respect of such year under this paragraph.

(4) DEFINITIONS. — For purposes of this subsection —

(A) POST-SEPARATION YEAR. — The term "post separation year" means any calendar year in the 6 calendar year period beginning with the first calendar year in which the payor spouse paid to the payee spouse alimony or separate maintenance payments to which this section applies.

(B) COMPUTATION YEAR. — The term "computation year" means the post-separation year for which the excess under paragraph (3) is being determined.

(5) EXCEPTIONS. —

(A) WHERE PAYMENTS CEASE BY REASON OF DEATH OR REMARRIAGE — Paragraph (2) shall not apply to any post-separation year (and subsequent post-separation years) if —

(i) either spouse dies before the close of such post-separation year or the payee spouse remarries before the close of such post-separation year, and

(ii) the alimony or separate maintenance payments cease by reason of such death or remarriage.

(B) SUPPORT PAYMENTS. — For purposes of this subsection, the term "alimony or separate maintenance payment" shall not include any payment received under a decree described in subsection (b)(2)(C).

(C) FLUCTUATING PAYMENTS NOT WITHIN CONTROL OF PAYOR SPOUSE. — For purposes of this subsection, the term "alimony or separate maintenance payment" shall not include any payment to the extent it is made pursuant to a continuing liability (over a period of not less than 6 years) to pay a fixed portion of the income from a business or property or from compensation for employment or self-employment.

[148] Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 422, 98 Stat. 494, 797 (amending 1954 Code § 215) provides:

SEC. 215. ALIMONY, ETC., PAYMENTS.

(a) GENERAL RULE. — In the case of an individual, there shall be allowed as

ments: (1) each payment must be received by or on behalf of a spouse or former spouse under a decree of divorce or separate maintenance, a written instrument incident to such a decree, a written separation agreement, or a decree requiring support or maintenance payments;[149] (2) the instrument must not designate the payment as one to which the tax regime for alimony is inapplicable; (3) if payments are made under a decree of divorce or separation, the spouses must not be members of the same household when the payment is made; and (4) there must be no obligation to continue the payments after the payee's death. A detailed explanation of each of these requirements follows.

a. *Divorce or separation instrument.* Under the 1984 divorce tax system, payments are not alimony (and so are not taxable to the payee and deductible by the payor) unless they are made under a divorce or separation instrument.[150] This term includes the same marital terminations covered by the divorce tax system since 1954, that is, decrees of divorce or separation, written separation agreements and court ordered decrees of support.[151] As under the 1954 system, the existence of a decree of divorce or separation is rarely necessary, although the lack of a decree may cause a problem in certain limited circumstances.[152]

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a deduction an amount equal to the alimony or separate maintenance payments paid during such individual's taxable year.

(b) ALIMONY OR SEPARATE MAINTENANCE PAYMENTS DEFINED. — For purposes of this section, the term "alimony or separate maintenance payment" means any alimony or separate maintenance payment (as defined in section 71(b)) which is includible in the gross income of the recipient under section 71.

(c) REQUIREMENT OF IDENTIFICATION NUMBER. — The Secretary may prescribe regulations under which —

(1) any individual receiving alimony or separate maintenance payments is required to furnish such individual's taxpayer identification number to the individual making such payments, and

(2) the individual making such payments is required to include such taxpayer identification number on such individual's return for the taxable year in which such payments are made.

(d) COORDINATION WITH SECTION 682. — No deduction shall be allowed under this section with respect to any payment if, by reason of section 682 (relating to income of alimony trusts), the amount thereof is not includible in such individual's gross income.

[149] 1984 Act § 71(b)(2).

[150] 1984 Act § 71(b)(1)(A).

[151] *See* 1984 Act § 71(b)(2)(A) (decree of divorce or separate maintenance or a written instrument incident to such a decree); 1984 Act § 71(b)(2)(B) (written separation agreement); 1984 Act § 71(b)(2)(C) (court ordered support decree).

[152] *See supra* text accompanying note 97.

b. *Designation as alimony.* Under section 71 of the 1984 system, cash payments are includible by the payee and deductible by the payor, unless the divorce or separation instrument designates such payments as outside the purview of sections 71 and 215.[153] Thus, under the 1984 system, even cash payments otherwise intended as property settlements are taxed as alimony, unless the divorce or separation instrument specifies that such payments are distributions of property. Similarly, payments provided as support are not taxed as alimony if the instrument so stipulates.

This provision places greater emphasis on the couple's stated preferences. As a consequence, tax-related negotiations take on increased importance. Payors may be more willing to give additional concessions in exchange for valuable deductions. Also, since couples together decide how payments are to be characterized under the alimony tax rules by the designation of payments as alimony or a property settlement or by the transfer of property or cash, payees regain some of the bargaining power lost under prior law.

c. *Obligation to continue payments after death of the payee.* Under the 1984 system, periodic payments are not alimony unless the payor's obligation terminates upon the payee's death.[154] Despite allowing couples to elect into or out of alimony rules through the use of cash payments, Congress remains concerned with property settlements disguised as alimony.[155] Since the dead need no support, payments that do not terminate upon the payee's death are presumed to be part of a property settlement. The requirement that payments cease upon the death of the payee may be provided for in the divorce or settlement agreement or supplied by state law or by oral agreement.[156]

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[153] 1984 Act § 71(b)(1)(B).

[154] 1984 Act § 71(b)(1)(D).

[155] *See, e.g.*, H.R REP. No. 432, Part II, 98th Cong., 1st Sess. 1496 (in order to prevent deduction of amounts which are in effect the transfer of property unrelated to the support needs of the recipient, the 1984 Act provides that payments qualify as alimony only if the payor has no liability to make payments after death of the payee spouse).

[156] Prior to the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085, failure to specifically provide for the termination of the obligation in the divorce or settlement agreement resulted in none of the payments being treated as alimony, whether they were made before or after the payee's death. Temp. Treas. Reg. § 1.71-1T(b) Answer 11 (1984). The 1986 Act's transition rules, however, altered this result, at least in some circumstances. For divorce or settlement agreements executed after December 31, 1984, termination of the obligation either by oral agreement or pursuant to state law remedies

d. *Child support.* As under prior law, the 1984 system distinguishes payments fixed by the instrument as support for the payor's children from alimony and separate maintenance[157] and provides that child support is taxable to the payor and excludible by the payee.[158] But there are differences in the 1984 system which attempt to address problems which developed as a result of *Commissioner v. Lester.*[159] Contrary to prior law, under the 1984 Act, payments are considered child support if the payment period is determined with reference to a particular event in the child's life.[160] This rule also applies if payments are to be reduced on a specified date that is "associated" with a particular event related to the child.[161] Thus, couples have more flexibility in negotiating the specifics of their divorce settlements, but cannot completely circumvent the alimony rules by merely labeling child support alimony.

e. *Cash payments.* One of Congress' primary goals in enacting the 1984 Act was to institute a uniform federal definition of alimony that would equalize treatment of transfers between spouses and former spouses.[162] The 1984 Act makes compliance with the alimony rules more straightforward by instituting a cash payment standard to distinguish alimony from divisions of property.[163] Congress intended this change to reduce the administrative burden on the Internal Revenue Service and to make it easier for couples to divorce.[164] The cash payment standard, however, creates inequities when applied to transactions involving the family home. If a family home is owned either by one spouse alone or jointly, the divorce settlement often provides for the rent-free occupancy by the other spouse. Such a transfer of the interest in the residence is not a "cash payment" and

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the failure to provide such termination in the divorce or settlement agreement. Tax Reform Act of 1986, P.L. No. 99-514, § 1843(b), 100 Stat. 2085, 2852.

[157] 1984 Act § 71(c)(1).

[158] *Id.* For a discussion of how child support was treated under prior law, see *supra* notes 65–69 and accompanying text.

[159] The consequences of *Lester* are discussed *supra* notes 122–124 and accompanying text.

[160] For example, if payments to a former spouse will decrease when a child marries or dies, each payment prior to the decrease is considered child support to the extent of the decrease in such payment. 1984 Act § 71(c)(2)(A).

[161] If, for example, a reduction is scheduled to occur on the child's eighteenth birthday, the amount of the reduction is considered to be the amount of child support. *Id.*

[162] H.R. REP. No. 432, *supra* note 155 at 1137.

[163] 1984 Act § 71(b)(1).

[164] H.R. REP. No. 432, *supra* note 155 at 1495.

hence its value is neither taxable to the payee nor deductible by the payor. This treatment is consistent with the policy of not taxing property settlements under alimony rules.

The cash payment standard also means that the spouse occupying the home rent-free is not taxed on the transfer. Although there is no cash payment, rent-free occupancy is more like a support payment than a division of property.[165] When the payor is required by the divorce decree or agreement to pay for utilities, insurance, repairs, property taxes, or mortgage interest on the home, these cash payments may fall under the 1984 system, assuming that other statutory requirements are satisfied.[166]

Many separation agreements provide that the payor spouse must maintain an ordinary life insurance policy with the payee spouse named as beneficiary. Prior to 1984, premiums paid on a whole life insurance policy qualified as alimony while premiums paid on a term life insurance policy did not. The 1984 Act's cash payment standard eliminates this disparity. If the payor spouse is required to maintain either a whole or term life insurance policy on his life, and the payee spouse is both the owner and the irrevocable beneficiary, the premiums are cash payments which fall under the 1984 alimony rules.[167]

f. *Transfers of property incident to divorce.* Until 1984, transfers of property between spouses or former spouses could have very different tax consequences. If the transfer was a sale, the transferor would recognize any gain and the transferee would receive a stepped-up basis in the property.[168] A sale between spouses resulting in a loss, however, would not give rise to a deduction.[169] In an exchange, either spouse or both might re-

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[165] Consider the example of spouse *A* and spouse *B*. Upon dissolution of her marriage, spouse *A* continues to reside in the family home which her former husband continues to own. Under the cash payment standard, she pays no tax on the imputed value of her rent. Spouse *B* moves into a $250 per month apartment which her former spouse is required to pay rent in the form of alimony. Spouse *B* must pay taxes on this amount.

[166] These requirements include: the payment must be designated as alimony in the instrument; payments will not continue after the death of the payor spouse; and the front-loading rules of § 71(f) are not violated. Temp. Treas. Reg. § 1.71-1T Answer 2 (1984).

[167] Temp. Treas. Reg. § 1.71-1T Answer 6 (1984).

[168] *See* I.R.C. § 1001 (1986) (gain recognition); I.R.C. § 1012 (1986) (cost basis).

[169] *See* I.R.C. § 165(c) (1986) (limited deductions for losses on sales outside the business context); I.R.C. § 267 (1986) (disallowance of losses on sales between related taxpayers).

ceive nonrecognition of gain and loss.[170] A gift's tax consequences would depend on whether the couple was married or divorced at the time of the transfer.[171] Moreover, in the divorce context, the Supreme Court held in *United States v. Davis*[172] that the transfer of property in exchange for marital rights was a taxable exchange. In dicta, the Court stated that this would be the result in most common law states, although it might be a tax free division of property in community property states.[173] In addition, differences among states in their definition of alimony made tax planning problematic.[174]

The 1984 Act provides that transfers between spouses when "incident to divorce"[175] result in no gain or loss to the transferor whether the transfer is a gift, sale, or exchange and whether the transfer is of separately-owned property or is a division of community property.[176] The impact of section 1041, however, is to complete the tax burden shift from payors to payees that began with the 1942 Act.[177]

A transfer of property is "incident to the divorce" if the transfer: (1) occurs within one year after the date on which the marriage ceases, or (2) is "related to the cessation of the marriage."[178] Thus, a transfer made within one year of a divorce need not be related to the cessation of the marriage in order to escape taxation under section 1041. In making such determinations, annulments and other actions which void marriages *ab initio* constitute divorces.[179] A transfer is "related to the cessation of the marriage" if it is made pursuant to a divorce or

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[170] *See* I.R.C. § 1031 (1986) (nonrecognition of gain or loss for like kind exchanges of property used in a trade or business or for the production of income).

[171] There are no gift tax consequences for interspousal gifts if a transfer is in fact a gift. I.R.C. § 2523 (1986). For an analysis of the basic requirements for tax-free transfers of gifts between spouses, see R. STEPHENS, G. MAXFIELD & S. LIND, FEDERAL ESTATE AND GIFT TAXATION ¶ 11.03 (5th ed. 1983).

[172] 370 U.S. 65 (1962).

[173] *Id.* at 71.

[174] *See* H.R. REP. No. 432, supra note 155 at 194–96.

[175] 1984 Act § 1041(a)(1) (transfers between spouses); 1984 Act § 1041(a)(2) (transfers between former spouses incident to a divorce).

[176] Temp. Treas. Reg. § 1.1041-1T(d) Answer 10 (1984). However, under 1984 Act § 1041(d), recognition of gain or loss is required (barring the application of another nonrecognition provision) if the transferee spouse is a nonresident alien. In addition, in order for § 1041 to apply, there must be a transfer of property as opposed to services. Temp. Treas. Reg. § 1.1041-1T(a) Answer 4 (1984).

[177] For a more extensive discussion of how section 1041 unfairly shifts the tax burden to the payee spouse, see Lepow, *Tax Policy for Lovers and Cynics: How Divorce Settlement Became the Last Tax Shelter in America*, 62 NOTRE DAME L. REV. 32 (1986).

[178] 1984 Act 1041(c); Temp. Treas. Reg. § 1.1041-1T(b) Answer 6 (1984).

[179] Temp. Treas. Reg. § 1.1041-1T(b) Answer 8 (1984).

separation instrument, as defined by section 71(b)(2), and the transfer occurs within six years of the cessation of the marriage.[180]

By treating such transfers like gifts, section 1041(b) extends the nonrecognition granted the transferor spouse by section 1041(a) to the transferee, who recognizes no income from the receipt. The disadvantage of this income exclusion is that the transferee must take the transferor's basis even if fair market value has been paid for the property.[181]

g. *Restrictions on front-loading payments.* Most of the complexity associated with the 1984 system stems from the restriction on "front-loading" alimony deductions. Front loading is the transfer to the payee of large cash payments in early years followed by significantly smaller or no payments in later years. Because property settlements are more likely to involve a few large transfers, while support is more often characterized by smaller, more numerous payments, the front-loading restriction is designed to prevent property transfers disguised as alimony. Under the 1984 system, alimony payments are subject to two provisions: (1) if the six-year rule is violated, the payments are taxed to the payor;[182] and (2) even if the six-year rule is met, certain payments may be "recaptured" resulting in their inclusion in the payor's income with a corresponding deduction to the payee.

(i) *Requirement of six consecutive annual payments.* When the decree or agreement requires annual payments of more than $10,000 per calendar year, section 71(f)(1) provides that the payments are not "alimony or separate maintenance payments" and, therefore, are neither includible in the payee's income nor deductible by the payor, unless the payments must continue for

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[180] The only way to rebut this presumption is to show that the transfer was made to effect a division of property owned by the former spouses at the time of the marriage's cessation. Temp. Treas. Reg. § 1.1041-1T(b) Answer 7 (1984).

[181] Temp. Treas. Reg. § 1.1041-1T(d) Answer 11 (1984). Unlike I.R.C. § 1015 (1986) which determines the transferee's basis for other gifts, the carryover basis required by I.R.C. § 1041(b) applies whether the transferor's basis is less than, equal to, or greater than fair market value at the time of the transfer and for purposes of determining the transferee's loss as well as gain. Temp. Treas. Reg. § 1.1041-1T(d) Answer 11 (1984).

[182] 1984 Act § 71(f)(1).

at least six consecutive calendar years.[183] Arbitrary application of this requirement can produce counterintuitive results.

(ii) *Recapture rules.* If the 1984 system's six-year requirement is met, the recapture rule will apply if payments decline by more than $10,000 over three calendar years.[184] The rule "recaptures" all payments that exceed the lowest amount paid in a later year by more than $10,000.[185] This recapture requires the payor to recognize gross income equal to the recapture amount and allows the payee a corresponding deduction.[186]

E. *One More Time with Feeling—1987 and Beyond*

In the Tax Reform Act of 1986,[187] Congress cured many of the ills associated with the 1984 system. The Act made the alimony tax rules more straightforward by eliminating the re-

[183] The six-year period begins with the year of the first payment and cannot end prematurely without running afoul of the 1984 Act § 71(f)(1) unless the termination is due to the death of either spouse or the payee spouse's remarriage. For example, the six-year rule is violated if the divorce decree requires annual payments of $12,000 for four years. Therefore, none of the payments are included in the payee's income even if made for the payee's support and the payor does not receive an alimony paid deduction. However, the same annual payments made over a seven-year period are alimony even if they are part of a property settlement as long as the other requirements of section 71 are met.

[184] 1984 Act § 71(f)

[185] The recapture provisions are shown below in an example which assumes a divorce decree requiring payments of $50,000 in the first year, $30,000 in the second year, and $1,000 in each subsequent year. In the second year, there is recaptured $10,000 of the first-year payment (i.e., $50,000 minus the sum of $10,000 and the second-year payment of $30,000). In the third year, there is a further recapture of $11,000 of the first-year payment and $1,000 of the second-year payment, computed as follows:

Recapture in Year 2

First-year payment	$ 50,000
Less: Sum of $10,000 and second-year payment ($30,000)	($ 40,000)
Amount of first-year's payment recaptured in year 2	$ 10,000

Recapture in Year 3

First-year payment	$ 50,000
Less: Sum of $10,000 plus amount recaptured in year 2 ($10,000) and amount paid in Year 3 ($1,000)	($ 21,000)
Amount of first-year's paymentrecaptured in year 3	$ 29,000
Second-year payment	$ 30,000
Less: Sum of $10,000 and third-year payment ($1,000)	($ 11,000)
Amount of second-year's payment recaptured in year 3	$ 19,000
Total payments recaptured in Year 3	$ 48,000

[186] Under the transitional rules adopted as part of the Tax Reform Act of 1986, the recapture period for payments subject to 1984 Act § 71(f)(2) is reduced to three years. Tax Reform Act of 1986, Pub. L. No. 99-514, § 1843(c)(3), 100 Stat. 2085, 2853–55. Accordingly, a payment of $1,000 in years 4 through 6 will not result in a recapture.

[187] Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085.

quirement that the instrument state that payments will terminate upon the death of the payee. In addition, the Act updates the recapture rules to reflect the trend toward rehabilitative alimony.

Under the 1984 Act, payments were not alimony if the divorce or separation instrument did not provide that the payor's obligation would cease on the payee's death.[188] This requirement became a trap for unsophisticated taxpayers, particularly for those who fashioned their own separation agreements or who appeared before judges using standard preprinted forms for support orders.[189] The 1986 Act retroactively eliminated this requirement.

Long before 1986, the view that husbands were permanently obligated to support their wives, regardless of whether or not the marriage remained intact, began to erode. The courts came to regard alimony as a means of enabling women to become self-sufficient after divorce, rather than as a means of permanent support.[190] The Uniform Marriage and Divorce Act, approved by the National Conference of Commissioners on Uniform State Laws in 1971, supports this view. The Act provides that a court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:

> 1) lacks sufficient property to provide for his reasonable needs; and
> 2) is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.[191]

Thus, the legal system began to expect women to become self-sufficient once they were given the opportunity to develop job

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[188] This requirement still appears in the temporary regulations at Temp. Treas. Reg. § 1.71-1T(b) Answer 10 (1984), but has been superceded by transitional rules within the 1986 Act. Tax Reform Act of 1986, Pub. L. No. 99-514, § 1843(b), 100 Stat. 2085, 2853.

[189] *Technical Corrections Act of 1985: Hearings on H.R. 1800 Before the House Ways and Means Committee*, 99th Cong., 1st Sess. 324–26 (1985) (testimony of Marjorie A. O'Connell, domestic relations and tax attorney).

[190] *E.g.*, Turner v. Turner, 158 N.J. Super. 313, 314, 385 A.2d 1280, 1282 (1978); Molnar v. Molnar, 314 S.E.2d 73 (W. Va. Ct. App. 1984); Cathleen C.Q. v. Norman C.Q., 452 A.2d 951 (Del. Supr. 1982) (basic purpose of Deleware Divorce and Annulment Act to award alimony only during continuation of dependency and in manner which will encourage parties to become self-supporting).

[191] UNIF. MARRIAGE & DIVORCE ACT § 308, 9A U.L.A. 147 (1987). Many states adopted the Uniform Act's approach: *e.g.*, KY. REV. STAT. ANN. § 403.200 (1984), MO. REV. STAT. § 452.33 (1986).

skills. Temporary alimony, often referred to as "rehabilitative" alimony, became standard.[192]

The 1984 front-loading rules, which provided for a six-year recapture period, were inconsistent with the move toward rehabilitative alimony. Under the 1984 Act, for example, payments made in years 4 and beyond might be subject to recapture. The 1986 Act shortened the recapture period to three years and made the change retrospective for payments subject to the 1984 system.[193] More complicated changes in the front-loading rules, however, were made prospectively.[194]

Finally, the 1984 Act originally required payments over a six-year period before any amount was deductible by the payor. The 1986 divorce tax system eliminated the possibility that payments would fall outside the payor deduction/payee inclusion rules under the 1984 or 1986 Acts merely because payments were not made over a six-year period.[195] Instead, the only pen-

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[192] *See* Krauskopf, *Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony*, 21 FAM. L.Q. 573 (1988), for a discussion of how the trend toward rehabilitative alimony has impacted the economic well-being of divorced women.

[193] I.R.C. § 71(f) (1986).

[194] Tax Reform Act of 1986, Pub. L. No. 99-514, § 1843(c)(2), (3), 100 Stat. 2085.

[195] I.R.C. § 71(f) (1986) provides:

(f) RECOMPUTATION WHERE EXCESS FRONT-LOADING OF ALIMONY PAYMENTS. —

(1) IN GENERAL. — If there are excess alimony payments —

(A) the payor spouse shall include the amount of such excess payments in gross income for the payor spouse's taxable year beginning in the 3rd post-separation year, and

(B) the payee spouse shall be allowed a deduction in computing adjusted gross income for the amount of such excess payments for the payee's taxable year beginning in the 3rd post-separation year.

(2) EXCESS ALIMONY PAYMENTS. — For purposes of this subsection, the term "excess alimony payments" mean the sum of -

(A) the excess payments for the 1st post-separation year, and

(B) the excess payments for the 2nd post-separation year.

(3) EXCESS PAYMENTS FOR 1ST POST-SEPARATION YEAR. — For purposes of this subsection, the amount of the excess payments for the 1st post-separation year is the excess (if any) of —

(A) the amount of the alimony or separate maintenance payments paid by the payor spouse during the 1st post separation year, over

(B) the sum of —

(i) the average of —

(I) the alimony or separate maintenance payments paid by the payor spouse during the 2nd post-separation year, reduced by the excess payments for the 2nd post-separation year, and

(II) the alimony or separate maintenance payments paid by the payor spouse during the 3rd post-separation year, plus

(ii) $15,000.

(4) EXCESS PAYMENTS FOR 2ND POST-SEPARATION YEAR. — For purposes of this subsection, the amount of the excess payments for the 2nd post-separation year is the excess (if any) of —

(A) the amount of the alimony or separate maintenance payments paid by the payor spouse during the 2nd post separation year, over

alty for failure to comply with the 1986 front-loading rules is the possible recapture of excess payments. This recapture, which first appeared in the 1984 Act, forces a payor to include previously deducted excess alimony payments.[196] In addition, the 1986 front-loading rules replace the $10,000 recapture threshold in the 1984 system with a $15,000 excess amount and replace the 1984 Act's year-by-year recapture with a single recapture of the combined "excess payments" from the first and second year in the third year.[197] This change was prospective only.

(B) the sum of —

(i) the amount of the alimony or separate maintenance payments paid by the payor spouse during the 3rd post-separation year, plus

(ii) $15,000.

(5) EXCEPTIONS. —

(A) WHERE PAYMENT CEASES BY REASON OF DEATH OR REMARRIAGE. — Paragraph (1) shall not apply if —

(i) either spouse dies before the close of the 3rd post-separation year, or the payee spouse remarries before the close of the 3rd post-separation year, and

(ii) the alimony or separate maintenance payments cease by reason of such death or remarriage.

(B) SUPPORT PAYMENTS. — For purposes of this subsection, the term "alimony or separate maintenance payment" shall not include any payment received under a decree described in subsection (b)(2)(C).

(C) FLUCTUATING PAYMENTS NOT WITHIN CONTROL OF PAYOR SPOUSE. — For purposes of this subsection, the term "alimony or separate maintenance payment" shall not include any payment to the extent it is made pursuant to a continuing liability (over a period of not less than 3 years) to pay a fixed portion or portions of the income from a business or property or from compensation for employment or self-employment.

(6) POST-SEPARATION YEARS. — For purposes of this subsection, the term "1st post-separation years" means the 1st calendar year in which the payor spouse paid to the payee spouse alimony or separate maintenance payments to which this section applies. The 2nd and 3rd post-separation years shall be the 1st and 2nd succeeding calendar years, respectively.

(g) CROSS REFERENCES. —

(1) For deduction of alimony or separate maintenance payments, see section 215.

(2) For taxable status of income of an estate or trust in the case of divorce, etc., see section 682.

[196] 1984 Act § 71(f).

[197] I.R.C. § 71(f) (1986). "Excess payments" for the first post-separation year are the amount by which payments in the first calendar year in which alimony or separate support payments were made exceed the sum of $15,000 plus the average of (a) payments for the second post-separation year minus excess payments for that year, and (b) payments for the third post-separation year. Excess payments for the second post-separation year are the amount that payments in the second post-separation year exceed the sum of $15,000 plus payments made in the third post separation year. No recomputation is required if payments do not decline by $15,000 or more per year.

This change under the 1986 divorce tax system is shown in the example below. The example assumes a $50,000 payment in the first year, a $30,000 payment in the second year and a $1,000 payment in the third year.

Excess payment for the second year

Second-year payment	$ 30,000
Less: Sum of $15,000 and third-year payment ($1,000)	($ 16,000)

II. Who Is Taxed Under What System? Effective Dates

The most complex aspect of divorce taxation is the multitude of effective dates for various provisions. The reason for this complexity is two-fold. First, Congress periodically revised several important divorce tax provisions. Statutory reform is fairly common; but, in addition to updating the divorce tax system for dissolutions occurring after each change, Congress grandfathered prior terminations under older rules. Further, Congress allowed couples who divorced under one set of rules to move forward into more recent systems, but prohibited couples from electing back into older systems. As a result, currently there are couples making and receiving identical payments, but receiving different tax treatment depending on the year of their divorce.[198]

At first blush, it might seem that Congress intended to avoid overlapping systems, even if this meant hardship for taxpayers who would have to adjust their settlements to reflect a change in the law. Such adjustment was made necessary, for example, by the 1942 revisions to the divorce tax system which were imposed on all payments made under a decree of divorce or separation, even if the decree was entered before passage of the 1942 Act.[199] But, Congress created overlap. The 1942 Act continues to remain in effect for some payments made under de-

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Excess payment	$ 14,000
Excess payment for first year	
First-year payment	$ 50,000
Less: Sum of $15,000 and average of (a) second-year payment ($30,000) minus excess payment from second-year ($14,000) plus (b) third-year payment ($1,000)	($ 23,500)
Excess payment	$ 26,500

As a result of the I.R.C. § 71(f) (1986) recapture computation, the payor includes $40,500 in income in the third year and the payee deducts the same amount.

These computations are not required if a decline in payments over the three-year period is due to the death of either spouse or the remarriage of the payee spouse. I.R.C. § 71(f)(a)(5) (1986). Section 71(f)(5)(C) also excludes payments made as a result of a continuing liability to pay a fixed amount.

[198] To illustrate the difference in treatment under the different systems, consider three couples, one divorced in 1983, the second divorced in 1985 and the third divorced in 1987. The disparity in treatment among the couples is significant. In order to come under the payor deduction/payee inclusion rules, payments under the 1983 divorce must satisfy different requirements than payments made under the 1985 decree. 1985 divorce payments must meet different tests than those applicable to the 1987 divorce. In addition, with the grandfathering of old terminations and the ability to elect forward but not back, the couple divorced in 1983 can choose among three systems; the couple divorced in 1985 can choose between two systems; but the 1987 divorce has only one option.

[199] *Id.*

crees of divorce or separation entered into before January 1, 1985.[200] The first disharmony occurred in 1954 when Congress expanded the 1942 provisions to include marital dissolutions which did not result in court sanctioned divorce or separation.[201] Until 1954, those payments remained subject to *Gould*. In order to protect taxpayer expectations, the 1954 expansion only applied to terminations made after 1953.[202] Thus, Congress created the first systemic disparity. Some but not all dissolutions were affected based solely on the timing of the divorce.

Each subsequent alimony tax reform grandfathered prior terminations under prior law, while requiring that alimony payments resulting from more recent dissolutions be made under new rules. Consequently, there are now three divorce tax systems for payments made under a decree of divorce or separation and four systems for payments made under informal separations and court ordered support decrees.

A. *Payments Made Under a Decree of Divorce or Separation*

Payments made under court sanctioned decrees of divorce or separation are taxed under one of three systems. Which system applies depends on the date of the original decree and the date of any relevant modification.

All payments made under court ordered decrees of divorce or separation fall under the provisions of the 1942 Act so long as the decree was entered before January 1, 1985 and the couple failed to modify the decree in order to bring it within the provisions of later Acts.[203] Where the decree of divorce or separation is dated between January 1, 1985 and December 31, 1986, however, payments fall under the 1984 rules unless the couple maneuvers into the 1986 rules.[204] Decrees entered after December 31, 1986 fall under the 1986 rules with no opportunity to elect otherwise.[205]

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[200] Treas. Regs. § 1.71-1(b) (1986).

[201] 1954 Code §§ 71(a)(2) and 71(a)(3).

[202] *See supra* text accompanying note 84–85.

[203] Treas. Reg. § 1.71-1(b)(1) (1960). The regulations refer to the provisions and section numbers of the 1954 Code. However, with the exception of the types of payments that could fall under the payor deduction/payee inclusion scheme, the substantive rules created by the 1942 Act did not change with the 1954 Code. The basic change was in the numbering of the sections. *See supra* note 76.

[204] Temp. Treas. Reg. § 1.71-1T(e) (1984).

[205] Tax Reform Act of 1986, Pub. L. No. 99-514, § 1843(c)(2), 100 Stat. 2085, 2853.

B. *Payments Made Under Written Separation Agreements or Court-Ordered Support Decrees*

Ignoring modifications which can move payments into later systems, payments made under written separation agreements or court-ordered support decrees fall under one of four systems. Where the court-ordered decree of separate maintenance was entered before March 1, 1954, payments fall under the *Gould* system. The same is true for written separation agreements executed before August 16, 1954.[206]

Payments made under a written separation agreement will fall under the 1942 Act as amended in 1954 provided that either the agreement was: (1) executed after August 16, 1954; or, was (2) executed before that date but modified after August 16, 1954.[207] Payments under court-ordered decrees of support follow the same pattern as written separation agreements except that the key date for support decrees is March 1, 1954.[208] Court ordered support decrees and written separation agreements entered into or executed between January 1, 1985 and December 31, 1986, produce payments which fall under the 1984 Act;[209] but those entered after December 31, 1986 fall under the 1986 Act.[210]

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[206] Treas. Reg. § 1.71-1(b)(2)(i) (1960) (payments made under a written separation agreement executed prior to August 16, 1954); Treas. Reg. § 1.71-1(b)(3)(i) (1960) (payments made under a court ordered decree for support entered into before March 1, 1954).

[207] Treas. Reg § 1.71-1(b)(2)(ii) (1986).

[208] 1954 Code § 71(a)(3). A decree or written separation agreement is treated as executed between 1954 and December 31, 1984 if any of the following are applicable: (1) the decree or agreement was actually executed between those dates, Treas. Reg. §§ 1.71 1(b)(2) (1960) and 1.71-1(b)(3) (1960); (2) the decree or agreement, although actually executed after December 31, 1984, incorporates or adopts without change the terms of a decree or agreement executed before January 1, 1985, Temp. Treas. Reg. § 1.71-1T(e) (1984); or, (3) the decree or agreement, although actually executed before the applicable 1954 dates, was materially altered or modified between 1954 and 1985, Treas. Reg. § 1.71-1(b)(2)(ii) (1960). The 1942 rules apply to payments made under a decree of divorce or separation entered before January 1, 1985. Temp. Treas. Reg. § 1.71-1T(e) (1984).

[209] Temp. Treas. Reg. § 1.71-1T(e) (1984). An instrument is treated as executed between these dates if: (1) actually executed during this period (unless a decree executed after December 31, 1984, incorporates or adopts *without change* the alimony or separate maintenance payments of an instrument executed before January 1, 1985); (2) although executed prior to December 31, 1984, the terms of alimony or separate maintenance payments are changed by an instrument executed after that date; or, (3) the instrument is expressly modified to provide that the Tax Reform Act of 1984 applies. *Id.*

[210] Tax Reform Act of 1986, Pub. L. No. 99-514, § 1843(c)(2), 100 Stat. 2085, 2854-55. An instrument is treated as executed after December 31, 1986, if: (1) actually executed after that date; or, (2) executed before January 1, 1987, but expressly modified after December 31, 1986 to fall within the provisions of the Tax Reform Act of 1986. *Id.*

III. Evaluating the Alimony Tax Systems

What does this review of the alimony tax system reveal about the present state of alimony taxation? First, the system is tremendously complex. This complexity is undesirable in an area of the law affecting so many unsophisticated taxpayers, and should be reduced. But, before an effort is made to simplify the system, an understanding of what gave rise to the complexity is necessary. One cause of the complexity is the existence of multiple alimony tax systems. Congress could easily remedy this problem by adopting a single unified system of alimony taxation. Simply discarding the multiple systems and replacing them with a single model, though, will solve only part of the problem.

From 1913 to the present, each system has shared one common feature: the use of a two transfer/single tax model as opposed to a two transfer/two tax approach. Rather than causing complexity however, the single tax model actually simplifies the tax because there is only one taxable event, rather than two. Further, at least in theory, the single tax approach leaves more after-tax income for the family unit because the overall tax burden is lower than under a two transfer/two tax approach.[211] Therefore, the single tax approach is not the villain in this drama.

Since 1942, all alimony systems have shared another common feature: all allow income to be split between divorced spouses. It is this income splitting feature that causes almost all of the complexity in the present divorce tax systems, primarily by necessitating that each system distinguish between spouse support, property settlements and child support. These distinctions require the complex rules reviewed above. As this Article demonstrates, it is the need to distinguish these payments that has plagued alimony taxation.

The complexity caused by the income splitting rules is eliminated by returning to the single tax model adopted by the Supreme Court in *Gould v. Gould*.[212] Under the *Gould* approach, the payee receives an alimony exclusion while the payor is denied an alimony deduction. Because the entire tax burden

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[211] For a discussion of the reduced tax burden produced by a two transfer/single tax model as opposed to the classic two transfer/two tax model, see *supra* text at notes 24–32.

[212] *See supra* notes 7–15 and accompanying text.

rests with one taxpayer, there is no need to distinguish alimony from other forms of support and the confusing front-loading rules of section 71(f) become obsolete. The fact that income splitting causes complexity, however, is not enough standing alone to justify the elimination of this feature of the alimony tax system. It is important to evaluate whether placing the tax burden on the payor comports with both the modern view of alimony and current income tax policy. With this in mind, there are five possible objections to returning to the alimony exclusion of pre-1942 law.

(a) *An alimony exclusion violates our statutory scheme by allowing the payee to completely escape taxation.* One objection to *Gould* is that an alimony exclusion allows payees to completely escape taxation. At first glance, allowing payees to receive tax-free alimony seems logically inconsistent with the Code's assertion that all accessions to wealth are subject to tax.[213] However, closer examination reveals that the alimony exclusion is actually the logical result of the two transfer/single tax approach endorsed by all alimony taxation systems since 1913. By adopting the single tax approach, Congress chose not to exercise its power to tax all income from whatever source derived where alimony payments are at issue. Taxing the payee is inconsistent with the single tax approach because it subjects alimony payments to a double tax.

Under a two transfer/two tax system the payee should be taxed on amounts received as alimony because this model assumes that every transfer should generate a tax, even if the monies used to pay an obligation have been taxed once before.[214] Once Congress adopted a two transfer/single tax model, it became difficult to justify taxing the payee. Given that the objective of a single tax system is to tax income once and only once, the view that the payee should be taxed on alimony must come from the belief that amounts received as alimony have never been taxed before. But is this notion accurate in the context of marriage, divorce and the joint return?

There are two ways of viewing an alimony payment. Either it is a repayment of property paid into a marital partnership or

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[213] I.R.C. § 61 (1986) subjects all income "from whatever source derived" to taxation.
[214] *See supra* text accompanying note 9.

it is a payment of support. Under either view, a single tax system cannot coexist with a tax on the payee.

The partnership view of marriage underlies the community property system,[215] is relied on by some courts,[216] and is advocated by many family law commentators.[217] According to this theory, a spouse who devotes her productive efforts to homemaking and childrearing during a marriage invests in her spouse's earning capacity.[218] By freeing her spouse to develop occupational skills and experience in the conventional workforce, the homemaker increases her husband's earning capacity at the expense of her own. The longer the marriage (and the longer the homemaker remains outside the workforce) the more she invests. Therefore, when a marriage of long duration dissolves, the homemaker has a property right to the capital she invested in the marital partnership.

Current divorce law implicitly supports this view. The Uniform Marriage and Divorce Act,[219] and most state divorce statutes direct courts to consider "duration of marriage" as an important factor in determining alimony payments.[220] Empirical evidence demonstrates that duration of marriage tends to increase the amount of the alimony award.[221] In addition, many state divorce statutes cite the homemaker's contribution to the marriage as a factor in fixing the amount of an alimony award.[222]

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[215] L. WEITZMAN, *supra* note 129, at 4–5.

[216] *See, e.g.*, Marcus v. Marcus, 135 A.D.2d 216, 525 N.Y.S.2d 216 (1988) (relative economic and non-economic contributions to lengthy marital partnership considered in determining distribution of marital assets); Woodward v. Woodward, 477 So.2d 631 (Fla. App. 1985) (trial court erred in awarding wife greater share of marital assets where parties were true marital partners in all respects throughout marriage, including share of workload and benefits of partnership).

[217] McLindon, *The Economic Disaster of Divorce for Women*, 21 FAM. L.Q. 351, 394 (1987); Note, *Pension Awards in Divorce and Bankruptcy*, 88 COLUM. L. REV. 194, 196–99 (1988).

[218] A spouse who works part-time in a job that does not enable her to realize her full earning capacity so that she may bear primary responsibility for homemaking activities similarly invests in her husband's earning capacity.

A 1978 survey of divorced men and women in Los Angeles County revealed that 68% of women and 54% of men endorsed the sharing of partnership assets as a rationale for rewarding alimony. That is to say, a majority of both sexes agreed that if a woman helped her husband "get ahead because they are really partners in his work," the woman deserves alimony if the marriage dissolves. L. WEITZMAN, *supra* note 129, at 151.

[219] UNIF. MARRIAGE & DIVORCE ACT § 308(b)(4), 9A U.L.A. 147 (1987).

[220] *E.g.*, COLO. REV. STAT. § 14-10 114(2)(d) (1987); FLA. STAT. § 61.08(2)(b) (1985); ILL. REV. STAT. ch. 40, para. 504(b)(4) (Supp. 1988).

[221] According to a random sample of Los Angeles County court records compiled by Weitzman in 1977, the median monthly award rose from $100 for marriages of one to four years to $299 for marriages of over fifteen years duration. L. WEITZMAN, *supra* note 129, at 172.

[222] *E.g.*, FLA. STAT. § 61.08(2)(f) (1985); GA. CODE ANN. § 19-6 5(a)(6) (1982); MASS.

If marriage is a partnership in which each spouse contributes to the production of income, then how is jointly-earned income taxed? Some of it is subject to tax in the year earned (such as salary earned outside the marriage and brought into the marriage to be shared by the spouses), while some of it should never be taxed given the exclusions accepted as part of the modern income tax system (such as the exclusion for imputed income derived from homemaking services). To the extent that this partnership income is subject to tax, it is taxed to *both* the husband and the wife through the use of the joint return.[223] Thus, combining a marital partnership analysis with the mechanics of the joint return prompts the conclusion that when a payee is awarded alimony she is not awarded future income (*i.e.*, a right to share in income which has yet to be earned and taxed). Rather, she is being repaid monies which she earned in the past and invested in the marital partnership. These repaid funds were either taxed to her in the past through the joint return or should never be subject to tax because they represent income which enjoys an exclusion. Alimony is more like a division of property, therefore, than it is a payment of income.[224] When we look at alimony in this way, it becomes clear that, under a single tax system, the payee should not be taxed on alimony because to do so would subject the income to a double tax (if it was previously taxed as in the case of salary), or to an impermissible single tax (if the payment represents repayment of excluded income as in the case of homemaking services).

No one made this argument when Congress shifted the alimony tax burden from the payor to the payee because the joint return did not exist in 1942 (when the burden was shifted) and therefore, it was harder to argue that both the husband and the wife paid tax on income earned during the marriage. Without the joint return, the husband and wife each paid a separate tax on their separate (for tax purposes) income. Thus, it did not seem as though the payee had already paid tax on these sums. The advent of the joint return, however, made it clear that the payee has already satisfied her tax obligation—now both husband and wife are liable for the amount of tax due on the joint

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GEN. LAWS ANN. ch. 208, § 34 (West 1987); TENN. CODE ANN. § 36-5-101(d)(9) (Supp. 1988).

[223] For a discussion of the joint return see *supra* text accompanying notes 74 - 76.

[224] *See* L. WEITZMAN, *supra* note 129, at 360 (alimony represents the repayment for the investment in human capital).

return.[225] In the context of a single tax system, the tax has already been paid. Given this payment, a single tax alimony system cannot require that the payee include alimony in income.

(b) *Alimony as support.* An alternative way to view alimony is not as a repayment of marital property, but rather as support. This approach acknowledges the reality that the women who are most often awarded alimony are those who lack the occupational skills and education to be immediately self-sufficient.[226] Because they have relied on their husbands' promise to support them economically, they have foregone the training and career building that would enable them to be self-sufficient.[227] A husband who encourages his wife to remain a housewife while he pursues a career, assuring her a share of his economic gain, cannot change the rules of the game once the wife's sacrifice is made. While a husband's personal obligation to support his wife may not last forever, it should last until a woman is self-sufficient.

State divorce statutes and courts give credence to this view. The goal of modern alimony is mainly rehabilitative—it provides women with financial support while they acquire the education and job skills that will increase their employability and earning capacity. The legal system clearly expects divorced women to become self sufficient, except where women are near retirement age at the time of their divorce.[228] In fact, the Uniform Marriage and Divorce Act (and state statutes patterned after it) make lack of self-sufficiency a prerequisite for alimony,[229] and, courts uniformly examine the capacity of a spouse to provide for herself

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[225] For the joint liability of spouses using the joint return see I.R.C. § 6013 (1986). There is a limited exception to this joint liability for innocent spouses (i.e., those who did not know of the income and did not benefit from it). I.R.C. § 6013(e) (1986).

[226] L. WEITZMAN, *supra* note 129, at 176–77.

[227] For a discussion of the opportunity costs of homemaking, see Beninger & Smith, *Career Opportunity Costs: A Factor in Spousal Support Determinations*, 16 FAM. L.Q. 203 (1982).

[228] *See, e.g.*, Reback v. Reback, 296 So.2d 541 (Fla. App. 1974) (holding grant of only rehabilitative alimony to 56-year-old wife who had not been employed since 1945 improper).

[229] UNIF. MARRIAGE AND DIVORCE ACT § 308, 9A U.L.A. 147 (1987). *See, e.g.*, COLO. REV. STAT. § 14-10-14(1) (1987); DEL. CODE ANN. tit. 13, § 1512(b) (1981); ILL. REV. STAT. ch. 40, para. 504(a) (Supp. 1988); MINN. STAT. § 518.552 (Supp. 1988); MONT. CODE ANN. § 40-4-203(1) (1987).

before awarding alimony.[230] If alimony is viewed as support, then the payor spouse should not receive an alimony paid deduction; support is a personal expense of the payor spouse and, as such, should be included in the payor's income.[231] Thus, if alimony is support, then the single tax model can only be maintained by excluding alimony from the payee's income.

(c) *An undue burden on payors*? A return to the *Gould* approach is likely to be criticized on the ground that denying payors an alimony deduction would leave husbands with insufficient income to meet both personal needs and income tax obligations.[232] This argument fails because courts do consider the husband's ability to pay in determining the propriety and amount of an alimony award.[233] Further, the overall frequency of alimony awards has dropped since the advent of no- fault divorce.[234] Thus, alimony awards are made only when courts believe that husbands will have sufficient after tax income to support themselves.[235]

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[230] *E.g.*, Hall v. Hall, 363 So. 2d 137 (Fla. App. 1978) (where wife was thirty-eight years of age, in good health and had briefly utilized a teaching degree from another state, the trial judge correctly perceived an opportunity for wife to be self-sufficient after obtaining a Florida teaching certificate, therefore rehabilitative alimony was appropriate until certificate obtained); *In re* Marriage of Weinberg, 125 Ill. App. 3d 904, 466 N.E.2d 925 (1984) (alimony proper where petitioner did not possess sufficient liquid assets or marketable skills to provide for herself or her children); Abuzzahab v. Abuzzahab, 359 N.W.2d 12 (Minn. 1984) (trial court erred in awarding permanent spousal support where wife's ability to support herself was established by record).

[231] I.R.C. § 262 (1986) dictates that personal and family expenses are not deductible from income. *See supra* note 11 and accompanying text.

[232] This argument was made in favor of the payor deduction/payee inclusion scheme in 1942. H.R. REP. No. 2333, *supra* note 29 at 409.

[233] *E.g.*, Hanson v. Hanson, 404 N.W.2d 460 (N.D. 1987) (upholding trial court order that husband pay wife lump sum of $10,000 where the husband's earnings ability was substantially greater than that of wife); *In re* Marriage of Weinberg, 466 N.E. 2d at 933 (former husband's earnings adequate to meet expenses of both himself and his ex-wife).

[234] The overall frequency of alimony awards in California dropped significantly when the no-fault law went into effect. Thus, between 1968 and 1972, the percentage of wives awarded alimony dropped from 20 percent to 15 percent of the divorce cases in both San Francisco and Los Angeles counties. L. WEITZMAN, *supra* note 129, at 167.

[235] In one study, only 15 percent of men who earned less that $20,000 per year were ordered to pay alimony, in contrast to 62 percent of husbands who earned $30,000 or more. Since only 17 percent of the divorced men in this study reported gross incomes greater than $20,000, it appears that courts view the bulk of divorced men as incapable of paying alimony. L. WEITZMAN, *supra* note 129, at 167. Even when alimony is awarded, the amount of the award is relatively small; the United States Bureau of the Census reports that the mean average income from alimony in 1985 was only $3,733. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMM., STATISTICAL ABSTRACT OF THE UNITED STATES 1988 (Table No. 358).

(d) The tax benefits of income splitting. Another objection to *Gould* is that the primary advantage of income splitting comes from a reduction in a couple's total tax liability. This overall reduction in total tax due, however, can only take place in the context of a progressive rate structure.[236] In other words, the tax saving benefits of income splitting are severely reduced, if not completely eliminated, once a progressive rate system is replaced with a flat or modified flat tax.[237] This distinction is important because, although this country has operated under a progressive tax structure for most of the seventy-five years of the modern income tax, the Tax Reform Act of 1986 moved America to a modified flat tax.[238] As a result of the compressed rates adopted by the 1986 Act, the effect of progressive rates becomes less important and the potential tax savings from income splitting is reduced, if not eliminated, for many Americans.

Even if income splitting does reduce a couple's total tax in some situations, this extra income will not necessarily be shared by the couple. Income splitting only provides an *opportunity*—not an *obligation*—to share in any extra after-tax income which might be generated. This opportunity is still subject to the payee's ability to successfully negotiate for a portion of those extra funds. There is evidence to the show that women do not do well in these types of negotiations.[239] Thus, the primary effect of the income split is to give more after-tax income to men rather than creating more money for the couple and its children to share.

(e) Equality as fairness. Finally, though the single tax system supports an alimony exclusion, there are still those who will argue that denying payors an alimony paid deduction violates notions of equality between men and women. This prompts the

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[236] For a discussion of the tax saving results of a single tax system combined with income splitting, see *supra* note 25 and accompanying text.

[237] *See supra* note 25 and accompanying text.

[238] *See* I.R.C. § 1 (1986) (rates for individuals now generally fall into two main tax brackets, 15% and 28%, with income under $17,850 falling in the 15% category for single taxpayers).

[239] *See, e.g.*, L. WEITZMAN, *supra* note 129, at 310–18. What little bargaining power women have in the divorce situation they use in order to keep custody of their children, rather than to increase their support awards. This is because the divorce laws do not require alimony to be awarded in most situations and most court awards tend to be modest. *Id. See* BUREAU OF THE CENSUS, *supra* note 235. If a husband knows that he will pay little alimony if he contests a settlement in court, he has no incentive to concede a share of the tax benefits of income splitting during an alimony settlement negotiation.

question whether treating people equally is the same as treating people fairly.[240] In the context of divorce it appears that equality and fairness are two distinct and incompatible notions.

The reality of divorce is that it often throws women into poverty without a social or legal "safety net."[241] Given this situation, should the Internal Revenue Code provide the final blow by taxing income to wives rather than husbands? It seems that the better result is to tax those with the greatest ability to pay and allow couples to fix payments based on the knowledge that the payor will bear the tax burden. If couples can negotiate a fair result when both sides pay the tax, then they should be able to also negotiate when only one spouse pays the tax. The difference is that women will come to these negotiations with some of the bargaining power that the 1942 alimony system and the 1948 joint return took away from them.[242]

V. CONCLUSION

The alimony tax system evolved through a series of policy choices. First, the Supreme Court chose to adopt a two transfer/single tax approach rather than the two transfer/two tax model originally advocated by the Internal Revenue Service, thereby choosing to treat divorced couples as a single tax unit rather than as two separate taxpayers.[243] This result was firmly grounded in the conception of marriage as a lifelong union.[244]

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[240] *See, e.g.*, Prager, *Sharing Principles and the Future of Marital Property Law*, 25 U.C.L.A. L. REV. 1, 5–6 and 11–14 (1977). (Given a perfect system where there is no discrimination, it may be possible to treat men and women equally; however, the realities of social norms makes this choice unfeasible.); Blum, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFFALO L. REV. 49 (1971) (treatment of men and women equally through the use of the joint return results in women being treated unfairly because their income becomes subject to higher marginal rates of tax).

[241] Weitzman shows that women's income drops as much as 73% after a divorce while the income of divorced husband climbs by about 42%. L. WEITZMAN, *supra* note 129, at 323. *See also* McLindon, *supra* note 501.

[242] For a discussion of the loss of bargaining power to women, see *supra* text accompanying note 81.

[243] Under the two tax model originally suggested by the Commissioner, there is no need to determine the proper taxpayer because both spouses pay tax.

[244] *See* L. WEITZMAN, *supra* note 129, at 367.

In next deciding who to tax, the Supreme Court determined that the payor must bear the complete alimony tax burden.[245] This result was consistent with the Court's view that husbands had a lifelong obligation to support their wives. This alimony tax treatment was simple to apply but some questioned its fairness. After nearly three decades, during which it became more common for women to be independent wage earners and taxpayers, Congress shifted the alimony tax burden to the payee. Thus, under three of the four present divorce tax systems, alimony is taxable to the payee while other payments—such as child support—remain taxable to the payor.[246]

The second issue raised by the two transfer/one tax model is which payments will be taxed to which spouse. The simplest solution to this problem is to choose one spouse to bear the entire tax burden. Instead, Congress restricted the payee's tax obligation to spouse support payments, leaving the payor with the burden for other payments. This added a layer of complexity to the divorce tax system that was not present under *Gould* and *Davis*. Congress then exacerbated the problem by including optional grandfather clauses in each wave of tax reform after 1942. As a result, payments are taxed under a variety of rules depending on when the original dissolution took place and whether the divorce instrument was modified so as to fall under a different set of rules. Because of Congress' inability to bring all alimony payments within a single unified system—as it did for decrees of divorce and separation in 1942—the alimony tax rules have become a trap for the unwary taxpayer and practitioner alike.

In addition, because payees are usually women and payors are usually men, shifting the tax on alimony to payees meant that the overall tax burden on women increased while it decreased for men. Given the economic hardship that women suffer because of divorce this was not necessarily the fair result. Further, with its expansion of the divorce tax system in 1954, Congress continued this policy by expanding the categories of

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[245] The complete tax burden on the payor comes from a combination of the *Gould* decision (which makes the payor responsible for the tax generated by support payments) and the holding in *Davis* (which makes the payor responsible for the tax on gains generated by the use of appreciated property to pay for the relinquishment of marital rights).

[246] Payments made under written separation agreements and court ordered support decrees entered into before 1954 and not modified to fall within later rules are still taxed to the payor. *See supra* text accompanying note 206.

payees caught in the system without providing them with sufficient negotiating power to offset the increased tax liability. This shift in the tax burden of divorce was completed in 1984 when Congress made payees liable for tax on the built-in appreciation in property transferred as part of a divorce settlement.

Whether alimony is viewed as a return of capital to which the payee spouse has a property right, or as support for those who lack the skills to be self-sufficient, the *Gould* tax treatment of alimony is most equitable, theoretically correct and straightforward. A return to the *Gould* approach also has the practical advantage of eliminating the need to distinguish alimony from other distributions incident to divorce, thereby enabling Congress to get rid of the complicated front-loading, periodic payment and lump-sum rules. If alimony is a distribution of property, it should not be taxed when distributed—to do so would impose a tax on income that has already gone through the income tax system. If alimony is support, it should not be taxable to the payee, for it is in discharge of a personal obligation of the payor.

NOTE

THE ROLE OF REGULATORY COMPLIANCE IN TORT ACTIONS

PAUL DUEFFERT*

Historically, a defendant's compliance with government statutes and regulations has not been a valid defense to a tort action. While such compliance has been allowed as evidence of due care, a dual system of regulation through both statutory requirements and tort liability has prevailed.

In this Note, Mr. Dueffert traces the historical treatment of regulatory compliance and suggests that historical bases for dual regulation may no longer be valid in certain regulated fields. After concluding that the dual system of regulation can be overburdensome and unnecessary, he offers model legislation as a guide to legislatures struggling with difficult tort reform issues.

For a hundred years courts have considered axiomatic the common law principle that, against possible liability in tort, a defendant's compliance with government statutes and regulations is admissible only as evidence of the defendant's exercise of due care.[1] Therefore, such compliance generally "does not prevent a finding of negligence where a reasonable man would take additional precautions."[2] Now, as they reform tort law in response to a perceived crisis of tort liability,[3] some state legislatures are attempting to modify this time-honored rule.[4]

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[1] *See, e.g.*, Dorsey v. Honda Motor Co., Ltd., 655 F.2d 650, 656 (5th Cir. 1981); Westinghouse Electric Corp. v. Nutt, 407 A.2d 606, 610 (D.C. App. 1979); Leonard v. Sav-A-Stop Services, Inc., 289 Md. 204, 424 A.2d 336, 340 (1981); Kemp v. Wisconsin Electric Power Co., 44 Wis. 2d 571, 172 N.W.2d 161, 164 (1969).

[2] RESTATEMENT (SECOND) OF TORTS § 288C (1964).

[3] Whether a true "crisis" of tort liability exists is debatable. Proponents of tort reform point to a 17 percent average annual growth rate in average compensation paid per non-auto liability claim between 1980 and 1985, while the Consumer Price Index experienced only a 7 percent average annual growth rate during the same period. *See* J. KAKALIK & N. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION, xii–xiii (1986). Conversely, those who question the importance of the putative tort crisis argue that as of 1982 all non-auto personal liability claims (including medical malpractice claims) totaled only $7.46 billion out of a comprehensive societal loss measuring $221.20 billion. *See* J. O'CONNELL, J. BARBER, C. SPERAT, J. GUINIVAN, COMPENSATION FOR INJURY AND ILLNESS § III, tables B & C (1987 draft).

[4] *See infra* text accompanying notes 19–22.

Whether the endeavor is either sensible or practicable is the topic of this Note.

This rule is predicated on the view that statutes, ordinances and regulations generally[5] establish only a minimum floor of acceptable conduct,[6] and that compliance with them suffices only to serve the narrow purposes of the relevant act.[7] Employing this theory, common law courts often require a defendant to meet a higher standard of care than that dictated by the relevant statute, ordinance, or regulation in order to escape liability in tort lawsuits. Grounds for a higher standard of care may include the nature of the relevant statute[8] or the facts of the particular case.[9]

To illustrate, an aircraft manufacturer defending itself against a post-crash negligence claim may maintain (1) that the design of the airplane met stringent safety regulations, and also (2) that the Federal Aviation Administration certified[10] the airworthiness of that particular plane. In response, a court would likely cite the limited purposes contemplated by Congress in authorizing the Federal Aviation Administration to promulgate safety regulations and to certify airplanes—purposes limited largely to remedying a few well-recognized safety concerns. Under such reasoning, the state nonetheless may impose common law liability upon the manufacturer for failing to meet whatever standard a jury deems "reasonable" for the airplane's design.[11]

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[5] Some state statutes explicitly provide that defendants gain a complete defense to civil and criminal liability by complying with their terms. *See* N.C. GEN. STAT. § 90-321 (Supp. 1987) (shields from liability physicians who comply with statute before withholding life-sustaining procedures from qualified patients); OKLA. STAT. tit. 63, § 3106 (1988) (same).

Because of the breadth of these statutes in insulating potential defendants from all liability, they universally regulate only very narrow, atypical conduct. Therefore, this Note instead analyzes statutes that do not explicitly state that compliance with them provides a defense against tort liability.

[6] *See, e.g.*, Smith v. Atlantic Richfield Co., 814 F.2d 1481, 1487 (10th Cir. 1987); Southern Pac. RR Co. v. Mitchell, 80 Ariz. 50, 292 P.2d 827, 832–33 (1956).

[7] *See* Hubbard-Hall Chemical Co. v. Silverman, 340 F.2d 402, 405 (1st Cir. 1965) (approval of warning label on poisonous insecticide by Department of Agriculture sufficient only to fulfill Congress' conditions for shipment in interstate commerce).

[8] *See* Raymond v. Riegel Textile Corp., 484 F.2d 1025, 1028 (1st Cir. 1973).

[9] *See, e.g.*, 292 P.2d, at 834 (railway in compliance with regulations liable in tort where railroad crossing which was site of accident was unusually dangerous).

[10] Throughout this Note, "regulatory compliance" will be used broadly to embrace situations in which the government has taken the additional step of approving the particular actions of the defendant material to a tort action.

[11] This hypothetical is drawn from Elsworth v. Beech Aircraft Corp., 195 Cal. Rptr. 227, 230–31, 147 Cal. App. 3d 279 (1983), and Wilson v. Piper Aircraft Corp., 282 Or. 61, 577 P.2d 1322, 1324–26 (1978) (en banc).

Product manufacturers and other potential defendants thus face a system of dual regulation.[12] First, they must comply with all applicable federal, state, and local statutes, regulations, and ordinances. Many of these regulations[13] will have been crafted by experts, and will gain the force of law only after public comments are solicited and hearings are held.[14] If a manufacturer fails to comply with applicable regulations, and if the governing agency discovers this, the agency may levy a fine, impose a penalty, or issue some type of order.

In addition, a manufacturer must face often unpredictable common law liability for negligent manufacture, negligent design, or negligent behavior. A lay jury, seeing only an isolated lawsuit and possessing no background of specialized training, will implement a "reasonable actor" standard to determine whether the manufacturer is liable. A court may grant compensatory or punitive damages, or issue an injunction.

Such dual regulation may have been reasonable prior to the New Deal, when government regulation did little more than slightly modify existing judge-made law.[15] Today, however, government pervasively regulates fields of industry such as nuclear power, pharmaceutical production and aviation manufacture. Various agency rules set standards for every kind of foreseeable conduct.[16] Therefore, defendants operating within highly regulated fields may plead with conviction that compliance with strict, complex regulations should suffice to immunize them from tort liability.[17] Especially where detailed federal regulation conflicts with established common law, it seems unfair to ad-

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[12] *See* Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357 (1984); R.B. STEWART, THE ROLES OF LIABILITY AND REGULATION IN CONTROLLING ENTERPRISE RISKS 8–9, 40–52, 82–89 (1987). For an economics-oriented treatment which focuses on the shipping industry, see Hartje, *Oil Pollution Caused by Tanker Accidents: Liability Versus Regulation*, 24 NAT. RESOURCES J. 41 (1984).

[13] The terms "statute," "act," "regulation," and "ordinance" are used interchangeably in this Note where the context does not indicate or require otherwise.

[14] *See* 5 U.S.C. § 553 (1982) (requirements for notice and comment rulemaking in the Administrative Procedure Subchapter of Title 5).

[15] *See* S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXTS AND CASES 22–29 (2d ed. 1985).

[16] *See id.* at 29–40.

[17] *See* Braithwaite, *The Limits of Economism in Controlling Harmful Corporate Conduct*, 16 LAW & SOC'Y REV. 481, 483 (1981–1982) ("Industry does not like the red tape of having its deeds continually scrutinized by government; industries resent being made to conform with government conceptions of right and wrong [through regulation by government specification standards].").

judge the defendant "damned if he does, and damned if he doesn't."[18]

Perhaps in response to such arguments, some state legislatures have instructed their courts to disregard the time-honored rule that regulatory compliance serves only as evidence of defendant's reasonable care.[19] Instead, these legislatures have created a presumption that regulatory compliance suffices to establish a defendant's exercise of due care. For instance, Kansas law declares:

> When the injury-causing aspect of the product was, at the time of manufacture, in compliance with legislative regulatory standards or administrative regulatory safety standards relating to design or performance, the product shall be deemed not defective by reason of design or performance, or, if the standard addressed warnings or instructions, the product shall be deemed not defective by reason of warnings or instructions, unless the claimant proves by a preponderance of the evidence that a reasonably prudent product seller could and would have taken additional precautions.[20]

Similarly, the Tennessee Products Liability Act of 1978 states:

> Compliance by a manufacturer or seller with any federal or state statute or administrative regulation existing at the time a product was manufactured and prescribing standards for design, inspection, testing, manufacture, labeling, warning or instructions for use of a product, shall raise a rebuttable presumption that the product is not in an unreasonably dangerous condition in regard to matters covered by these standards.[21]

These statutes[22] are crafted so as to apply uniformly to a vast spectrum of cases. Whether the allegedly defective product is a

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[18] *See* Ferebee v. Chevron Chemical Co., 736 F.2d 1529, 1538–43 (D.C. Cir. 1984), which held a manufacturer liable in tort for inadequate labelling. The label on its product was approved by the Environmental Protection Agency; the defendant was required to use it until such time as the agency sanctioned more comprehensive labelling. *Ferebee* thus compelled the manfacturer both to comply with government regulations and to pay damages in tort on account of this compliance. For an extended discussion of this case see *infra* at text accompanying notes 123–35.

[19] Such a response to the perceived crisis of tort liability may be classified as incremental rather than radical or systemic, because it seeks only to tinker mildly with the existing background of common law rules. For an overview of proposals for wholesale alteration of the social insurance system, see Stewart, *Crisis in Tort Law? The Institutional Perspective*, 54 U. CHI. L. REV. 184 (1987).

[20] KAN. STAT. ANN. § 60-3304 (1983 & Supp. 1987).

[21] TENN. CODE ANN. § 29-28-104 (1978 & Supp. 1987).

[22] *See also* COLO. REV. STAT. § 13-21-403 (1987):

> In any product liability action, it shall be rebuttably presumed that the product which caused the injury, death, or property damage was not defective

nuclear power plant or a pair of children's pajamas, these statutes instruct a court to presume a manufacturer non-negligent if the manufacturer complied with governing regulations. Furthermore, the applicability of these statutes does not depend on the comprehensiveness of the governing statute, the foreseeability of the accident or the nature of the plaintiff. However, courts have traditionally looked to all of these factors in determining whether a manufacturer's compliance with regulation stands as a defense to tort liability.[23] Therefore, I will argue that one may attack these statutes as dangerously crude in their breadth of construction.

Nevertheless, the passage of such statutes raises a host of intriguing questions: Should regulatory compliance ever operate as a conclusive bar to liability in tort? When should such compliance create a presumption that a defendant exercised due care? Should regulatory compliance prevent a court from levying punitive damages against a defendant? And, may one formulate intelligent, comprehensive rules regarding the role in tort law of regulatory compliance, or must courts treat this defense in a manner that is fact-based and ad hoc?

This Note examines the various categories of cases in which defendants plead regulatory compliance as a bar to tort liability, and analyzes the instances in which courts actually defer to this defense. Part I reviews the common law history of the rule. Part II discusses the manner in which courts have treated the general classes of cases in which the defense of regulatory compliance is raised. These classes include standard personal injury litigation, products liability actions, and more specialized suits against aerospace manufacturers, the nuclear power industry and the tobacco industry. Part III suggests an approach to regulatory compliance which recognizes that in determining whether regulatory compliance suffices to immunize defendants from liability, I argue that courts explicitly or implicitly examine (1) the nature of the underlying event, (2) the nature of the

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> and that the manufacturer or seller thereof was not negligent if the product . . . [c]omplied with, at the time of sale by the manufacturer, and applicable code standard, or regulation adopted or promulgated by the United States or by this state, or by an agency of the United States or this state.

Cf. WASH. REV. CODE ANN. § 7.72.050(1) (1985 & Supp. 1988) ("Evidence . . . that the product was or was not, in compliance . . . with legislative regulatory standards or administrative regulatory standards, whether relating to design, construction or performance of the product or to warnings or instructions as to its use may be considered by the trier of fact.").

[23] *See supra* text accompanying notes 24–52.

governing statute or regulation and (3) the type of defendant involved. In concluding, Part IV describes an appropriate role for regulatory compliance in tort reform statutes, and suggests a model reform statute which could guide courts in their treatment of regulatory compliance as a defense against tort liability.

I. Common Law History

A. *The Early Railroad Cases*

The principle that regulatory compliance fails to excuse tort liability emerged when, in the interest of public safety, the government first systematically regulated the railroads.[24] In the late eighteenth century, while agencies set guidelines for safeguards at railroad crossings, suits on behalf of persons killed or injured by passing trains were brought against the responsible railroad companies.[25] Against this backdrop, the railroads first raised compliance with government safety standards as a defense to personal injury lawsuits.

By 1892, the Supreme Court in *Grand Trunk Railway Co. v. Ives*[26] noted that almost all states had ruled that railroads could be held liable for negligence, even where they had fully complied with statutes prescribing the nature and location of crossing signals and other precautions, such as flagmen, designed to protect the public.[27]

In *Ives*, an elderly man and his wife were driving their buggy toward Detroit when they came upon a railroad crossing. Observing one train go by on the tracks, they proceeded toward the town. Because of the departing train's noise, the driver did not notice another train, that of the defendant, approaching on

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[24] *See* S. Breyer & R. Stewart, Administrative Law and Regulatory Policy 26–29 (2d ed. 1985); *cf.* State ex rel. Railroad & Warehouse Comm'n. v. Chicago, Minneapolis & St. Paul Railway Co., 38 Minn. 281, 37 N.W. 782 (1888) (plaintiffs complain of rates set by the Minnesota Railroad and Warehouse Commission).

[25] *See, e.g.*, Chicago, Burlington & Quincy R.R. Co. v. Perkins, 125 Ill. (95 Freeman) 127, 17 N.E. 1 (1888); Weber v. New York Central & Hudson River R.R. Co., 58 N.Y. (13 Sickels) 451 (1874). *Cf.* Thompson v. New York R.R., 110 N.Y. (65 Sickels) 636, 17 N.E. 690 (1888) (plaintiff's horse killed by train at railroad crossing).

[26] 144 U.S. 408 (1892). *Ives* represents the seminal opinion on regulatory compliance as a defense to tort actions.

[27] *Id.* at 420–21.

a second set of tracks. This second train hit the buggy, killing both occupants.[28]

In suing the railroad, the estate argued that the company was negligent because the train engineer did not blow the train's whistle and ring its bell before reaching the crossing. Additionally, the estate argued for corporate liability on the grounds that the train was travelling in excess of twenty miles per hour. Witnesses for the railway testified that the train had blown its whistle and had rung its bell as required by Detroit ordinance, and that the train moved no faster than six miles per hour, also as required by local ordinance.[29]

The Supreme Court ruled that a jury should determine the issue of the railway's negligence, and that a trial court should not grant summary judgment for the railway merely because it fully complied with local ordinances.[30] Regardless of these ordinances, "every one must so conduct himself and use his own property as that, under ordinary circumstances, he will not injure another, in any way."[31] With this view, the Court held that it was a question of fact for the jury to decide whether the railway had properly positioned flagmen, had properly used its whistles, and had run its train at a proper speed.[32]

The Court, however, added an important qualification as dicta. Where no statute required it, a jury would be warranted in holding a railroad responsible to place a flagman or gates at a crossing only where a plaintiff demonstrated that the site was more than ordinarily dangerous—such as in a thickly populated area, or where the crossing was obscured by surrounding terrain.[33] This suggests that regulatory compliance under *Ives* provides a defense sufficient against tort liability only where no extraordinary hazards exist to justify extrastatutory compliance.[34]

Ives presented the basic fact paradigm upon which courts for decades interpreted the rule that defendants could use regulatory compliance as evidence of due care but that it was not in

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[28] *Id.* at 410–11.

[29] *Id.* at 411–12.

[30] *See also* Thompson v. New York Central R.R., 110 N.Y. (Sickels) 636, 17 N.E. 690 (1888); Chicago R.R. v. Perkins, 125 Ill. (95 Freeman) 127, 17 N.E. 1 (1888); Weber v. New York Central R.R., 58 N.Y. (13 Sickels) 451 (1874).

[31] 144 U.S. at 421.

[32] *Id.*

[33] *Id.*

[34] As will be discussed *infra* at text accompanying notes 53–59, this stance is the one adopted by the RESTATEMENT (SECOND) OF TORTS § 288C (1964).

itself sufficient to establish due care. As originally announced, the principle governed circumstances in which the government established minimum safety standards to protect the travelling public. Several factors support the view that the railroad crossing safety statute complied with in *Ives* could be viewed as setting only minimal standards. First, the statute expressly preserved the right of an injured party to recover damages in tort.[35] Second, the statute did not provide comprehensive safety protection. It left to local ordinances the regulation of locomotive speed limits and that of the whistles which a passing train must sound. Moreover the statute did not provide the state commissioner of railroads with any criteria by which to judge the propriety of positioning flagmen at individual crossings. Indeed, the statute did not differentiate among categories of crossings at all, such as those in highly populated areas, or those with an obstructed view. Third, the state statute regulating crossings did not provide for any regulatory mechanisms for statutory enforcement, such as audits at selected crossings. This suggests that failure to comply with the statute was meant to establish a prima facie case of negligence in a suit at common law, but that compliance itself would demonstrate little or nothing. Fourth, well-developed principles of tort liability persisted alongside regulation to deal with circumstances not contemplated by the railroad crossing safety statute. From this one may infer that the drafters of the statute intended to rely on tort law to amplify the basic statutory minima, and that they would not want compliance with the statute accepted as evidence of the railroad's due care.

B. *Later Automobile Cases*

As automobiles replaced buggies, the principle of *Ives* survived through decades of personal injury litigation. Thus, in 1933 the Connecticut Supreme Court ruled that the owner of a

[35] The Michigan statute provided that

> [I]f [a] flagman shall neglect to display his flag, or perform such other duties as may be required of him by said commissioner, he shall, for every such neglect, be liable to a fine of twenty-five dollars, and shall also be liable for all damages sustained by any person by reason of such neglect, to be recovered in an action of tort: Provided, the corporation owning or operating any such railroad shall not be released from liability therefor, but shall be subject to the same liability at the option of the aggrieved party.

3 How. Stat. § 3301 (1892).

parked truck may be liable to another driver even if in parking his vehicle he complied with all applicable parking ordinances.[36] In *Caviote v. Shea*, the defendant had parked his dark brown truck upon the hard shoulder of a busy turnpike at 10 o'clock in the evening in heavy fog. The oversized truck, loaded with pianos, was unguarded and unlit by street lights. Plaintiffs also asserted that the truck used no parking lights.[37]

On these facts, the trial judge instructed the jury that "if [the defendant had] stopped his car on the highway, even though there may be fog, and had complied with the law, he is not liable. . . . I do not see that the presence of the fog required him to take any more precautions than the law required him to do."[38] The *Caviote* trial court thus accepted a position consistent with that of modern reformers who wish to create at least a presumption that regulatory compliance establishes a shield against tort liability.[39]

On appeal, the Connecticut Supreme Court held that while parking in violation of applicable ordinances[40] might constitute negligence, it did not follow that the statute authorized parking the truck without precautions other than those expressly required by the statute.[41] Citing plaintiff's evidence of an unusually dark and foggy evening, a dim tail-light on the truck, and the contours of the road, the court ruled that the truck driver's negligence was a question left open for the jury, regardless of defendant's compliance with relevant statutes.[42]

Caviote and *Ives* share three attributes. First, the "events" sued upon were common accidents in unpredictable environments. *Ives* involved a buggy-and-train crash at a generic railroad crossing; *Caviote*, an automobile collision with a truck

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[36] *See* Caviote v. Shea, 116 Conn. 569, 165 A. 788 (1933).

[37] 165 A. at 788.

[38] *Id.* at 789 (quoting trial court jury instruction).

[39] *See supra* text accompanying notes 19–22, where reform statutes are discussed.

[40] The relevant statute, Connecticut Gen. Stat. § 1653, provided:

> No vehicle shall be permitted to remain stationary within ten feet of any fire hydrant, or upon the traveled portion of any highway except upon the right hand side of such highway in the direction in which such vehicle shall be headed; and, if such highway shall be curbed, such vehicle shall be so placed that its right hand wheels, when stationary, shall, when safety will permit, be within a distance of twelve inches of the curb.

Caviote, 116 Conn. 569, 165 A. at 789. Thus, while the statute addressed the placement of a vehicle, it did not address the proper safeguards for insuring a parked vehicle's visibility.

[41] *Id.* (discussing whether defendant had properly displayed a red tail-light on the rear of his truck).

[42] *Id.*

parked on a highway. The *Ives* court found the environment of the accident wholly unremarkable, and thus held the railway to a standard of care applicable to generic railroad crossings;[43] the *Caviote* court ruled that extraordinary hazards such as fog and geography mandated extrastatutory precautions. In both cases, the everyday circumstances sued upon represented but one of infinite possible outcomes, for situations encountered when reaching railroad crossings and when travelling highways are not to be comprehensively foreseen.

Second, the statutes with which the defendants complied were cursory and general. In *Ives*, the pertinent statute merely set certain signals to be given by a train prior to reaching all crossings. The statute in *Caviote* simply allowed that it was legal to park a vehicle if it was positioned in a certain way. Neither statute attempted to contemplate all possible railroad crossing environments nor all possible street conditions. Instead, both statutes merely regulated the norm, and impliedly left adjudication of liability under extraordinary conditions to the courts using common law jurisdiction.

Third, the defendants in each suit were private—neither public nor quasi-governmental—and engaged in traditional two-party adversarial litigation.[44] No parties in these cases were normally strictly regulated in their behavior by statute, and in neither case was the court faced with questions of separation of powers in finding the defendant possibly liable. These three attributes are commonly found in early twentieth-century cases where courts invoked the rule that a defendant's regulatory compliance fails to excuse it from tort liability.[45]

Two decades later, the Supreme Court of Arizona faced a case much like *Ives*. It determined that a defendant railway had not necessarily met its common law duty of care by complying

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[43] *See also* Leisy v. Northern Pacific Ry. Co., 230 Minn. 61, 40 N.W.2d 626, 629–30 (1950). In holding that extrastatutory care is required only at unusually dangerous railroad crossings, *Leisy* held that "where but a few persons pass over the tracks each day and where there are no interferences with hearing and sight, compliance with statutory requirements suffices." *Id.* at 629. Using this test, the court found the crossing at issue to be so unexceptional as to compel summary judgment for the defendant railway.

[44] *See generally* A. Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

[45] Similarly, in 1933, the Supreme Court of Washington ruled in an automobile accident case that "reasonable care" might require the defendant to give more than the statutory arm signal before making a left turn. *See* Curtis v. Perry, 171 Wash. 607, 18 P.2d 840, 843 (1933).

with safety statutes where defendant's train, backing an unlit boxcar across the tracks of a railroad crossing, collided with an automobile at 3:25 a.m.[46] Under these peculiar facts, the court ruled the railway's negligence a question for the jury to decide.[47] The *Mitchell* decision represented the mainstream of judicial thought in its day.[48]

Liability cases existed apart from common automobile and train accidents, and these likewise found that compliance with relevant governmental regulations would not immunize a defendant from tort liability. In *Mitchell v. Hotel Berry Co.*,[49] the Ohio Court of Appeals found that a hotel owner, defending a lawsuit after a fire, had not necessarily met his common law duty of care by providing the minimum number of emergency exits mandated by state statute.[50] In so holding the court ruled that the defendant's standard of due care was fixed in part by the characteristics of a particular building, such as its size, the situation of the hallways and rooms, and the number of people accommodated.[51] Because none of these characteristics were contemplated by the relevant statute, the court was compelled to consider them when adjudicating common law tort liability.[52]

[46] *See* Southern Pacific R.R. Co. v. Mitchell, 80 Ariz. 50, 292 P.2d 827 (1956).

[47] *Id.* at 833. Additionally, in Peterson v. Salt River Agric. Improvement & Power Dist., 96 Ariz. 1, 391 P.2d 567 (1964), the Supreme Court of Arizona ruled on a case akin to *Caviote*. In *Peterson*, an automobile collided with the end of a 70-foot power pole being towed by a semi-truck trailer. In finding the truck driver's negligence a question of fact appropriate for the jury, the court found inconclusive of due care the truck driver's compliance with a state statute requiring a 12-inch-by-12-inch red flag to be placed at the end of the pole. 391 P.2d at 570–71. Specifically, the court noted:

> Where an extra large rig is involved, the jury might also find that a helper, perhaps riding the rear end, a follow up car, or any other additional safety precaution would have been adopted by a reasonable power company before launching a 70-foot pole with a 30-foot overhang on the public highways.

Id. at 571 (footnote omitted).

[48] Another court ruled in 1960 that extraordinary hazards, present at a railroad crossing, may require a railway to provide moving automobiles with extrastatutory warnings. In that decision, a jury question existed as to whether a railroad was negligent for failing to provide extrastatutory warnings where an automobile travelling within the high end of the legal speed limit would be unable to stop short of crossing after it first became visible. New York Central R.R. Co. v. Chernew, 285 F.2d 189, 193 (8th Cir. 1960).

[49] 171 N.E. 39 (Ohio App. 1929).

[50] The court remanded after holding that statutory compliance did not dictate a finding of due care. The statute referred to by the court provided only that in a hotel similar to that of the defendant the owner would provide convenient exits from the upper stories, and that these would be easily accessible in case of fire. The section prescribing certain required exits did not fix the number of exits. *Id.* at 41. In dicta, the court suggested only that negligence *per se* arises when this statutory minimum is not met. *Id.*

[51] *Id.*

[52] For another case outside the context of common vehicular accidents, see Maize v. Atlantic Refining, Inc., 352 Pa. 51, 41 A.2d 850, 852–53 (1945) (wrongful death from inhalation of cleaning fluid vapors).

C. *The Second Restatement of Torts*

This perspective[53] on regulatory compliance was adopted by the Second Restatement of Torts. Although the First Restatement ignored the issue of regulatory compliance, the Second Restatement states that "[c]ompliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions."[54] In its accompanying commentary the Restatement notes as an example that "the enactment of an automobile speed limit of forty miles an hour does not mean that the driver is free to proceed always at that speed, and he may be required to slow down to fifteen miles an hour, or even to stop, where traffic conditions require it."[55] The fact paradigm of *Ives*, assuming simple statutes regulating complex and unpredictable environments, thus survived.

As did *Ives*, however, the Second Restatement also provided that a court may accept as a matter of law compliance with applicable regulations as meeting defendant's burden of due care: "Where there are no special circumstances, the minimum standard prescribed by the legislation or regulation may be accepted by . . . the court as a matter of law, as sufficient for the occasion . . . ."[56]

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[53] A different view is expressed in at least one early case which embodies the minority view on regulatory compliance. Shramek v. Huff, 135 Neb. 178, 280 N.W. 450 (1938), determined that a plaintiff who allegedly fell down a stairway could not collect against an apartment house owner who had complied fully with local ordinances in providing a hand-rail for the staircase. 280 N.W. at 452. The applicable provisions of the building code provided that "[i]nclosed stairs shall have at least one hand-rail and where the width of such stairs is greater than three feet six inches, shall have a hand-rail on each side. Open stairs shall be provided with hand-rails on each side." *Id.* at 451.

The court ruled that it was proper to direct a verdict for the defendant given such compliance. *Id.* at 452. The opinion cites no sources and forwards no substantive reasoning in holding compliance with local ordinances sufficient for the defendant to escape liability. Perhaps the court refused to further examine the reasonable care of the defendant in providing the stairway out of the fear of expanding tort liability to a host of similar cases.

[54] RESTATEMENT (SECOND) OF TORTS § 288C (1964).

[55] *Id.* comment a. The commentary additionally provides:

> Likewise the requirement that a hand signal be given by a driver who is about to make a left turn does not confer immunity upon a driver who makes the signal but is otherwise negligent in making the turn, as by cutting the corner; and where the driver has reason to know that his signal has not been observed, or for some other reason is not sufficient, he may be required to do more, as for example to blow his horn or to refrain from making an immediate turn.

This provision comports with Curtis v. Perry, 171 Wash. 607, 18 P.2d 840 (1933).

[56] RESTATEMENT (SECOND) OF TORTS § 288C comment a (1964).

Surprisingly, the Second Restatement offers no guidelines suggesting when a court should accept regulatory compliance as establishing a conclusive defense against tort liability. However, the Second Restatement presumably draws on railroad crossing accident cases which hold that at generic crossings a railway need give no more than statutorily prescribed warnings.[57] Therefore, one may infer that where the situation sued upon is one commonly contemplated by the statute, a court should find compliance with statutory precautions alone to be a sufficient defense.

The Second Restatement rests upon a number of assumptions not applicable to many tort suits today. First, it contemplates a private, bipolar suit concerning a matter far removed from the arena of political debate. Second, it envisions a plaintiff who is the victim of a predictable, common accident. Finally, the defendant presumably complies with a general statute that sets only the loosest of safety standards. In formulating its standard, therefore, the Second Restatement ignores the complexity of the governing regulation, the predictability of the event sued upon, or whether non-judicial branches are debating in broad terms the liability of similar defendants.

Assuming certain factors as it does, the Second Restatement declares that the "legislative or administrative minimum does not prevent a finding that a reasonable man would have taken additional precautions where the situation is such as to call for them."[58] It thus allows not only that regulatory compliance may be used by a defendant as evidence of due care, but also that a court generally should not consider such compliance as proof that the defendant met the applicable standard of care in a

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[57] The only illustration to § 288C is drawn directly from *Ives* and four similar railroad accident cases. *See* RESTATEMENT (SECOND) OF TORTS § 288C reporter's notes. *See also* Gigliotti v. New York, Chicago & St. Louis R.R. Co., 107 Ohio App. 174, 157 N.E.2d 447, 451 (Ct. App. 1958) ("reasonable minds could reach the conclusion only that this crossing, at the time of the accident, possessed no features which would make it more than ordinarily hazardous; and, under such circumstances, there is no basis for extrastatutory warnings"); Hood v. New York, Chicago & St. Louis R.R. Co., 166 Ohio St. 529, 536, 144 N.E.2d 104, 109 (1957), where the court stated:

> [A] railroad is under no duty to provide extrastatutory warnings at a grade crossing, where not required to do so by any order of the Public Utilities Commission, if there is no substantial risk that a driver in the exercise of ordinary care may be unable to avoid colliding with a train that is being operated over the crossing in compliance with statutory requirements.

[58] RESTATEMENT (SECOND) OF TORTS § 288C comment a. This standard is also that adopted in W. PROSSER & W. KEETON, THE LAW OF TORTS § 36, at 233 (5th ed. 1984) ("[s]uch a standard is no more than a minimum, and it does not necessarily preclude a finding that the actor was negligent in failing to take additional precautions").

negligence suit.[59] Under this view, courts historically have treated regulatory compliance only as evidence of due care because, generally, events sued upon were unforeseeable and governing acts were general in nature, possibly obsolescent, and designed to provide no more than a minimum standard of conduct.

II. Regulatory Compliance in Modern Tort Litigation

While claims of regulatory compliance traditionally were raised in simple accident cases, the defense now finds application in new categories of lawsuits. Apart from conventional personal injury and products liability lawsuits, plaintiffs today claim negligence by nuclear power producers, pharmaceutical and tobacco manufacturers, and aerospace companies. In seeking to avoid liability, defendants invoke compliance with intricate regulatory mechanisms unknown to the era in which the rule of regulatory compliance was formed. And, today, courts sometimes allow as a valid defense a manufacturer's claim of regulatory compliance, but only after analyzing the character of the event sued upon or the statute with which the defendant complied. In other words, courts accept regulatory compliance as a defense only after inquiries that seem fact-based and ad hoc. Therefore, in order to understand the possible role for regulatory compliance in tort reform, one must analyze the various contexts in which this claim is made.

A. *Personal Injury Litigation*

Personal injury litigation,[60] which arises out of common accidents such as those involved in *Ives* and *Caviote*, continues unabated today. In most cases, courts still view defendants' regulatory compliance as evidence of due care but not proof thereof. Because personal injury litigation represents a large percentage of all tort actions, one might expect to find more

[59] *See also* Prosser and Keeton on The Law of Torts § 36 at 233 (W.P. Keeton 5th ed. 1984) (reiterating view of Restatement (Second) of Torts).

[60] For the purposes of this Note, "personal injury litigation" is taken to be litigation resulting from accident injuries, such as that resulting from car collisions. "Personal injury litigation" is thus exclusive of "products liability litigation" and other less commonplace torts, which will be discussed later in this Note.

detailed treatment of regulatory compliance defenses by courts adjudicating these accident claims. Auto torts, which most closely resemble the train and automobile collisions of the early twentieth century, "accounted for about half of all tort filings in courts of general jurisdiction in 1985, and also about half of the total compensation paid."[61] Surprisingly, however, regulatory compliance as a defense is rarely discussed in recent reported opinions of common accident cases.[62]

1. Regulatory Compliance Not a Complete Defense

Some modern cases do follow the fact paradigm of *Ives*, that is, the accident involved is commonplace, the governing statute is general by construction, and the parties are purely private in nature. For instance, in *Christou v. Arlington Park-Washington Park Race Tracks Corp.*,[63] the plaintiff fell through a plate glass door at defendant's race track. In his suit, the plaintiff alleged that the race track was negligent in failing to use safety glass in the door instead of simple plate glass. Noting that while compliance with administrative regulations does not present a complete defense, an Illinois appeals court ruled that the trial court should have admitted into evidence relevant statutes and administrative regulations with which the defendant had complied in using the plate glass door.[64]

Similarly, in *Smith v. Atlantic Richfield Co.*[65] a coal miner was injured by rock falling from the roof of the mine in which

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[61] J. KAKALIK & N. PACE, COSTS AND COMPENSATION PAID IN TORT LITIGATION, x (1986).

[62] This absence may be attributed to three factors. First, because most automobile tort cases settle prior to judgment, few cases of this type may be reported at all. Second, the relatively small dollar amounts at stake in such cases precludes defendants from arguing fairly obscure points such as those grounded in regulatory compliance. Finally, the wide acceptance of the doctrine of *Ives*, as codified by the Second Restatement of Torts, suggests to defendants that it is unwise to make arguments based on regulatory compliance in standard personal injury and accident cases. *See supra* note 58.

[63] 104 Ill. App. 3d 257, 432 N.E.2d 920 (1982).

[64] 423 N.E.2d at 923–24 (stating that this is a matter of simple fairness). *Christou* further focuses on the proper form for jury instructions and admission into evidence of statutes themselves. The court reasoned that

> In the present case, since plaintiff was allowed to show that safety glass was safer than plate glass, defendant was entitled to show that the use of safety glass by existing structures was not required by law. While defendant did introduce this testimony through its expert witness, it should also have been permitted to introduce the statutes and receive appropriate jury instructions.

Id. at 924. The opinion does not recite the terms of the regulations with which the defendant complied in installing the plate glass door.

[65] 814 F.2d 1481 (10th Cir. 1987).

he worked. Previously, the federal Mine Safety and Health Administration had approved the roof control plan used by the defendant mining company. Holding that it was proper to introduce this agency approval as evidence, the Tenth Circuit argued that approval of safety measures was relevant to permitting only an inference that the mining company met at least a minimum standard of care.[66] Thus, where a regulatory body inspects and approves the management of the specific site where an accident occurs, regulatory compliance again presents evidence of due care by the defendant.

Several simple principles may be derived from these two modern accident cases. In both its factual background and in its legal reasoning, *Christou* closely parallels the traditional paradigm. It teaches that where the defendant has complied with a regulation that only loosely sets a standard of care—one which does not specifically detail precautions to be taken at a given site—a court will view compliance with that regulation solely as evidence of due care rather than proof of its exercise.[67] This is sensible, as in such cases government regulation will not by itself optimally deter defendant's harmful conduct. *Smith* suggests, furthermore, that even where a government body inspects and strictly regulates the particular accident site, regulatory compliance will not conclusively establish the exercise of due care. However, where defendants are tightly regulated to the point of actual on-site agency inspections, it is difficult to see how dual regulatory and tort control of a defendant better serves the goal of deterrence than would comprehensive, well-reasoned regulation alone.

Importantly, the legislative enactments in both *Christou* and *Smith* governed conduct in areas where a strong history of common law tort liability existed, a judicial control which already effectively regulated defendants' conduct and provided compensation to injured parties. These courts may have relied on this common law tradition in implicitly ruling that a second

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[66] *Id.* at 1487.

[67] The Restatement's position that an accident site's special circumstances or extraordinary hazards may require extrastatutory precautions serves as another obstacle to avoiding liability through regulatory compliance. This doctrine, although infrequently discussed in standard modern accident cases, does survive. For instance, in Kemp v. Wisconsin Electric Power Co., 44 Wis.2d 571, 172 N.W.2d 161 (Wis. 1969), compliance with the state electrical code did not support summary judgment in favor of defendant power company in an action for negligence (Defendant maintained a high voltage power line through a densely settled residential neighborhood where a child suffered burns after flying his model airplane into the wires of the power line). *Id.* at 164–65.

set of regulations, that with which defendants pled compliance, did not wholly supplant comprehensive common law remedies.

2. Regulatory Compliance Sufficient

In standard accident litigation, the most intriguing modern opinion discussing a defendant's regulatory compliance departs from the traditional paradigm by honoring regulatory compliance as an absolute defense. In *Jefferson County School Dist. R-1 v. Gilbert*,[68] a kindergarten student was killed when hit by an automobile at an intersection in a school area. In a suit against the city, the majority of the Colorado Supreme Court held that the city's only duty in designing the intersection was to comply with the engineering judgment embodied by U.S. Department of Transportation's *Manual on Uniform Traffic Control Devices for Streets and Highways*.[69] In so holding, the majority rejected plaintiff's argument that the intersection was unreasonably designed, noting that because a city could not realistically attain perfect safety in designing its intersection, local governments were required to achieve only a reasonable level of safety in conformance with the national engineering standards set forth in the Manual.[70] Departing from the view of the Second Restatement,[71] the court held that the technical expertise of the Department of Transportation, as expressed in its *Manual*, would determine whether or not the city had acted reasonably. In comparison with such expertise, the views of a lay jury as to the city's reasonableness in designing its intersection had no place.

The dissent in *Gilbert* argued that, notwithstanding the city's compliance with the *Manual*, the plaintiffs had presented a question of fact with regard to the city's failure to use reasonable care in placing adequate traffic control signals in the intersection.[72] It also noted that nothing in the statute itself suggested that compliance with the *Manual* constituted the upper boundary of the city's responsibility in tort to design and maintain roadways in a reasonably safe manner.[73] Therefore, the dissent

[68] 725 P.2d 774 (Colo. 1986) (en banc).
[69] *Id.* at 777–78.
[70] *Id.* at 779.
[71] *See supra* text accompanying notes 53–59.
[72] 725 P.2d at 780.
[73] *Id.*

falls squarely within the traditional view that in accident cases regulatory compliance does not preclude a finding of negligence where a reasonable person, as defined by a lay jury or a generalist judge, would take additional precautions.[74]

Within the framework of *Christou* and *Smith*,[75] *Gilbert* is unusual in that it finds that a defendant's regulatory compliance is conclusive on the issue of due care where a municipality is sued for improperly designing an intersection. The majority in *Gilbert* simply assumes that compliance with applicable highway regulations exhausted the city's obligations under tort law. Perhaps the majority implicitly relies on the fact that the situation in which the accident occurred was wholly *normal*, within that contemplated by the controlling enactment, and that the plaintiffs failed to argue special circumstances which would require affirmative action beyond the requirements of the *Manual*.[76] The majority, however, failed to undertake a complete analysis. They neither reviewed the applicable statute to determine if the legislature intended to supplant common law, nor scrutinized the accident site to determine if it was similar to that contemplated by the highway statute. In so treating the issue of regulatory compliance, then, the majority departed from the traditional analysis of *Ives*. One may assume that *Gilbert* finds regulatory compliance a complete defense in deference to the fact that the defendant was a municipality.[77]

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[74] *See supra* text accompanying notes 26–32, 40–42, and 53–55; Home Insurance Co. v. Hamilton, 253 F. Supp. 752, 755–56 (E.D. Ky. 1966), which notes in dictum that compliance with state administrative regulations is prima facie evidence of the absence of negligence. *Hamilton* holds, conversely, that the violation of state fire prevention regulations, which caused a fire in a gasoline station, constituted negligence *per se*.

[75] *See supra* text accompanying notes 63–68.

[76] *See* RESTATEMENT (SECOND) OF TORTS § 288C (1965) ("Where there are no . . . special circumstances, the minimum standard prescribed by the legislation or regulation may be accepted by the triers of fact, or by the court as a matter of law, as sufficient for the occasion . . .").

See also Collingwood v. General Electric Real Estate Equities, Inc., 86 N.C. App., 656, 366 S.E.2d 901 (1988) (landlord under no legal duty to install safety equipment not required by applicable building codes); *cf.* Montgomery v. Royal Motel, 98 Nev. 240, 645 P.2d 968, 970 (1982), in which plaintiffs who were assaulted and robbed in their motel room charged the proprietor with negligence in not providing a self-locking door. A local ordinance provided that all motel doors be provided with a dead bolt lock. The Nevada Supreme Court held that compliance with the ordinance established the proprietor's due care because the case presented no facts which would constitute "special circumstances" not contemplated by the statute. In particular, the proprietor had no reason to suspect that an attacker was near the motel, there was no showing of prior similar incidents and the plaintiffs were not deceived by the door's appearance. *Id.* at 970.

[77] The view that courts habitually take the identity of defendants into consideration when gauging the adequacy as a defense of regulatory compliance is more fully explored *infra* in Section III, Part C, of this Note.

B. *Products Liability Litigation*

All cases discussed above fall within a category of simple accidents where a vehicle or other unforeseen object causes the victim's injuries, and all thus fall within the historical paradigm of *Ives*. However, most modern opinions treating questions of regulatory compliance involve plaintiffs who first willingly purchase the product that caused them harm and who then sue the manufacturer of the product for defective design or defective labelling.

Products liability cases differ from standard accident cases in several ways. First, these cases may not involve any close analogy to the railroad crossing accident cases. There, the configuration of the accident site could easily have been contemplated by the legislators drafting a statute. Because products, unlike railroad crossings, are nearly infinite in their variety, legislators drafting product safety statutes will often find it necessary to confine the scope of these statutes by regulating only a few predictable problems. Second, relevant enactments and regulations in product manufacture may be of an entirely different character than those relevant to, for instance, automobile cases. Certain products, such as pharmaceuticals, may be strictly regulated in both composition and labelling. Others, such as articles of clothing, may be sold under only the loosest of standards. Third, the history of common law *regulation* through tort liability of products may differ substantially from that of traditional accident cases, especially where the product is novel or where, as with asbestos, it has been found to be dangerous only recently. Finally, unlike defendants in cases involving unforeseeable accidents, those in products liability actions may have acted intentionally or recklessly in bringing about injury.

1. Defective Design

a. *Regulatory complexity in products liability suits.* In products liability cases, regulations with which the defendant complied may possess a higher level of detail than those encountered in simple accident cases such as *Ives*. For instance, in *Wolford v. General Cable Co.*[78] an electrician working aboard the aircraft carrier *U.S.S. Saratoga* fell while pulling a cable through a

[78] 58 F.R.D. 583 (E.D. Pa. 1973).

wireway. Against allegations that the cable was defectively designed because it was inflexible, the defendant manufacturer argued its compliance with highly detailed military specifications.[79] The court in *Wolford* found, after little analysis, that compliance with such detailed regulations was insufficient to establish the manufacturer's exercise of due care in designing its cable.[80]

Because the military specifications met a level of particularity unknown to traditional simple accident cases, and because they regulated the specific flexibility characteristics of the product challenged by the plaintiff as defective, one may question the sensibility of holding the manufacturer to a possibly duplicative tort standard of care.[81] To generalize from *Wolford*, however, one would have to distinguish government specification standards from performance standards.[82] For instance, while a spec-

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[79] *Id.* at 584–85. The defendant cited a host of military and industry standards, arguing that while some military specifications consciously excluded requirements of flexibility, it nevertheless had complied with other standards which did prescribe a minimum bending radius. For instance, one set of standards required a manufacturer to put its cable through two bending endurance tests, and stated that a "ten foot sample of finished cable should be capable of being bent at room temperature 180 degrees around a mandrel having a diameter as given in table 19 [Appendix]." *Id.* at 585, quoting AMERICAN INSTITUTE OF ELECTRICAL ENGINEERS, RECOMMENDED PRACTICE FOR ELECTRIC LNSTALLATIONS ON SHIPBOARD § 18.31(c) (1962 rev. ed.).

[80] *Id.* at 586. The defendant apparently did not rely on the "military contractor defense" established by Yearsle v. W.A. Ross Construction Co., 309 U.S. 18 (1940), which relies on an agency theory to hold that military contractors enjoy something akin to derivative sovereign immunity. This defense does not view a manufacturer's compliance with either government regulations or government contracts per se as its foundation. Instead, the defense is justified by appeals to economics, national security, judicial non-reviewability and the need for contractors to cooperate with the military. *See generally* Turner & Sutin, *The Government Contractor Defense: When are Manufacturers of Military Equipment Shielded from Liability for Design Defects?*, 52 J. AIR L. & COM. 397 (1986).

[81] Conversely, legislative enactments regulating products may be as vague and general as those regulating the paradigm railroad crossing accident. Where an 87-year old bus passenger falls when reaching for the bell cord and charges that the bus was improperly designed, the manufacturer of the vehicle may plead compliance with federal safety standards. Turner v. American Motors General Corp., 392 A.2d 1005, 1007 (D.C. App. 1978). However, where these regulations do not require that the cord be placed in a position where a passenger must stand to reach it, regulatory compliance will not shield the bus manufacturer from liability for negligence. *See id.*

In *Turner* the plaintiff charged defendant bus manufacturer with liability for defective design; she apparently did not sue the buyer/owner of the products because of sovereign immunity. Defendant, however, argued that it had complied fully with the contractual specifications of the buyer Washington Metropolitan Area Transit Authority as with administrative regulations. Although this might support shifting the burden of tort liability to the Transit Authority, the *Turner* court dismissed compliance with contractual terms as no more determinative of the manufacturer's exercise of due care than was its compliance with applicable regulations. *See id.* at 1007–08.

[82] *See* Braithwaite, *The Limits of Economism in Controlling Harmful Corporate Conduct*, 16 LAW & SOC'Y REV. 481, 483–84 (1982).

ification standard would require that a cable consist of five hundred 20-gauge wires, the governing regulation in *Wolford* instead required only that the cable bend around a mandrel of a certain diameter.[83] Thus, through specification standards, the government controls the design of a product, while performance standards are end-oriented. Where a manufacturer has complied with a specification standard, it has no choice but to design its product as the government requires, and compliance with applicable regulations should in many cases immunize it from tort liability for negligent design. Conversely, where a manufacturer is controlled by a performance standard, it enjoys a relatively broad range of discretion in designing its product, and a defense of regulatory compliance against tort liability would thus seem much weaker. No hint of this distinction exists in *Wolford* or in other relevant case law.

b. *Regulation and industry-wide standards.* Compliance with legislative enactments by manufacturers may be strongly tied to compliance with existing industry-wide standards.[84] No analogy to this tie exists in common accident cases under the *Ives* paradigm of simple vehicular accidents.[85] Thus, in *Westinghouse Electric Corp. v. Nutt*[86] a plaintiff injured when falling down an elevator shaft alleged that the elevator manufacturer had been negligent in not designing a long "toe guard" that would extend below the elevator to prevent falls into the shaft.[87] In deciding that the issue of the manufacturer's negligence was for the jury, despite the manufacturer's compliance with all applicable codes, the court in *Nutt* noted that neither regulatory compliance nor compliance with industry-wide custom conclusively determines the applicable standard of due care.[88]

From this one may derive the principle that compliance with regulations might constitute sufficient proof of due care where such governing regulations impose a higher standard of care

[83] *See supra* note 79.

[84] The two seem most closely linked where legislative enactments merely codify existing industry practice.

[85] In *Ives*, the defendant was regulated by a dual system of state legislative enactments (setting standards for the placement of crossing signals) alongside traditional common law tort liability. *See supra* text accompanying notes 26–34. Where industry-wide standards exist (such as those of engineers), a third plane of regulation is added to the two in *Ives*.

[86] 407 A.2d 606 (D.C. App. 1979).

[87] *Id.* at 609.

[88] *Id.* at 610.

than does simple industry-wide custom.[89] Because industry custom by definition reflects the standard of care generally employed by manufacturers, compliance with a regulatory standard much tougher than that of industry custom should exonerate a defendant from liability for negligently designing or manufacturing its product. However, because regulatory standards are rarely significantly more demanding than industry custom,[90] the usefulness of this principle is greatly limited in practice.

c. *Compliance with criminal statutes.* A court may consider differently a defendant's compliance with a statute that imposes criminal, not civil, liability. Thus, in *Blueflame Gas v. Van Hoose*,[91] propane buyers injured in an explosion of their hot water heater alleged that the supplier had insufficiently odorized the propane to enable easy identification of leaks. In response to the supplier's assertion that it had complied with state safety standards,[92] the court noted that the applicable regulation issued by the State Inspector of Oils made violations of the standard a misdemeanor punishable by a fine of not more than five hundred dollars.[93] Concluding that a regulation imposing a criminal liability might establish, given the relative severity of its punishment, a much lower standard of care than is relevant in a civil action in strict liability and negligence,[94] the court held that due care would be analyzed within traditional framework of those

[89] *Simple industry wide custom* is here taken to establish a lesser standard of care than does industry *state of the art* compliance, which alone raises a presumptive defense under several tort reform statutes. *See, e.g.*, KY. REV. STAT. ANN. § 411.310 (Michie/Bobbs-Merrill Supp. 1986):

> In any product liability action, it shall be presumed, until rebutted by a preponderance of the evidence to the contrary, that the product was not defective if the design, methods of manufacture, and testing conformed to the generally recognized and prevailing standards or the state of the art in existence at the time the design was prepared, and the product was manufactured.

See also IND. CODE ANN. § 33-1-1.5-4(b)(4) (West Supp. 1987); *cf.* WASH. REV. CODE ANN. § 7.72.050 (West Supp. 1988) (establishing "technological feasibility" of safer product as element to be considered in determining negligence).

[90] *See* Wilson, *The Dead Hand of Regulation*, THE PUBLIC INTEREST, Fall 1971, at 39–58 (noting the pervasiveness of "agency capture" by regulated industries).

[91] 679 P.2d 579 (Colo. 1984).

[92] *Id.* at 590. The regulation stated that the odorization requirement "shall be considered to be met by the use of 1.0 pounds of ethyl mercaptan . . . per 10,000 gallons of LP-Gas." *Id.*

[93] *Id.*

[94] Almost all of the products liability cases discussed in this section proceed on alternative theories of strict liability and negligence. Because under strict liability a defendant's exercise of due care is deemed irrelevant, the analysis here treats these lawsuits as if they alleged negligence alone.

tort liability principles.[95] Thus, while in the simple accident cases discussed above compliance with a civil statute was regarded as at least evidence of due care, in *Blueflame Gas* a criminal statute was disregarded entirely when determining whether the manufacturer was negligent.

In many cases, however, compliance with criminal statutes should not be so disregarded. Because criminal penalties for regulatory violations are generally far lower than potential tort liabilities for the same acts, observance of the criminal law should not bar recovery in tort for otherwise negligent activity. This does not mean that compliance with criminal statutes should not be ignored completely, however. Criminal statutes which are designed to ensure public safety do represent standards relevant in gauging due care, and "the criminal law builds reasonable expectations which should not be disappointed lightly."[96] In *Blueflame Gas*, the criminal statute represented a legislative determination that by adding a certain amount of ethyl mercaptan to propane gas,[97] propane suppliers would adequately safeguard the public interest. The alleged negligent act, failure to properly odorize gas, coincided exactly with the threat to safety which the statute presumably sought to prevent. Where the two are so closely aligned, conformance with a criminal statute should not be wholly excluded from evidence at trial.

d. *Regulatory compliance and punitive damages.* Common product liability actions also introduce problems of punitive damages. While in simple accident cases defendants universally lack the culpable intent that would trigger punitive damages in tort, such intent may come into play where one knowingly manufactures a dangerously defective product. For instance, in *Gryc v. Dayton-Hudson Corp.*,[98] a four-year-old child suffered severe burns when her "flannelette" pajamas caught fire as she reached over the lighted burner of a stove. Requesting both compensatory and punitive damages, the plaintiffs contended that the cotton flannelette was unreasonably dangerous for use in children's sleepwear because of its highly flammable characteristics, and that alternatives to the fabric were readily avail-

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[95] *Id.* at 590–91.

[96] Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COLUM. L. REV. 21, 44 (1949)

[97] *See supra* note 92.

[98] 297 N.W.2d 727 (Minn.), *cert. denied*, 449 U.S. 921 (1980).

able.[99] In response, the defendant textile manufacturer maintained that it had complied with applicable federal safety standards of product flammability.[100]

These safety standards were quite lax,[101] and in determining a fabric's safety they did not take into account the uses to which a fabric would be put.[102] Additionally, legislative history made clear that Congress passed the standards in order "to protect the public against certain highly flammable synthetic products, not all unreasonably dangerous clothing."[103] Thus, the court in *Gryc* looked to Congressional intent, the structure and scope of the statute, and the practical unreliability of the act in holding that state compensatory tort damages could be awarded although defendant's fabric complied with the statute.[104]

Against this loose regulatory background, the *Gryc* court considered whether defendant's compliance with the federal safety statute barred the state from awarding punitive damages. The defendant textile manufacturer contended that even if its compliance with the applicable safety standard did not shield it from all tort liability, such compliance precluded, as a matter of law, a finding of the guilty state of mind requisite to a punitive damages award.[105]

In ruling that the plaintiff could recover punitive damages, the court cited several factors. First, because the trial court found ample evidence that the defendant knew that the safety standards were unreliable, and that its cotton flannelette product was extremely dangerous, any reliance by the manufacturer on the statute was not taken in good faith.[106] Second, legislative

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[99] *Id.* at 730.

[100] *Id.* at 733.

[101] A piece of newspaper passed the federal flammability test with a forty-eight percent margin of safety. *Id.* at 734.

[102] *Id.*

[103] *Id.* at 734 & n.4, citing 1953 *U.S. Code Cong. & Admin. News* 1723, which notes that

> Congress enacted the . . . Act . . . to protect the public from newly introduced highly flammable clothing, including "torch sweaters" and certain children's cowboy chaps . . . . These fixed standards were stringent enough to halt the marketing of the . . . clothing noted above, but did not affect the marketing of most . . . articles of clothing that were then—and are still now—commonly in use.

[104] For factually similar cases, see also LaGorga v. Kroger Co., 275 F. Supp. 373 (W.D. Pa. 1967) (refusal to grant judgment n.o.v. for defendant where the jury awarded damages for burns due to a jacket that both parties stipulated was not in violation of 15 U.S.C. § 1191); Ingalls v. Meissner, 11 Wis.2d 371, 105 N.W.2d 748 (1960) (sustained recovery in tort suit for burns where the fabric met federal flammability standards).

[105] 297 N.W.2d at 733.

[106] *Id.* at 733–34.

history indicated that Congress, through the Flammable Fabrics Act, only "intended to preempt inconsistent state statutory enactments rather than all state laws."[107] Third, the statute was general in nature and no regulations concerning private civil remedies were ever promulgated under the Act, establishing that statutory control of flammable fabrics was neither pervasive nor detailed.[108] Fourth, the Act did not deal "with an area of traditional federal concern."[109] Finally, the *Gryc* court pointed to a "vital state interest of protecting persons against personal injury," especially in cases of willful or reckless manufacture of "dangerously flammable fabric for use in children's sleepwear."[110]

One may thus derive two general principles from *Gryc*. First, a defendant may be liable in tort for manufacturing a defective product which complies with applicable safety regulations that by nature are lax, ineffective, and intended to govern products materially different than those presented to the court.[111] Second, a court may award punitive damages even where a defendant pleads full compliance with applicable safety statutes as proof of due care.[112] Such an award of punitive damages, however, should not extend to cases where the manufacturer has complied with government standards intended to provide some general standard of reasonable action. Especially where most manufacturers in an industry have come to adopt a regulation as the

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[107] *Id.* at 736.

[108] *Id.* at 738.

[109] *Id.*

[110] *Id.* at 737.

[111] For an earlier tort suit against the same manufacturer of flannelette on almost identical facts, see Raymond v. Reigel Textile Corporation, 484 F.2d 1025 (1st Cir. 1973). In holding that the Federal Flammable Fabrics Act did not preclude an award of civil compensatory damages, the *Raymond* court relied on the fact that the Act did not itself provide for private civil remedies. *Id.* at 1028.

[112] *Gryc*'s holding that punitive damages may be awarded in the face of a defendant's regulatory compliance finds support in Dorsey v. Honda Motor Co., 655 F.2d 650 (5th Cir. 1981), where the plaintiff alleged that Honda had defectively designed its small, lightweight automobiles. Specifically, when plaintiff's Honda collided with another vehicle, a post supporting the windshield collapsed, the driver's seat came off its track, and the seatbelt failed. In finding that plaintiff could recover punitive damages, the *Dorsey* court held that Honda's compliance with federal safety standards did not negate a finding of recklessness as a matter of law. *Id.* at 656.

In so holding, *Dorsey* noted that the Federal Motor Vehicle Safety Act itself provided that compliance with federal regulations did "not exempt any person from any liability under common law," and determined that this reference to common law included its provisions for punitive damages. *Id.*, quoting 15 U.S.C. § 1397(c). Moreover, the court found that no statutory provisions cited as complied with by Honda specifically regulated the strength of the collapsed post or the overall ability of the passenger compartment to protect occupants in a crash. *Id.* at 656–67.

proper safety norm, proof of compliance ordinarily should be deemed conclusive proof of good faith and thus a conclusive defense to a punitive damages claim.[113]

In sum, judicial treatment of regulatory compliance in actions alleging defective design parallels that applied in the simple accident cases from which the doctrine of regulatory compliance emerged. However, courts perhaps have acted too broadly in extending to defective design cases their distrust of regulatory compliance as proof of due care. Where applicable regulations establish detailed specifications for product design, compliance generally should establish a defendant's exercise of due care.[114] Even where a statute imposes criminal sanctions, compliance with it should carry some weight in determining whether the manufacturer exercised due care in designing a product.[115] And, finally, regulatory compliance should in most cases bar an award of punitive damages against a manufacturer.[116]

2. Inadequate Warning

Products liability actions charging inadequate warning, rather than defective design, present issues of regulatory compliance more troubling than those previously discussed. In such cases, a defendant often will have printed on the label of its product the exact words of a warning mandated by statute and in the particular size and manner statutorily required for the specific type of product sold. Alternatively, a regulatory agency may have expressly approved the exact label used by the manufacturer. In other words, statutes and administrative decisionmaking leave some defendants with little choice when designing product labels. Following the traditional analysis of regulatory compliance, nevertheless, courts have freely imposed common law tort liability on defendants in compliance with the relevant statute.

For instance, in *Hill v. Husky Briquetting Inc.*[117] a child died when charcoal briquettes were used to heat his bedroom at night. The bag of briquettes bore at the bottom of both sides

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[113] *See* Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 41–42 (1982).

[114] *See supra* text accompanying notes 81–83.

[115] *See supra* text accompanying notes 91–97.

[116] *See supra* text accompanying notes 98–113.

[117] 54 Mich. App. 17, 220 N.W.2d 137 (1974), *aff'd*, 223 N.W.2d 290 (1975).

the legend, "CAUTION—FOR INDOOR USE—COOK ONLY IN VENTILATED AREAS." These were the words expressly required by New York statute,[118] and thus were used by most charcoal manufacturers. No other precautionary words or symbols appeared on the bag.[119]

Holding that the statute merely set a minimum standard for labelling, the *Hill* court asserted that the common law at times imposes a higher general duty than that imposed by statute.[120] Although the charcoal manufacturer had complied with the average standard in the industry, it had not discharged its duty to make a statement adequate under the facts of this case.[121] Impliedly, the court required the manufacturer to add warnings to its product beyond those which the legislature deemed necessary to protect consumers from improper indoor use.

More notorious examples may be drawn from suits by agricultural workers against the manufacturers of poisonous herbicides. In *Ferebee v. Chevron Chemical Co.*,[122] a worker contracted pulmonary fibrosis as a result of long-term skin exposure to the herbicide paraquat. The manufacturer, Chevron, contended that because paraquat was sold only when accompanied by a label approved by the Environmental Protection Agency (EPA), a state jury should not be allowed to find that label inadequate. To support its position, Chevron cited a section of the governing Federal Insecticide, Fungicide, and Rodenticide Act[123] (FIFRA), which provides that a state "shall not impose or continue in effect any requirements for labeling . . . in addition to or different from those required under this subchapter."[124] Chevron thus argued that EPA approval of the label required a jury to find the label adequate, and that federal law preempted

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[118] The New York statute provided that

> charcoal briquettes . . . shall be plainly and conspicuously marked to show the net quantity of the contents in letters and figures commensurate with the size of the container as shall be determined and fixed by the commissioner of agriculture and markets, and shall also bear the legend "*Caution—For Indoor Use Cook Only In Properly Ventilated Areas*," or a substantially similar legend as may be approved by the commissioner, in a size commensurate with the size of the container and so placed on the container as shall be determined and fixed by the commissioner.

220 N.W.2d at 138 n.3, quoting 1966 N.Y. Laws 569.

[119] *Id.* at 138.

[120] *Id.* at 139.

[121] *Id.* at 139–41.

[122] 736 F.2d 1529 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1062 (1984).

[123] 7 U.S.C. § 136 (1982).

[124] 7 U.S.C. § 136v(b) (1982).

state tort law.[125] In other words, Chevron objected to an allegedly inconsistent system of dual regulation of its labelling, which involved both express regulation by federal statute and implied regulation through state damage actions.

In an opinion remarkable for its extended analysis of regulatory compliance, the *Ferebee* court rejected Chevron's contentions. The court held that the EPA's approval of Chevron's label as adequate for the discrete purposes of FIFRA was independent of whether the label was adequate for purposes of state tort law as well.[126] The court reasoned that while FIFRA was aimed at ensuring that paraquat as labelled did not produce "unreasonable adverse effects on the environment," state tort law pursued broader compensatory goals. The court reasoned that the state, through its jury, might strike a different balance than did the EPA in weighing personal health risks against the benefit to society of using the chemical.[127]

The court asserted that even if federal regulation prevented Chevron from altering its label, the state tort verdict merely imposed on Chevron the duty to compensate plaintiffs for injuries resulting from the use of the chemical. While the court allowed that this burdened the sale of paraquat in Maryland, it found that such state tort liability did not amount to a direct regulatory command to change Chevron's label.[128] As a general matter, then, *Ferebee* holds that federal law poses no barrier to a state's ability to restrict the use of a product by requiring that the manufacturer compensate victims for injuries resulting therefrom.[129]

The court in *Ferebee* grounded its holding on three factors. First, the applicable statute did not expressly preempt state damage actions,[130] but instead only precluded states from di-

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[125] 736 F.2d at 1539.

[126] *Id.* at 1540. For a less sophisticated opinion with facts nearly identical to those in *Ferebee*, see Hubbard-Hall Chemical Co. v. Silverman, 340 F.2d 402 (1st Cir. 1965). The plaintiff Puerto Rican farm laborers in *Hubbard-Hall* did not read English, and thus when using the insecticide Parathon could not read its label, which was approved by the U.S. Department of Agriculture under FIFRA. The First Circuit held that agency approval did not preclude a state court from finding Hubbard-Hall liable in negligence for not using a skull-and-crossbones or other graphic representation to indicate the dangerousness of the insecticide. *Id.* at 405.

[127] *See* 736 F.2d at 1540.

[128] *Id.* at 1541.

[129] *Id.*

[130] Under the Supremacy Clause, a federal enactment or legislative scheme may preempt state statutory and common law by (1) express statutory provision, (2) congressional intent to occupy the field, or (3) where a conflict between federal and state statutes places the state statute in an unconstitutionally obstructive position. *See* Fidelity Federal Savings and Loan Assn. v. de la Cuesta, 458 U.S. 141, 152–53 (1982);

rectly ordering changes in labels approved by the EPA. Second, compliance with both state and federal law was possible; Chevron could continue use of its EPA-approved label while paying out damages to tort victims or could petition the EPA to approve an appropriate change in paraquat labelling. Finally, the purposes of FIFRA were not stymied by state tort actions, because FIFRA set only a floor of safe conduct. To find otherwise, *Ferebee* would require a clear statement on the face of the statute that its standards established a limit on the ability of the states to protect their citizens. FIFRA did not contain any such clear statement of congressional intent. Instead, FIFRA was designed to protect pesticide users with the force of both federal and state law acting in concert.[131]

The *Ferebee* court also cited two general policy considerations in upholding dual administrative and common law regulation of paraquat. First, state tort suits would unearth information not previously available to the EPA, better enabling the agency to fulfill its statutory charge to regulate pesticide labelling. Second, the specter of liability in tort would provide an incentive to manufacturers to better keep abreast of all possible injuries stemming from the use of its products.[132] These two policy arguments extend far beyond the facts of *Ferebee* to justify dual administrative and tort regulation of all forms of conduct over which a federal or state agency has jurisdiction.

Ferebee thus goes extraordinarily far to uphold a system of dual regulation of product labelling. It follows the traditional view that legislative enactments prescribe only a minimum standard of care. But it further suggests that state tort liability can be imposed on the manufacturer for not making changes in the very warnings expressly required by regulation.[133] In the face

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see generally Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975).

Usually, preemption is invoked where a defendant has failed to comply with applicable federal law, and the defendant wishes to avoid further liability under state law. *See, e.g.*, Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 249 (1984), discussed *infra* note 159. For this reason, this Note does not delve into the arcana of preemption doctrine except in those few cases in which compliance with the preempting federal law serves to shield a defendant from all tort liability, such as in tobacco litigation.

[131] *Ferebee*, 736 F.2d at 1542–43.

[132] Id. at 1541–42.

[133] While the government tightly regulates the labels of some especially dangerous products such as pesticides, defendants in the vast majority of inadequate warning suits can point to no such extensive regulatory control.

For instance, in Jonescue v. Jewel Home Shopping Service, 16 Ill. App. 3d 339, 306 N.E.2d 312 (1974), an 18-month-old girl was injured when she drank from a bottle of cleaning fluid. The labels on the bottle contained no clear warnings that the cleaner would be harmful if swallowed. The labels identified the product as a concentrated,

of such liability, *Ferebee* allows only that a manufacturer may petition an agency to permit more detailed labelling on its product.[134] Indeed, the opinion recites no evidence indicating that the EPA's control over paraquat's labelling was exercised in ignorance of newly uncovered facts regarding the chemical or that the agency otherwise acted in a manner not well-considered. Defendant manufacturers have just cause to complain of contradictory dual regulation under such circumstances.

C. *Aircraft Crash Litigation*

Aircraft crash cases differ from specialized lawsuits alleging defective design, in that aircraft maintenance is subject to far more regulation. Before any airplane or helicopter model may be sold in this country, its design must be approved by the Federal Aviation Administration (FAA). Furthermore, no particular aircraft can fly without receiving a certificate of airworthiness from that agency.[135] Defendant aircraft manufacturers thus commonly argue in products liability suits that because the FAA has statutory authority[136] to set safety standards for air-

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heavy-duty cleaner effective against such difficult stains as crayon and heel marks, labelling which suggested that the product might be dangerous if ingested. On the other hand, the bottle had a colorful and harmless appearance, and included a statement that the product "was tested and approved by Jewel Homemakers Institute" and a guarantee which read "money back with a smile if not satisfied with this item." These statements, the court suggested, might lead the consumer to believe that the cleaner was relatively safe. 306 N.E.2d at 317.

Pleading regulatory compliance as a defense, the manufacturer relied on the conclusion of a report submitted to the U.S. Poison Control Center, which stated that the cleaning fluid was non-toxic according to the standards of the Federal Hazardous Labelling Act. *Id.* at 316, citing 15 U.S.C. § 1261. The court rejected this defense without analysis, stating simply that such compliance was not controlling in defining a defendant's common law liability for failure to warn. *Jonesque*, as an inadequate warning case, is similar to the simple accident cases which employ the traditional analysis of regulatory compliance announced in the RESTATEMENT (SECOND) OF TORTS. *See supra* text accompanying notes 53–59.

[134] *Ferebee*, 736 F.2d at 1541.

[135] *See* Wilson v. Piper Aircraft Corp., 282 Or. 61, 63, 577 P.2d 1322, 1324 (1978) (en banc).

[136] 49 U.S.C.A. app. § 1421 (West Supp. 1988) provides:

> (a) The Secretary of Transportation is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:
>
> (1) Such minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety . . . .

craft, the design of an aircraft certified by the FAA could not be dangerously defective.[137]

In the field of aircraft design, defendant manufacturers can argue that a lay jury is not qualified to handle highly technical questions of aeronautical design, an institutional incompetence argument not available to defendants who manufacture more commonplace products.[138] Additionally, problems of conscious product design are inherently unsuited to determination by courts.[139] Aircraft manufacturers therefore maintain that because of the unusual complexity of their product, these arguments should prevail when defending as reasonable the design of an aircraft.

Nevertheless, courts have universally held that compliance with FAA design standards does not shield an aircraft manufacturer from liability for negligent design.[140] In so holding, these courts rely on several factors. First, the relevant statute itself suggests that FAA standards are to be considered "minimum."[141] Second, legislative history does not indicate congressional intent that FAA approval of either the general model design or the airworthiness of the particular craft was meant to be a complete defense to a claim of civil liability for faulty design.[142] Finally, problems of aircraft design are not peculiar enough to remove them from the rules which govern more common cases of defective design; the level of technicality involved in aircraft design does not render a jury incompetent to evaluate its reasonableness.[143]

In considering these factors, the question arises: should compliance with intricate federal design regulations and successful FAA certification of a downed plane suffice to shield an aircraft

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[137] *See Wilson*, 577 P.2d at 1324 (alleging that faulty carburetor design allowed icing); Bruce v. Martin-Marietta Corp., 544 F.2d 442, 446 (10th Cir. 1976) (alleging improper design of seat fastenings and fire prevention features); Elsworth v. Beech Aircraft Corp., 147 Cal. App. 3d 384, 195 Cal. Rptr. 226 (1983) (alleging faulty engine valve and tendency of airplane to stall and spin), *vacated*, 37 Cal. 3d 540, 208 Cal. Rptr. 874 (1984); Berkebile v. Brantly Helicopter Corp., 219 Pa. Super. 479, 281 A.2d 707 (1971) (alleging defective autorotational design).

[138] *Wilson*, 577 P.2d at 1326.

[139] *See id.*; *see also* Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973); Henderson, *Design Defect Litigation Revisited*, 61 CORNELL L. REV. 541 (1976).

[140] *Elsworth*, 195 Cal. Rptr. at 230; *Wilson*, 577 P.2d at 1325; *Bruce*, 544 F.2d at 446; *Berkebile*, 281 A.2d at 710.

[141] *See supra* note 136.

[142] *See* 1958 U.S. CODE CONG. & ADMIN. NEWS 3741.

[143] *See Wilson*, 577 P.2d at 1326.

manufacturer from tort liability? One commentator convincingly argues that compliance with federal crashworthiness regulations should carry very little weight because the FAA has been lax in updating them, despite dramatic overall improvements in the state-of-the-art safety features available to aircraft makers.[144] Generally, tort remedies should not be supplanted by the force of regulations which dictate a standard of care now antiquated. Therefore, courts have acted sensibly in not deferring to manufacturers' compliance with federal air safety regulations.

D. *Pharmaceuticals Litigation*

The production and distribution of pharmaceuticals in some ways resembles the manufacture of aircraft. Before a drug may be sold in this country, it must undergo extensive testing by the Food and Drug Administration (FDA), which, prior to approving a drug, reviews data and pharmacological studies developed during testing.[145] Both the drug and its label must pass such inspection. Approved labels must universally carry appropriate warnings and list certain adverse effects which were noted during testing. Moreover, the principles of chemistry and biology underlying the medical decisionmaking with regard to drug production and labelling may be viewed as beyond the ken of a lay jury.

One might argue that a drug, labelled with appropriate warnings, approved by the FDA, and marketed properly under federal regulations, is, as a matter of law, a reasonably safe prod-

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[144] Dillingham, *Crashworthiness FARs and the Effect of Compliance in Products Liability Actions Involving Airplanes*, 33 FED'N. INS. COUNS. Q. 55, 64–65 (1982) quoting National Transportation Safety Board, *Safety Report — the Status of General Aviation Crashworthiness*, NTSB-SR-80-2 at 26 (1980) ("[T]he standards for general aviation aircraft have changed little since . . . 1950. This contrasts greatly with the advancements made in state-of-the-art through extensive studies and reasearch projects, many of which were conducted by or for the FAA") and National Transportation Safety Board, *Cabin Safety in Large Transport Aircraft*, NTSB-AAS-81-2 at 31 (1981) ("regulations and standards governing crashworthiness of cabin furnishings have not been upgraded for about 30 years"); *cf.* Foss & Tepper, *Fire Safety in Transport Category Aircraft: Litigating a Post-Crash or In-Flight Aircraft Fire*, 49 J. AIR L. & COM. 801, 809 (1984) (noting that an airline as common carrier owes passengers the highest degree of care and that compliance with Federal Aviation Regulations does not necessarily shield an operator from liability).

[145] 21 U.S.C. § 355 (1982); 21 C.F.R. § 314 (1988).

uct.[146] If such were the rule, a claimant would have to demonstrate that a drug was manufactured or labelled in a fashion inconsistent with prior FDA approval in order to recover against a pharmaceutical manufacturer in tort or for breach of warranty. Alternatively, an injured plaintiff could subject a drug manufacturer to liability by demonstrating that the manufacturer submitted fraudulent data to the FDA. In the spirit of tort reform, at least one state legislature has amended its products liability statute to embody this principle with respect to grants of punitive damages.[147]

The majority of courts, nonetheless, have found compliance with federal regulations and FDA approval of a drug insufficient to shield a drug manufacturer from liability. In *Stevens v. Parke, Davis & Co.*,[148] plaintiffs brought a wrongful death action on behalf of a patient who suffered from bone marrow failure after treatment with Chloromycetin, a broad-spectrum antibiotic. The FDA had previously allowed the drug to be sold after directing Parke, Davis, the manufacturer, to include a warning on each label of the drug which read: "Warning—Blood dyscrasias [disorders] may be associated with intermittent or prolonged use. It is essential that adequate blood studies be made."[149] Parke, Davis also distributed "Dear Doctor" letters to the medical profession summarizing the results of the FDA investigation of the drug.[150]

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[146] One case so held, only later to be overruled. In Lewis v. Baker, 243 Or. 317, 324, 413 P.2d 400, 404 (1966) (en banc), the Oregon Supreme Court concluded that "a drug, properly tested, labeled with appropriate warnings, approved by the Food and Drug Administration, and marketed properly under federal regulation, is, as a matter of law, a reasonably safe product." In later overruling *Lewis*, the same court held that "the warnings given by an ethical drug manufacturer may be found inadequate, '[a]lthough all of the government regulations and requirements have been satisfactorily met in the production and marketing of [the drug], and in the changes made in the literature . . . .'" McEwen v. Ortho Pharmaceutical Corp., 270 Or. 375, 398, 528 P.2d 522, 534 (1974), *quoting* Yarrow v. Sterling Drug, Inc., 263 F. Supp. 159, 162 (D.S.D. 1967), *aff'd*, 408 F.2d 978 (8th Cir. 1969). *McEwen* futher noted that the FDA's policy was to forego any action against drug manufacturers who made needed additions or deletions to their labelling or advertising prior to securing formal written approval by the agency. 528 P.2d at 534. Therefore, FDA regulations did not prevent drug companies from making changes regarded as essential to protect the consumer. One could easily argue, however, that the FDA approval at issue in *McEwen* and *Lewis* nevertheless did establish a reliable objective standard for "reasonable care."

[147] *See* OHIO REV. CODE ANN. §§ 2307.76(C), 2307.80(C) (Anderson Supp. 1988).

[148] 9 Cal. 3d 51, 507 P.2d 653, 107 Cal. Rptr. 45 (1973) (en banc).

[149] 507 P.2d at 655. The label also referred to an insert in the drug's box which contained further details on possible side effects. Only the pharmacist, and not the prescribing doctor, had access to this more informative warning. *Id.* at 655–56.

[150] *Id.*

Despite such precautions, the *Stevens* court held that a jury could find Parke, Davis negligent for overpromoting the drug. It reasoned that the warnings required by the FDA were only minimal. The court stated that when a manufacturer or supplier knew, or had reason to know, of greater dangers not included in its warning, use of an FDA-approved label alone might not fulfill its duty to warn.[151] In this case, advertisements and calendars distributed by Parke, Davis were found to constantly remind doctors of the effectiveness of Chloromycetin without mentioning its dangers.[152]

The court in *Stevens* held Parke, Davis liable because its nonlabel promotional material did not adequately warn of possible side effects. Unlike the drug's label, this promotional material was not closely regulated by the FDA. In order to honor regulatory compliance as a defense to tort liability, a court should ensure that the regulation complied with is in fact tied to the injury at issue. Because the consumer did not claim injury caused by FDA-approved labelling, it was entirely proper for the *Stevens* court to allow plaintiffs' recovery.

Other courts have held simply that FDA certification represents only the FDA's opinion, albeit an informed one, of the safety and efficacy of a drug. "Despite the FDA's best efforts, negligently designed drugs may and apparently do sometimes reach the market. Nothing in federal statutory or regulatory law indicates that the FDA certification intends to preclude allegations of negligence in these cases."[153] These courts would generally find FDA approval of a drug as evidence, but not conclusive evidence, of a drug manufacturer's reasonableness. This view of regulatory compliance is perfectly consistent with that favored by the Second Restatement of Torts.[154] The perspective of the Second Restatement, however, is based upon the simple statutory schemes and railroad crossing accidents of the nineteenth century.

Courts' unwillingness today to defer to the judgment of the FDA in areas of drug labelling and composition is unwarranted.

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[151] *Id.* at 661.

[152] *Id.* at 662.

[153] Toner v. Lederle Laboratories, 112 Idaho 328, 342 n.12, 732 P.2d 297, 311 n.12 (1987); *see also* Salmon v. Parke, Davis & Co., 520 P.2d 1359, 1362 (4th Cir. 1975) (alleging overpromotion and failure to adequately warn of the hazards of Chloromycetin).

[154] RESTATEMENT (SECOND) OF TORTS § 288C; *see supra* text accompanying notes 53–59.

In gauging the safety of any particular drug, the FDA possesses indisputable competence in balancing societal benefits derived from the use of a drug against attendant safety risks. The FDA simply knows more—it benefits from the expertise of a trained and experienced staff as well as from its careful and well-established processes for evaluating the efficacy of proposed drugs. And although the FDA exercises authority over numerous products, each drug is fungible and thus possesses nothing akin to the unforeseeable "extraordinary hazards" which in the past have been doctrinally required to subject a defendant to tort liability.[155] Furthermore, the FDA is intimately familiar with the unique drug distribution network and the special role that doctors and pharmacists play in both advising patients regarding harmful side-effects and in limiting public access to drugs. In such an environment, lay opinions as to the reasonableness of product labelling are likely to be misguided. Finally, the FDA enjoys a powerful statutory mandate to prevent unsafe pharmaceuticals from reaching the marketplace; the actions of courts in assessing tort liability against manufacturers would seem merely to duplicate the role. Therefore, the case against dual control of pharmaceutical production by both the FDA and the tort system seems strong indeed. Only where a manufacturer has defrauded the FDA, or has through negligence misproduced a drug so as to materially differ from the FDA-approved composition, should a drug manufacturer be subject to tort liability.[156]

E. *Nuclear Power Lawsuits*

Nuclear power plants present an even stronger case for allowing regulatory compliance to stand as a complete defense to allegations of negligence, because nuclear facilities are subject to licensing and extensive regulation by the Nuclear Regulatory Commission (NRC) pursuant to the Atomic Energy Act.[157] Nu-

[155] *See supra* text accompanying notes 33–34, 56–57.

[156] Such an innovation would dictate provision of some type of social insurance for the victims of harmful drugs in order to further the compensatory goals of the tort system. *See* Pierce, *Encouraging Safety: The Limits of Tort Law and Government Regulation*, 33 VAND. L. REV. 1281, 1320–21 (1980).

[157] 42 U.S.C. §§ 2011–2296 (1982).

clear power is a field both highly technical[158] and unusually charged with political considerations; the construction of any plant is preceded by years of public hearings.

Because of the pervasiveness of this scheme of regulation and its attendant need for national uniformity, the Atomic Energy Act generally preempts states from regulating, and state courts from adjudicating, all matters which deal with dangerous radiological hazards.[159] It is now well established that "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States."[160] Such a general preemptive effect[161] is not granted to regulation by the FAA and the FDA in the aviation and pharmaceutical lawsuits discussed above.

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[158] *See* H.R. REP. No. 1125, 86th. Cong., 1st. Sess. 3 (1959) ("the technical safety considerations are of such complexity that it is not likely that any State would be prepared to deal with them during the foreseeable future").

[159] *See* Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 249 (1984). While the celebrated *Silkwood* case concerns in general the federal preemption of punitive damages in tort actions, it is not directly apposite to the question of whether compliance with federal nuclear regulation presents a complete defense against claims of negligence. In *Silkwood*, a plant worker was exposed to plutonium; evidence was ambiguous whether the defendant had complied with governing regulations. *Id.* at 241–44. The jury returned a verdict in favor of the plaintiff and awarded $505,000 in actual damages and $10 million in punitive damages. *Id.* at 245. On certiorari, the defendant contended that because a state-authorized award of punitive damages punishes and deters conduct related to radiation hazards, it falls within a broad prohibited field preempted by the Atomic Energy Act. *Id.* at 249. Under traditional preemption analysis, the Supreme Court rejected this claim and stated that paying "both federal fines and state-imposed punitive damages for the same incident would not appear to be physically impossible. Nor does exposure to punitive damages frustrate any purpose of the federal remedial scheme." *Id.* at 257. While this language is broad enough to sanction the award of punitive damages against a nuclear facility that had complied with federal regulations, the issue presented by *Silkwood* is formally not whether a defendant may plead regulatory compliance in order to escape punitive damages, but instead whether a state may impose punitive damages despite the preemptive effect of the Atomic Energy Act where the defendant has violated applicable regulations.

See generally Smith, *Silkwood v. Kerr-McGee Corp.: Preemption of State Law for Nuclear Torts?*, 12 ENVTL. L. 1059 (1982); Note, *Federal Preemption, Punitive Damages, and the Nuclear Tortfeasor*, 33 KAN. L. REV. 123 (1984); Note, *Federal Preemption: State Law Principles of Strict Liability in a Nuclear Accident—A Preemption Problem in Light of the Price- Anderson Act?*, 6 U. DAYTON L. REV. 279 (1981).

[160] Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190, 212 (1983).

[161] Two exceptions exist to the general preemptive effect. First, the 1957 Price-Anderson Amendment to the Atomic Energy Act, 42 U.S.C. § 2210, allows states to adjudicate tort claims stemming from a "nuclear incident." Such incidents, like that which occurred at Three-Mile Island, are obviously rare. Second, under the Atomic Energy Act the individual states retain their traditional responsibility to regulate electrical utilities for determining economic questions of need, reliability, and cost. *Pacific Gas & Electric Co.*, 461 U.S. at 205. This exception allows for some legislative state action but has no bearing on private tort suits.

Even where plaintiffs claim in tort for the apparently nonradiological hazards which are posed by nuclear plants, such as environmental damage stemming from warm water discharge, common law courts are unlikely to allow recovery where the defendant power plant has complied with federal regulations. The basic nuisance suit represents the legal action most commonly launched against a nuclear facility. In such cases, plaintiffs repeatedly charge that nuclear plants unlawfully alter the surrounding environment by discharging warm water into nearby rivers, lakes, or pools.

For instance, in *State v. Jersey Central Power & Light Co.*,[162] a state environmental agency sued the operator of a nuclear power plant for killing fish when warm water discharge from the plant lured fish during winter to stay in water that would otherwise have been cold. The fish died when the plant was temporarily shut down.[163] Noting that the shut-down was a requirement included in the plant's license, the court held the state interference to be impermissible, "whether by statutory penalty, injunction or monetary damages, with . . . facets of nuclear power generation, [the] regulation of which has been vested exclusively with the [NRC]."[164] Courts thus generally will not award damages to tort claimants where to do so would indirectly regulate radiological hazards such as the waste discharge system of a reactor.[165]

That the operator of a nuclear power plant is usually shielded from tort liability by complying with federal regulation is not troubling. The case for federal preemption here is strong and accords with common sense: the governing regulation is pervasive, detailed, well-considered, and constantly updated. Su-

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[162] 69 N.J. 102, 351 A.2d 337 (1976).

[163] *Id.* at 108–09, 351 A.2d at 340–41.

[164] *Id.* at 114–15, 351 A.2d at 344.

[165] *See also* Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd mem.* 405 U.S. 1035 (1972); Van Dissel v. Jersey Central Power & Light Co., 152 N.J. Super. 391, 377 A.2d 1244 (1977) (impermissible for tort claimant to collect for shipworm infestation of dock caused by nuclear plant's warm water discharge).

A minority view is expressed by Marshall v. Consumers Power Co., 65 Mich. App. 237, 260–64, 237 N.W.2d 266, 281–82 (1975), which invokes the state's police powers to find that it could grant damages for a non-radiological nuisance, arguing that the Atomic Energy Act allows the state to act in the interest of the health, safety and welfare of its citizens and that, "where, as here, coordinate state and Federal efforts exist within a complementary administrative and governmental framework and where both have the same objectives, the case for Federal preemption is not strong." 237 N.W.2d at 282. However, in *Marshall* the court held that while it had power to grant common law relief for environmental hazards, the plaintiff's allegations of nuisance were too speculative to warrant relief. *Id.* at 284.

pervision of nuclear power facilities by regulators is attentive and constant, and penalties for violations can be substantial. Finally, agencies benefit from trained personnel and well-tailored procedures. By contrast, the courts are burdened with a host of institutional limitations.

Suits involving nuclear power plants are interesting due to their demonstration of precisely how far issues of regulatory compliance have developed in the hundred years since the defense was first pleaded in simple railroad crossing incidents. The assumptions of the old doctrine simply do not fit well into environments regulated by statutes of extreme complexity, and the institutional limitations of the courts—limitations which had no reason to surface a hundred years ago—today loom large in determining whether tort liability should exist alongside the penalties imposed by regulators.

F. *Tobacco Litigation*

In many ways, tobacco litigation is *sui generis*. As in the case of products liability actions against manufacturers of herbicides,[166] lawsuits against tobacco companies often allege inadequate warning. However, manufacturers of cigarettes successfully argue that because the dangers of tobacco have been widely known for decades, plaintiffs have assumed the risk of their smoking habits. Furthermore, cigarettes are inherently dangerous when used as intended.[167] This contrasts with products such as household cleaning fluids which are relatively harmless if used properly.[168]

In tort litigation, tobacco manufacturers sucessfully rely on their compliance with federal legislation which specifically regulates cigarette labelling. While this legislation is textually similar to that governing the labelling used by manufacturers of non-tobacco products, such manufacturers generally have been unable to use this regulation to shield themselves from tort liability. In tobacco tort litigation, nevertheless, courts using

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[166] *See supra* text accompanying notes 122–134.

[167] *Cf.* CAL. CIV. CODE § 1714.45 (West 1985 & Supp. 1988) (providing that manufacturer or seller is not liable in products liability action if the product is inherently unsafe, is known by the ordinarily consumer to be unsafe, and is a common consumer product such as tobacco, alcohol, castor oil, or butter).

[168] *See* Jonescue v. Jewel Home Shopping Service, 16 Ill. App. 3d 339, 306 N.E.2d 312 (1974), discussed in *supra* note 134.

preemption doctrine have universally refused to find inadequate the warnings appearing on cigarette packages. This judicial deference to legislative control perhaps can be attributed to the extraordinary degree of political attention devoted to the public debate on tobacco use and labelling.

For instance, in *Cipollone v. Liggett Group, Inc.*,[169] the U.S. Court of Appeals for the Third Circuit held that the Federal Cigarette Labeling and Advertising Act[170] (FCLAA) preempted state law damage actions that challenge either the adequacy of the warning on cigarette packages or the propriety of a manufacturer's actions in advertising and promoting its cigarettes.[171] The court further held that the FCLAA preempted any action which depended for its success on a determination that a cigarette producer bore a duty to provide a warning to consumers in addition to that required by statute.[172]

In finding this broad preemptive effect, the court ruled that the FCLAA neither expressly preempted state common law nor that the scheme created by the statute was "so pervasive" as to eradicate all of the Cipollone's claims.[173] Instead, the court held that the FCLAA represents "a carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the national economy."[174] This balance "would be upset by either a requirement of a warning other than that prescribed in [15 U.S.C.] section 1333 or a requirement or prohibition based on smoking and health 'with respect to the advertising or promotion' of cigarettes."[175] Therefore, to impose tort liability on tobacco manufacturers for inadequate warning would tip the balance struck by Congress in crafting the

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[169] 789 F.2d 181 (3d Cir. 1986).

[170] 15 U.S.C. §§ 1331–41 (1982 & Supp. I 1988).

[171] The plaintiff in *Cipollone* alleged that she developed lung cancer as a result of smoking cigarettes from 1942 to 1983. 789 F.2d at 183. The fourteen-count complaint set forth claims based on strict liability, negligence, breach of warranty and intentional tort. The plaintiff alleged that the defendant's cigarettes were unsafe and defective, that the defendant failed to properly warn consumers of the dangers of cigarettes, and that it negligently or intentionally advertised its products so as to make warnings required by the FCLAA meaningless. *Id.* at 184. On remand, the district court denied Liggett's motion for a directed verdict and held that on the evidence before it the jury could reasonably conclude that Liggett's activity prior to 1966, when the FCLAA was enacted, proximately caused plaintiff's injuries. Cipollone v. Liggett Group, Inc., 683 F. Supp. 1487, 1496–97 (D.N.J. 1988).

[172] *Cipollone*, 789 F.2d at 187.

[173] *Id.* at 185–86.

[174] *Id.* at 187.

[175] *Id.*, citing 15 U.S.C. § 1334.

FCLAA; allowing a state tort remedy would "conflict" with the federal act, a result prohibited by preemption doctrine.[176]

Courts giving the FCLAA preemptive effect rely on a number of factors in supporting this position. First, legislative history suggests that Congress, through the FCLAA, carefully balanced social benefits against potential safety risks. As is the case with actions against nuclear power producers,[177] courts are unwilling in this respect to second-guess Congress, especially as they are limited in expertise, burdened by rules of evidence, constrained by busy dockets, and do not possess the fact-finding machinery of the legislature. Second, the federal statute is thought to impose needed uniformity in regulating tobacco, a uniformity that individual courts are not wont to disturb. Finally, the FCLAA was the product of bitterly partisan infighting, and courts find it improper to intrude on this legislative debate.[178] Within the framework of regulatory compliance, tobacco litigation represents a special case. Where governing regulation—federal or state, formally preemptive or not—is so much the product of intense political debate, courts should not devalue that debate by subjecting regulated conduct to additional tort liability.

III. A Principled Approach to Regulatory Compliance

Specific issues of regulatory compliance are best resolved by attention to the context in which lawsuits arise. Workable rules as to the sufficiency of compliance may be adopted for broad catagories of cases such as vehicular accident suits[179] or pharmaceuticals litigation.[180] In most cases, a lawyer will not be able to use a client's regulatory compliance successfully to shield the client from tort liability as a matter of law. One may introduce into evidence the regulatory compliance of the defendant, and the jury will then assess the value of such compliance.[181] The leading exception to this pattern is where, as in nuclear power and tobacco litigation, a federal statute preempts all related state law.[182]

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[176] *Id.*
[177] *See supra* text accompanying notes 157–165.
[178] *See* Palmer v. Liggett Group Inc., 825 F.2d 620 (1st Cir. 1987).
[179] *See supra* text accompanying notes 68–77.
[180] *See supra* text accompanying notes 145–156.
[181] *See supra* text accompanying notes 66, 140, 153.
[182] *See supra* text accompanying notes 157–178.

At times, however, courts behave unpredictably. They will depart from the traditional rule as laid down by the Second Restatement of Torts[183] and invoke regulatory compliance as a complete defense in quite mundane tort cases having nothing to do with formal federal preemption. In such cases, the defendant must argue that:

(1) the event sued upon was commonplace;
(2) the applicable statute tightly regulated its conduct, and the statute specifically contemplated the nature or cause of the event; and
(3) the defendant was subject to broad political controls of the legislative or executive branch.

These elements provide the overall framework within which courts adjudge issues of regulatory compliance and from them one may derive informative general principles.

A. *The Nature of the Event*

Using a time-honored test, a court will likely accept regulatory compliance as a defense only where the event sued upon is so commonplace as to be within the contemplation of the governing regulation.[184] Where the event sued upon occurs in an environment free of extraordinary hazards, courts will in some circumstances hold the defendant free from negligence as a matter of law.[185] Conversely, where the event sued upon occurs as a result of an environment obviously unforeseeable or uncommon in character, compliance with applicable regulations will universally fail to shield a defendant from liability for negligence.[186]

By allowing regulatory compliance to stand as a defense only where legislators may foresee the particular circumstances giving rise to injury, courts implicitly recognize that legislative enactments are generally designed to control only a small number of the possible events which could lead to liability out of a class of environments. These courts effectively adopt a pre-

[183] *See supra* text accompanying notes 53–59.

[184] *See, e.g.*, Caviote v. Shea, 165 A. 788 (1933), discussed *supra* in text accompanying notes 36–45.

[185] *See, e.g.*, Leisy v. Northern Pacific Ry. Co., 230 Minn. 61, 40 N.W.2d 626 (1950) (at an unobscured countryside railroad crossing, compliance by railroad with statute suffices); *see also* text accompanying notes 70–79.

[186] Airplane crash litigation, with its innumerable complexities, presents an ideal example of the unforeseeable situations upon which liability may be predicated. *See supra* text accompanying notes 135–144.

sumption that a legislature or agency will not have acted so as to control anything out of the ordinary.

This presumption recognizes the different capabilities of courts and legislatures to exercise control efficiently over different types of events. While legislatures may broadly regulate the behavioral norm, courts adjudicate suits arising out of extraordinary circumstances.[187] Moreover, some types of environments are inherently susceptible to legislative control through rulemaking. For instance, the highly regimented environment of factory assembly lines allows regulators to foresee with precision the vast majority of accidents commonly arising out of that environment. In this extreme case, the worker's compensation system has entirely foreclosed judicial control over workplace accidents.[188] Importantly, however, even where certain types of accidents are so common as to be *scheduled* in the worker's compensation system, a factory's compliance with detailed workplace regulations will not prevent the employer from having to contribute to the insurance pool for claimants' recovery. This illustrates the manner in which the compensatory and deterrence goals of tort law may be bifurcated when a regulatory scheme displaces the traditional tort system. By analogy, where courts allow regulatory compliance to shield a defendant from paying damages in tort, some similar insurance scheme to provide compensation to those harmed must be available.

Some types of activity, on the other hand, seem best controlled by the judiciary alone through the common law or by a system of dual regulatory and tort control. For example, the judiciary may be the best forum for adequately adjudicating injuries arising out of medical care because such care is individualized and non-routine. The courts both control behavior by imposing liability after the fact and are sensitive to particular fact situations. Perhaps because of this, those injured during the delivery of medical care have been compensated through the tort law of medical malpractice and through broad social insurance programs. Apart from market controls,[189] the policing of medicine has been accomplished largely within the profession

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[187] *See generally* Shavell, *Liability for Harm Versus Regulation for Safety*, 13 J. LEGAL STUD. 357 (1984).

[188] *See* Friedman & Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 69–72 (1967).

[189] *See* Epstein, *Medical Malpractice: The Case for Contract*, 1976 AM. B. FOUND. RES. J. 87, 94–95, 126–28.

through peer review,[190] while government regulation has played a minor role. Given the weakness of regulations governing medicine and similar fields, courts should not honor a defendant's compliance with applicable regulations so as to supplant traditional tort remedies.

B. *The Nature of the Statute*

Regulatory compliance most often stands as a defense where the governing statute (1) tightly controls the defendant's conduct, (2) obviously reflects a careful balancing of the interests usually gauged in determining negligence at common law, and (3) carries substantial sanctions for failure to comply. The regulation of nuclear power plants stands at one end of a spectrum listing these factors, for the Atomic Energy Act is detailed and comprehensive, expressly notes its careful balance of concerns for public safety and cost, and carries heavy fines and injunctive penalties.[191] In lawsuits against nuclear power operators, courts thus defer to defendants' compliance with preempting federal statutes.

At the other extreme lies the regulation of automobile drivers and most product makers, which is general and carries only light sanctions.[192] Here, courts will allow regulatory compliance to stand as evidence of defendants' exercise of due care, but no more. In between these two cases, one will find the federal government's regulation of aircraft and pharmaceutical production.[193] The rules promulgated by the FDA, for example, are comprehensive and highly detailed, but they do not expressly represent a careful balancing of the public interest, and they usually do not impose sanctions beyond delaying the manufacture of a proposed product. Here, too, courts generally have allowed regulatory compliance to establish no more than evidence of reasonable care.

In the century since the broad common law rule of regulatory compliance was drafted, the complexity of much government regulation has increased dramatically. In regulating the rail-

[190] For one example of a state which, in reforming its tort law, has granted immunity from tort liability for those engaged in peer review, *see* MONT. CODE ANN. § 37-7-1101 (1987).

[191] *See supra* text accompanying notes 157–165.

[192] *See supra* text accompanying notes 36–45, 60–62, 78–113.

[193] *See supra* text accompanying notes 135–157.

roads, legislatures of the 1800's only sought to control a few of the aspects common to the great majority of railroad crossings, and in doing so mandated that railways use certain crossing guards and sound whistles in a specific manner.[194] Such statutes did not purport to control the behavior of the railroads in such a way as to preclude civil liability where a crossing was particularly dangerous owing to unusual terrain or to its situation in a highly populated area. The nineteenth-century legislature was probably unwilling to regulate in detail such extraordinary circumstances and was institutionally incompetent to foresee the vast majority of tort suits.

Today, however, regulations promulgated by administrative agencies are often more detailed than their historical counterparts. Regulations prescribe the exact words of caution to be used on a bag of charcoal or a package of cigarettes.[195] Automobile bumpers must be able to accommodate specified stresses, and years of animal and human testing precede the production of most drugs. Against such complex regulatory schemes, the rule that regulatory compliance cannot shield a defendant from liability seems archaic.

Thus, courts today will look to the face of a statute or to intent reflected by legislative history in order to determine whether the enactment should preclude compensatory or punitive damages at common law.[196] This approach once again is rooted in appreciation for the different institutional capacities of administrative agencies and courts. Thus, a court should look to the governing regulation to determine if the rulemaking process embodied the advantages of administrative control. While some rules testify to a thoughtful and comprehensive exercise of ongoing control by an agency or legislature, other regulations by their cursory nature or outdatedness suggest that the agency only wished to place an outer boundary on certain selected classes of heinous conduct, and not to supplant common law liability for any activity.[197] Tort reform legislation which fails to

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[194] *See supra* text accompanying notes 24–35.

[195] *See supra* text accompanying notes 118, 166–178.

[196] This question is distinct from that posed by the previous section. In asking whether an "event" sued upon is commonplace, one must determine whether it *could* have been foreseen by legislators. Here, we essentially look to see what events legislators *actually* contemplated. Although this latter question seems to supercede the former, it is the former which was explicitly used in the early railroad cases and codified in the RESTATEMENT (SECOND) OF TORTS § 288C (1964).

[197] *See supra* text accompanying notes 98–113.

recognize the different levels of complexity among relevant statutes, and which fails to mandate less deference to those statutory schemes relatively less developed, is overbroad.

C. *The Nature of the Defendant*

Finally, courts more often accept a defendant's regulatory compliance as a complete defense where the defendant is quasi-governmental or where its actions have been the object of charged political debate. Courts do not articulate their reliance on the nature of the defendant in gauging the effect of the defendant's regulatory compliance. This contrasts with courts' explicit analyses of both events sued upon and the complexities of governing regulations. Nevertheless, several opinions indicate that courts do in fact shield certain types of defendants from liability where other defendants would not enjoy such protection as a result of regulatory compliance.

Where a defendant is a quasi-governmental body, courts seem especially reluctant to impose liability on the defendant for negligence where it has complied with applicable regulations. Courts have traditionally declined to impose tort liability upon a defendant where to do so would impose a burden upon the coffers of the state treasury. States,[198] school districts,[199] and school bus companies[200] all seem to have relative success in using their compliance with government regulations as a defense against tort liability.

Similarly, where the defendant's conduct has been the object of sustained political debate, a court will likely be unwilling to

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[198] *See* Pickering v. State of Hawaii, 57 Haw. 405, 557 P.2d 125 (1976), where a state highway authority was found not negligent in its design of a median barrier which divided the portion of a highway in which an accident occurred. Although the court noted that the state's compliance with established statutory and administrative standards was not necessarily conclusive on the issue of negligence, the court placed great weight on the state's conformance with federal highway standards. *Id.* at 407–10, 557 P.2d at 127–28.

[199] *See, e.g.*, Jefferson County School Dist. R-1 v. Gilbert, 725 P.2d 774 (Colo. 1986) (en banc), discussed *supra* at text accompanying notes 69–78; *cf.* Kersey v. Harbin, 591 S.W.2d 745 (Mo. App. 1979), in which school officials were found possibly negligent in allowing a junior high school gym student under their supervision to injure another in a brawl, although the gym teacher was probably not in violation of state regulations setting the maximum size of the gym class. 591 S.W.2d at 750.

[200] *See* Josephson v. Myers, 180 Conn. 302, 429 A.2d 877 (1980), in which defendant school bus driver was found not negligent in supervising a child who was killed in an auto accident after the child alighted from a school bus. The court stressed that the bus driver had followed all statutory requirements for the safe discharge of passengers. 429 A.2d at 880 & n.4.

co-opt that debate. Both the nuclear power and the tobacco industries have been objects of such political debate, and in both cases courts are unwilling to augment the federal statutes they find preemptive with tort liability.[201]

These two exceptions to the general rule of regulatory compliance are related. In both, courts look to the nature of the defendant to determine if its role in the political process is such that additional judicial control is inappropriate. In many ways deference to political control of certain types of defendants is both legitimate and desirable. Under the doctrine of sovereign immunity, courts have traditionally declined to subject the states to tort liability absent consent.[202] Using the amorphous doctrine of justicability, courts have traditionally hesitated before intruding in fights between the legislative and executive branches.[203] Finally, courts touting "judicial restraint" refuse to alter the balances struck by the public through their representatives in the legislature. All of these doctrines seek to preserve the structural integrity of our complex governmental scheme, and implicitly accord special status to the regulatory compliance of defendants significantly affected by the political process.[204]

IV. Conclusion: Regulatory Compliance and Tort Reform

The common law of regulatory compliance, as stated in the Second Restatement of Torts, made sense fifty years ago. A defendant's compliance with regulations would not usually stand as conclusive evidence of reasonable care. At times, and only where the environment of an accident was free of extraordinary hazards, compliance with an enactment could shield a defendant from liability, if a court in its discretion so determined.[205]

This rule was laid out originally within the context of simple railroad and automobile accidents, which all shared a number of attributes. The accidents themselves were unpredictable, occurring on roads and crossings encompassing the varied terrains

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[201] *See supra* text accompanying notes 157–178.

[202] *See* U.S. Const. art. XI; Hans v. Louisiana, 134 U.S. 1 (1890).

[203] *See* Baker v. Carr, 369 U.S. 186 (1962).

[204] *But cf.* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 241 (1947) (Frankfurter, J., dissenting) (argues for the continued existence of state legislative control alongside possibly preemptive state regulation because of federalism concerns).

[205] *See supra* text accompanying notes 53–59.

of numerous locales. More importantly, the statutes governing the behavior of railroad companies and automobile drivers were cursory at best, and only prohibited the most egregious conduct. Finally, relatively little public comment accompanied the passage of the minimal regulations that controlled the transportation of the time.[206]

Courts now apply the traditional rules of regulatory compliance to a greater variety of cases. In products liability actions, whether the plaintiffs allege defective design or inadequate labelling, courts in most cases will still not consider a manufacturer's regulatory compliance as conclusive evidence of reasonableness.[207] Similarly, aircraft disasters,[208] as well as a never-ending onslaught of vehicular accidents,[209] continue to be decided under the old principles.

For the majority of these lawsuits, it seems appropriate to rely on the traditional rules of regulatory compliance. These actions possess the same attributes as did the old railroad accidents. The accidents sued upon—encompassing a multitude of products used in a multitude of ways—are complicated, varied and unpredictable. Regulations governing these modern torts are often spare, general, limited in scope, or outdated. Defendants in most of these actions are private parties and the acts for which they are being sued are far removed from the public sphere. In such cases, courts act wisely in admitting regulatory compliance only as evidence of reasonable care.

However, in the past few decades courts have also increasingly faced types of litigation in which these factors play little part. With nuclear power[210] and tobacco litigation,[211] courts have invoked the doctrine of federal preemption to supplant tort liability with regulatory remedies. With pharmaceutical[212] and herbicide production,[213] however, courts have maintained a system of dual control of manufacturers. In addition to strict regulatory control, these producers face the ongoing possibility of tort liability for negligence in design or labelling.

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[206] *See supra* text accompanying notes 24–35, 43–45.
[207] *See supra* text accompanying notes 78–97.
[208] *See supra* text accompanying notes 135–144.
[209] *See, e.g.*, Turner v. American Motors General Corp., 392 A.2d 1005, 1007 (D.C. App. 1978), discussed *supra* in 81.
[210] *See supra* text accompanying notes 157–165.
[211] *See supra* text accompanying notes 166–178.
[212] *See supra* text accompanying notes 145–156.
[213] *See supra* text accompanying notes 122–134.

In maintaining this system of dual control, courts apply the old principles of regulatory compliance somewhat too liberally. Attacks against pharmaceutical and herbicide manufacturers may allege inadequate labelling where an agency has prescribed the exact words of warning to be used on a product label.[214] Where an agency has mandated particular labelling in this way, one may assume that the producer has acted reasonably in using the agency-approved label. Where an agency has acted in a well-considered manner, there is a strong argument that a manufacturer which follows the standard approved by an agency has acted reasonably.

This system of dual regulations disturbs companies which perceive themselves unjustly liable in tort when in full compliance with complex government regulations. State legislators perceive a substantial increase in lawsuits arising from defective products, as well as escalating costs of product liability insurance.[215] And in this light they are enacting broad prophylactic legislation to change the old common law rules of tort liability. Legislators cap claimants' possible recovery for noneconomic pain and suffering losses at $500,000,[216] or they limit recovery in wrongful death actions to $1,000,000.[217] Short of any tie to the economic realities of individual cases, some of this legislation is almost certainly misguided.

Within some of these reform packages, legislators are reversing the presumption laid down by the old common law principles of regulatory compliance. Facially, these statutes require courts to adopt a rebuttable presumption that a manufacturer in compliance with applicable regulations is non-negligent.[218] These statutory presumptions pay no heed to the nature of underlying accidents, the complexity of the governing statute, or the identity of defendants.

As enacted, these reforms are too broad to be either helpful or meaningful. It is true that there is a genuine need to reverse the principles of statutory compliance in a small number of cases. A few industries are governed by regulatory schemes in

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[214] *See, e.g.*, Ferebee v. Chevron Chemical Co., 736 F.2d 1529 (D.C. Cir. 1984), discussed *supra* at text accompanying notes 122–134.

[215] *See, e.g.*, N.D. CENT. CODE § 28-01.1-01 (Supp. 1987) (declaration of legislative findings and intent of North Dakota products liability act).

[216] ALASKA STAT. § 09.17.010 (1983 & Supp. 1987).

[217] *See, e.g.*, ALA. CODE § 6-5-547 (1975 & Supp. 1987) (limits judgment in action against health care providers to $1,000,000).

[218] *See supra* text accompanying notes 20–22.

which the government has committed itself to an ongoing investment of considerable resources, and yet they face an unwarranted additional burden of tort liability. Pharmaceuticals may provide one example, where perhaps manufacturers should be deemed reasonable as a matter of law in the production and labelling of medicine pursuant to FDA approval.

The reform statutes, by contrast, comprehensively erect a rebuttable presumption of reasonableness whenever any producer complies with applicable regulations. Assuming a plaintiff in a products liability action will, as a matter of course, rebut defendant's claims of reasonableness, the statutes in their vagueness are unhelpful in listing factors which would give force to the presumptions they create. A reform statute which establishes a presumption that is defeated when "the claimant proves by a preponderance of the evidence that a reasonably prudent product seller could and would have taken additional precautions"[219] has too little content to pose any real danger to litigants. Meaningless to judges as well as litigants, such a presumption will surely be ignored.

In the end, issues of regulatory compliance are best approached through categorization of litigation. As automobile accidents are different from incidents at nuclear power plants, so to is pharmaceutical litigation different from claims against aerospace companies. Accidents engendering certain products liability suits are often alike. Governing regulation in individual fields is uniform in character. Certain areas of production are alone subject to extraordinary public scrutiny. Thus, tort reform legislation should create a strong presumption of non-negligence for manufacturers such as those selling FDA-approved drugs. A statute based on this type of categorical exclusion might read:

> **If a claimant alleges in a product liability claim that a drug caused harm to him or her, the manufacturer of the drug shall be deemed to have acted reasonably and in a manner not negligent in connection with that product liability claim if the drug that allegedly caused the harm was manufactured and labelled in relevant and material respects in accordance with the terms of an approval or license issued by the federal food and drug administration under the "Federal Food, Drug, and Cosmetic Act," 52 Stat. 1040, 21 U.S.C. 301–392, as amended, or the "Public Health Service Act," 58 Stat. 682, 42 U.S.C.**

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[219] KAN. STAT. ANN. § 60-3304 (1983 & Supp. 1987), quoted fully at *supra* text accompanying note 20.

> **201-300cc-15, as amended, unless it is established, by a preponderance of the evidence, that the manufacturer fraudulently and in violation of applicable regulations of the food and drug administration withheld from the food and drug administration information known to be material and relevant to the harm that the claimant allegedly suffered or misrepresented to the food and drug administration information of that type.**[220]

Alternatively, a model reform statute could guide courts by instructing them to presume reasonableness where certain criteria are met, and would allow courts to use discretion as they treat issues of regulatory compliance:

> **If a claimant alleges in a product liability claim that a product caused harm to him or her, the manufacturer of the product shall be presumed to have acted reasonably and in a manner not negligent in connection with that product liability claim if the product that allegedly caused the harm was manufactured and labelled in relevant and material respects in accordance with the terms, applicable codes, standards, and regulations adopted or promulgated by the United States or by this state, or by any agency of the United States or of this state. The tribunal adjudicating the action shall give relatively stronger force to this presumption where:**
>
> **(1) The accident or event sued upon possessed no extraordinary hazards which were not contemplated by governing codes, standards, and regulations;**
>
> **(2) The governing codes, standards, and regulations invoked under this section are by nature comprehensive, pervasive, and modern;**
>
> **(3) The liability of the defendant manufacturer in cases similar to the one sued upon is the subject of political debate and legislative control.**

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[220] This draft is modelled on OHIO REV. CODE ANN. § 2307.80 (Supp. 1987).

NOTE

MEDICARE'S END-STAGE RENAL DISEASE PROGRAM: ITS DEVELOPMENT AND IMPLICATIONS FOR HEALTH CARE POLICY

H. BRADLEY SOUTHERN*

Dialysis and kidney transplantation have been used in the United States since the 1960's as treatment for terminal kidney disfunction, a condition generally referred to as end-stage renal disease (ESRD). Dialysis and transplantation do not cure the condition, but they can prolong the lives of ESRD victims. Unfortunately, the cost of these treatments is enormous, and many patients find themselves unable to afford life-saving treatment. In order to solve this dilemma, Congress extended Medicare health insurance in the 1970's to fund almost 100% of ESRD treatment. No other terminal illness has received such funding.

In this Note, Mr. Southern addresses the economic and ethical aspects of the ESRD program. Efficiency and fairness issues are involved whenever scarce resources are allocated, but the issues are even more significant when large amounts of resources are funnelled to one program that benefits a relatively small group of people. Mr. Southern identifies some basic problems with the ESRD program and argues that they could have been avoided had policy makers confronted these issues from the beginning of the program. All major health care legislation will have to respond to such issues in the future. Mr. Southern considers a number of allocative approaches, argues that no one system is appropriate on its own, and suggests a multiple-criteria approach to the problem.

I. INTRODUCTION

End-stage renal disease (ESRD) is a general term that describes the permanent and irreversible breakdown of the human kidneys' blood-filtering functions. Left untreated, the condition is uniformly fatal.

The search for an understanding of the causes of chronic renal disease and the means to prevent it continues. No cure has yet been found,[1] but two proven forms of treatment, dialysis and kidney transplantation, have been available since the early 1960's. Both therapies prolong the lives of otherwise terminally-

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[1] SUBCOMM. ON HEALTH AND THE SUBCOMM. ON OVERSIGHT OF THE HOUSE WAYS AND MEANS COMM., 94TH CONG., 1ST SESS., BACKGROUND INFORMATION ON KIDNEY DISEASE BENEFITS UNDER MEDICARE 1 (Comm. Print 1975) [hereinafter BACKGROUND INFORMATION].

ill patients. The treatments are overwhelmingly expensive, however, far beyond the ability of most ESRD patients to pay. As a result, the United States by the early 1970's found itself with a medical crisis: technology had made possible treatments that would prolong the lives of terminally ill patients, but those treatments were inaccessible to most patients because of their costs.

Congress responded to this policy dilemma by enacting a program to extend Medicare health insurance coverage for end-stage renal disease to more than 90% of the U.S. population as part of the Social Security Amendments of 1972.[2] The program was refined in 1978 and 1981 with provisions designed to reduce costs and improve program administration.[3]

An analysis of Medicare's ESRD program is important for a number of reasons. The program is unique because it represents the first time a specific medical disease category has been isolated by the federal government for almost 100% federally-funded treatment.[4] Congress has chosen to fund no other disease category in this way. The factors that influenced legislators to select kidney disease over other disease categories should be understood.

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[2] Pub. L. No. 92-603, § 299I, 86 Stat. 1329 (1972) (codified as amended at 42 U.S.C. § 426-1 (1987)) [hereinafter the "1972 Amendment"]. The 1965 statute establishing Medicare provided health insurance coverage to Social Security beneficiaries over 65 years of age. Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (1965) (codified as amended at 42 U.S.C. § 1395 (1987)). Coverage for renal failure was included. To extend coverage to those not otherwise able to receive Medicare benefits, § 299I of the 1972 Amendments provided that every person under age 65 who was eligible for a monthly insurance benefit under Social Security would receive coverage for ESRD. These people are called "Section 299I beneficiaries." *See* BACKGROUND INFORMATION, *supra* note 1, at 2–3. Because approximately six to eight percent of the population is not covered by Social Security, the ESRD statute does not reach everyone. *Id.* at 4.

The Social Security Amendments of 1972, introduced as H.R. 1, consolidated 54 federal-state aid programs, streamlined Medicare and Medicaid, provided for health maintenance organizations (HMOs), and added various modifications to the social security benefit structure. *See* HEALTH CARE FINANCING ADMINISTRATION, IMPLEMENTING THE END-STAGE RENAL DISEASE PROGRAM OF MEDICARE 27 (1981) [hereinafter IMPLEMENTING THE ESRD PROGRAM]. For the bill as it came to the Senate floor, see SENATE COMM. ON FINANCE, SOCIAL SECURITY AMENDMENTS OF 1972, S. REP. NO. 1230, 92d Cong., 2d Sess. (1972).

[3] End-Stage Renal Disease Program Amendments of 1978, Pub. L. No. 95-292, 92 Stat. 307 (codified in scattered sections of 42 U.S.C. (1978)) [hereinafter the "1978 Amendments"]; Omnibus Budget Reconciliation Act (OBRA) of 1981, Pub. L. No. 97-35, 95 Stat. 799 (codified at 42 U.S.C. § 1395 and 26 U.S.C. § 162 (1981)).

[4] *See* Iglehart, *Funding the End-Stage Renal-Disease Program*, 306 NEW ENG. J. MED. 492, 492 (1982).

More generally, while medical advances have enabled physicians and surgeons to treat a host of life-threatening illnesses more effectively, the attendant costs of new therapies force society to confront two inescapable dilemmas. First, in a world of scarce resources, society must determine what portion of its resources it is willing to devote to health care rather than to other goods.[5] Second, even after an appropriate level of health care is found, society still must decide how to allocate its health care resources among competing treatments and patients.

This Note will address these issues as it examines the economic and ethical aspects of the ESRD program. It argues that difficulties faced by the program could have been avoided had a more structured, comprehensive approach to the problem of health care resource allocation been employed. The Note considers a number of allocation approaches and their ethical foundations. It argues that no single allocative system is sufficient and suggests a multiple-criteria approach. This Note does not attempt to determine whether national health insurance is wise or unwise. Rather, it asserts that when Congress legislates health care, it must address explicitly the tradeoffs involved and must not impulsively make promises it cannot keep.

II. Background on ESRD

Healthy kidneys perform several essential functions, the most important of which are ridding the body of metabolic waste products and regulating the composition of body fluids and electrolytes. ESRD, the failure of these blood-filtering mechanisms,[6] is fatal[7] unless the functions are restored through dialysis or kidney transplantation.

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[5] As the percentage of Gross National Product (GNP) represented by health care expenditure has risen, policy makers have begun to suggest that the maximum acceptable level may have been reached already. The *New York Times* expressed the resource allocation problem in 1973 as follows: "If a billion dollars has to go to prolonging the lives of thousands of kidney disease victims, that is a billion dollars that cannot go to eradicating slums, improving education or finding a cure for cancer." *Medicarelessness*, N.Y. Times, Jan. 14, 1973, at 16, col. 1.

[6] The most common diseases leading to ESRD are glomerulonephritis; interstitial nephritis, including pyelonephritis; hypertension; diabetes; and polycystic disease. *See Implementing the ESRD Program*, *supra* note 2, at 24.

[7] See Background Information, *supra* note 1, at 1. The human body adapts to low-level renal insufficiency very well, since good health can be maintained even if there is a 75% loss of kidney function. Late chronic renal failure is said to occur when the kidneys' blood-filtering capacity falls below 10% of its normal rate. The condition becomes terminal when filtration falls below approximately 5% of normal levels. *See*

Dialysis substitutes an artificial device for a natural kidney to filter wastes from blood.[8] Two general types exist: hemodialysis and peritoneal dialysis. In hemodialysis, the more widely used method,[9] an external kidney machine removes wastes before filtered blood is returned to the body. In peritoneal dialysis, filtration takes place entirely within the body.[10] The first artificial kidney machine was developed in the 1940's and was introduced into the United States in 1947.[11] Doctors soon discovered that dialysis must be performed frequently — typically three times a week[12] — and that repeated access to blood vessels is necessary for successful treatment. As a result, dialysis did not become widely used until 1960, when a permanently implanted subcutaneous cannulae-and-shunt apparatus, a device for repeated diversion of blood flow from the body, was developed.[13]

The other general treatment for chronic renal failure is kidney transplantation. The first human kidney transplant was performed in 1947, but the problem of immunologic rejection delayed the first success until 1956. Difficulties persisted until the early 1960's, when advances in immunology and the development of a number of immunosuppressive drugs for combatting kidney rejection permitted widespread transplantation.[14] Most

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Eggers, Connerton & McMullan, *The Medicare Experience with End-stage Renal Disease: Trends in Incidence, Prevalence, and Survival*, 5 HEALTH CARE FINANCING REV. 69, 69 (1984) [hereinafter *The Medicare Experience with ESRD*].

[8] Rettig, *End-stage Renal Disease and the "Cost" of Medical Technology*, in MEDICAL TECHNOLOGY: THE CULPRIT BEHIND HEALTH CARE COSTS? 88, 88 (1979) [hereinafter Rettig, *The "Cost" of Medical Technology*].

[9] Hemodialysis was used in approximately 87% of all dialysis cases in 1979. *The Medicare Experience with ESRD*, *supra* note 7, at 69.

[10] BACKGROUND INFORMATION, *supra* note 1, at 1. Peritoneal dialysis introduces a dialysate solution into the abdomen's peritoneal cavity. After wastes pass from the blood into this solution, the solution is drained. Intermittent Peritoneal Dialysis (IPD) is performed for a 10-hour period four times a week. A newer form of peritoneal dialysis, Continuous Ambulatory Peritoneal Dialysis (CAPD), maintains fluid in the body at all times. The fluid is changed daily. *See The Medicare Experience with ESRD*, *supra* note 7, at 69. CAPD is becoming increasingly popular, and most new dialysis patients receive this form of treatment. Telephone interview with Dolph Chinciano, National Kidney Foundation (Jan. 31, 1988).

[11] Rettig, *The "Cost" of Medical Technology*, *supra* note 8, at 89.

[12] *The Medicare Experience with ESRD*, *supra* note 7, at 69.

[13] The cannulae-and-shunt has been hailed as the critical technical invention making widespread dialysis possible. *See* Rettig, *The "Cost" of Medical Technology*, *supra* note 8, at 90. The first major facility to perform dialysis for patients, the Seattle Artificial Kidney Center, opened soon after the invention of the apparatus. Johnstone, *Justice and Cost-Containment in End-Stage Renal Disease*, 3 J. CONTEMP. HEALTH L. & POL'Y 65, 66 (1987).

[14] Rettig, *The "Cost" of Medical Technology*, *supra* note 8, at 92.

transplanted kidneys (roughly 70% in 1983) are received from cadavers, although only transplants from live donors have been shown to lengthen life.[15]

Determination of the appropriate treatment therapy for a given patient is complex. Relevant considerations include patient age, primary cause of renal failure, accompanying medical conditions, family support structure, and physician and patient preferences.[16] However, prior to the Social Security Amendments of 1972, the enormous costs associated with all ESRD treatments rendered them unreachable for many ESRD victims.

III. The Growth of Health Care Costs

Rising health care costs loom as one of the most important domestic problems of recent decades. In 1986, $458 billion, representing nearly eleven percent of the entire Gross National Product (GNP), was spent in the United States for health care.[17] Projections for 1987 predict an even larger $511 billion, constituting 11.4% of the GNP and a greater than 10% increase over 1986.[18] The level of health care spending has grown steadily and rapidly, with the projected 1987 amount more than 12 times the $41.9 billion spent in 1965.[19] The growth rate was 8.4% in 1986, up from 8.1% in 1985.[20] Spending for health care in the United

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[15] *The Medicare Experience with ESRD*, *supra* note 7, at 69.

[16] *Id.*

[17] *National Health Expenditures, 1986–2000*, 8 Health Care Financing Rev. 1987, at 1 [hereinafter *Health Expenditures*]. Health care spending increased at a faster rate in 1986 than did the GNP, so that health care expenditure as a percentage of GNP rose to 10.8% from 10.6% in 1985. *Id.* Between 1965 and 1985, the rate of growth in health care spending averaged 12.3% per year while the GNP grew at an average rate of 9.1% per year. U.S. Dep't of Health and Human Services, Catastrophic Illness Expenses: Department of Health and Human Services Report to the President, Nov. 1986, at 8–9.

[18] Ginzberg, *A Hard Look at Cost Containment*, 316 New Eng. J. Med. 1151, 1151 (1987).

[19] *See Health Expenditures*, *supra* note 17, at 25. National health care expenditures have been projected to rise to nearly two trillion dollars, or 14% of expected GNP, by the year 2000. *See* GAO, Constraining National Health Care Expenditures: Achieving Quality Care at an Affordable Cost 12 (1985) [hereinafter GAO Report].

[20] *Health Expenditures*, *supra* note 17, at 1. Although the 8.4% rate is large, it represents the second lowest rate of increase in twenty years. In 1980, expenditures grew at a rate of *15.3* percent. GAO Report, *supra* note 19, at 9. The growth in 1986 was largely due to the high rate of price inflation that persists in the health care market. Prices paid by consumers for medical care rose by 7.7% from the end of 1985 to the end of 1986, even though the rate of increase in the Consumer Price Index (CPI) was only 1.9%. Even when the 13.2% decline in energy prices over the year is factored out, the general rate of inflation in goods and services was only 3.9%, about half the health

States amounted to an allocation of resources equal to $1,837 per person in 1986, up from only $211 in 1965.[21] Roughly 40% of this amount was channelled through federal, state and local government programs.[22]

The federal government's most important health care program, Medicare, is enormous. It provides care to more than 31 million enrollees, up from 21.6 million in 1980.[23] The program paid out $76 billion in benefits in 1986, 7.8% more than in 1985.[24] Total Medicare reimbursements rose from $7 billion in 1970 to $35.6 billion in 1980.[25] Nationwide, in 1986 Medicare was the largest single purchaser of hospital care and physician services, accounting for 29% of all hospital revenues and 21% of physician services.[26] Major extensions of Medicare coverage thus have a tremendous impact on the entire health care economy.

IV. MEDICARE'S ESRD PROGRAM

A. *Creating the ESRD Program: The 1972 Amendment*

During the seven years between the establishment of Medicare and the creation of the ESRD program in 1972, Medicare insurance only covered the costs associated with renal disease for the relatively few patients over age 65. As early as 1967, however, the enormous treatment costs faced by younger kidney disease patients and the agonizing patient selection decisions faced by physicians and hospitals led Congress to consider extending coverage to patients under 65.

It is not clear why Congress favored kidney disease treatment over treatments for other terminal conditions, but the federal government had been active in the development of ESRD treatment capability for some time. Encouraged by the National Kidney Foundation as well as other supporters, the National

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care rate. Finally, prices for all services rose 5.0% in 1986, still well below the health care inflation rate. *Health Expenditures*, *supra* note 17, at 3. *See also* GAO REPORT, *supra* note 19, at 15–18.

[21] GAO REPORT, *supra* note 19, at 8.

[22] *Health Expenditures*, *supra* note 17, at 1.

[23] HEALTH CARE FININCING ADMINISTRATION, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, HEALTH CARE FINANCING, PROGRAM STATISTICS, THE MEDICARE AND MEDICAID DATA BOOK, 1983, at 16 (1983) [hereinafter DATA BOOK].

[24] *Health Expenditures*, *supra* note 17, at 13.

[25] DATA BOOK, *supra* note 23, at 23.

[26] *Health Expenditures*, *supra* note 17, at 13.

Institutes of Health (NIH) became involved in kidney disease research in the early 1960's.[27] Large sums flowed to the development of the artificial kidney and to immunosuppressive drugs for use in transplantation. Beginning in 1963, Public Health Service Funds also were used to assist community dialysis centers.

The federal government's role expanded in 1970 when kidney disease funding responsibility was placed with the Regional Medical Programs Service. Dialysis capacity was increased at the local community level, although the government stopped short of a comprehensive federal program.[28] Because of its ongoing investment in these programs, it was natural for Congress to focus on treating kidney disease at a national level.

To help develop a kidney disease program, the Bureau of the Budget created the Committee on Chronic Renal Disease in 1967.[29] Named the Gottschalk Committee after its chairman, the committee set out to study the incidence of ESRD and to make recommendations for federal action. Its report revealed that

> approximately 5,000 patients with chronic uremia died in fiscal year 1967 because of lack of adequate treatment facilities, and by 1973 . . . a minimum of 24,000 additional medically suitable patients will have died without the opportunity for treatment by chronic dialysis or transplantation.[30]

To meet the "psychological, ethical, and political problems"[31] resulting from the scarcity of available treatment, the committee urged steps to make treatment universally available. The committee recommended that "[a] national program be initiated for the treatment of end-stage renal disease" to provide care for "all the American population for whom it is medically indicated."[32]

The Committee's recommendations were not accepted at first. Within five years, however, Congress passed the act creating

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[27] For background on the National Institutes of Health, *see* Strickland, POLITICS, SCIENCE, AND DREAD DISEASE: A SHORT HISTORY OF UNITED STATES MEDICAL RESEARCH POLICY (1972).

[28] *See* Rettig, *The Policy Debate on Patient Care Financing for Victims of End-Stage Renal Disease*, 40 LAW & CONTEMP. PROBS. 212–17 (1976) [hereinafter *Policy Debate*].

[29] *See* BACKGROUND INFORMATION, *supra* note 1, at 2.

[30] U.S. BUREAU OF THE BUDGET, REPORT OF THE COMMITTEE ON CHRONIC KIDNEY DISEASE 20 (1967) [hereinafter the GOTTSCHALK REPORT] *quoted in* Fox, *Social and Ethical Problems in the Treatment of End-Stage Renal Disease Patients*, in MAKING CHOICES: ETHICS ISSUES FOR HEALTH CARE PROFESSIONALS 85, 86–87 (Friedman, ed., 1986).

[31] GOTTSCHALK REPORT, *supra* note 30, at 20.

[32] *Id.* at 7.

the Medicare End-Stage Renal Disease Program as part of the Social Security Amendments of 1972.[33] The act extended Medicare coverage to individuals under 65 who required either dialysis or transplantation because of permanent kidney failure. To be eligible for benefits, individuals and their spouses or dependents had to be either fully or currently insured or entitled to a monthly insurance benefit under either the Social Security Act or the Federal Railroad Retirement Program.[34] Coverage began on July 1, 1973.

Under the 1972 Amendment, patient coverage commenced with the third month after the month of chronic kidney failure and ended twelve months after the patient received a renal transplant. The Health Care Financing Administration (HCFA) administered the program.[35]

After the 1972 Amendment, Medicare covered substantially all services required by renal patients. Transplant recipients covered by both Part A (Hospital Insurance) and Part B (Supplementary Medical Insurance)[36] were covered for inpatient hospital and physician care, as well as for tissue typing and related services to both donors and recipients. Dialysis patients were covered whether they were treated in hospitals, in hospital outpatient dialysis facilities, in qualified free-standing independent dialysis centers, or in their own homes. Hospital dialysis was covered under Part A while Part B covered the rental or pur-

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[33] Social Security Amendments of 1972, § 299I.

[34] The 1972 Amendment actually provided this full coverage in two separate ways. First, ESRD patients under age 65 who qualified for cash benefits under Social Security or the railroad retirement system because of incapacitating disability became eligible for coverage for physicians' and related services under Medicare's Supplementary Medical Insurance (Part B) program after a 24-month waiting period. Second, patients who could not qualify for Medicare on the basis of either age or entitlement to cash disability benefits — approximately 60% of total potential ESRD patients — became directly eligible for Medicare coverage (for both hospital and physicians' services) pursuant to § 299I. *See* Mehlman, *Rationing Expensive Lifesaving Medical Treatments*, 1985 WIS. L. REV. 239, 248, n.42.

Thus, § 299I established a particular kidney disease benefit that became coterminous with the general medicare benefit structure, so that all eligible for the former were also eligible for the latter, and vice-versa. With its shorter waiting period, § 299I became for some a portal of entry into the disabled ESRD beneficiary class eligible for monthly income support from Social Security. Finally, by extending a particular entitlement to the elderly, the 1972 Amendment encouraged them to claim renal disease benefits at higher levels. *See* IMPLEMENTING THE ESRD PROGRAM, *supra* note 2, at 55.

[35] IMPLEMENTING THE ESRD PROGRAM, *supra* note 2, at 33.

[36] Medicare's Part B covers physician services, including surgery, consultation, and home or office visits. It also covers a variety of associated services. Unlike Part A, which provides coverage for hospital and skilled nursing facility care, Part B is a voluntary program and requires a monthly premium payment from its beneficiaries. *See* GAO REPORT, *supra* note 19, at 12.

chase of dialysis equipment used at home and most necessary supplies. No limits were set on total reimbursement expenditures,[37] and beneficiaries were protected against cuts in coverage; the ESRD program was created as an "entitlement program", and the government was required to provide all monies necessary to meet the needs of ESRD patients unless the law were changed.[38]

The 1972 Amendment made ESRD the only disease whose victims were covered for their treatment costs by the federal government. The consequences of this major health policy development for Medicare and for the future of health care promised to be significant. Yet debate over passage of the 1972 Amendment attracted surprisingly little attention or participation within the general public. Until the ESRD proposals reached Congress, discussion of the issues took place exclusively within the medical and scientific community or in the context of budgetary discussions within the executive branch. Neither forum was accessible to the public. Even the Gottschalk Committee released its report quietly.[39] The reasons for such limited discussion remain unclear,[40] but the lack of public participation no doubt affected the outcome of the process.

Public participation failed to improve when the ESRD issue reached Congress. The issue emerged initially during debate over the 1972 Social Security Amendments. The bill primarily addressed welfare reform, and debate became long and involved.[41] Protracted controversy eventually began to jeopardize the entire initiative, and the final scramble to reach an agreement on welfare diverted attention from the bill's other provisions.

While the debate continued, Senator Vance Hartke (D-Ind.) introduced the ESRD program as Amendment 555 to H.R. 1. In the rush to complete the passage of the bill, legislators devoted no more than thirty minutes to debate on this major extension

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[37] *See* BACKGROUND INFORMATION, *supra* note 1, at 5.

[38] An entitlement program is a "federal program that guarantees a certain level of benefits to persons who meet the requirements set by law." Ney, *The ESRD Medicare Program: A Clarification*, 10 DIALYSIS AND TRANSPLANTATION 227, 227 (1981) *quoted in* Johnstone, *supra* note 13, at 70.

[39] *See* Blamphin, *Capital Rounds*, Medical World News, Nov. 24, 1967, at 77.

[40] Richard Rettig suggests that the divisive nature of the topic itself may have contributed to the lack of debate. *See Policy Debate*, *supra* note 28, at 221.

[41] During 20 days of hearings, the Senate Finance Committee heard 3,700 pages of testimony. Johnstone, *supra* note 13, at 69.

of Medicare.[42] The schedule afforded no opportunity for testimony. To most legislators, it seems, the public's need for the program was so clear that further debate would be a waste of time.

Congressional haste to pass H.R. 1 and the attendant lack of relevant testimony denied an opportunity to participate in the debate to a broad range of affected persons, including patients whose disabilities did not qualify for government-provided insurance. Neither health care professionals nor interested taxpayers could express their views. By establishing the program without public participation, Congress unfairly limited not only the range of views presented but also the scope of the issues discussed.

The program's cost was one of the most important issues to be considered. Legislators knew, of course, that the proposed coverage of kidney disease would impose enormous cost pressures on the Medicare system. The Department of Health, Education and Welfare (HEW) estimated that the program would cost $250 million in its first year, including $150 million in payments to § 299I beneficiaries. HEW projected total costs for 1975, 1976, and 1977 at $350 million, $500 million and $600 million respectively. Total expenditure was expected to reach $1 billion by 1984.[43] These predictions were assumed to be accurate, and the limited legislative process afforded Congress no opportunity to obtain competing cost data.

Generous though HEW's estimates seemed, however, they soon proved to be grossly understated. The actual expenditures in 1976 exceeded projections by almost $200 million;[44] by 1979, the cost of the program reached $1 billion. Expenditures rose to $1.8 billion in 1982 and neared $2.7 billion in 1986.[45]

Some observers argue that over time, costs for ESRD treatment have risen quite moderately when compared with overall increases in medical costs. Considered in light of general health

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[42] Caplan, *Kidneys, Ethics, and Politics: Policy Lessons of the ESRD Experience*, 6 J. HEALTH POL. POL'Y & L. 488, 495 (1981). *See generally* 118 CONG. REC. 33,007 (1972) (recording the brief debate over the amendment).

[43] BACKGROUND INFORMATION, *supra* note 1, at 15.

[44] RESEARCH AND DEMONSTRATIONS IN HEALTH CARE FINANCING, 1978–79, at 23 (Galblum, ed., 1980).

[45] *The Medicare Experience with ESRD*, *supra* note 7, at 70–72. Approximately 85,000 patients received dialysis in 1985. Johnstone, *supra* note 13, at 72. The current ESRD patient population numbers nearly 100,000. Telephone interview with Claudine Gilbert, Legislative Assistant to Rep. Pete Stark (D-Cal.), Chairman of the Subcomm. on Health of the House Ways and Means Comm. (March 2, 1988).

care inflation, ESRD costs per patient may even have fallen overall. Between 1978 and 1984, the average yearly benefit payment per patient rose 35%, from $14,895 in 1984 to $20,149 in 1978. When adjusted by the Consumer Price Index (using 1972 dollars), however, the average payment rose only three percent from $12,842 in 1974 to $13,255 in 1978. Correcting for the general rate of inflation in medical costs, payment actually *fell* from $13,368 to $12,170.[46] These measures do not reflect the likely possibility of major changes in the beneficiary population, but the statistics do suggest that inflation in ESRD may be no worse than elsewhere in medical care. The program may not be "out of control."

Some explanation for rising costs may lie in the method of reimbursement. Although expenditures are not entirely unlimited, the government's plan permits cost inflation. The program shifts treatment costs from patients to the government without any limits on patients' total consumption of kidney treatment services. However, the 1972 Amendment placed a maximum limit on the insured cost for each dialysis treatment; excessive per-treatment costs are not reimbursed.[47]

Despite limits imposed by these control measures, a very small percentage of Medicare beneficiaries consumes a disproportionate share of Medicare's total expenditures. In 1983, ESRD patients received nearly 4% of total benefit payments, although they represented only one-fourth of one percent

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[46] *See* IMPLEMENTING THE ESRD PROGRAM, *supra* note 2, at 7. For further discussion of trends in costs, *see also* Lowrie & Hampers, *The Success of Medicare's End-stage Renal-disease Program*, 305 NEW ENG. J. MED. 434, 434 (1981); Eggers, *Trends in Medicare Reimbursement for End-Stage Renal Disease: 1974–1979*, HEALTH CARE FINANCING REV. 31, 31 (1984) [hereinafter *Trends*].

[47] This screen is probably the single most important government ESRD cost-control mechanism. Lowrie & Hampers, *supra* note 46, at 434. The impact of government reimbursement policies on the cost increases that result from advancement in medical technology are debated in three articles in MEDICAL TECHNOLOGY: THE CULPRIT BEHIND HEALTH CARE COSTS? (Meyer & Lewin, eds., 1979): Gaus & Cooper, *Controlling Health Technology*; Berman & Maloney, *Regulating the Cost of Health Care: A Discussion and a Proposal*; and Heyssel, *Controlling Health Technology; A Public Policy Dilemma*. *See also* Rettig, *Medical Technology in a Changing Health Care Environment*, in CHARTING THE FUTURE OF HEALTH CARE: POLICY, POLITICS AND PUBLIC HEALTH at 98, 105–06 (Meyer & Lewin, eds., 1987) (discussing the relationship between reimbursement and cost).

It should also be noted that while open-ended funding may produce higher costs, the British experience with ESRD illustrates that no satisfactory mode of therapy may emerge if total funds available for renal disease treatment are tightly capped. The British Kidney Patients Association (BKPA) maintains that between 2,000 and 3,000 people die annually in the U.K. from renal failure. *See Lancet Reprints*, 52 MEDICO-LEGAL J. 127 (1984).

(0.25%) of Medicare beneficiaries. They consumed nearly 10% of the entire budget for Medicare's Part B, which subsidizes outpatient care for the elderly.[48] In 1978, the House Ways and Means Committee recognized the implications of these figures for Medicare and for health care generally, finding that "the high and steadily rising cost of the program" threatened "to undermine its continuing stability and effectiveness."[49] Perhaps more significantly, several legislators have revealed that they would have opposed the 1972 Amendment if they had known the full extent of its costs.[50]

A number of factors contributed to the program's upward cost spiral, but the most important controllable influence was a sharp and unexpected decrease in the percentage of patients dialyzing at home. Over 40% of all dialysis patients were receiving treatment at home in 1972. By 1975, only 25% were dialyzing at home.[51] Three years later, the proportion had fallen to less than 10%.[52]

This trend away from home dialysis is important because in-facility dialysis costs much more than home dialysis.[53] In 1977, the cost of dialysis received at home ranged from $8,000 to $12,000 per year.[54] The annual cost of treatment in a hospital or dialysis center at the time ranged from $20,000 to $30,000.[55] Not everyone may opt for home dialysis: some patients require more extensive medical attention than is available at home, while others lack the personal motivation and supportive home environment needed to conduct their own treatment. Nevertheless, it became apparent by 1978 that many patients able to receive treatment at home chose the more expensive alternatives. The cost implications of this development were equally clear.

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[48] *Trends*, *supra* note 46, at 31. In 1978, sixty percent of Medicare payments for ESRD reimbursed costs of outpatient care. Twenty-five percent reimbursed inpatient care and fifteen percent covered physician services. RESEARCH AND DEMONSTRATIONS IN HEALTH CARE FINANCING, 1978–79, *supra* note 44, at 9.

[49] S. REP. NO. 714, 95th Cong., 2d Sess. 2, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 848, 849 [hereinafter 1978 AMENDMENTS LEGISLATIVE HISTORY].

[50] *See Policy Debate*, *supra* note 28, at 226.

[51] SUBCOMM. ON HEALTH OF THE HOUSE COMM. ON WAYS AND MEANS, 95TH CONG., 1ST SESS., H.R. 3112 MEDICARE RENAL DISEASE PROGRAM AMENDMENTS 3 (Comm. Print 1977) [hereinafter PROGRAM AMENDMENTS].

[52] 1978 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 49, at 852.

[53] In 1979, home patient costs averaged $18,659 per person, or 21% lower than average program costs of $23,591 for in-unit dialysis patients. *Trends*, *supra* note 46, at 34.

[54] PROGRAM AMENDMENTS, *supra* note 51, at 2.

[55] *Id.*

B. *Making the Program More Cost-Effective: The 1978 Amendments*

Congress responded to these trends in 1978 by passing the Social Security Act—End-Stage Renal Disease Program Improvements Act.[56] The 1978 Amendments sought to remove the existing law's financial disincentives for the use of home dialysis and other types of self-dialysis. The legislators identified these financial disincentives as the primary reason for the shift away from home dialysis.[57] The 1978 Amendments also sought to eliminate perceived obstacles to the use of kidney transplantion, a far more cost-effective form of treatment than dialysis.[58] The Act had two other major objectives: to eliminate reimbursement difficulties plaguing patients dialyzing both in institutions and at home, and to fund studies of other ways to improve the ESRD program.[59]

1. Incentives for Use of Self-Dialysis

The 1978 Amendments included a number of proposals to encourage patients to use less costly self-dialysis.[60] Among the

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[56] End-Stage Renal Disease Program Amendments of 1978, *supra* note 3.

[57] Some other explanations for this trend have been offered. They include changes in the population undergoing treatment, professional disinterest on the part of physicians in encouraging home dialysis, and increased patient access to institutional facilities. *See* 1978 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 49, at 852. Nevertheless, although before 1972 the number of patients dialyzing at home was rising more rapidly than the number dialyzing in facilities, the percentage of home care patients began to fall immediately after the program was inaugurated. Rettig, *The "Cost" of Medical Technology*, *supra* note 8, at 100.

[58] *See Policy Debate*, *supra* note 28, at 199. Kidney transplants cost approximately $20,000 to $25,000 in 1977, but annual costs for drugs and physician services following transplantion were only $3,000 in the first year and $1,000 to $2,000 thereafter. PROGRAM AMENDMENTS, *supra* note 51, at 7. Transplant costs have remained stable during the past decade, although maintenance costs have risen to about $6,000 per year. Telephone interview with Ilene Fagouri, Budget Office, Brigham & Women's Hospital, Boston, Massachusetts (January 31, 1988). Approximately 5,300 transplants were performed in the United States in 1982, and 7,700 in 1985. *The Medicare Experience with ESRD*, *supra* note 7, at 69; Johnstone, *supra* note 13, at 72.

[59] 1978 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 49, at 849.

[60] The Amendments evolved in part from a proposal to mandate home care or in-center self-dialysis for fully one-half the nation's dialysis patients by 1980. National Medical Care (NMC), the largest proprietary dialysis provider, vigorously opposed this plan. NMC's efforts were successful, and a more moderate approach was enacted. Arguably, NMC's intervention impeded the establishment of legislation that would have saved millions of dollars in inefficient in-facility care. *See* Iglehart, *supra* note 4, at 494. Some commentators have noted that by drafting such a brief statute in 1972, Congress paved the way for later shaping of the program to the advantage of powerful lobbying interests. *See* Califano, AMERICA'S HEALTH CARE REVOLUTION: WHO LIVES? WHO

most important were those providing immediate benefits for ESRD patients entering self-care training programs; coverage for disposable supplies (such as syringes, needles and sterile drapes) and periodic support services (including emergency visits and servicing of dialysis equipment) needed by those dialyzing at home; and reimbursment of dialysis facilities for equipment purchased by the facilities for the exclusive use of home-dialyzers.

a. *Waiver of the three-month waiting period.* The 1972 Amendment required patients under 65 to wait three months after kidney failure for their Medicare benefits. They could not receive self-care training during this period unless they bore the costs themselves. As a result, many patients who otherwise might have begun self-care training immediately waited three months for benefits. By this time they often became accustomed to facility dialysis and difficult to "wean." The 1978 Amendments eliminated this waiting period to encourage more patients to learn to dialyze themselves.

b. *Coverage for supplies.* The 1972 Amendment did not provide coverage for necessary disposable items used by home-dialyzers.[61] Because these items absorbed as much as 15% of the total cost of home dialysis,[62] beneficiaries had a powerful incentive to enter a facility where these items were covered by Medicare. The 1978 Amendments limited this effect by extending coverage to all disposable supplies used in home dialysis.[63]

c. *Coverage for periodic support services.* Patients dialyzing at home need periodic services to ensure proper treatment. These services include monitoring of the patient's adaptation to self-dialysis, emergency visits when necessary, and servicing and maintenance of equipment. Existing law did not cover these needed services. The 1978 Amendments provided coverage

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DIES? WHO PAYS? 146 (1986). Perhaps the fact that the program grew out of a last-minute, testimony-free 30-minute debate made it all the more vulnerable to improper influence.

[61] *See* 1978 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 49, at 853.

[62] *Id.*

[63] It had been argued by HEW that coverage of disposable supplies represented a departure from traditional Medicare coverage provisions. However, the unique character of the ESRD program overall, as well as precedent for coverage in the case of colostomy supplies (including disposables) overcame this obstacle. *See* PROGRAM AMENDMENTS, *supra* note 51, at 5.

whenever such services were furnished by a dialysis facility or hospital to an at-home patient.[64]

d. *Coverage for services of a self-care dialysis unit.* Many patients who desire to pursue self-care at home are deterred by physical or social constraints in the home environment. These patients are able to provide their own dialysis in a dialysis facility and require much less ongoing medical supervision and assistance than institutionalized patients. The 1978 Amendments encouraged in-facility self-dialysis by providing coverage in these settings.[65]

2. Eliminating Disincentives for Transplantation

As a form of ESRD treatment, transplantation offers substantial benefits both to patients and to the program. Patients generally lead more normal, productive lives,[66] and the program benefits from significant cost reductions. In 1978, the savings were estimated to be more than $60,000 for each successful transplant.[67] However, certain limitations in the 1972 Amendments exposed potential transplantees to severe financial risk, and the percentage of total ESRD patients receiving transplants fell from 18% in 1974 to 9% in 1978.[68] To eliminate these disin-

[64] *Id.* at 5–6.

[65] 1978 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 49, at 854.

[66] A comprehensive 1985 study assessed the quality of life of patients with end-stage renal disease. The study's authors evaluated various subjective indicators, including the "index of psychological affect," the "index of overall life satisfaction," and the "index of well-being," all chosen to correspond with factors used in previous studies of the quality of life of the U.S. population as a whole. They also examined objective indicators of the quality of life, including functional impairment and the ability to work. After correcting for sociodemographic and medical variables, the authors concluded that transplant recipients consistently reported "higher objective and subjective quality of life than patients undergoing dialysis." Evans, Manninen, Garrison, Hart, Blagg, Gutman, Hull & Lowrie, *The Quality of Life of Patients with End-stage Renal Disease*, 312 NEW ENG. J. MED. 553 (1985) [hereinafter *Quality of Life*]. Much of this improvement stems from elimination of the need for ten to twelve hours of dialysis per week. In addition, patients using artificial kidneys are more likely to develop such medical complications as anemia and renal osteodystrophy. *See* Rettig, *The "Cost" of Medical Technology*, *supra* note 8, at 105.

[67] PROGRAM AMENDMENTS, *supra* note 51, at 7.

[68] *See* IMPLEMENTING THE ESRD PROGRAM, *supra* note 6, at 58 ("Increasingly, the ESRD program is a dialysis program"). Furthermore, in contrast to hemodialysis, the availability of transplants is limited by noneconomic factors as well as ability to pay. Shortages of available organs present a problem: the lack of transplantable kidneys kept 7,000 people from receiving transplants in 1985. Attempts to alleviate this shortage include the National Organ Transplant Act, Pub. L. No. 98-507, 98 Stat. 2339 (1984) (codified at 42 U.S.C. § 273 (1987)), which provided federal grants totalling $25 million

centives, the 1978 Amendments provided coverage for transplant patients beginning in the first month of hospitalization, post-transplant coverage up to 36 months, and immediate resumption of coverage after transplant failure. The law also clarified the rules for coverage of expenses incurred by kidney donors.

a. *Coverage beginning in the month of hospitalization.* For many patients, a period of up to eight weeks lapses between the removal of a diseased kidney and its replacement with a new one. The 1972 Amendment provided coverage for transplant patients beginning with the first day of hospitalization, but only if the entire procedure was completed within one month. The 1978 Amendments extend payment if the second step occurs within two months, assuring fuller and fairer coverage.[69]

b. *Extension of post-transplant coverage.* The 1972 Amendment terminated Medicare coverage twelve months following transplantation. Many patients require extensive care even after this time, and the 1978 Amendments extend coverage to 36 months.[70]

c. *Immediate resumption of coverage if transplant fails.* If a transplant fails, a patient must return to dialysis. Under the 1972 Amendment, the three-month waiting period was again tolled after a failed transplant, and the patient had to bear the interim costs. To eliminate the risk of lapse in dialysis coverage for patients choosing transplantation, the 1978 Amendments removed the waiting period for coverage resumption.[71]

d. *Other changes.* The 1978 Amendments also attempted to streamline the ESRD program by clarifying ambiguities in its reimbursement regulations. These steps toward more cost-effective administration were supplemented by an ongoing pro-

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to organizations that coordinated procurement and distribution of organs in fiscal years 1985 to 1987. *See* Sorian, *Several Health Bills Signed into Law*, 14 The Nation's Health 3 (December 1984). Meanwhile, persistent technical obstacles make the provision of kidney transplants a function of technological advancement. *See* GAO REPORT, *supra* note 19, at 109.

[69] *See* PROGRAM AMENDMENTS, *supra* note 51, at 7.

[70] Pub. L. No. 95-292, § 226A(b)(2). *See* 1978 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 49, at 856.

[71] Pub. L. No. 95-292, § 226A(c)(2). *See* 1978 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 49, at 856–57.

gram of Congressionally-sponsored studies and reports. Five studies for program improvement were slated initially,[72] and the Amendments require the Secretary of HEW to submit a report to Congress on program progress in October of each year.

C. *The Latest Efforts: The Omnibus Budget Reconciliation Act (OBRA) of 1981*

As part of cost-cutting efforts, the 1978 Amendments imposed a coverage limit for hospital-based dialysis. For each treatment, Medicare insurance paid 80% of the cost or $138, whichever was less. Payment for treatment at independent dialysis facilities also was set at cost or $138, whichever was less.[73] Although a provision for exceptions to the $138 cap was included, the objective was to provide a single rate for both types of treatment locations.[74]

However, the imposition of a uniform rate limit threatened to squeeze out hospitals in favor of the more efficient independent centers.[75] More importantly, a single rate limit jeopardized Congress's intent to foster dialysis at home, because most home care was supported by hospital-based dialysis facilities.[76] These hospital-based facilities could be driven from the market, to be replaced by proprietary facilities that did not provide home

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[72] The 1978 Amendments provided for the following studies: (1) pilot projects regarding use of durable medical equipment by ESRD patients; (2) various studies and experiments to evaluate ways to reduce the costs of the ESRD program, including reimbursement for home dialysis aides; (3) studies of ways to increase public participation in kidney donation programs; (4) a study of physician reimbursement methods; and (5) a study of ways to help renal patients not eligible for Medicare to meet their medical care costs. *See* 1978 AMENDMENTS LEGISLATIVE HISTORY, *supra* note 49, at 862–63. *See also* RESEARCH AND DEMONSTRATIONS IN HEALTH CARE FINANCING, 1978–79, *supra* note 44, at 22–24 (description of initial studies and results).

[73] *See* Iglehart, *supra* note 4, at 493. *See also* PROGRAM AMENDMENTS, *supra* note 51, at 11.

[74] Exceptions are more often granted to hospitals than to independent treatment centers. The average hospital-based reimbursement in 1982 was $159, while the average per-treatment payment for independent facilities was $138. *See* Iglehart, *supra* note 4, at 493. Rates have been decreased twice, in 1983 and 1986. Rates since 1986 have been $129 for hospitals and $125 for free-standing facilities. Telephone interview with Claudine Gilbert, Legislative Assistant to Rep. Pete Stark (D-Cal.), Chairman of the Subcomm. on Health of the House Ways and Means Comm. (March 2, 1988).

[75] The initial $138 rate was itself established on the basis of the cost experience of the independent centers. *See* Iglehart, *supra* note 4, at 493.

[76] Among those voicing this concern were Erwin Hytner, staff director of the House Ways and Means Subcommittee on Oversight, and Sheila Burke and Robert Hoyer of the Senate Finance Committee staff. *Id.*

treatment.[77] Such a result would undercut one of the principal objectives of the 1978 Amendments.

To forestall such a development, Congress directed the Department of Health and Human Services (HHS) to establish separate reimbursement rates for hospital-based centers and non-hospital facilities. This directive was passed as part of the Omnibus Budget Reconciliation Act of 1981 (OBRA).[78] The dual rate system went into effect on August 1, 1983, limiting coverage to $131 per treatment in hospitals and $127 in free-standing facilities.[79] The same payment would be made whether dialysis took place in a facility or in the patient's home.[80]

V. Problems with the Program

The legislative initiatives making up the Medicare ESRD program — from the 1972 Amendment to OBRA — represent an extraordinarily ambitious program. Tackling a complex medical and policy issue, Congress simultaneously attempted to do three very difficult things: guarantee nearly universal access to ESRD care; insure that the care provided was of high quality; and control the high cost of delivering that care.[81] While everyone expected these goals to be difficult to achieve, Congress made

[77] National Medical Care, Inc. (NMC) also played a key role in the framing of OBRA. A letter sent by NMC to hospitals was a major factor leading to the view that the single-rate system would disadvantage home care. In the letter, NMC offered to assume responsibility for hospitals' ESRD services. *See* Iglehart, *supra* note 4, at 494.

[78] Pub. L. No. 97-35, 95 Stat. 357 (1981).

[79] *See* Pristave & Riley, *HCFA Publishes Final ESRD Prospective Reimbursement Regulations*, 12 Dialysis & Transplantation 452 (1983). The change to a dual system emerged from an intense debate between those favoring a single rate to encourage price competition and those who believed that OBRA's directive demonstrated Congressional desire for a dual rate. *See* Iglehart, *supra* note 4, at 494.

[80] More recent legislation affecting ESRD includes the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 9214, 100 Stat. 82, 180 (codified at 42 U.S.C. § 1395rr (1986)), which includes limitations on mergers of end-stage renal disease networks. There are some indications that regulations under the act may seek to reduce ESRD reimbursement, but the published rules contain no explicit requirement for a reduction. *See* 51 Fed. Reg. 30, 356 (1986) (codified at 42 C.F.R § 405 (proposed Aug. 26, 1986)).

On October 12, 1988, Representative Pete Stark introduced the "ESRD Patient Protection and Health Outcomes Act" to Congress. The bill will be reintroduced, with amendments, for the 101st Congress at the beginning of next year. The legislation is designed to establish quality of care standards for dialysis treatment and to provide patients with information about their care. Quality of life is to be assessed based on mortality rates, hospital admissions and rehabilitation rates, with adjustments for individual differences. Telephone interviews with members of Rep. Stark's office staff (March 2, 1988; November 1, 1988).

[81] *See* Implementing the ESRD Program, *supra* note 2, at 5.

its task even harder by ignoring a number of critical issues. The implications of these omissions must be considered before Congress undertakes any similar health policy project in the future.

Two issues have emerged as most significant. The first is technology. The abbreviated policy debate focused on two medical technologies — hemodialysis and organ transplantation — that were undergoing rapid development at the time, but the nascency of ESRD technology and the uncertainty regarding its "stage" of maturity[82] were virtually ignored in the policy design. The second and more important issue is that Congress, when it enacted the ESRD program, failed to examine the broader policy and ethical implications of identifying a single, costly disease category and selecting it for fully covered treatment in an environment of limited health care resources.[83]

A. *The Role of Technology*

The ESRD program was bolstered by the undeniable appeal of a new medical technology that could prolong the lives of formerly hopeless ESRD victims. Like any other new medical technology, however, it could only be implemented at very high costs.[84] Advancing technology in ESRD treatment thus con-

[82] Richard Rettig points out that since it was implemented the program has been plagued by less-than-anticipated clinical success in cadaveric transplants, fewer-than-expected major therapeutic advances from medical research, and greater-than-expected quality of life problems for ESRD patients. Rettig, *The "Cost" of Medical Technology*, *supra* note 8, at 95.

[83] Indeed, Richard Rettig reveals that Congress examined few, if any, of the consequences of such a program. The proposed amendment was discussed for thirty minutes, and comments were primarily limited to the importance of making life-saving health care available to all, regardless of cost. *See Policy Debate*, *supra* note 28, at 196–97, 222–28.

[84] Medical advances are responsible for much health care inflation. It is estimated that 20 to 40% of the cost increase in hospital care from 1966 to 1976 is attributed to technology. *See Report of the Symposium August 1–5, 1977*, in MEDICAL TECHNOLOGY: THE CULPRIT BEHIND HEALTH CARE COSTS? 292, 296 (1979). *See also* Banta & Gelijns, *Health Care Costs: Technology and Policy*, in HEALTH CARE AND ITS COSTS 252, 253–65 (Schramm ed. 1987) (rising costs may be attributed to drugs, medical services, medical and surgical procedure, and support systems as well as to new equipment). More recent estimates have placed the total contribution as high as 50%. *See* Ruby, Banta & Burns, *Medicare Coverage, Medicare Costs, and Medical Technology*, 10 J. HEALTH POL. POL'Y & L. 141, 141 (1985).

Technology-based cost increases stem from the purchase of expensive capital equipment, dedicated space and maintenance, supplies, and additional personnel training. Expenses are compounded when a hospital or other facility maintains more than one type of technology to accomplish the same purpose. *See* Pettiti, *Competing Technologies: Implications for the Costs and Complexity of Medical Care*, 315 N. ENG. J. MED. 1480 (1986); *see also* Havighurst & McDonough, *The Lithotripsy Game in North Car-*

fronted policy makers with a serious dilemma: how to provide for the development of this new technology and still control its costs. A response to this question should have been at the center of ESRD program design from the outset. Instead, cost issues entered the policy debate only gradually, surfacing only in the 1978 and 1981 modifications.[85]

More importantly, however, kidney disease treatment technology was still developing when the ESRD program was begun. Members of the medical-scientific community disagreed as to whether the treatments were experimental, calling for more research, or established, demanding immediate clinical application.[86] Some physicians thought of dialysis and transplantation as interim measures only, like the iron lung, ready to be rendered obsolete by a new scientific discovery.[87]

Despite the disagreement, the Gottschalk Committee Report officially labelled dialysis and transplantation "sufficiently well advanced today to warrant launching a national program."[88] Congress heard no conflicting testimony. As a result policy makers regarded the ESRD program as purely a treatment pro-

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olina: A New Technology Under Regulation and Deregulation, 19 IND. L. REV. 989, 990–91 (1986) (the availability of new technology in some hospitals meant having duplicative facilities and neglecting alternative therapies once the investment had been made).

Many commentators have argued that the march of medical technology is beyond policy control, and that it inevitably leads to higher costs, whether the benefits are marginal or substantial. *See* Rettig, *supra* note 47, at 99.

Efforts are now underway to control technology-based cost increases, mainly involving critical assessment of technological innovations. Perceiving the culprit to be not technology itself but technology that is ineffective or superfluous, policy makers have proposed the establishment of a private, nonprofit "Institute for Health Care Evolution" to collect and distribute data on technological innovations and to sponsor research. *See* Relman, *An Institute for Health Care Evaluation*, 306 N. ENG. J. MED. 669 (1980); Evans, *Health Care Technology and the Inevitability of Resource Allocation and Rationing Decisions*, in MAKING CHOICES: ETHICS ISSUES FOR HEALTH CARE PROFESSIONALS 27, 44 (E. Friedman ed. 1986).

[85] *See* Johnstone, *supra* note 13, at 70–72.

[86] *See* Caplan, *supra* note 42, at 493. The shortage of kidney machines during the 1960's has been attributed in part to physicians' reluctance to acknowledge the therapeutic value of the treatments. *See Policy Debate*, *supra* note 28, at 204–09. The National Institutes of Health (NIH), on the other hand, was initially reluctant to support research on the artificial kidney, because the organization saw it as a treatment device; helping to develop it would not be appropriate for a body dedicated to fundamental scientific research. Rettig, *The "Cost" of Medical Technology*, *supra* note 8, at 93.

Debate continued in Congress as well. In 1965, in hearings before the House of Representatives Appropriations Committee, Congressman Melvin Laird asked two physician witnesses whether they considered dialysis a research program or a treatment program. One responded that it was at a point in-between — an "operational research program." The other declared that dialysis had progressed beyond the experimental stage. *Policy Debate*, *supra* note 28, at 207.

[87] *See Policy Debate*, *supra* note 28, at 209.

[88] GOTTSCHALK REPORT, *supra* note 30, at 5.

gram, and did not discuss the program's impact on further research. Debate about the developmental stage of kidney treatment still continues.

B. *Allocation Issues*

Clearly the most important engine driving Congress to embrace ESRD treatment technology and to provide universal coverage for its use was the fact that Congress had identified lives that could be "saved" by legislation. The Gottschalk Committee's report had made it clear that nothing but money stood between 24,000 untreated terminal patients and life.[89] Attention to distributive justice issues and the "rescue imperative"[90] overshadowed any concern about costs. As Senator Lawton Chiles argued:

> [I]n this country with so much affluence, to think that there are people who will die this year merely because we do not have enough of these [kidney] machines and . . . dollars, so that we have to make the choice of who will live and who will die, when we already know we have a good treatment . . . . This should not happen in this country.[91]

Policy makers were aware that during the decade before 1972, scarce private resources had forced doctors and hospital committees to decide case-by-case which patients would receive lifesaving treatment and which would die.[92] Policy makers hoped to eliminate such triage. Universal funding seemed to be a way to avoid addressing some very difficult moral dilemmas, and cost containment was not yet considered vital.

The resulting program thus grew out of a broad misunderstanding of the magnitude of the issues involved. Policy makers failed to appreciate that when they devoted hundreds of millions

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[89] *See* Fox, *supra* note 30, at 86.

[90] *See* Johnstone, *supra* note 13, at 68–69. Deciding how much of our resources to devote to such rescue efforts is known as the "problem of identified lives." Society is willing to incur great costs when particularly-identified lives are at stake — such as by undertaking monumentally expensive search and rescue efforts when a small number of individuals is lost at sea. *See generally* Evans, *supra* note 84, at 34 (explaining why the problem of resource allocation is probably the most acute and problematic in the area of medicine).

[91] 118 CONG. REC. 33003, 33008 (1972), *quoted in Policy Debate*, *supra* note 28, at 224.

[92] Extensive publicity about identified patients at the time of the 1972 Amendment dramatized the plight of the kidney impaired, and it no doubt had an important role in encouraging government funding. *See Policy Debate*, *supra* note 28, at 219–20.

of dollars to a specific disease category, they *a fortiori* denied those resources to others: victims of other debilitating diseases, or perhaps persons unable to afford food or housing. The resources could also have been left in the private sector, or used to reduce taxes. Cost cannot be discussed in isolation. It must be considered in terms of its allocational implications.

VI. The Allocation Decision

Allocation decisions generally fall into two broad categories. In the context of health care, *macroallocation* refers to decisions regarding how much should be expended for health care overall. *Microallocation* relates to the process by which health care resources are distributed among those who need them. Limits on our health care resources require us to allocate them among competing patients. The allocation may operate explicitly, such as through rationing, or indirectly, such as through a market system.

Allocative efficiency and distributive justice are important concerns in all areas of medical care, but they manifest themselves most dramatically in the context of Expensive Lifesaving Medical Treatments (ELTs).[93] Kidney dialysis and transplants are ELTs, as are coronary bypass graft operations, artificial hearts, lithotripsy, and treatments for Chronic Obstructive Pulmonary Disease (COPD). ESRD policy is part of a broader system of ELT policy.

A. *Macroallocation Issues*

The macroallocation decision has two dimensions. First, choices must be made as to what fraction of the nation's resources should be devoted to health care. How much of our economy should be spent on medicine and hospitals, and how much on other basic needs? Debates over this issue are evident in the controversy over a national health insurance. The disputes center on whether it would allocate a disproportionate amount

[93] Childress calls them "Scarce Lifesaving Medical Resources" or "SLMRs." Childress, *Who Shall Live When Not All Can Live?*, in Contemporary Issues in Bioethics 389, 389 (1978).

of our national resources to health care, and thus implicitly presuppose that there is some limit as to how much is enough.[94]

Second, distributions *within* the health care budget must be made. Some funds, of course, should be spent on research. The remaining clinical component must be allocated among the various disease categories and the patients afflicted with them. But should more health care funds be devoted to *preventive* medicine, to keep people healthier (in part so they will need less critical care)? The ESRD program has devoted vast resources to treating but not curing a terminal condition. Perhaps some of these resources should be devoted to finding a cure for the various diseases that lead to kidney failure, or to finding ways to avoid the onset of kidney disease.

Analysis of macroallocation in the United States must also focus on a systemic factor: unlike Great Britain, the United States does not have a "closed" health care system. In Great Britain, decisions about how much money should go toward health care are made explicitly, within a closed allocational system.[95] In the United States, however, health policy is the end result of a collection of independent and sometimes conflicting decisions and incentives, with no single body controlling aggregate expenditure.[96] Whatever the overall merits or demerits of the British system, it directly responds to the macroallocation problem.[97] The United States' open system responds to it only indirectly.

Whatever the system, macroallocation questions require policy makers to decide what a just distribution system for health care must include. Some observers, however, contend that no such system can be found or implemented. These observers often support the existing market system as a default mechanism which would allocate health care according to willingness to

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[94] *See* Johnstone, *supra* note 13, at 77–82 (since resources are finite, some kind of limit must be set, and theories of justice will influence those limits).

[95] *See* Johnstone, *supra* note 13, at 78.

[96] As a result, say critics, the American system is wasteful, inefficient and confused. *See* Lee, *Health Policy, a Social Contract: A Comparison of the United States and Canada*, 3 J. PUB. HEALTH POL'Y 293, 298 (1982) ("If one had deliberately set out to produce as complex and costly an administrative system as possible, the U.S. system represents an excellent model.").

[97] *See* Johnstone, *supra* note 13, at 78. Note, for example, that if Britain were to dialyze on the same scale as the U.S., it would have to increase its total health expenditure by an amount equal to the real growth in *all* health expenditures for two years. The British system forces policy makers to consider such comparisons, addressing the cost tradeoffs explicitly. *Id.*

pay, as is the case with other goods.[98] Others contend that even if we cannot agree on any *obligatory* criteria for distribution, we can fashion a fair and effective *process* for establishing an improved system.[99]

1. Health Care Versus Other Goods

Health care is something we all want. No one desires illness, so presumably the more health care we provide, the better off we are. But not everyone agrees. Leon Kass, for example, argues that while our desire for better health need not be bounded, there is a limit on how much doctors and public health officials can do to improve it.[100] If so, there must come a point of diminishing returns at which more dollars spent on *health care* will have little or no marginal effect on *health.*

An essential issue in the question of "how much is enough?" is the controversy over whether people have a right to a certain minimum level of health care. If health care is just a commodity, the market can decide how much will be provided and how it will be distributed without doing fundamental injustice. But if everyone has a moral right to some level of health care, society is obligated to provide enough to guarantee this level. How we respond to this question of access in turn frames our response to macroallocation questions.

If society decides as a matter of policy or right to guarantee some level of health care for all, how much must be provided? Many argue that everyone must be guaranteed equal access to health care, no matter what his or her level of wealth.[101] This position has superficial appeal, but it would be totally unwork-

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[98] *See* Mehlman, *supra* note 34, at 261–66 (Mehlman gives the arguments for and against such an approach).

[99] *See* Mehlman, *supra* note 34, at 278–80 (discussing how notions of due process may fit within an allocational scheme).

[100] Kass, *The Pursuit of Health and the Right to Health*, in CONTEMPORARY ISSUES IN BIOETHICS 371, 375 (1978) (we must be skeptical of the claim that "more money, more targeted research, better distribution of services, more doctors and hospitals, and bigger and better cobalt machines, lasers, and artificial organs will bring the medical millenium to every American citizen.").

[101] Gene Outka contends that a prima facie case for this position can be made. Outka, *Social Justice and Equal Access to Health Care*, in CONTEMPORARY ISSUES IN BIOETHICS 352, 352 (1978).

able.[102] The frontiers of medical knowledge expand daily, and many conditions can be treated in multiple ways. Some treatments are clearly "gold-plated," luxuries too expensive to provide for everyone.[103] Cost limitations are recognized when government supplies other basic necessities for those who cannot afford them. Social programs provide food and shelter, but it is recognized that we are unable to offer everyone a palace.[104]

Entitlement programs are supposed to provide everyone with minimally acceptable food and shelter, however. Charles Fried supports their health care analogue: a right to a minimally acceptable level of health care.[105] He argues that the proposition flows from fundamental rights issues as well as practical considerations. Standing in opposition to such a plan, he declares, is the medical community. Physicians' professional obligations and interests, and the fact that doctors are face-to-face with "identified patients," encourage them to support ever more expensive and comprehensive treatment. They will not cut costs at the bedside. Fried warns against such an approach at the policy level: "It is monstrous if an individual doctor thinks like a budget officer when he cares for his patient in need; but it is chaotic and incoherent if budget officers and voters making general policy think like doctors at the bedside."[106]

This position is difficult to assert in public debate. It is hard to argue that we must limit our health care expenditures in the face of the public view that health care is in some way "spe-

[102] Fleshing out the notion of equal access would implicate several difficult issues. For example, should we refuse to develop such new technologies as artificial hearts, if we know they will be too expensive to provide universally? And how do we develop the infrastructure to provide rural residents equal access to specialized medicare found only in a few large cities? Even if it could be done, the cost would be overwhelming. *See* Thurow, *Medicine Versus Economics*, 313 NEW ENG. J. MED. 611 (1985) (Thurow admits that providing everyone with health care is a complicated and problematic issue, and suggests a three-tiered system for providing health care).

[103] An example may be radial keratotomy surgery to cure myopia. The surgery is expensive, and those who cannot afford it have a treatment alternative: eyeglasses.

[104] Outka responds that unlike the need for health care, the need for food and shelter are predictable. The individual is more at the mercy of events with respect to health and thus more in need. *See* Outka, *supra* note 98, at 356–58. Others argue that people must accept more responsibility for the state of their own health and thus seem to dispute Outka's proposition. *See* Kass, *supra* note 100, at 372, 376 ("we are in an important way responsible for our own state of health"; "I would lean much more in the direction . . . of saying that health is a *duty*, that one has an obligation to preserve one's own health." (emphasis in original)). Further, the possibilities of natural disasters, economic dislocation, and other major events create unpredictable needs for additional food and shelter as well.

[105] *See* Fried, *Equality and Rights in Medical Care*, in CONTEMPORARY ISSUES IN BIOETHICS 364 (1978).

[106] *Id.* at 370.

cial."[107] But physical health care is just one of the goods society has to offer. And it may not be the most important.[108] In any case, we must not let the unpopularity of difficult decisions tempt us to make costly mistakes.

2. Allocation Within Health Care

In practice, macroallocation decisions are not presented in terms of health care versus other things. Rather, they take the form of allocation within the health care budget among individual diseases, between research and clinical care, and between prevention and cure.

The problem of allocation among disease categories is critical for ESRD. Whatever our health care budget, a very few consume very much of it. Whether one supports equal access or not, can it fairly be said that some serious health care needs are inherently more "special" than others? The government has helped ESRD sufferers, but there are many other patients with conditions worthy of the government's attention. Critics of the program argue that an improper political process, fueled by ill-considered sentimentality, pushed through a program that benefits kidney patients at the expense of hemophiliacs, cardiac patients, COPD patients, and others.[109] Public policy seems to be moving ahead one disease at a time without carefully evaluating whether and how to proceed.

Two other macroallocation concerns focus on how to allocate resources across functional specialties within the medical field. First, how much should be put into research, and how much into clinical treatment? Money spent searching for a cure for chronic renal disease cannot be used to treat patients now suffering from the condition. But research is essential, and some funds paying for dialysis today might more effectively be spent to help even more patients tomorrow. Arthur L. Caplan expresses the intertemporal distribution problem as follows: "[W]ho should pay for developing and disseminating new med-

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[107] *See* Fried, *supra* note 105, at 369 (the task of defining a decent minimum is not above the political process, and the objective of "providing the best medical care for all, regardless of ability to pay," is a dangerously misleading slogan).

[108] For a theological perspective on the relative importance of health, see Smith, *Death Be Not Proud: Medical, Ethical and Legal Dilemmas in Resource Allocation*, 3 J. CONTEMP. HEALTH L. & POL'Y 47, 62–63 (1987).

[109] *See* Kass, *supra* note 100, at 376.

ical therapies, and how should ethical and scientific considerations influence the allocation of newly evolved technologies?"[110]

Second, how much should be put into preventative medicine and how much into cure? In both cases, policy makers are faced with the choice between emphasizing current problems (clinical and crisis medicine) and emphasizing investment for long-term benefit (preventive and research medicine). The research/treatment choice is critical in making policy regarding diseases that are presently incurable. Increases in research budgets are typically funded not from non-health programs but from unrelated clinical efforts, yet when large numbers of specifically-identified people can be kept alive by current treatment, it is politically difficult to use treatment money for research. The benefits of research, however can be dramatic; had research for the polio vaccine not been done, the amount spent on ventilation for polio victims could now be enormous. No cure for ESRD is on the horizon,[111] making allocation for research more important, yet more challenging to justify.

Congress avoided explicitly facing the research/treatment dilemma for ESRD by enacting its treatment program while dialysis and kidney transplants were still being developed. Most medical treatments, in contrast, are well-established, in a stage of "mastery,"[112] so that congressional funds need to cover only treatment.

Funds not devoted to research must be further divided between treatment and preventive medicine. Such practices as improved sanitation and diet reduce the incidence of disease, and over time they may have contributed more to the improvement of public health than have hospitals.[113] The benefits seem diffuse, however, and it is unsatisfactory to neglect those who need treatment now in the interests of long-run gain. Efficiency considerations may favor prevention, but distributive concerns require balancing a known, acute need with an ambiguous future

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[110] Caplan, *supra* note 42, at 500.

[111] *See* BACKGROUND INFORMATION, *supra* note 1, at 1.

[112] Caplan distinguishes among four stages in the development of any new medical technology: invention; advertisement; acceptance by the medical community as valid; and mastery, in which the iatrogenic, or negative, incidental effects of the treatment are observed and techniques are developed to avoid them. Mastery for ESRD, he says, did not occur until around 1977. Caplan, *supra* note 42, at 491–94.

[113] *See* Illich, MEDICAL NEMESIS: THE EXPROPRIATION OF HEALTH 15–28 (1975).

expectation.[114] And there is always the possibility that the research will yield nothing.

Focusing these generalizations on ESRD, however, suggests some additional considerations. First, prospects of cure are remote, and transplantation increases length of life. Dialysis, the more widely-used treatment, does not. Second, the quality of life for most dialysis patients is poor. Patients undergoing treatment do not live well, and they are only marginally able to adapt psychologically to their circumstances.[115] Third, patient risk factors for the initiation of dialysis have been observed[116] which affect future decisions regarding initiation of treatment. Finally, stoppage of dialysis treatment is presently a frequent cause of death for dialysis patients. These considerations suggest the inadequacy of relying on dialysis as our main response to ESRD and point to the need for further fundamental research regarding both transplants and eventual cure.

B. *Microallocation Issues*

Given existing resource constraints, not all of society's health care needs can be met. Some form of microallocation is inevitable. Microallocation is not new to ESRD treatment; it occurred at the individual level during the early years of dialysis, before the government became involved. Individual physicians and hospital committees were forced by resource limitations to decide which of their patients would receive treatment when it could not be provided for all of them.[117]

Some form of rationing is unavoidable whenever a beneficial public resource is in limited supply. Policy choices in part must address whether the rationing system is to be explicit or implicit. The American health care system allocates resources implicitly, even with respect to publicly-provided benefits. For example,

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[114] *See* Beauchamp, *The Allocation of Scarce Medical Resources*, in CONTEMPORARY ISSUES IN BIOETHICS, at 347–48 (1978).

[115] *See Quality of Life*, *supra* note 66, at 557–58.

[116] Neu & Kjellstrand, *Stopping Long-term Dialysis*, 314 NEW ENG. J. MED. 14 (1986). The authors studied 1766 patients. In 9% of the cases dialysis was discontinued, accounting for 22% of all deaths. Of the 66 competent patients in the sample, 58 made the decision on their own. The patient usually initiated discussion of termination, but physicians made initial contact 40% of the time. The leading medical complications were dementia and cerebrovascular accidents (stroke), but age and diabetes were found to be the leading risk factors for discontinuation. *Id.* As the U.S. population ages, the incidence of discontinuation may rise.

[117] *See* Evans, *supra* note 84, at 35.

for most Medicare Part B benefits, premium payments and deductibles mean that the patient must share the costs of his treatment. This cost sharing affects the individual's ability to secure treatment, so the system allocates treatment to those able to pay the deductible. A purely market-based system would have the same effect, except that it would be more pronounced.

The British rationing system is explicit. Rationing decisions do not arise from multiple independent decisions and the incentives surrounding them; rather, allocation is by an administrative body. Supporters of explicit rationing argue that it is more efficient, rational and equitable.[118] Problems develop, however, because people's views of an equitable allocation system differ. Consensus choices may also be difficult to determine, and policy makers may not always translate their unclear understanding of the public's priorities into wise policy.

The rationing system that is selected, however, expresses a belief about the proper basis for providing needed care to some and denying it to others. Current U.S. law provides no guide for allocating scarce resources, but current medical practice suggests two generally available decision schemes: utilitarianism and egalitarianism. These allocation systems provide guides for the microallocation component of an effective health policy.

1. Utilitarian Criteria

Utilitarian, or "good maximizing,"[119] strategies seek the highest possible net benefits to society. The main utilitarian principles for allocating medical care are: social worth; medical success or benefit; and the market.

a. *Social worth.* If society must choose to save one life in favor of another, it may be justified in considering the services to society the person has rendered or can be expected to offer. Talent, training and other factors could be considered.[120] After all, those who subscribe to social worth principles would say,

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[118] *See* MECHANIC, FUTURE ISSUES IN HEALTH CARE 95, 101 (1979). Further, it is not necessarily true that explicit health care rationing must entail higher total health care spending. The process for allocation need not determine the results that are achieved.

[119] *See* Smith, *supra* note 108, at 56.

[120] *See* Rescher, *The Allocation of Exotic Medical Lifesaving Therapy*, in CONTEMPORARY ISSUES IN BIOETHICS 378, 382 (1978).

society is investing a scarce resource in whoever receives it, and it ought to achieve the maximum benefits possible.

Social worth allocation has some appeal in extreme cases. It would be difficult to deny an expensive lifesaving treatment to a head of state in favor of a convicted axe-murderer.[121] A social worth system was used to distribute some kidney dialysis machines in the 1960's. The Seattle Artificial Kidney Center used this method.[122]

The center was viciously criticized for using this method.[123] The opposition focused first on the difficulty of making comparisons. How may a scientific researcher, for example, be compared to a novelist or statesman? And what if the novelist is chosen, and he never writes again? Also, there was a pervasive concern that the comparisons would be made in a biased way or according to "objective" criteria that had inequitable effects.[124] Most importantly, social worth allocation was attacked as repugnant on humanitarian grounds. The system was seen as undermining the belief that everyone has fundamental value and that people must not be graded like common goods.[125]

b. *Medical benefits.* If a treatment will do no good, scarce resources should not be expended to provide it. This notion is basic to the idea that relative likelihood of medical success is an appropriate criterion for allocation of medical care. Such a criterion would give higher priority to the patient with the greatest likelihood of responding successfully to treatment.[126]

Defining relative medical success is difficult, however, when patients with different ages and different physical activity levels are compared.[127] A medical benefits system might completely

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[121] This example and others are found in Mehlman, *supra* note 34, at 257.

[122] *See* Mehlman, *supra* note 34, at 257. According to one report, dialysis was specifically denied to a prostitute, a drug peddler, and a psychotic who had escaped from a prison hospital. *Id.*

[123] Sanders and Dukeminier, for example, challenge the "prejudices and mindless cliches that pollute[d] the [allocation] committee's deliberations." Describing its selection system as "the bourgeoisie sparing the bourgeoisie," they declare: "The Pacific Northwest [was] no place for a Henry David Thoreau with bad kidneys." Sanders & Dukeminier, Excerpt from *Medical Advance and Legal Lag: Hemodialysis and Kidney Transplantation* in ETHICS IN MEDICINE: HISTORICAL PERSPECTIVES AND CONTEMPORARY CONCERNS 606, 609–10 (1977).

[124] *See* Evans, *supra* note 84, at 46.

[125] *See* Mehlman, *supra* note 34, at 257–59.

[126] *See id.* at 266 n.124.

[127] *See id.* at 266–67 (gives hypothetical comparisons of potential program beneficiaries with different ages, activity levels, and chances for success).

exclude members of certain groups. For example, some doctors might believe that elderly or diabetic patients have smaller chances of being kept alive through dialysis.[128] These "risky" patients would be less likely ever to receive dialysis under a medical benefits system. Further, doctors may differ in their diagnoses. Their diagnoses may even mask unspoken social worth prejudices.[129]

c. *Market mechanisms.* Most private goods and services are allocated by allowing the market to set a price and making the goods and services available to those who pay for them. Market systems are usually supported because of their presumed ability to achieve the utilitarian goal of allocative efficiency. Health care also relies on the market system, although those without private or public insurance are excluded. Medicare Part B incorporates a deductible payment, so the market scheme is maintained in part as an allocative mechanism. The market is a form of social utility-based allocation, using an administrable but obviously flawed measure of worth.

The crudeness of wealth as an index of social utility and moral worth — an itinerant gambler whose horses win might fare better than a public official or charitable worker — makes it suspect as an allocative measure for health care.[130] Wealth was implicitly used to allocate ESRD treatment in the 1960's,[131] but explicit public policy using this measure would likely encounter strenuous political opposition. Resistance to it finally led to the 1972 Amendments. Opposition to the market is also behind proposals for national health insurance, and efforts to limit market-based allocation of health care are likely to continue.[132]

2. Egalitarian Criteria

Unlike utilitarian systems, egalitarian allocation programs ignore the benefits or disadvantages to society of treating person

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[128] *But cf.* Neu & Kjellstrand, *supra* note 116, at 19 ("Because there are no reliable markers foretelling the success or failure of dialysis in old or diabetic patients, we advocate a liberal policy for the selection of such patients.").

[129] *See* Mehlman, *supra* note 34, at 267–68.

[130] *See id.* at 262–63.

[131] Hemodialysis was available to anyone who bought a dialysis machine and paid for treatment. But the machine cost $3,000, and treatments cost up to $300 each. *See* Mehlman, *supra* note 34, at 263–64.

[132] *See* Mehlman, *supra* note 34, at 262–66. Proponents of market systems generally resist this trend by stressing the efficiencies of markets while at the same time seeking ways to limit their adverse distributional effects.

A rather than person *B*. They seek instead to achieve or preserve equality among persons needing a particular medical treatment.[133] In addition to retaining human dignity, say their supporters, egalitarian systems reduce selection and comparison problems, avoid bias, and impose less stress upon those involved.[134] The basic principles used to achieve these goals are: (1) nonallocation — the principle of saving no one if not all can be saved; (2) neediness (both medical and general); and (3) random selection.

a. *Nonallocation*. If a good is not available to everyone, those who do not get it are disadvantaged relative to those who do. Perhaps the only fair approach, then, is to give it to no one. This nonallocation approach seems extreme, but it has been used in the context of ESRD; at least one hospital discontinued its dialysis program because it could not treat everyone in need and did not want to decide who would receive treatment.[135] The nonallocation approach is not a solution to health care problems, however. It is at best a way to avoid making allocation decisions, at great cost to whoever would have received treatment under any other scheme.

b. *Neediness*. Perhaps health care should be available to those who need it most. Neediness could be defined specifically, in terms of medical need, or generally, allocating resources to those neediest or most helpless overall.

The medical need criterion is the other side of the medical benefit criterion: instead of providing resources to those whose medical condition will improve the most in objective terms, medical need allocates them to those whose prior condition is initially most desperate, even if the prospects for success are relatively bleak. This plan has two advantages: first, it closes the gap between the most seriously ill and the least ill among those needing treatment (it "evens" the population); second, it ameliorates, rather than exacerbates, the close correlation between poor health and poor socioeconomic status. Doctors usually gave priority to medical need in rationing dialysis machines in the 1960's: they typically provided them for patients in im-

[133] *See* Smith, *supra* note 108, at 56.
[134] *See* Mehlman, *supra* note 34, at 268–69.
[135] *See id.* at 281.

mediate danger of death, everything else being equal.[136] Nevertheless, the same problems of measurement and bias that limit medical benefit rationing persist here.

The general version of the neediness criterion goes beyond health status and looks at the individual's overall condition. If the prospective patient is poor or has family difficulties, it is said, society should not add to his troubles by denying him relief from his medical ills. The need factor could be turned around, providing medical resources to those for whom health is most important. We could also consider *others* who depend on patients' lives — family members in particular — and assert that these persons' *needs* for the patients to live must be considered.[137] *Ceteris paribus*, a single parent with small children, would take priority over a middle-aged single person with no dependents.

If the medical need approach is difficult, the obstacles to using general need would be overwhelming. Administrators could never develop the necessary weights to compare the needs of young and old, married and single, rich and poor, black and white.

c. *Random allocation.* Perhaps the most natural egalitarian system is random selection. No factors need be weighed, and no biases can creep in. The government could simply have a lottery and allocate ELTs to those who "win." Or, a system of "first-come, first-served"[138] could be employed until resources are exhausted. A random system preserves human dignity and trust, and insures equal opportunity for life itself.[139]

Whatever the form random allocation takes, it seems to be another system that allows decision makers to avoid difficult allocation choices altogether. As such it is probably inadequate.

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[136] *See id.* at 266.

[137] For a further discussion of the "family-role" factor, see Rescher, *supra* note 120, at 382.

[138] First-come, first-served provides medical care to whomever has been waiting for it the longest. *See* Mehlman, *supra* note 34, at 270. Any hospital that in the 1960's rejected a patient for dialysis because the hospital had already reached its capacity was implicitly using this method.

[139] Choice by lots has been accepted as a way to allocate scarce public housing and liquor licenses. *See* Holmes v. New York City Housing Auth., 398 F.2d 262, 265 (2d Cir. 1968) (housing); Hornsby v. Allen, 330 F.2d 55, 56 (5th Cir. 1964) (liquor licenses). These cases would also permit first-come first-served selection. *See Holmes*, 398 F.2d at 265; *Hornsby*, 330 F.2d at 56. For a detailed argument favoring the approach, see Childress, *supra* note 93, at 393–97.

It ignores the values that are implicit in the utilitarian approaches and in other egalitarian methods. It may not be clear which of these values should triumph, but they should not all be disregarded. And a random system might face political opposition if it were perceived that "less deserving" people were saved and "more deserving" people were allowed to die.

3. A Possible Solution

From the above discussion it appears that no single microallocation system is adequate by itself to guide ELT policy. Yet each system offers something important, emphasizing an essential health policy value. The egalitarian concerns underlying randomness and medical need should not be ignored, but the medical benefit and social worth systems offer programs to make society as well off as possible. A combination of factors, it seems, should be used to distribute those resources society allocates to providing ELTs. And the macroallocation decision establishing this amount likewise should not be iconoclastic.

A complex-criteria system has the advantage of incorporating both the utility principle and the principle of justice. The most important obstacle to using such a system is the need to decide how the considerations factor in. The factoring might be quantitative; policy makers could allocate medical resources according to the number of criteria the prospective patient satisfies. Or, the factoring might be qualitative; policy makers could treat the considerations subjectively, weighing some more heavily than others.

Analysis is facilitated if the considerations are categorized. They may be divided into medical considerations (medical benefit and medical need), individual extramedical considerations (nonmedical need) and societal considerations (social worth and market allocation).

Nicholas Rescher suggests a two-stage allocation system, in which a pool of candidates is first designated using specified *criteria of inclusion*. Then, the actual recipients of needed ELTs are selected from this group using *criteria of comparison*.[140] The

[140] *See generally* Rescher, *supra* note 120. The use of a pool from which candidates are selected would be somewhat analogous to selective service. There, random allocation defines a maximally inclusive pool, and then individual selection criteria are used to distribute the burden of military service (and the "benefit" of exclusion). Various criteria are used to make the selection. *See* Katz, *Process Design for Selection of*

criteria for inclusion and for comparison would incorporate varying allocative approaches, egalitarian or utilitarian. This system recognizes that different concerns are preeminent when society is determining generally which group should be considered seriously for treatment and when society is making final "cuts."

Following this general guideline, inclusion criteria should be used which emphasize the efficacy of the treatment. Thus, patients for whom treatment is unlikely to be successful should be given reduced priority. Those who would receive the greatest benefits from the treatment should be included in the pool. This approach would yield results directly contrary to those achieved using the medical need criterion in some cases, such as that of an elderly person who would die soon without the ELT but whose life expectancy is not high regardless. But generally, medical need should be emphasized at the inclusion stage. Nonmedical need should only be factored in to the extent it broadly reflects the needs of *others* for that person to live. Other "social need" factors are too complex and shadowy to consider. Finally, social worth and ability-to-pay should be used sparingly as inclusion criteria. No arbitrary nonmedical excluding factors, such as alcoholism or age beyond some set maximum, should be used. Those who can pay for their treatment should be required to do so. To the extent they are able, they should absorb the costs of their treatment themselves.

Probably any patient who scores especially highly on any one of these criteria should be part of the pool. The system for selection within this pool, however, is more problematic. It must necessarily involve assigning weights to the competing considerations. How the weighting should be done presents a difficult political problem. Some commentators, such as Nicholas Rescher, suggest that medical considerations and nonmedical considerations should be rated equally.[141]

If this system still fails to distinguish among candidates, random allocation must be employed.[142] A first-come, first-served system among those candidates is probably preferable. Other-

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Hemodialysis and Organ Transplant Recipients, 22 BUFF. L. REV. 373, 378–81 (1973). Katz also discusses criminal law process as an analogy from which ideas useful for health care allocation may be derived. *See id.* at 381–85.

[141] *See* Rescher, *supra* note 120, at 385–86.

[142] Both Rescher and Katz agree that some form of random allocation is proper at some stage. *See* Rescher, *supra* note 120, at 386; Katz, *supra* note 140, at 402.

wise, some people might have to wait indefinitely for treatment, sitting through lottery after lottery.

Finally, the priorities expressed by an allocation system have obvious implications when the separate issue of when to terminate treatment must be considered. If social worth criteria are preeminent, for example, shouldn't a "less deserving" person already receiving dialysis be taken off the machine in favor of a "more deserving" person who comes along later? Nothing in the allocation system precludes "unplugging." But the legal and ethical issues surrounding suspension of treatment are themselves vast, and they extend beyond the ESRD debate. The debate does not address whether present beneficiaries should have their benefits cut off but rather considers how treatment can be provided at the lowest cost.[143]

In designing the selection system, policy makers must seek to design a system whose *process* is as simple as possible, without losing credibility. The public must be given access to the deliberation process.[144] People must be able to understand the system, and they must be able to see its justifications. It should be structured in a way that maximizes public participation. One of the most important failings of the ESRD program lies in the fact that public discussion was foreclosed by abbreviated public debate.

The proposed microallocation system presupposes that some limit is set on the amount of resources devoted to any given ELT. Such a macroallocation decision is more difficult to structure, but it must be made. Creators of the ESRD program were unable to avoid the hard choices associated with kidney disease treatment. The same problems will recur, particularly since replicating the ESRD program approach across many disease programs would ultimately confront the broader limitation of society's willingness to spend for health care. Now that kidney disease coverage has been provided, it is difficult to explain why coverage should be denied for any other condition.

VII. Conclusion

A number of lessons emerge from the policy development of the Medicare ESRD program. The program has achieved its

[143] *See* Evans, *supra* note 84, at 34–35.

[144] Sanders and Dukeminier state the point aggressively: "Selection by a secret committee operating without explicit criteria is a grotesque conceit worthy of Franz Kafka." Sanders & Dukeminier, *supra* note 123, at 610.

primary goals, and has shown that cost controls can be effective. On the other hand, the program developed through an inefficient course of *muddling through*. This incrementalism could have been diminished by more comprehensive public planning and debate at the outset. The government's policy-making capability only deteriorated over time. Implementation was poorly executed. No single government entity was charged with sole responsibility for the ESRD program, and the program's development reflects the internecine battles that developed. Also, the role of technology in the ESRD experience was underestimated, and its impact further limits the general application of the kidney program as a blueprint for later developments in national health insurance.[145] Finally, the abbreviated policy debate preceding the program's enactment left little time to consider the fundamental ethical issues this unique program raised.

The ESRD program was passed in the wake of excitement over the development of a new and important medical technology. It responded to revelations that there were thousands of desperate victims of a treatable disease who nevertheless would die from it simply because they did not have enough money. The program saved them. Still waiting, however, are thousands of other equally deserving terminally-ill patients whose diseases are not fully covered. Their misfortune is that their disease — whether it is hemophilia, respiratory disease, or something else — has not yet captured the attention of Congress. And their prospects are only diminished when large portions of the scarce resources on which they depend are reserved for a relatively small number of others.

Until society is capable of helping all terminally-ill patients, we must allocate our scarce health care resources among them. Allocation decisions will continue to be difficult. Various utilitarian and egalitarian considerations, including social worth, medical benefits, need, and others, will compete for preeminance in the policymaking process. They are all important, but none is adequate by itself. Perhaps by accounting for a number of them in a two-step process, policymakers can respond to

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[145] Notably, the Harvard Medicare Project, a policy review with recommendations commemorating the twentieth anniversary of Medicare, contains no mention of the ESRD program. Its authors apparently do not consider it a model for future reform. *See* HARVARD MEDICARE PROJECT, MEDICARE COMING OF AGE: A PROPOSAL FOR REFORM (1986).

many of their concerns while at the same time avoiding the dangers of relying exclusively on any one.

No matter what the process, allocation decisions will always be agonizing. No one wants to make them. But they are essential if we are to provide the maximum available relief from illness in the most equitable manner possible. Medical progress, which continues to find miraculous yet costly ways to relieve human suffering, will only make the problem more pressing as time goes on. More and more, we will have to determine who shall live when not all can live. When we do, we must be sure that we are guided by the courage to act wisely. Only then can we say that for those needing medical care, we have done the best we can.

STATUTE

A PROPOSED MODEL ACT FOR THE REINSTATEMENT OF EMPLOYEES UPON RECOVERY FROM WORK-RELATED INJURY OR ILLNESS

MARK A. ROTHSTEIN*

I. INTRODUCTION: THE PROBLEM

Kevin Clifford was employed as a floor hand by the Cactus Drilling Corporation. As a result of an unspecified on-the-job injury, Clifford was absent from work for a period of five weeks, during which time he received workers' compensation benefits. He subsequently returned to work for four days, but a recurrence of the pain caused him to call in sick on the fifth day. The next day Clifford was discharged for excessive absences.

Clifford brought a common law wrongful discharge action[1] alleging that his dismissal did not fall under the employment at will rule.[2] The Michigan Supreme Court held that it did not violate public policy for an employer to discharge an employee because of an absence from work, even though the absence was caused by a work-related injury.[3] Indeed, there was no legal requirement that Cactus Drilling reinstate Clifford in the first place. Clifford could have been dismissed at any time during the five weeks he missed work and received workers' compensation benefits for temporary total disability[4]—at least insofar

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[1] Clifford v. Cactus Drilling Corp., 419 Mich. 356, 353 N.W.2d 469 (1984).

[2] *See generally* W. HOLLOWAY & M. LEECH, EMPLOYMENT TERMINATION: RIGHTS AND REMEDIES 249–306 (1985); M. ROTHSTEIN, A. KNAPP, & L. LIEBMAN, CASES AND MATERIALS ON EMPLOYMENT LAW 753–68 (1987).

[3] 419 Mich. at 360, 353 N.W.2d at 471.

[4] *See, e.g.*, Kern v. South Baltimore Gen. Hosp., 66 Md. App. 441, 504 A.2d 1154 (1986); Federici v. Mansfield Credit Union, 399 Mass. 592, 506 N.E.2d 115 (1987); Duncan v. New York State Dev. Center, 63 N.Y.2d 128, 470 N.E.2d 820, 481 N.Y.S.2d 22 (1984).

as the discharge was not in retaliation for filing the workers' compensation claim.[5]

Not only is the result in *Clifford* the law in virtually every jurisdiction,[6] but the threat of dismissal for injury-related absences is one that is shared by thousands of American workers injured on the job each year. According to the Bureau of Labor Statistics, there were an estimated 2.1 million lost workday cases in the private sector in 1983, resulting in 36.4 million lost workdays—an average of 17.3 workdays per case.[7] The Bureau does not compile nationwide data on the average length of time a claimant receives benefits for temporary total disability and only a few states compile state data. In Wisconsin, the average number of compensation days per case is sixty-five.[8] Figures from Minnesota are generally consistent with those from Wisconsin: ninety-five percent of claimants who received temporary total disability were able to return to work within one year, and of that ninety-five percent the average duration of disability was six weeks.[9] In the only other state with available data, Washington, the average length of temporary total disability was 240 days, up from approximately 150 days ten years ago.[10]

There are no readily available data for any state specifying how many employees are reinstated upon recovery from their injuries. Yet the *ability* to return to work does not necessarily mean that the employee is reinstated or hired by another employer.[11] One might suppose that most employees are reinstated to their former positions even though there is no legal require-

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[5] 419 Mich. at 360, 353 N.W.2d at 471.

[6] For a treatment of contrary authority see *Judson Steel Corp. v. Workers' Compensation Appeals Bd.*, 22 Cal. 3d 658, 586 P.2d 564, 150 Cal. Rptr. 250 (1978), *infra* note 56, and accompanying text.

[7] OFFICE OF TECHNOLOGY ASSESSMENT, UNITED STATES CONGRESS, PREVENTING ILLNESS AND INJURY IN THE WORKPLACE 32–33 (1985).

[8] Telephone interview with Simon Tai, Director, Bureau of Compensation Performance, Wisconsin Department of Labor and Industry (Apr. 12, 1988).

[9] MINNESOTA DEPARTMENT OF LABOR AND INDUSTRY, REPORT TO THE LEGISLATURE ON WORKERS' COMPENSATION IN MINNESOTA, BACKGROUND RESEARCH STUDIES, "Income Replacement" tab at 29 (1988).

[10] Telephone interview with Bill Antley, Actuarial Department, Washington Department of Labor and Industry (Apr. 13, 1988). It is unclear why the number of lost workdays in Washington is so much higher than in either Wisconsin or Minnesota. There are at least three possibilities: the method of calculating lost workdays may be significantly different in Washington; the Washington figures may be inflated by serious logging injuries; or benefits may be extended too leniently in Washington.

[11] Some collective bargaining agreements contain provisions setting out medical leaves of absence for both work-related and nonwork-related causes. *See, e.g.*, Jordan v. Workers' Compensation Appeals Bd., 175 Cal. App. 3d 162, 220 Cal. Rptr. 554 (1985) (collective bargaining agreement provided for eighteen-month leave of absence).

ment that the employer do so. A sampling of cases and anecdotal reports, however, suggests that the problem of injured workers with the ability to return to work being discharged because of excessive absences is substantial.[12] The Model Act described in this Article is an attempt to provide a plan for the mitigation of the human and economic costs of these injury-related discharges.

II. The Inadequacy of Existing Laws

A. *Antiretaliation Laws*

The majority of jurisdictions now provide some type of civil remedy for an employee who has been discharged in retaliation for filing a workers' compensation claim. According to one compilation,[13] eleven states recognize a common law tort action, six states have created a statutory cause of action for damages, three states authorize equitable relief, two states impose a civil penalty of up to one year's back pay, and six states have created an administrative remedy allowing for reinstatement and back pay.[14] Given the current trend of legislative and judicial creation of remedies for retaliatory discharge, the number of jurisdictions providing relief can be expected to increase in the future.

The logic behind antiretaliation protection is unassailable. If injured workers could be discharged for filing workers' compensation claims they would be dissuaded from exercising their statutory rights. Inasmuch as the workers' compensation system precludes a worker from suing his or her employer in tort, the effect of unchecked employer reprisals would be that injured workers would suffer both physical and economic harm with no remedy whatsoever.[15]

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[12] *See, e.g.*, Fergerstrom v. Datapoint Corp., 680 F. Supp. 1456 (D. Haw. 1988); Slover v. Brown, 140 Ill. App. 3d 616, 488 N.E.2d 1103 (1986).

[13] Love, *Retaliatory Discharge for Filing a Workers' Compensation Claim: The Development of a Modern Tort Action*, 37 Hastings L.J. 551, 554–55 (1986).

[14] *Id.*

[15] In Lingle v. Norge Div. of Magic Chef, Inc., ____ U.S. ____, 108 S. Ct. 1877 (1988), the Supreme Court recognized the importance of an employee's right to sue for retaliatory discharge under a state workers' compensation law. The Court held that these actions were not preempted by section 301 of the Taft-Hartley Act, 29 U.S.C. § 185 (1982), which provides a federal cause of action for enforcing collective bargaining agreements.

Antiretaliation laws provide an important element in the arsenal of employee rights, but they usually do not apply to discharges based solely on absence from work.[16] The essence of an antiretaliation claim is proof, even if circumstantial, of the employer's retaliatory motive or animus. On the other hand, an employer that replaces an absent employee may merely be attempting to keep the business operating efficiently. A reinstatement claim is based not on the goal of ensuring workers' rights in the face of improper employer motives, but on the sound policy consideration of facilitating the return to productive status of workers injured at the workplace.

B. *Handicap Discrimination Laws*

As with antiretaliation laws, handicap discrimination laws offer a limited degree of protection to employees who have been discharged because of a work-related injury or illness. Both the federal Rehabilitation Act[17] and state handicap discrimination laws[18] prohibit employers from discriminating—with regard to hiring, firing and other terms and conditions of employment—against qualified individuals with handicaps. If these statutory schemes were applied to the context of rehiring or reinstatement after a work-related injury or illness, the employer would be prohibited from refusing to rehire an employee because of the residual effects of the injury or illness so long as the individual is able to perform the job safely and efficiently.[19] The employer would also be prohibited from discriminating because the indi-

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[16] *See, e.g.*, Fergerstrom v. Datapoint Corp., 680 F. Supp. 1456 (D. Haw. 1988); Slover v. Brown, 140 Ill. App. 3d 618, 488 N.E.2d 1103 (1986). *But cf.* Moore v. McDermott, 494 So. 2d 1159 (La. 1986) (employer violated state statute by discharging employee for failing to return to work immediately upon termination of workers' compensation benefits); Lo Dolce v. Regional Transit Serv., Inc., 77 A.D.2d 697, 429 N.Y.S.2d 505 (App. Div. 1980) (discharge for absenteeism following work-related injury violated statutory provision prohibiting discrimination against workers' compensation claimants).

[17] 29 U.S.C. §§ 701–96 (1982 & Supp. III 1988).

[18] For a listing of handicap discrimination provisions in forty-four states and the District of Columbia, see M. ROTHSTEIN, MEDICAL SCREENING OF WORKERS, ch. 9, n.1 at 238–39 (1984).

[19] *See, e.g.*, Kenall Mfg. Co. v. Illinois Human Rights Comm'n, 152 Ill. App. 3d 695, 504 N.E.2d 805 (1987).

vidual had a record of impairment or was perceived as being impaired.[20]

Furthermore, the Rehabilitation Act and some state laws mandate that employers subject to these statutes owe a duty of reasonable accommodation to otherwise qualified individuals with handicaps. For example, workplaces must be made accessible to orthopedically impaired employees. Major modifications or disruptions of an enterprise, however, are not required.[21] Although the parameters of the duty are still being clarified by case law, some factors used by the courts in deciding whether an accommodation is reasonable are the cost, nature and size of the business, and the nature of the accommodation.[22]

Several problems arise, however, in attempting to apply handicap discrimination laws to the rehire setting. First is the limited scope of coverage in the federal provisions. The Rehabilitation Act applies only to three discrete classes of employers: the federal government (section 501),[23] contractors dealing with the federal government (section 503),[24] and recipients of federal financial assistance (section 504).[25] Thus, while the Rehabilitation Act covers a substantial number of employees, many more are not covered. And although a private right of action exists under sections 501 and 504, the exclusive responsibility for enforcing section 503 is vested in the Office of Federal Contract Compliance Programs in the Department of Labor,[26] further limiting the scope of the Act's coverage.

State handicap discrimination laws generally apply to all public and private employers in the state[27] and often provide for a private right of action. Therefore, state laws are important in

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[20] The term "individual with a handicap" is broadly defined in the Rehabilitation Act as "any person who (A) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (B) has a record of such an impairment, or (C) is regarded as having such an impairment." 29 U.S.C. § 706(7)(B) (1982 & Supp. III 1988).

[21] *See* Southeastern Community College v. Davis, 442 U.S. 397 (1979).

[22] *See* Nelson v. Thornburgh, 567 F. Supp. 369 (E.D. Pa. 1983), *aff'd*, 732 F.2d 146 (3d Cir. 1984), *cert. denied*, 469 U.S. 1188 (1985).

[23] 29 U.S.C. § 791 (1982 & Supp. III 1985).

[24] *Id.* § 793.

[25] *Id.* § 794.

[26] *See generally* L. ROTHSTEIN, RIGHTS OF PHYSICALLY HANDICAPPED PERSONS (1984).

[27] Alabama and Mississippi, however, have laws applicable only to public employment. ALA. CODE § 21-7-8 (1975); MISS. CODE ANN. § 25-9-149 (1972 and 1987 Supp.). Additionally, many states exempt small employers. *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 5221(k), § 2.01(5) (Vernon 1988) (employers with fourteen or fewer employees exempt).

redressing claims of discrimination in employment based on handicap.

Nonetheless, handicap discrimination laws fail to deal effectively with the problem of reinstatement of workers. The bedrock principle of handicap discrimination law is that it is illegal to discriminate against an individual with a handicap who is currently capable of performing the job safely and efficiently. If an injured employee is off work and receiving workers' compensation benefits for a temporary total disability, the employee is (at least temporarily) ipso facto incapable of performing the job. Therefore, terminating the employee or hiring a replacement would probably not be discriminatory.[28] An expansive interpretation of the duty to make reasonable accommodation may require that the employer attempt to place a handicapped employee in an appropriate alternative position.[29] No court, however, has required or is likely to require that a worker be reinstated to his or her former position if the position already has been filled. In effect, replaced employees are on the same footing as other job applicants: it is illegal to discriminate against them, but they are owed no affirmative duties by the employer.

Another limitation on the use of handicap discrimination laws is their possible preemption by other statutory schemes. In *Schachtner v. Department of Industry, Labor & Human Relations*,[30] the plaintiff stopped working due to a work-related injury. Two years later, upon learning of an opening at her former employer, she applied for the position and was rejected. She then filed an action alleging handicap discrimination under Wisconsin state law. The Wisconsin Court of Appeals held that an action for handicap discrimination was barred by the "exclusive remedy" provision of the state workers' compensation law:

> The injury in the case at bar arose incidental to, and only as a result of, Schachtner's performance of an integral part of her job . . . . Such an injury is the precise sort for which the worker's compensation system operates to provide prompt and assured recovery and as to which the exclusivity provision should operate to provide immunity.[31]

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[28] *See, e.g.*, Giaquinto v. New York Tel. Co., 135 A.D.2d 928, 522 N.Y.S.2d 329 (1987).

[29] *See, e.g.*, Cerro Gordo County Care Facility v. Civil Rights Comm'n, 401 N.W.2d 192 (Iowa 1987); Reese v. Sears, Roebuck & Co., 107 Wash. 2d 563, 731 P.2d 497 (1987).

[30] 144 Wis. 2d 1, 422 N.W.2d 906 (Wis. Ct. App. 1988).

[31] 144 Wis. 2d at _____, 422 N.W.2d at 909–10.

The court distinguished contrary decisions in other states[32] by noting, ironically, that Wisconsin had a specific statutory provision dealing with the rehire rights of employees.[33] Thus, the fact that Wisconsin attempted to provide some measure of protection against rehire discrimination under its workers' compensation law was used to prevent the assertion of the more generally accepted claim of handicap discrimination.

C. *Common Law*

As exemplified by the *Clifford* case, common law actions for wrongful discharge have been generally unsuccessful where plaintiffs have been discharged because of an absence from work caused by an occupational injury or illness. There are, however, a few exceptions. For example, in *Hinthorn v. Roland's of Bloomington, Inc.*,[34] a clerk in the shipping department, who had twice before been injured on the job, notified her supervisor that she had sustained another back injury and requested medical attention. The plaintiff alleged that a company vice-president coerced her into resigning because she was "getting hurt too much—costing the company too much money."[35] In affirming the Appellate Court's decision to remand, the Illinois Supreme Court held that if in fact the plaintiff had been constructively discharged, her discharge violated the public policy exception to the at will doctrine.

> It would be anomalous to allow a retaliatory discharge action to employees who are fired after filing a workers' compensation claim for work-related injuries, but not those who are injured and fired before they ever get the chance to file such claims. Plaintiff should not be penalized because her employer discharged her in retaliation for orally requesting medical attention, instead of filing a formal compensation claim—the effect is the same: being fired in retaliation for asserting legal rights to medical care for work-related injuries.[36]

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[32] Boscaglia v. Michigan Bell Tel. Co., 420 Mich. 308, 362 N.W.2d 642 (1984); Reese v. Sears, Roebuck & Co., 107 Wash. 2d 563, 731 P.2d 497 (1987); *see also* Muncy v. Norfolk & W. Ry. Co., 650 F. Supp. 641 (S.D.W.V. 1986) (action for handicap discrimination under West Virginia Human Rights Act based on failure to rehire not barred by Railway Labor Act or section 503 of Rehabilitation Act).

[33] 144 Wis. 2d at ____, 422 N.W.2d at 910.

[34] 119 Ill. 2d 526, 519 N.E.2d 909 (1988).

[35] 119 Ill. 2d at ____, 519 N.E.2d at 911.

[36] 119 Ill. 2d at ____, 519 N.E.2d at 913.

Hinthorn is significant because it adopted the broad view that any discrimination related to the workers' compensation process is prohibited. In *Coleman v. Safeway Stores, Inc.*,[37] the Kansas Supreme Court focused more directly on the issue of whether discharging an employee for absences caused by a work-related injury violates the public policy exception to the at will rule. In holding that such an action would lie,[38] the court stated that "[a]llowing an employer to discharge an employee for being absent or [for] failing to call in an anticipated absence as the result of a work-related injury would allow an employer to indirectly fire an employee for filing a workers' compensation claim, a practice contrary to the public policy of this state . . . ."[39]

Despite the inroads made by *Hinthorn* and *Coleman*, it is an open question whether these holdings will be embraced by other jurisdictions. In any event, a statutory approach remains more desirable than ad hoc court decisions: a statute can more clearly set forth the rights and duties of employers, employees, and replacements, and can also specify filing periods, hiring preferences, procedures, remedies, and other matters that will make the change in policy much easier to implement.

D. *Rehire Statutes*

There are only seven states[40] with laws addressing the issue of reinstatement of employees after recovery from a work-related injury or illness. Although some of these statutes are more thorough than others, none is able to address completely the problems facing injured workers. Connecticut has a "light work" law which provides for the transfer of an injured employee to "other suitable full-time work in the employer's establishment, if available . . . ."[41] Massachusetts has a "preference" law which provides that a person who has lost a job as a result of a compensable injury shall be given a preference in hiring for any

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[37] 242 Kan. 804, 752 P.2d 645 (1988).

[38] The court also held that a wrongful discharge action was not preempted by section 301 of the Taft-Hartley Act, 29 U.S.C. § 185 (1982), correctly anticipating the Supreme Court's decision in Lingle v. Norge Division of Magic Chef, Inc., ——— U.S. ———, 108 S. Ct. 1877 (1988), discussed *supra* note 15.

[39] 242 Kan. at ———, 752 P.2d at 652.

[40] California, Connecticut, Hawaii, Massachusetts, Oregon, Washington, and Wisconsin; the laws of these states are discussed *infra* notes 41–58 and accompanying text.

[41] CONN. GEN. STAT. § 31-313(b) (1985).

suitable job available.[42] Neither of these vague exhortations has been effective, largely because comparable jobs are frequently unavailable at the time the employee is able to return to work.

Hawaii enacted a "preference" law in 1978. Although similar to the law in Massachusetts, the Hawaii statute is more detailed:

> Any employee who is suspended or discharged because of . . . [a] work injury shall be given first preference of reemployment by the employer in any position which the employee is capable of performing and which becomes available after the suspension or discharge and during the period thereafter until the employee secures new employment.[43]

Although there are no reported decisions interpreting the law, an employer's duty under the statute is a limited one. The employer must merely rehire the employee to a position which "becomes available." Thus, if a replacement has been hired, the former employee must wait until another position becomes available.

The Hawaii law also provides that the employee retains rights to the former position only until new employment is secured elsewhere. This provision may result in the employee being faced with the dilemma of either accepting a lower paying job and forfeiting all reemployment rights or remaining unemployed in hopes that the prior job will become available at some point in the future.

Wisconsin's 1975 reinstatement law is notable because, unlike the statutes of Connecticut, Massachusetts, and Hawaii, it provides a remedy:

> Any employer who without reasonable cause refuses to rehire an employe who is injured in the course of employment, where suitable employment is available within the employe's physical and mental limitations, upon order of the [D]epartment [of Industry, Labor and Human Services] and in addition to other benefits, has exclusive liability to pay to the employe the wages lost during the period of such refusal, not exceeding one year's wages. In determining the availability of suitable employment the continuance in business of the employer shall be considered and any written rules promulgated by the employer with respect to seniority or the provisions of any collective bargaining agreement with respect to seniority shall govern.[44]

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[42] MASS. GEN. LAWS ANN. ch. 152, § 75A (West 1988).
[43] HAW. REV. STAT. § 386-142 (1985).
[44] WIS. STAT. ANN. § 102.35(3) (West 1986).

The Wisconsin statute has been interpreted to place the burden on the employer to show that there was reasonable cause not to rehire the injured employee.[45] Further, the employer must rehire the employee with a good faith intention to keep the employee on the job; the rehiring cannot be merely pro forma to meet the language of the statute.[46] If there is an eventual discharge, the employer must show that there was no bad faith on its part and that the rehired employee was discharged for good cause.[47]

A number of factors limit the scope of the statute, however. Significantly, Wisconsin courts have interpreted "available" to mean that the job is vacant, not merely that it exists.[48] Therefore, if there are no openings, the employee need not be rehired. Also, the employer's rules or those of a collective bargaining agreement regarding seniority expressly apply and no time period for exercising rehire rights or the effect of obtaining another job is expressly mentioned in the law.

Oregon's 1973 reinstatement law is the most detailed of any state and gives employees more job security than provided by laws of other states by imposing additional duties on employers. The Oregon law provides:

> 659.415 . . .
> (1) A worker who has sustained a compensable injury shall be reinstated by the worker's employer to the worker's former position of employment upon demand for such reinstatement, provided that the position is available and the worker is not disabled from performing the duties of such position. If the former position is not available, the worker shall be reinstated in any other position which is available and suitable. A certificate by a duly licensed physician that the physician approves the worker's return to the worker's regular employment shall be prima facie evidence that the worker is able to perform such duties.
> (2) Such right of reemployment shall be subject to the provisions for seniority rights and other employment restrictions

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[45] Dielectric Corp. v. Labor & Indus. Review Comm'n., 111 Wis. 2d 270, 330 N.W.2d 606 (Wis. Ct. App. 1983).

[46] Dalco Metal Prods., Inc. v. Labor & Indus. Review Comm'n., 142 Wis. 2d 595, 419 N.W.2d 292 (Wis. Ct. App. 1987); West Allis School Dist. v. Dep't of Indus., Labor & Human Relations, 116 Wis. 2d 410, 342 N.W.2d 415 (1984).

[47] West Bend Co. v. Labor & Indus. Review Comm'n., 141 Wis. 2d 165, 413 N.W.2d 662 (Wis. Ct. App. 1987); Link Indus., Inc. v. Labor & Indus. Review Comm'n., 141 Wis. 2d 551, 415 N.W.2d 574 (Wis. Ct. App. 1987).

[48] *See, e.g.*, West Allis School Dist. v. Dep't of Indus., Labor & Human Relations, 116 Wis. 2d at 425, 342 N.W.2d at 423; West Bend Co. v. Labor & Indus. Review Comm'n., 141 Wis. 2d at 169, 413 N.W.2d at 664.

> contained in a valid collective bargaining agreement between the employer and a representative of the employer's employes.
> (3) Any violation of this section is an unlawful employment practice.
>
> 659.420 . . .
> (1) A worker who has sustained a compensable injury and is disabled from performing the duties of the worker's former regular employment shall, upon demand, be reemployed by the worker's employer at employment which is available and suitable.
> (2) A certificate of the worker's attending physician that the worker is able to perform described types of work shall be prima facie evidence of such ability.
> (3) Such right of reemployment shall be subject to the provisions for seniority rights and other employment restrictions contained in a valid collective bargaining agreement between the employer and a representative of the employer's employes.
> (4) Any violation of this section is an unlawful employment practice.[49]

The provision requiring reinstatement if the job is "available" has, however, been interpreted to mean that reinstatement is required only if the job still exists and is vacant.[50] Thus, as in Wisconsin, an employee would not be entitled to reinstatement if a replacement had been hired. Furthermore, the Oregon statute specifies neither a time limitation for exercising reinstatement rights nor any guidance as to the effect of accepting another job.

Nonetheless, the Oregon statute has been found not to preempt an employee's recourse to separate claims. In *Palmer v. Central Oregon Irrigation District*,[51] the Oregon Court of Appeals held that compliance with the Oregon rehire statute does not preclude a finding that the employer is liable for common law wrongful discharge.

> [F]ailure to reinstate a worker who has sought benefits can be discriminatory, even if the refusal to reinstate does not violate ORS 659.415. For example, an employer's elimination of a compensably injured employe's position and its later refusal to restore the employe to the position would not offend ORS 659.415. However, the employer would be

[49] OR. REV. STAT. §§ 659.415, .420 (Supp. 1987).
[50] Knapp v. City of North Bend, 304 Or. 34, 741 P.2d 505 (1987).
[51] 91 Or. App. 132, 754 P.2d 601 (1988).

> guilty of discrimination if its reason for eliminating the position and not reinstating the employe was that the employe had claimed workers' compensation.[52]

Washington law does not address the issue of reinstatement, but it is the only state to focus on the cost of accommodating an employee who has suffered a compensable injury. Washington law provides that the state's "second-injury fund"[53] will pay up to $5,000 to modify an injured employee's job to permit the employee to return to work following a work-related injury.[54]

Finally, California law is important not so much because of the language of its statute, but because of the way its statute has been interpreted. In 1972 California amended its Labor Code to provide, in pertinent part: "It is the declared policy of this state that there should not be discrimination against workers who are injured in the course and scope of their employment."[55] In *Judson Steel Corp. v. Workers' Compensation Appeals Board*,[56] the Supreme Court of California held, four-to-three, that this general provision required the employer to reinstate an employee to his position and with seniority after an on-the-job injury for which the employee received workers' compensation benefits. The court left open the issue of the extent of remedies available to the employee, but awarded an increase in compensation (the relief sought by the employee) pursuant to a separate statutory provision incorporated into the section that permits up to a one-half increase in compensation where the employer has engaged in serious and willful misconduct.[57]

Judson remains the law in California, although it has been distinguished in subsequent cases.[58] *Judson*'s vague treatment

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[52] 91 Or. App. at 136–37, 754 P.2d at 603–04.

[53] Second-injury funds were developed to meet the problems arising when a preexisting injury combines with a second injury to produce disability greater than that caused by the latter alone. The funds encourage the hiring of the physically handicapped and more equitably allocate costs of providing benefits to such employees. Second-injury employers pay compensation related primarily to the disability caused by the second injury alone—even though the employee receives a benefit related to the combined disability. The difference is made up from a second-injury fund. The sources of the fund vary by state and include a special tax on employers and general revenue appropriations. UNITED STATES CHAMBER OF COMMERCE, 1988 ANALYSIS OF WORKERS COMPENSATION LAWS, 30, 38–41 (1988) [hereinafter CHAMBER OF COMMERCE ANALYSIS].

[54] WASH. REV. CODE ANN. § 51.32.250 (Supp. 1988).

[55] CAL. LAB. CODE. § 132a (Supp. 1988).

[56] 22 Cal. 3d 658, 586 P.2d 564, 150 Cal. Rptr. 250 (1978).

[57] 22 Cal. 3d at 668, 586 P.2d at 570, 150 Cal. Rptr. at 256.

[58] *See, e.g.*, Leamon v. Workers' Compensation Appeals Bd., 190 Cal. App. 3d 1409, 235 Cal. Rptr. 912 (1987) (*Judson* only applies when the employer knew that the absences were related to an industrial injury).

of the rights and obligations of employees and employers, and the possibility that the decision will be overruled or substantially modified, strongly suggest that a carefully drafted, specific statute is preferable to a judicial interpretation of a general statutory provision.

III. Proposed Model Act

ACT FOR THE REINSTATEMENT OF EMPLOYEES UPON RECOVERY FROM WORK-RELATED INJURY OR ILLNESS

Section (a). Employee's Right to Reinstatement.

1. An employee who has suffered a compensable work-related injury or illness involving lost work time shall be reinstated by the employer to the employee's former position of employment within fifteen working days of making written application for such reinstatement, unless the employer has reasonable cause not to reinstate the employee, provided the employee is able to perform the duties of such position. A physician's certificate approving the employee's return to employment shall be prima facie evidence that the employee is able to perform such duties.

2. If the employee is not granted reinstatement, the employer shall provide within fifteen working days of receiving the application a written explanation of the reasons therefor. An employer may extend this fifteen-day period by a maximum of seven working days to provide for an independent medical examination to determine the employee's fitness for duty, with all costs related to the examination to be borne by the employer. If the medical examiner does not bill the employer directly, the employer shall pay for the examination in advance.

3. It shall be the employer's burden to show reasonable cause why the employee should not be reinstated, and reasonable cause shall in no event be established because the employee applied for or received workers' compensation or because the employee is or has become disabled.

4. The right to reinstatement shall be in effect for a period of one year after the employee ceases work due to a compensable injury or illness, even if the employee's former position has been filled. If, one year after the injury occurs the employee has not been reinstated, then for an additional two years the employee shall be given preference by the employer for any full-time position

that becomes available and is commensurate with the employee's skill, training, and physical and mental condition, provided the employee has notified the employer in writing of the employee's eligibility for reinstatement.

5. An employee who has suffered a compensable, work-related injury or illness involving lost work time who is able to return to work, but because of the work-related injury or illness is unable to return to the employee's former position, shall be reemployed by the employer in the first full-time position that becomes available and that is commensurate with the employee's skill, training, and physical and mental condition, provided the employee has notified the employer in writing of the employee's ability to return to employment. An employee's preference under this section shall exist for a period of two years following the notification of ability to return to work.

6. The employee loses the right to reinstatement preference provided by this section if: (a) the employee fails to notify the employer in writing within sixty working days of the termination of the employee's temporary total disability status that the employee is able to return to work in the same position or in the first available full-time position commensurate with the employee's skill, training, and physical and mental condition; (b) the employee refuses to accept employment with the employer in a full-time position commensurate with the employee's skill, training, and physical and mental condition; or (c) the employee secures and performs for thirty days full-time employment with another employer which is substantially equivalent in pay and benefits to the position the employee would have been entitled to had the employee been reinstated by the employee's employer at the time of the injury.

7. Any employee reinstated under this section shall be entitled to the same salary or wage rates, benefits, and seniority as if the employee had been continuously employed in that position, unless reinstatement is otherwise controlled by a provision of a valid collective bargaining agreement.

8. The reinstatement rights provided by this section shall not be adversely affected by a determination that the employee is permanently partially disabled, provided that the employee, with reasonable accomodation, is able to perform the duties required by the position.

9. The rights and remedies provided by this section shall not be adversely affected by the employee's receipt of vocational rehabilitation services.

10. It shall be the responsibility of the employer to notify the employee of the employee's rights and obligations under this section. Such notification shall be written in plain English and delivered in writing to the employee within ten working days of receipt of notice of the employee's compensable injury.

11. Compliance with the reinstatement provisions of this section requires that the employer act in good faith. To act in good faith the employer must reinstate the employee with the intention of keeping the employee on the job, as it would intend to keep its other employees on the job, and not merely reinstate the employee with the intent to meet the letter of the statute, only later to terminate the employee's employment.

Section (b). Reasonable Accommodation.

1. An employer shall make reasonable accommodation to the handicaps of a worker exercising reinstatement rights under this section.

2. If the costs of accommodation are such as to constitute an unreasonable burden on the employer, the employer may be reimbursed from the compensation fund for specific job site modifications in an amount not to exceed five thousand dollars per worker.

3. The provisions of this section shall not diminish or otherwise affect the employer's duty under federal or state laws prohibiting employment discrimination on the basis of handicap.

Section (c). Penalties and Remedies.

1. Any employer who knowingly violates a provision of this section shall be guilty of a misdemeanor and, upon conviction shall be punished by a fine of [ ] dollars, or by imprisonment not exceeding twelve months, or by both fine and imprisonment, at the discretion of the court.

2. This section specifically provides for a private right of action against any employer that fails to comply with an employee's written request for reinstatement or reemployment within fifteen working days of receipt of such request. Suit may be brought in any court having jurisdiction over the employer and the subject matter.

3. Private remedies available under this section shall include, but shall not be limited to, the following: reinstatement, reemployment, back pay, compensatory damages, reasonable attorneys' fees, court costs, and punitive damages not to exceed ten thousand dollars.

4. The provisions of this section shall not diminish or otherwise affect any other remedies to which the employee is entitled at law or equity.

Section (d). Construction.

1. This Model Act is to be liberally construed to secure its basic objective of protecting the rights of employees who have suffered work-related injuries and illnesses.

IV. COMMENTARY

The Model Act is intended to apply to all full-time, permanent employees who are covered by state workers' compensation law. After recovering from a work-related injury or illness the employee has sixty working days to file an application for reinstatement. (Subsection (a)(6)). A physician's certificate, from a physician of the employee's choice, approving the employee's return to work may be submitted with the application for reinstatement. (Subsection (a)(1)). The application for reinstatement must be in writing. An approved application form would be available from either the employer or the workers' compensation commission, or would be mailed to the claimant with the benefit checks.

The employer must reinstate the employee within fifteen working days of receipt of the application for reinstatement unless there is reasonable cause to deny reinstatement. (Subsection (a)(1)). Reasonable cause includes, but is not limited to, the following: the employee is unable to perform the job even with reasonable accommodation or the position no longer exists. Reasonable cause shall not exist merely because the employee has filed for workers' compensation or has become disabled. (Subsection (a)(3)).

The burden is on the employer to show reasonable cause for failure to reinstate. (Subsection (a)(3)). If the employee is not granted reinstatement, the employer has fifteen working days from receipt of the application to provide a written explanation. (Subsection (a)(2)). The period of time for reinstatement or for giving written reasons for denial may be extended by seven working days to allow for an independent medical examination by a physician chosen by the employer, with all costs to be borne by the employer. (Subsection (a)(2)).

The employee has sixty days from cessation of temporary total disability benefits (Subsection (a)(6)), or one year from the date of injury (Subsection (a)(4)), whichever comes first, to apply for reinstatement. Thus, after one year from the date of injury the employee has no right to reinstatement. In effect, any replacement employee, whose statutory job rights are secondary to the injured employee's, would then have, at least as to this statute, the vested right to remain in the position on a permanent basis.

If the injured employee recovers from the injury after one year but before three years from the date of injury, the employee must be given a preference for any full-time position that becomes available and for which the employee is qualified. (Subsection (a)(4)). The above provision is an attempt to accommodate the interests of the injured employee, the replacement employee, and the employer. It appears that most employees who have a substantially complete recovery from a work-related injury will be able to return to work long before the end of one year.[59]

An employee who has reached maximum medical recovery (the date when temporary total disability benefits stop and permanent partial disability benefits begin), but who is still unable to resume the duties of his or her former position, must be given a preference, for a period of three years from the date of injury, for any other available position commensurate with the employee's skill, training, and physical and mental condition. (Subsection (a)(5)). Such "light duty" preferences already are contained in the laws in Connecticut[60] and Oregon.[61] The employee could be assigned to another work site so long as the new assignment is not an unreasonable distance from the prior site or does not otherwise cause a hardship to the employee.

In addition to the sixty-day requirement mentioned earlier, Subsection (a)(6) provides that the reinstatement right is lost if the employee refuses to accept the same or a similar position, or if the employee secures a substantially equivalent, full-time job and performs in the new job for a period of thirty working days. This provision allows an employee waiting for a job opening to accept a part-time or temporary job without waiving

[59] This conclusion is based on the limited amount of state data available. *See supra* notes 8–10 and accompanying text.

[60] CONN. GEN. STAT. ANN. § 31-313(b) (West 1987).

[61] OR. REV. STAT. § 659.420(1) (Supp. 1987).

reinstatement rights. It also allows for a trial work period to see if the employee is able to perform adequately in a new position without waiving reinstatement rights.

The employment status of a reinstated employee should not be adversely affected by the work-related injury and therefore the employee must receive seniority and wage and benefit increases as if the employee were employed continuously. (Subsection (a)(7)). Reinstatement rights created by this Model Act are subject to the terms of a valid collective bargaining agreement and are waivable. Similar provisions regarding collective bargaining appear in the laws of Massachusetts,[62] Oregon,[63] and Wisconsin.[64]

Many employees who suffer temporary total disability do not recover fully and are left with a permanent partial disability. An individual with a permanent partial disability will have a difficult time obtaining a job with another employer. Subsections (a)(8) and (b)(3) codify the present requirements under the handicap discrimination laws in most states and attempt to ensure that the Model Act will not diminish the existing rights of otherwise qualified handicapped individuals.

Even if an injured employee receives training in a new skill through vocational rehabilitation services, the employee retains the option of exercising the rights granted in this Model Act. (Subsection (a)(9)). This is particularly important with regard to alternative or light-duty job assignment under Subsection (a)(5).

The good-faith requirement in Subsection (a)(11) was suggested by case law developments in Wisconsin.[65] It should be noted that section A contains no limit on the number of times an employee may assert the right to reinstatement, so long as the reinstatement request follows a compensable, work-related injury or illness.

Section (b) of the Model Act is a further attempt to harmonize the Model Act with existing duties under state and federal handicap discrimination laws. Subsection (b)(2) is based on Washington law.[66] In Washington, the job modification costs may be taken from the state's "second-injury fund," although the source

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[62] MASS. GEN. LAWS ANN. ch. 152, § 75A (West 1988).

[63] OR. REV. STAT. §§ 659.415, .420(3) (Supp. 1987).

[64] WIS. STAT. ANN. § 102.35(3) (West 1986).

[65] Dalco Metal Prods., Inc. v. Labor & Indus. Review Comm'n., 142 Wis. 2d 595, 419 N.W.2d 292 (Wis. Ct. App. 1987); West Allis School Dist. v. Dep't of Indus., Labor & Human Relations, 116 Wis. 2d 410, 342 N.W.2d 415 (1984).

[66] WASH. REV. CODE ANN. § 51.32.250 (Supp. 1988).

of the funds is not important for implementation of the proposed Model Act. What is important is facilitating the reinstatement of injured workers without causing an economic hardship to employers. The state workers' compensation board may wish to issue regulations specifying eligibility criteria for employers seeking reimbursement for job modification costs.

The penalties and remedies provisions in Section (c) are stringent compared with existing legislation, but they are intended to ensure compliance with the Model Act. Verbatim enactment of Section (c) is not as crucial to the statutory scheme as is enactment of Sections (a) and (b). Nevertheless, a private right of action in favor of the employee is an essential part of the Model Act because without such a provision injured workers will be forced to rely on enforcement provided by the workers' compensation administration, a solution which places insufficient deterrent pressure on employers.

V. Conclusion: The Model Act Promotes Important Public Policies

Considerations of both equity and efficiency support adoption of the Model Act. The most compelling reason is the need to redress the injustice of allowing an injured employee to lose his or her job as a result of an injury or illness sustained in the furtherance of the employer's business. It is all the more compelling in situations where the injury or illness is not the result of any fault of the employee. It is ironic that an employee may not be discharged for filing a workers' compensation claim, but the employee may be discharged, in effect, for becoming sick or injured in the first place.

Increasingly, employment laws have recognized that employees have legitimate interests in retaining their jobs when their absence from work was due to no fault of their own. For example, a federal statute prohibits the discharge of an employee because of an absence caused by service on a federal jury,[67] and at least thirty-eight states have similar statutes protecting employees who serve on state court juries.[68] Federal law also provides that employees who leave their jobs to join the armed

[67] 28 U.S.C. § 1875 (1982).

[68] *See* W. Holloway & M. Leech, Employment Termination: Rights and Remedies 270–71 (1985).

forces, including reserve duties, are entitled to reemployment with full seniority upon completion of their duty.[69]

Recently, legislation was introduced in both houses of Congress to permit employees to take up to eighteen weeks of unpaid "parental" leave (in cases of the birth or adoption of a child, or of the illness of a parent or child) or twenty-six weeks of temporary disability leave.[70] Similar laws have been enacted in at least seven states.[71] Interestingly, the term "temporary disability leave" as used in an earlier version of the federal legislation was defined as "leave by reason of an employee's inability to perform his or her job due to nonoccupational medical reasons."[72] The Model Act furthers similar policy interests but has an even closer nexus to the workplace because the very reason a leave of absence is necessary is an injury or illness sustained in the course of employment.[73]

Adoption of the Model Act may also result in cost savings to employers, insurers, workers' compensation funds, and taxpayers. Presently, an injured employee who has been replaced by another employee may have little incentive to make a speedy recovery and to return to work. With no job, and perhaps no prospects, the employee may have an incentive to remain on the workers' compensation rolls as long as possible. After exhausting workers' compensation benefits, the employee may then apply for unemployment insurance and, if still unable to find a job, welfare benefits. Public policy must encourage able-bodied employees to return to work as soon as they are able.

Additionally, injured employees who are not assisted in returning to their former jobs may suffer from a longer period of unemployment than those who are assisted. It is likely that

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[69] 38 U.S.C. §§ 2021, 2024 (1982); *see* Lang v. Great Falls School Dist. No. 1 and A, 842 F.2d 1046 (9th Cir. 1988).

[70] The Parental and Medical Leave Act of 1987, S. 249, 100th Cong., 1st Sess., 133 CONG. REC. S154 (daily ed. Jan. 6, 1987), (introduced by Sens. Dodd and Specter) and The Family and Medical Leave Act of 1987, H.R. 925, 100th Cong., 1st Sess., 133 CONG. REC. H528 (daily ed. Feb 3, 1987) (introduced by Reps. Clay and Schroeder).

[71] CONN. GEN. STAT. ANN. Pub. Act 87-291 (West Supp. 1988); LA. REV. STAT. ANN. § 23:1008 (West 1988); MINN. STAT. ANN. § 181.941 (West 1988); OR. REV. STAT. § 659.360 (1987); R.I. GEN. LAWS §§ 28-48-1 to 28-48-9 (Supp. 1987); TENN. CODE ANN. § 4-21-408 (Supp. 1988); WIS. STAT. ANN. § 111.36 (West 1988).

[72] H.R. 2020, 99th Cong., 1st Sess., 131 CONG. REC. H1942 (daily ed. Apr. 4, 1985).

[73] Under the Model Act replacements for injured workers would be "temporary" for a period of time up to one year from the date the employee was injured. There is an analogy in the National Labor Relations Act, 29 U.S.C. §§ 151–69 (1982). Employees who strike to protest an employer's unfair labor practice may be replaced by temporary replacements only. These "unfair labor strikers" are entitled to have their jobs back upon return to work. Mastro Plastics v. NLRB, 350 U.S. 270 (1956).

displaced temporary workers will have an easier time finding equivalent jobs than will workers returning from the workers' compensation rolls who are more senior or who suffer from partial disabilities. Public policy should favor reinstating injured employees in their prior jobs while attempting to find new permanent jobs for their replacements.[74]

Other economic considerations support adoption of the Model Act. For example, most state workers' compensation laws pay for the vocational rehabilitation of injured workers.[75] These payments may be wasted and this policy may be frustrated by permitting the discharge of injured employees by the employer responsible for their injuries.[76] Thus, both equity and efficiency will increasingly demand a reasonable system of reinstating injured workers. The Model Act would create that system.

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[74] After the injured employee is reinstated, the employer may want to place the displaced temporary employee on a preferential hiring list. There would be no requirement for the employer to do so.

[75] CHAMBER OF COMMERCE ANALYSIS, *supra* note 53 at 28–29.

[76] *See generally* Gardner, *Vocational Rehabilitation; Lessons for the Employer*, BUSINESS AND HEALTH, Mar. 1987, at 20.

BOOK REVIEW

THE SUPREME COURT: HOW IT WAS, HOW IT IS. By *William H. Rehnquist*. New York: William Morrow and Company, Inc., 1987. Pp. 338, table of cases, bibliography, index. $18.95, cloth.

*Review by Paul Brickner**

Expectations of excellence come to mind immediately upon learning that the Chief Justice of the United States Supreme Court has written a book. Richard M. Nixon has described William Hubbs Rehnquist as possessing "unquestioned legal qualifications."[1] He was a Phi Beta Kappa graduate of Stanford and holds masters degrees from both Stanford and Harvard Universities. He was graduated first in his class at Stanford Law School, was elected to the Order of the Coif and served as an editor of the Stanford Law Review.[2]

After clerking for Supreme Court Justice Robert H. Jackson from 1952 to 1953, he engaged in the private practice of law in Phoenix until 1969. In 1969 he was appointed Assistant Attorney General, Office of Legal Counsel. Within three years he left the United States Department of Justice and commenced service as an Associate Justice of the Supreme Court in 1971.[3] In 1986, Chief Justice Warren Burger resigned from the Court, and Justice Rehnquist was named his successor by President Reagan.[4]

Despite these impressive credentials, *The Supreme Court: How It Was, How It Is* falls far short of our expectations. This book will not join Oliver Wendell Holmes' *The Common Law*[5] and Benjamin Nathan Cardozo's *The Nature of the Judicial Process*[6] or *The Growth of the Law*[7] as a great classic of Amer-

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[1] R. NIXON, THE MEMOIRS OF RICHARD NIXON 424 (1978).

[2] *See* THE AMERICAN BENCH 65 (M. Hough 4th ed. 1987–1988).

[3] *See* V. BLASI, THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 250–51 (1983).

[4] *See* Weinraub, *Burger Retiring, Rehnquist Named Chief; Scalia, Appeals Judge, Chosen for Court*, N.Y. Times, June 18, 1986, at A1, col. 6; Engleberg, *Dedicated Conservative Jurist: William Hubbs Rehnquist*, N.Y. Times, June 18, 1986, at A31, col. 1.

[5] O.W. HOLMES, THE COMMON LAW (1968).

[6] B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

[7] B. CARDOZO, THE GROWTH OF THE LAW (1924).

ican legal literature. Those who had looked forward to reading an exposition of conservative constitutional jurisprudence will be particularly disappointed.

Both the book and its shortcomings can be divided into three parts. The book begins with a compelling narration of Rehnquist's service as a law clerk to Justice Robert Jackson and the famous *Steel Seizure* case[8] that began and ended during his clerkship. The middle portion of the book takes its readers back to the era of Chief Justice John Marshall and *Marbury v. Madison*[9] and then forward through the history of the Court, focusing on biographical sketches of Justices Taney, Story, Miller, Field, Peckham, Holmes and Brandeis. The final third of the book covers the Court packing plan of Franklin Roosevelt, the appointment process and management aspects of the Court operations.

The book suffers from a deplorable job of editing, despite the praise given by the Chief Justice to his publisher and editor. The primary deficiency is the lack of a theme for the book as a whole. Rehnquist seems to have no message to deliver and no special insight or viewpoint that he wishes to share with his intended readers. And somewhat related to the lack of a theme, the book fails because it neglects to discuss recent developments in constitutional law, in particular, developments that have occurred since 1953—thirty-four years prior to the date of publication. While the title suggests an up-to-the-minute study of the Court, the recent past—in fact, an entire generation of Supreme Court effort—is ignored. As far as this book is concerned, the Warren Court never existed.

In short, Chief Justice Rehnquist's glass is both half full and half empty. If its entirety were as good as its beginnings and if the editing were a bit more thorough, it might well have been a classic. But the deficencies loom so large they overshadow the substance of the book, perhaps revealing shortcomings of the author himself.

Good writing requires hard work from both author and editor. Rewriting and editing can be laborious and frustrating. However, when the Chief Justice of the United States takes pen in hand, one expects the end product to approach perfection. This

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[8] Youngstown Sheet and Tube v. Sawyer, 343 U.S. 579 (1952).
[9] 5 U.S. 137 (1803).

volume seems to have been hastily edited, perhaps with an eye towards both the Christmas selling season and the bicentennial of the Constitution. For example, too many misspelled words remain uncorrected, such as "by" for "but" and "indicated" for "indicted." In addition, one sentence makes absolutely no sense.[10] Indeed, no less important a word than "due" is left out of his discussion of the fourteenth amendment's "due process" clause (p. 180).

Moreover, the Chief Justice appears to try to make himself come across to his readers as a "regular guy" rather than a "stuffed shirt." His language, however, seems inappropriate for his stature and for the august nature of the Court. Why should the Chief Justice downgrade his commentary by using phrases like "whole hog" (p. 40), "great shakes" (p. 84), and "in spades" (p. 122)?

Perhaps part of the editing problems result from portions of the book having been delivered first as speeches to law student audiences. Stories that serve well to establish rapport with an audience, such as Rehnquist's tale of maple flavored syrup and soggy pancakes at a Wooster, Ohio diner (pp. 17–18), come across as trivial in a book. Similarly, Rehnquist's categorization of attorney orators appearing before the High Court (pp. 278–81) seems out of place in this primarily historical study. Nevertheless, the hard labor of good editing should have resolved many of these problems. After all, Holmes' *The Common Law*[11] and virtually all of Cardozo's writings were delivered first as speeches.

The Chief Justice seems to have no discernible message to deliver. More than a year before its publication, Rehnquist described his book as depicting his "experiences as a law clerk," with additional material on "how the [C]ourt works . . . and a great deal of history."[12] These disparate purposes leave the reader wondering about, and searching for, a message. A book without a theme, particularly one with so all-encompassing a title, must falter.

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[10] "But the necessity to repel boarders from the popularly elected branches of government is not the only difficulty the Court faces in carrying out its duties of constitutional interpretation" (p. 312).

[11] O.W. HOLMES, *supra* note 5.

[12] Wermiel, *Shroud of Secrecy That Veils the Supreme Court Lifts as Justices Assume Higher Public Profiles*, Wall St. J., July 1, 1986, at 54, col. 1.

Chief Justice Rehnquist tells us that he has written for two readerships: "interested, informed laym[e]n" and "lawyers who do not specialize in constitutional law" (p. 7). He sought to fill what he perceived "to be a hiatus between the descriptive material and texts in American government and the comprehensive historical works" (p. 8). Yet there seems to be no shortage of the widest variety of books about the Supreme Court, many of which would appear to fill any category of need.

Most likely, Rehnquist's intended readers, both laymen and attorneys, would expect a book on the Supreme Court to focus on, in large part, the role of the Supreme Court in safeguarding rights and liberties. But, when one reflects on the total work, it becomes apparent that Chief Justice Rehnquist has neglected the Bill of Rights. Rehnquist suggests a different concern:

> [An] oft-heard description of the Supreme Court is that it is the ultimate protector in our society of the liberties of the individual. Again, this phrase describes an important role of the Surpeme Court, but by ignoring other equally important functions of the Court, it has its own potential for mischief (pp. 317–18).

Justice Powell has written recently, "It is fair to say, I think, that over the years, the Justices of this Court have considered as their highest responsibility the safeguarding of the rights and liberties of our people, particularly those guaranteed in the First, Fourth, Fifth, Sixth and Eighth Amendments."[13]

Powell's and Rehnquist's emphases are so different that one senses that they brought to the High Court two different sets of values and priorities. Rehnquist believes that viewing the Court as the ultimate guardian of individual liberties and as the nation's conscience may cause mischief. By contrast, Powell believes that the highest responsibility of the Court is indeed to guard individual rights and liberties. One seems to worry primarily about possible problems, the other seems to worry about guarding rights and liberties first and attending to the problems afterwards, should any arise. It is a small wonder, with this perspective, that the Chief Justice could write about so many of his predecessors without seriously addressing those rights and liberties that former justices safeguarded and treasured as deeply as did Justice Powell.

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[13] Powell, *Foreword* to THE SUPREME COURT AND ITS JUSTICES 6 (J. Choper ed. 1987).

In addition to neglecting basic rights, Rehnquist's interpretations at times seem overly political. For example, he suggests that it was "quite natural" for President Wilson to appoint Louis D. Brandeis to the Court in exchange for the latter's support and speeches (pp. 210–11), but Wilson, an attorney, saw high idealism in the law.[14] The relationship between the two men and the appointment of Brandeis by Wilson was more complex than what Rehnquist attributes to simple political patronage.[15]

What Chief Justice Rehnquist does best is to tell us about his service as a law clerk to Justice Robert H. Jackson and about the famous *Steel Seizure* case that arose and ended during his stay. The story of his clerkship is a fascinating one. We learn about the first impressions of a new law clerk, about the operation of the Court, and share the excitement as the case is headlined in newspaper stories, is heard by the trial court and then bypasses the court of appeals and moves directly to the High Court. He writes about the influence of the press and of the importance of the times and historical setting in which the case arose. He contrasts World War II and the Korean conflict and the feelings of the nation for each war effort. Finally, he discusses the members of the Court who made the decision.

Chief Justice Rehnquist tells us that the "tide of public opinion" (p. 95) influenced the decision and speculates on whether geographic determinism was at work among the dissenters, all of whom hailed from home towns in the Ohio River Valley not more than two hundred miles apart (p. 92). A few words explaining his thoughts would have been better than merely raising the issue and then moving on. Many readers will be puzzled by these momentary digressions and references to concepts that are unknown to them.

The narrative of the *Steel Seizure* case is both meaningful and interesting. The cast of characters includes Harry S Truman, John W. Davis, the members of the Supreme Court and law clerk Rehnquist looking back and noting,

> [o]nly later did I come to realize that it would be all but impossible to assemble a more hypercritical, not to say arrogant, audience than a group of law clerks criticizing an opinion circulated by one of their employers. Their scorn—and in due time it became my scorn too—was not reserved

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[14] Wilson, *The Lawyer and the Community*, 192 NORTH AM. REV. 604, 609–10 (1910).

[15] *See* A. TODD, JUSTICE ON TRIAL (1964); 2 A. LINK, WILSON: THE NEW FREEDOM 10–15 (1956).

> for Justice Jackson, but was lavished with considerable impartiality upon the products of all nine chambers of the Court (p. 37).

In the end, Justice Jackson declared to his clerks, "Well, boys, the President got licked" (p. 92). It was a dramatic moment in the law.

Here, too, however, the book would have benefited from better editing. Rehnquist's prolonged description of the nine men could have been separated into another chapter or set off as a subchapter. Also misplaced are the several pages where he confesses he inadvertently fixed a speeding ticket (pp. 79–81). In fact, those pages could have been better used to discuss other matters, for example, the Bill of Rights.

The Chief Justice continues his volume by turning back the clock to *Marbury v. Madison*, a chapter that serves both as an explanation for the Supreme Court's power over presidential action in the *Steel Seizure* case and an introduction to his fascinating biographical portrait of Chief Justice John Marshall. Marshall's greatness and wisdom make almost any study of his life and achievements meaningful. His decisional interpretations of the Constitution provide the foundation of our federal system of government.

Rehnquist, at times, provides too many other details, which, though interesting, are not well related to their impact on Marshall's thinking. For example, of Marshall's military background, Rehnquist tells us that he served in the Revolutionary War, fought at Brandywine, Germantown and Monmouth before turning twenty-five and served under George Washington at Valley Forge. He relates also that Marshall served in the Virginia Legislature and in the United States Congress (p. 103).

Chief Justice Warren Burger, in a bicentennial address on the Constitution provided a far superior explanation for why *Marbury v. Madison* was decided as it was:

> Washington, Hamilton, and others, who had undergone the terrible ordeal of trying to run a revolution with sporadic and uncertain support from the thirteen states, were convinced that there must be a strong central government. Young John Marshall was a lieutenant, a captain-lieutenant, and later deputy judge advocate under Washington. He spent that terrible winter at Valley Forge and saw his comrades die for want of a central authority. We can see a constant theme throughout the great building block cases written by

John Marshall—*Marbury v. Madison*, *McCulloch v. Maryland* and *Gibbons v. Ogden*.[16]

Unlike Rehnquist, who merely presents historical tidbits and vast quantities of geographical trivia, Burger explains succinctly the importance of the facts he provides. Their importance is related to the outcome of the decisions reached by Marshall. The spectre of starvation and death on the battlefield surely influenced Marshall's belief in a strong central government more than the fact that he lived in a boarding house for thirty-four years while serving on the Court.

The other biographical chapters, except for the chapter on Chief Justice Taney, fall short of telling the interested lay readers why these judges or their decisions remain vital today. Rehnquist's decision not to discuss opinions after 1953 made his job of demonstrating present-day relevance difficult. Louis D. Brandeis once wondered why so excellent a judge as Samuel F. Miller had been forgotten.[17] More than forty years later, Rehnquist praises Miller (pp. 184–85), but provides no clue to the answer that eluded Brandeis.

Chief Justice Rehnquist portrays both Holmes and Brandeis as great men but does nothing to explain why they are great or why their ideas play a vital and continuing role in current judicial philosophy. Once again, Rehnquist limits his ability to explain because he has omitted the last generation of Supreme Court decisions from his topics of discussion. It is most difficult to talk about the influence of Holmes and Brandeis on the current state of the law without discussing the current state of the law. However, free speech and the right to privacy have been at the cutting edge of constitutional debate for some years now and would have added interest to the Holmes and Brandeis materials.

The Civil War, the Taney Court and the *Dred Scott* decision[18] are well-reported by our Chief Justice with ample detail. Yet here, too, one senses that except for the Marshall and *Marbury v. Madison* chapters, all of the biographical chapters could have been excerpted just as well from standard texts, reference works and encyclopedias. The "interested, informed laym[e]n" for

[16] Burger, *We the People*, 37 CASE W. RES. L. REV. 385, 391 (1986–1987).

[17] Douglas, *Louis Brandeis: Dangerous Because Incorruptible* (Book Review) N.Y. Times, July 5, 1964, § 7, at 3, col. 1 (reviewing A.L. TODD, JUSTICE ON TRIAL (1964)).

[18] Dred Scott v. Sandford, 60 U.S. 393 (1857).

whom the Chief Justice writes might have done just as well to turn to recent historical studies or more colorful books that have the imprimatur of the Supreme Court Historical Society.[19]

Chief Justice Rehnquist has told us that he will not discuss any matter since 1953, when Chief Justice Vinson died, or any "of the cases and doctrines in which any of my present colleagues have played a part" (p. 8). This neatly eliminates any discussion of cases decided since Justice Brennan was appointed by President Eisenhower in 1956, and seems even to have eliminated any discussion of the 1954 decision *Brown v. Board of Education*,[20] arguably the most important case of the twentieth century.

Judges are under no clearly defined constraints when it comes to speaking publicly on issues. Several years ago, before delivering a memorable address, Justice Sandra Day O'Connor expressed reluctance at speaking on a number of topics, "I knew that you might like to hear how I set about deciding cases . . . and how I feel personally about my colleagues on the bench, and so on."[21] But she noted the need for judges to be judicious and stated that we have long known that almost any issue is likely to come before the Supreme Court. Yet Benjamin N. Cardozo, while a Judge on the New York Court of Appeals spoke with no apparent hesitation on how he decided his cases and similar matters.[22] His series of four lectures delivered in 1920 at Yale Law School have become his classic, *The Nature of the Judicial Process*.[23]

There is no easy answer to what is proper and what is improper for judges to say. No one can fault Chief Justice Rehnquist for eliminating from his discussions the last one-third of a century, but it certainly limits the value of his book. He might have been better off by presenting merely a history from Justices Marshall to Vinson or by funding a more complete study written by a professor to express views similar to his own.

Someone who did not know that Chief Justice Rehnquist is one of the most conservative justices in recent history would

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[19] *See, e.g.*, M. HARRELL & B. ANDERSON, EQUAL JUSTICE UNDER THE LAW: THE SUPREME COURT IN AMERICAN LIFE (rev. ed. 1982); R. SHNAYERSON, THE ILLUSTRATED HISTORY OF THE SUPREME COURT OF THE UNITED STATES (1986).

[20] 347 U.S. 483 (1954).

[21] O'Connor, *Our Judicial Federalism*, 35 CASE W. RES. L. REV. 1 (1984–1985).

[22] *See* B. CARDOZO, *supra* note 6, at 10; SELECTED WRITINGS 108–09 (M. Hall ed. 1947).

[23] B. CARDOZO, *supra* note 6.

be hard pressed to determine that from reading this book. While its calm and deliberate tone is a favorable quality, the Chief Justice seems to have suppressed all traces of emotion. Surely anyone with such strongly held views could be expected to be a bit more open with them. Perhaps Rehnquist is fearful that his opinions might be too far out of the mainstream and might appear too controversial for many readers.

Similarly, the absence of any discussion of Earl Warren and the Warren Court from a book of this nature and scope raises questions and suggests possible shortcomings on the part of the author. Perhaps Rehnquist does not hold Warren in the highest esteem and has deliberately refrained from mentioning his name. If so, the absence of the last thirty-four years of Supreme Court history may well be attributed to a secondary reason, namely that Chief Justice Rehnquist is generally so at odds with Warren's criminal justice revolution that he prefers not to discuss or even mention *Miranda*[24] and other notable decisions by the Warren Court.

The limited scope of this volume and the important nature of the materials that have been left out suggest that this author lacks statesmanlike qualities.[25] Would that he had made a simple statement such as the one by Justice Powell noted above.[26] But perhaps his own background of a "desultory" (p. 208) private practice, political activity and three years at the Justice Department may not have provided the foundation needed for high level statesmanship.

Rehnquist's apparent lack of statesmanship manifests itself throughout this book. The reader is left with the feeling that the author has not told us as much as he might have, especially about the more recent justices and the Bill of Rights. Rehnquist neglected to discuss these important topics and instead filled the book with too many trivial details. Whether the problems with the book can be attributed to the poor editing or the author's

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[24] Miranda v. Arizona, 384 U.S. 486 (1966).

[25] Some years ago, Professor Felix Frankfurter noted, "Not by chance have the most influential Chief Justices been drawn from the world of affairs. Jay and Marshall and Taney, Chase and White and Taft were summoned to preside over the Court not merely because they were lawyers. The accents of statesmen are the recurring motif of Supreme Court opinions." F. FRANKFURTER, *Supreme Court Decisions: "What Stuff 'Tis Made Of"* in FELIX FRANKFURTER ON THE SUPREME COURT 194 (P. Kurland ed. 1970). In a similar fashion, Professor Philip Kurland has also used the term "statesman" to describe distinguished justices. Kurland, *Bork: The Transformation of a Conservative Constitutionalist* 9 CARDOZO L. REV. 127, 134 (1987).

[26] *See* Powell, *supra* text accompanying note 13.

manner of handling the materials, the result is a volume that adds little to the existing body of literature on the Supreme Court. Indeed, the book does not live up to the expectations one would have of the Chief Justice of the Supreme Court and generally leaves much to be desired.